



Original: English

No: ICC-02/17
Date: 29 April 2021

PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Cross-Border Victims' response to the Prosecutor's "Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request"

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

The Office of the Prosecutor

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 McCarthy

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
 Defence**

States' Representatives

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Defence Support Section

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Detention Section

**Victims Participation and Reparations
 Section Other**

Introduction

1. These brief submissions are made on behalf of a group of victims ("**the Cross-Border Victims**") in response to the Prosecutor's "*Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request*".
2. The Cross-Border Victims comprise victims, located in Pakistan, who have been injured or had family members killed in cross-border air strikes launched from the territory of Afghanistan, into Pakistan. In many instances, these cross-border military operations have killed and injured scores of civilians and destroyed civilian objects including schools and medical facilities. A list of the victims on behalf of whom these submissions are made is set out in the Annex to these submissions.¹

Procedural History and Standing

3. By decision of 24 October 2019, the Appeals Chamber granted the Cross-Border Victims permission² pursuant to Rule 93 of the Rules of Procedure and Evidence, to file observations, and to participate, in the appeal against the decision of Pre-Trial Chamber II refusing to authorize the Prosecutor to investigate possible crimes within the jurisdiction of the court in respect of Afghanistan.³ On 5 March 2020 the Appeals Chamber authorized 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.*"
4. These submissions are made, *inter alia*, pursuant to Articles 15 (3) and 68 (3) of the Statute and Rules 93 and 89 (1) of the ICC Rules of Procedure and Evidence ("**RPE**").

¹ It is important to note that, at this stage, these victims are representative of many hundreds of other civilians based in Pakistan who have been killed or injured (or who are close family members of persons killed or injured) in cross-border air strikes launched into Pakistan from Afghan territory in connection with the Afghan conflict.

² In early 2014 the Cross-border Victims submitted a substantial dossier to the Prosecutor which contained evidence of crimes within the jurisdiction of the ICC that had been committed in Pakistan but launched from Afghanistan. Subsequently, in January 2018 the Cross-Border Victims submitted witness statements and further evidence of crimes within the jurisdiction of the court of which they are victim, and made accompanying applications to VPRS.

³ Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, No. ICC-02/17 OA OA2 OA3 OA4.

Submissions

5. The Cross-Border Victims have read, in draft, and agree with the representations of other victims in submissions entitled “*Victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”*”.
6. The Cross-Border Victims observe, in particular:
 - 6.1. Afghanistan is the only state which has requested deferral of the Prosecutor’s investigation under Article 18 of the Statute. The crimes alleged by the Cross-Border Victims were perpetrated by the United States, with the assistance of a number of States Parties to the Rome Statute, including several NATO Member States. None of these states is reported by the Prosecutor to have requested deferral of her investigation.
 - 6.2. In its deferral letter, Afghanistan **does not** suggest that it is investigating (or that it is even capable of investigating) the cross-border military operations launched from its territory into Pakistan.
 - 6.3. Notably, none of the categories of crime in Afghanistan’s outline of national investigations and proceedings concern the position of persons in Pakistan killed and injured by military strikes launched from Afghanistan (or any crimes analogous to this).
7. Against this backdrop, there is no indication that persons suspected of involvement in crimes alleged by the Cross-Border Victims are under any form of investigation by Afghanistan.
8. The issue, then, is whether the Prosecutor can rely on Afghanistan’s deferral request to defer investigation into the Cross-Border Victims, despite having nothing to do with the crimes they allege. Article 18 of the ICC Statute states:

*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.

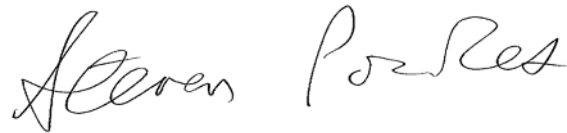
9. This provision must, of course, be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which provides “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
10. Interpreted consistent with these rules, it is clear that (a) any State may inform the court that it is investigating its nationals or others within the jurisdiction of the court; and (b) the Prosecutor may only “defer to the State’s investigation of those persons” (i.e. the persons under investigation) (emphasis added). This does not permit the Prosecutor to defer its investigation in respect of persons other than those properly found to be under investigation by the deferring State.
11. This does not appear to be the way in which the Prosecutor is interpreting Article 18 of the Statute. The Prosecutor’s notification leaves opaque whether (a) she has requested confirmation from Afghanistan as to whether it considers itself willing or able to investigate the crimes alleged by the Cross-Border Victims; and (b) whether – given that Afghanistan makes no suggestion that it is investigating the position of the victims, that the Prosecutor considers herself able to progress this aspect of her investigation, including – importantly – by requesting information and cooperation from states, such as the United Kingdom, which were also implicated in these cross-border military operations in Pakistan.

Relief

12. Regulation 28 (1) of the Regulations of the Court provides that the PTC “may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber”. In addition, Regulation 28 (2) provides that it “may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber”. These powers have been used by the Pre-Trial Chamber on previous occasions to require the Prosecutor to provide clarification of its position.⁴
13. Given the lack of information in the Prosecutor’s notification, the Cross-Border Victims respectfully request that the Pre-Trial Chamber:

⁴ Decision Requesting Clarification and Additional Information PTC II, Situation in Republic of Kenya, 18 February 2010, ICC-01/09.

- 13.1. Confirm whether the Prosecutor is taking steps to proceed with its investigation into crimes within the Afghanistan Situation, which were perpetrated other than by nationals of Afghanistan or which Afghanistan does not purport to investigate.
- 13.2. Confirm whether the Prosecutor is taking steps to obtain the cooperation of other State Parties, in its investigation of crimes within the jurisdiction of the Court in the Afghanistan Situation which Afghanistan is not purporting to investigate.
14. Without this clarification, it is unclear whether the Prosecutor is directing herself properly in law as to the obligations imposed by Article 18 (2) of the Statute.

A handwritten signature in black ink, appearing to read 'Steven Powles'.

Steven Powles QC

Conor McCarthy

29 April 2021

London, United Kingdom