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No.: ICC-02/17

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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

**Response to “Request for Reconsideration or, Alternatively, Leave to Appeal of the
‘Decision Regarding Applications Related to the Prosecution’s ‘Notification on
Status of the Islamic Republic of Afghanistan’s Article 18(2) Deferral Request’
(ICC-02/17-156)”**

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The Office of the Prosecutor

Mr Karim A. A. Khan QC

Mr Manoj Sachdeva

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

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

Other

Ms Spojmie Ahmady Nasiri

Mr Nema Milaninia

Introduction

1. The Applicants seek reconsideration and/or leave to appeal the Pre-Trial Chamber's recent decision on their motion for orders to require both the Registry and Prosecution to take certain steps pursuant to their claim of a right to public information and outreach.¹ First, this request should be dismissed because, as previously submitted, and in accordance with the Rome Statute, the applicants have no *locus standi* to make submissions at this stage of the proceedings.² Second, in any event, the request should be dismissed because it fails to recognise the narrower procedural context of the Pre-Trial Chamber's decision, which disposed of all matters relevant to the current operations of the Court in this situation (when article 18 of the Statute is engaged). While the Applicants disagree as to the proper scope of the Decision, which they contend should have been broader, they do not squarely challenge the correctness of the Pre-Trial Chamber's legal interpretation or the adequacy of its reasoning. Consequently, the remedies they seek are inapposite.

Submissions

2. The Prosecution had opposed the Applicants' motion to the extent that the requested remedies were unnecessary³ and trespassed into the Prosecutor's independent responsibility for the conduct of investigations⁴—including for making an initial determination under article 18(2) of the Statute⁵—or relied on any claim that victims are entitled to participate in non-judicial proceedings.⁶ It took no position on matters pertaining solely to the management or supervision of Registry activities.⁷

¹ [ICC-02/17-157-Anx](#) ("Application").

² See [ICC-02/17-151](#). See also [ICC-02/17-152](#), and [ICC-02/17-155](#).

³ [ICC-02/17-151](#) ("Prosecution Response"), paras. 24-33.

⁴ [Prosecution Response](#), paras. 6, 10, 13, 37-40.

⁵ [Prosecution Response](#), paras. 14, 34-36.

⁶ [Prosecution Response](#), paras. 14, 16-23.

⁷ [Prosecution Response](#), paras. 7, 12, 41.

3. In its Decision, the Pre-Trial Chamber reaffirmed that the Statute “does not provide for judicial oversight of the Prosecution’s compliance with article 54(1) as such”,⁸ and that “[a]rticle 18(2) of the Statute contemplates a Pre-Trial Chamber’s intervention only upon the application of the Prosecution”.⁹ As a result, the Chamber rightly concluded that there is no legal basis for the Chamber “to intervene” before the Prosecutor has reached a decision under article 18(2)—and consequently the Applicants lacked the standing required to request the Chamber to exercise its power.¹⁰ Nor did the Pre-Trial Chamber entertain the possibility that it may supervise the performance of the Registry’s public information function, even without prejudice to the independence of the Prosecutor under articles 18(2) and 54(1).¹¹

4. Notwithstanding the current procedural context of this situation (where article 18 is engaged), or some of the specific forms of relief sought in its original motion (information concerning the progress of the Prosecution’s analysis under article 18(2)), the thrust of the Application is that the Decision should have engaged with broader questions about the general right of victims and affected communities to public information and outreach—but without asserting that the reasoning actually contained in the Decision was inadequate, or legally incorrect.

5. As such, the Application reflects a mere disagreement with the Pre-Trial Chamber on the forensic purpose of the Applicants’ original motion—which is not a matter that the remedies of reconsideration or certification are potentially apt to resolve. Notably, to any extent that the Applicants may have concerns about the manner in which the Registry discharges its administrative and executive functions,

⁸ [ICC-02/17-156](#) (“Decision”), para. 22.

⁹ [Decision](#), para. 23.

¹⁰ [Decision](#), para. 25.

¹¹ See also [Application](#), paras. 6-9 (noting that the Decision’s “analysis [...] is viable only as it relates to information and outreach pertaining to article 18(2) procedures” and “does not extend to those issues which are separate and distinct from the Afghan government’s deferral request, such as information and effective outreach regarding victims’ rights generally, and ensuring information is properly delivered to marginalised and vulnerable communities in Afghanistan”).

litigation in the context of a particular situation or case is not the correct forum for their resolution.

6. Accordingly, reconsideration of the Decision, which is an exceptional remedy, is not warranted. No injustice was caused by the Pre-Trial Chamber's correct interpretation of articles 18(2) and 54(1), which serve to maintain the independence of the Prosecutor—including the essential power to maintain the confidentiality of its investigative activities in order to ensure their effectiveness, as required by article 54(1) itself.¹² While the Prosecution agrees that public information and outreach is important, this cannot entail measures which would degrade the effectiveness of investigations since this would impede the delivery of justice to which victims and affected communities are equally entitled.

7. Nor do the Applicants show that the requirements of article 82(1)(d) are met, permitting certification of any issue in the Decision for appeal.¹³ In particular, the intervention of the Appeals Chamber would not materially advance the proceedings. This is because, as the Decision explains, the Prosecutor has “exclusive power” to determine whether and when to bring a request to the Pre-Trial Chamber under article 18(2) of the Statute, and the degree to which he informs potential victims and the general public of the current state of his assessment “falls under [his] sole discretion”.¹⁴ Since the Applicants do not seem to challenge the correctness of this interpretation of the Statute, including articles 18 and 54, they must necessarily accept that any interlocutory appeal concerning *other* aspects of any right to public information would be purely advisory in nature. This is impermissible.

8. Indeed, and in any event, the Prosecution also notes that the Applicants' proposed issues for appeal are explicit in seeking to litigate questions far *beyond* the

¹² Cf. [Application](#), paras. 10-11.

¹³ *Contra* [Application](#), paras. 12-22.

¹⁴ [Decision](#), para. 23.

present procedural context under article 18.¹⁵ Broad questions of this kind cannot be considered as ‘appealable’ issues genuinely arising from the Decision. To the contrary, they would invite the Appeals Chamber to conduct an abstract assessment of the legal framework, divorced from the concrete facts of the first instance decision, which is contrary to judicial economy and inconsistent with the exceptional nature of interlocutory appeals.

Conclusion

9. For the reasons above, the Application should be dismissed.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 17th day of September 2021

At The Hague, The Netherlands

¹⁵ See [Application](#), paras. 8, 16.