

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **3 September 2021**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request'

Decision 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
Mr James Stewart

Counsel for 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

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Ms Spojmie Ahmady Nasiri
Ms Margaret L. Sathertwaite
Ms Megan Hirst
Mr Tim Moloney
Mr Steven Powles

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues the present ‘Decision regarding applications related to the Prosecution’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”’.

I. Procedural history

1. On 12 April 2019, the Chamber rendered the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (the ‘Article 15 Decision’);¹ on 31 May 2019, Judge Antoine Kesia-Mbe Mindua issued his concurring and separate opinion.²

2. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised an investigation into ‘alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002’ (the ‘Appeals Chamber Article 15 Judgment’).³

3. On 15 April 2020, the Chamber received the Prosecution’s ‘Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute’⁴ notifying the Chamber of the Government of the Islamic Republic of Afghanistan’s (the ‘Afghanistan’) request of 26 March 2020 seeking a deferral of the Prosecution’s investigation into the situation in Afghanistan pursuant to article 18(2) of the Statute (the ‘Deferral Request’).⁵

4. On 16 April 2021, the Chamber received the Prosecution’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’ in which

¹ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, [ICC-02/17-33](#).

² Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, 31 May 2019, [ICC-02/17-33-Anx-Corr](#), annexed to Article 15 Decision, and a [public annex](#) (explanatory note).

³ Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, [ICC-02/17-138](#), with Separate Opinion of Judge Luz del Carmen Ibáñez Carranza, [ICC-02/17-138-Anx-Corr](#), and a public annex [ICC-02/17-138-Anx-Corr](#) (explanatory note).

⁴ [ICC-02/17-139](#).

⁵ [ICC-02/17-139-Anx1](#).

it informed the Chamber of its latest communications with Afghanistan in the context of the Deferral Request (the ‘Prosecution 16 April 2021 Notification’).⁶

5. On 21 April 2021, the Registry transmitted⁷ to the Chamber an application dated 20 April 2021 from Ms Spojmie Ahmady Nasiri (the ‘First Application’ and ‘First Applicant’ respectively).⁸ The First Applicant submits that the Prosecution and the Registry have not provided adequate information on the investigation and relevant developments in the situation in Afghanistan and effective outreach to the Afghan victims and, for this reason, requests the Chamber to: (i) order the Registry and the Prosecution to issue quarterly reports on their outreach efforts and the Prosecution’s investigative activities; (ii) order the Prosecution to provide more information concerning the Deferral Request, including the Prosecution’s understanding of article 18(2) of the Statute; and (iii) set a deadline for the Prosecution’s review of the Deferral Request.⁹

6. On 30 April 2021, the Chamber received the ‘Transmission of a “Motion for Clarification and reclassification of “Motion Seeking Remedies for Information and Effective Outreach”’’.¹⁰ Annexed to the filing is an email dated 28 April 2021 from the First Applicant to the Registry with clarifications as to the standing of the said applicant.¹¹ The Chamber notes that upon the submission of the First Application, the Registry was instructed to put it on the record via a transmission filing.¹²

7. On the same day, the Chamber received the ‘Registry Request for Further Redactions to Annex D to the Transmission of a “Motion Seeking Remedies for Information and Effective Outreach” (ICC-02/17-143-Conf-Exp-AnxD)’ (the ‘Registry Request for Further Redactions’).¹³

⁶ [ICC-02/17-142](#).

⁷ Transmission of a “Motion Seeking Remedies for Information and Effective Outreach”, [ICC-02/17-143](#), with two confidential annexes, two confidential *ex parte* annexes, public annexes 1, E-G (reclassified as public pursuant to the Chamber’s instructions on 28 April 2021), and annex D (public redacted version filed on 16 June 2021).

⁸ Annex 1 to the Transmission of a “Motion Seeking Remedies for Information and Effective Outreach” dated 20 April 2021 and transmitted to the Chamber on 21 April 2021 (reclassified as public per the Chamber’s instructions on 28 April 2021), [ICC-02/17-143-Anx1](#).

⁹ [First Application](#), paras 1, 4-5, 43-46.

¹⁰ [ICC-02/17-144](#), with public annexes [ICC-02/17-144-Anx1](#) and [ICC-02/17-144-Anx2](#).

¹¹ [ICC-02/17-144-Anx2](#)

¹² Email to the Registry, 28 April 2021, 18h15.

¹³ [ICC-02/17-145](#) (reclassified as public on 16 June 2021 pursuant to the Chamber’s instructions), with an annex confidential *ex parte* available to the Registry, the First Applicant, the Prosecution, and the Chamber. On 20 May 2021, the Chamber directed the Registry to provide the Prosecution with access to both filing ICC-02/17-145-Conf-Exp and its annex, as well as to filing ICC-02/17-143-Conf-Exp-AnxD,

8. On 6 May 2021, the Registry transmitted¹⁴ to the Chamber an application dated 9 April 2021 from Ms Margaret L. Sathertwaite, Ms Megan Hirst, and Mr Tim Moloney QC (the ‘Second Application’ and the ‘Second Applicants’ respectively),¹⁵ requesting the Chamber to order the Prosecution to clarify the scope of the Deferral Request and to set a deadline for the Prosecution’s review of the Deferral Request.¹⁶

9. On the same day, the Chamber received the Prosecution’s ‘Request to file a consolidated response’ (the ‘Prosecution Request to File a Consolidated Response’).¹⁷

10. Still on the same day, the Registry transmitted¹⁸ to the Chamber an application dated 29 April 2021 from Mr Steven Powles (the ‘Third Application’ and the ‘Third Applicant’, respectively),¹⁹ requesting the Chamber to: (i) confirm whether the Prosecution is taking steps to proceed with its investigation into crimes within the situation in Afghanistan, which were perpetrated by nationals of other countries than Afghanistan or which Afghanistan does not purport to investigate; and (ii) confirm whether the Prosecution is taking steps to obtain the cooperation of other States Parties, in its investigation of crimes within the jurisdiction of the Court which Afghanistan is not purporting to investigate.²⁰

11. On 7 May 2021, the Chamber received the Prosecution’s ‘Addendum to request to file a consolidated response’ (the ‘Prosecution Addendum to Request to File a Consolidated Response’).²¹

by Friday 21 May 2021 at the latest, and the Prosecution to respond to filing ICC-02/17-145-Conf-Exp by Tuesday 25 May 2021 at the latest (Email to the Registry and the Prosecution, 20 May 2021, 9h09).

¹⁴ Corrigendum to Transmission of a “Victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request” and request for compliance with Part 5 of the Statute”, 6 May 2021, [ICC-02/17-146-Corr](#), with a public annex [ICC-02/17-146-Corr-Anx](#) (explanatory note).

¹⁵ Annex to the Transmission of a “Victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request” and request for compliance with Part 5 of the Statute”, dated 29 April 2021 and transmitted to the Chamber on 6 May 2021, [ICC-02/17-146-Anx](#).

¹⁶ [Second Application](#), paras 1, 49.

¹⁷ [ICC-02/17-147](#).

¹⁸ Transmission of a “Cross-Border Victim’s response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”, [ICC-02/17-148](#).

¹⁹ Annex to the Transmission of a “Cross-Border Victim’s response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”, dated 29 April 2021 and transmitted to the Chamber on 8 May 2021, [ICC-02/17-148-Anx](#), with one public annex [ICC-02/17-148-AnxI](#).

²⁰ [Third Application](#), para. 13.

²¹ [ICC-02/17-149](#).

12. On the same day, the Chamber received the ‘Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence’ submitted by International Federation for Human Right (‘FIDH’) and Armanshahr|OPEN ASIA (the ‘Armanshahr|OPEN ASIA and FIDH Request Pursuant to Rule 103’).²²

13. On 10 May 2021, the Chamber rejected the Prosecution Request to File a Consolidated Response and Addendum to Request to File a Consolidated Response (the ‘10 May 2021 Decision’) and instructed the Prosecution, if it so wished, to file separate responses to the First, Second, and Third Application.²³

14. On 17 May 2021, the Chamber received the Prosecution’s ‘Response to Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1)’ (the ‘Prosecution Response to the First Application’)²⁴ and ‘Response to Submissions on Behalf of Certain Victims Who Participated in the Litigation Under Article 15(4) (ICC-02/17-146-Anx and ICC-02/17-148-Anx)’ (the ‘Prosecution Response to the Second and Third Application’).²⁵

15. On 25 May 2021, the Chamber received the Prosecution’s ‘Response to Registry’s Request for Further Redactions to Annex D to the Transmission of a “Motion Seeking Remedies for Information and Effective Outreach” (ICC-02/17-143-Conf-Exp-AnxD) and ICC-02/17-145-Conf-Exp-Anx1’.²⁶

16. On 31 May 2021, the Chamber granted the Registry Request for Further Redactions.²⁷

17. On 16 August 2021, the Registry transmitted²⁸ to the Chamber an application dated 15 August 2021 from the First Applicant entitled ‘Urgent Request for Ruling on the “Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1)”’ (the ‘First Applicant’s 16 August 2021 Request’).²⁹

²² [ICC-02/17-150](#).

²³ Email to the Prosecution, 10 May 2021, 9h41.

²⁴ [ICC-02/17-151](#).

²⁵ [ICC-02/17-152](#).

²⁶ [ICC-02/17-153](#) (reclassified as public on 16 June 2021 pursuant to the Chamber’s instructions), with a confidential *ex parte* annex.

²⁷ Email to the Registry, 31 May 2021, 12h56.

²⁸ Transmission of an “Urgent Request for Ruling on the “Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1)””, [ICC-02/17-154](#), with a public annex.

²⁹ Annex A to the Transmission of an “Urgent Request for Ruling on the “Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1)””, [ICC-02/17-154-AnxA](#).

18. On 27 August 2021, the Chamber received the Prosecutor’s ‘Response to “Urgent request for ruling on the ‘Motion seeking remedies for information and effective outreach’ (ICC-02/17-143-Anx1)”’.³⁰

II. Preliminary matter

19. As regards the Armanshahr|OPEN ASIA and FIDH Request Pursuant to Rule 103, the Chamber considers in accordance with the principle ‘*Iura novit curia*’ that it does not require any support to interpret the law applicable to the issue *sub judice*. The Armanshahr|OPEN ASIA and FIDH Request Pursuant to Rule 103 is therefore rejected.

III. Determination by the Chamber

20. The Chamber notes that the First, Second, and Third Applicants claim standing as ‘legal representatives of victims’ who suffered harm as a result of crimes under the investigation of the Prosecution pursuant to article 15(3) and/or article 68(3) of the Statute³¹ in the context of the Prosecution’s investigation in the situation in Afghanistan, and specifically, in connection with the Prosecution 16 April 2021 Notification regarding the review of the Deferral Request.

21. The Chamber also notes that the First, Second, and Third Applicants submit a series of requests, which, whilst slightly differing, are all premised upon and revolve around on a number of assumptions which do not appear straightforward: first, the existence of a general judicial oversight of the Pre-Trial Chamber over the investigation conducted by the Prosecution as well as over the Registry’s activities of information and outreach in the situation in Afghanistan; second, the fact that the individuals represented by the First, Second, and Third Applicants would qualify as victims within the meaning of rule 85 of the Rules and would as such be entitled to participate at this specific ‘stage[...] of the proceedings’ pursuant to article 68(3) of the Statute; third, the fact that this right would encompass standing to submit to the Chamber requests like those of the First, Second, and Third Applications.

³⁰ [ICC-02/17-155](#).

³¹ See [First Application](#), para. 16; [Second Application](#), paras 1, 18-31; [Third Application](#), paras 2-4.

22. As to the first assumption, the Chamber recalls that the situation in Afghanistan has reached the investigation stage;³² while article 53 of the Statute regulates the Pre-Trial Chamber's power to review the Prosecution's exercise of its powers with respect to *the initiation of an investigation*, article 54 of the Statute does not provide for judicial oversight of the Prosecution's compliance with article 54(1) as such. Concerning the respective powers of the Prosecution and Pre-Trial Chambers during the investigative stage of the proceedings, the Appeals Chamber has recently clarified in the context of the Article 15 Decision that:

[the] continuous monitoring of the scope of the Prosecutor's investigation by the pre-trial chamber is contrary to the statutory scheme regulating the respective functions and powers of these two organs with respect to investigations [and] that article 42(1) recognises the independence of the Prosecutor and her responsibility for the conduct of investigations, while articles 56 and 57 of the Statute identify specific functions that may be exercised by the pre-trial chamber during the investigation.³³

23. The Chamber further observes that the First, Second, and Third Applications all arise in the specific context of the Prosecution 16 April 2021 Notification regarding the review of the Deferral Request submitted pursuant to article 18(2) of the Statute. Article 18(2) reads as follows:

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons *unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.*

Article 18(2) of the Statute contemplates a Pre-Trial Chamber's intervention only upon the application of the Prosecution, in the event that the Prosecution does not intend to defer to the relevant State's investigations. This provision confers upon the Prosecution

³² See paragraph 2 above.

³³ [Appeals Chamber Article 15 Judgment](#), para. 63.

the exclusive power to review the Deferral Request with the modalities and the timing it regards as appropriate. The decision as to whether, and to what extent, to provide information on the procedure under article 18(2) of the Statute to potential victims and the general public also falls under the sole discretion of the Prosecution.

24. The Chamber further stresses that the litigation pertaining to the decision whether to authorise the opening of an investigation under article 15(3) of the Statute in the situation in Afghanistan has been conclusively resolved with the opening of the investigation; accordingly, contrary to the Third Applicant's submission,³⁴ article 15(3) cannot be the legal basis for the participation of potential victims.

25. In light of the above, the Chamber finds that: (i) there is no legal basis for the Chamber to intervene in the context of the Prosecution's review of the Deferral Request; and (ii) as a consequence, the First, Second, and Third Applicants are deprived of procedural standing at this stage. As to the First Applicant's submissions regarding information and outreach in the situation in Afghanistan, the Chamber notes that they are interlinked with the proceedings related to the Deferral Request; as stated above, the Chamber is not competent to intervene at this stage of the proceedings. Accordingly, the First, Second, and Third Applications must be dismissed *in limine*. For the same reasons, the First Applicant's 16 August 2021 Request must equally be dismissed *in limine*.

26. Having rejected the applications due to the Chamber's absence of oversight powers at this stage of the proceedings, the Chamber does not consider it necessary to address the First, Second, and Third Applicants' submissions related to article 68 of the Statute.

27. Finally, the Chamber wishes to stress that, whilst the current situation in Afghanistan is a reason for concern, the Court must always act strictly within the framework of its core legal texts: as regards the Applications, the Chamber must respect the fact that the Statute confers upon the Prosecution alone the power to review the Deferral Request, also in light of all relevant developments on the ground. The option to amend those texts, including with a view to possibly expanding the scope of judicial scrutiny of the Pre-Trial Chamber over the prerogatives of the Prosecution at the

³⁴ [Third Application](#), paras 1-2.

investigation stage, remains open to the State Parties, should they so wish, by way of an amendment to the relevant texts and in compliance with the applicable procedures.

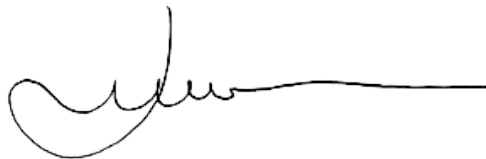
FOR THESE REASONS, THE CHAMBER

REJECTS the Armanshahr|OPEN ASIA and FIDH Request Pursuant to Rule 103;

DISMISSES the First, Second, and Third Applications *in limine*; and

DISMISSES the First Applicant's 16 August 2021 Request *in limine*.

Done in both English and French, the English version being authoritative.



Judge Rosario Salvatore Aitala
Presiding Judge



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Friday, 3 September 2021

At The Hague, The Netherlands