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No.: ICC-02/17

Date: **10 September 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**

**Request for Reconsideration or, Alternatively, Leave for 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)**

**Source:** Legal Representative for Victims

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

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(Participation/Reparation)**

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## I. INTRODUCTION

1. Petitioners respectfully request reconsideration of the Chamber's "Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request'" ("Decision").<sup>1</sup> The Decision does not address the main issues identified by Petitioners in their "Motion Seeking Remedies for Information and Effective Outreach" ("Motion").<sup>2</sup> The Decision is principally focused exclusively on what rights victims have in relation to the Afghan government's deferral request made under article 18(2). Petitioners' Motion, however, was about access to information and effective outreach for Afghan victims and affected communities concerning a broader set of issues that are wholly unrelated to the deferral request, such as the absence of effective outreach to marginalised Afghans, including Afghan women and Afghan children.

2. The Decision does not address those broader set of issues, including generally whether victims have a right to information and effective outreach during the investigation stage. The Decision also does not address the remedies requested by Petitioners that other Chambers of this Court have implemented, including quarterly reporting by the Registry and Prosecution on their outreach efforts. As a result, the deficiencies in information and effective outreach specifically identified in the Motion persist, exacting real harm to Afghan victims. Absent proper judicial recourse, the Petitioners' requests remain undecided and the harms identified in the Motion will persist.

3. To the extent the request for reconsideration is denied, Petitioners respectfully seek leave to appeal the Decision under article 82(1)(d) of the Statute on the following issues: (i) whether victims and affected communities have the right to information and effective outreach during the investigation stage; and (ii) whether

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<sup>1</sup> [ICC-02/17-156](#), 3 September 2021.

<sup>2</sup> [ICC-02/17-143-Anx1](#), 20 April 2021.

victims have standing to vindicate those rights when such rights have been denied by the Court. Petitioners constitute a “party” for purposes of article 82(1) in this instance since the Decision implicates the specific rights that victims enjoy under the Statute. These two proposed issues are of core constitutional importance to victims. Appellate level review will help clarify the scope of victim rights at the investigation stage for the entire Court and provide clarity for all situations—an issue of fundamental importance to victims and their communities and one which the Appeals Chamber has failed to properly clarify to-date. In so doing, resolution of these issues would positively affect the fair and expeditious conduct of and may materially advance the proceedings.

## II. SUBMISSIONS

### A. Request for Reconsideration

#### a. *The Decision does not appear to address the Motion’s main arguments or requests*

4. Petitioner’s Motion was never about the Afghan government’s deferral request. It concerned having access to information and effective outreach—rights conferred to victims under the Court’s legal texts—concerning a wide range of matters.<sup>3</sup> And while a portion of the information requested by Petitioners did involve details regarding the Afghan government’s deferral request,<sup>4</sup> the deficiencies in information and outreach identified by Petitioners were much broader and more fundamental.

5. For instance, the Motion noted that the Registry and Prosecution had: (1) failed to inform victims and affected communities as to *when* and *how* they can participate at the investigation stage; (2) failed to execute an outreach strategy that effectively

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<sup>3</sup> See [Motion](#), paras. 35-37, 44-45.

<sup>4</sup> See [Motion](#), para. 45.

delivered information to Afghan women and children, thereby excluding them from the proceedings to-date; (3) failed to acknowledge whether an investigation was pending *at all*; and (4) failed to provide timely information regarding developments in the proceedings since the Appeals Chamber judgment authorising the investigation.<sup>5</sup> For those reasons, Petitioners asked that the Chamber adopt an order on information and outreach like those issued by Pre-Trial Chambers I and III in *the Situation in the State of Palestine* and in *the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, respectively, to both remediate the Registry's defective outreach plan and ensure that victims were afforded proper information and outreach going-forward.<sup>6</sup>

6. The Decision also does not address the principal issues identified by the Motion: whether victims enjoy the right to information and effective outreach under the Court's legal texts; what those rights entail; and what remedies victims have to vindicate those rights when Organs of the Court itself, through the Prosecution and Registry, are responsible for their violation.<sup>7</sup>

7. Instead, the Decision appears to be limited to matters solely related to article 18(2) of the Statute.<sup>8</sup> The Decision is articulated as "regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request'";<sup>9</sup> even though the Motion was filed independent of the Prosecution's notification, not in response or in relation thereto. The Chamber's reasoning appears to be limited to article 18(2).<sup>10</sup> Indeed, with respect to information and outreach, the Decision only concludes that there is no obligation to provide

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<sup>5</sup> See [Motion](#), paras. 35-37.

<sup>6</sup> See [Motion](#), paras. 43-45.

<sup>7</sup> See [Motion](#), paras. 16-34.

<sup>8</sup> [Decision](#), paras. 22-24.

<sup>9</sup> [Decision](#), p. 1.

<sup>10</sup> [Decision](#), paras. 22-24.

information regarding article 18(2);<sup>11</sup> ignoring the broader set of issues identified by the Motion.

8. The Chamber does generally state that the “submissions regarding information and outreach in the situation in Afghanistan [...] are interlinked with the proceedings related to the Deferral Request”.<sup>12</sup> That analysis, however, is viable only as it relates to information and outreach pertaining to article 18(2) procedures. It 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 victim’s rights generally, and ensuring information is properly delivered to marginalised and vulnerable communities in Afghanistan. The Chamber’s ruling is limited to the rights possessed by victims in regard to particular developments—like the status of the deferral request—whereas Petitioners had argued in favour of a number of rights that are unrelated to specific events, and supported by the text and intent of the Rome Statute.

9. Overall, the Decision does not appear to address the core issues identified by the Motion, despite rejecting the Motion wholesale. In so doing, the Decision has left open and unresolved many (if not most) of the requests made by the Petitioners which will continue to go unresolved absent reconsideration.

***b. Reconsideration is necessary to prevent an injustice***

10. Without reconsideration of the Decision, victims and affected communities continue to face injustice and be harmed by the Court’s sustained failure to provide

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<sup>11</sup> [Decision](#), para. 23.

<sup>12</sup> [Decision](#), para. 25.

information and effective outreach.<sup>13</sup> As detailed in the Motion, the absence of information and an effective outreach program has meant that:

- Vulnerable groups in Afghanistan, particularly women and children, are denied the genuine ability to participate in proceedings to-date, or otherwise exercise their rights.
- Rampant misinformation and disinformation are prominent concerning the Court’s mandate, the rights of victims, and the Court’s role in Afghanistan.
- Victims and affected communities—including would-be witnesses and intermediaries—have lost confidence in the Court and distrust its intentions.
- The critique that the Court serves Western, not Afghan, interests continue to deepen.<sup>14</sup>

11. These harms are neither marginal nor trivial. They are serious, real, and impact a large number of victims. They are also heightened by the current security situation in Afghanistan, which has left many victims feeling abandoned, marginalised, hopeless, and disrespected by international institutions, including the ICC. Even if the Afghan government were to withdraw its deferral request or the Prosecution were to continue its investigation, the deficiencies concerning information and outreach would persist unless this Chamber imposes measures, like the ones requested in the Motion. Addressing these harms—caused by the Court’s neglect of

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<sup>13</sup> *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Request for Reconsideration of Decision ICC-02/05-01/20-110 Submitted by the Defence (ICC-02/05-01/20-113), [ICC-02/05-01/20-163-tENG](#), para. 12 (noting that the Chamber has the power to reconsider its decisions where “‘a clear error of reasoning’ has been demonstrated, or if it ‘is necessary to prevent an injustice’ or if the decision rendered is ‘manifestly unsound’.”).

Afghan victims and a failure to be inclusive in its processes—and preventing further injustice can only be achieved by reconsidering the Decision.

## **B. Request for leave to appeal the Decision**

12. To the extent the request for reconsideration is denied, Petitioners respectfully ask that the Chamber grant leave to appeal the Decision in accordance with article 82(1)(b) of the Statute.

### ***a. Petitioners have standing to seek leave to appeal the Decision***

13. Petitioners have standing to seek leave to appeal the Decision under article 82(1) of the Statute since the Decision concerns rights explicitly afforded to victims. As recently found by the Appeals Chamber, “who qualifies as a ‘party’ in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal” and that “the meaning of the term ‘either party’ thus depends on the procedural context”.<sup>15</sup> Within the current context, victims must qualify as a “party” given that the Decision directly implicates rights that are specifically afforded to them. The Court’s legal texts, as detailed in the Motion, establish that the Registry and the Prosecution have the duty to conduct outreach to victims to inform them of their rights and to keep them apprised of the Court’s activities, including during ongoing investigations.<sup>16</sup> Pre-Trial Chambers I and III and the Assembly of State Parties have all equally affirmed that victims enjoy such rights.<sup>17</sup> These rights have also long been recognised as essential human rights

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<sup>15</sup> Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, [ICC-02/17-137](#), 4 March 2020 (“4 March 2020 Appeals Chamber Decision”), para. 12 (*quoting* Transcript of hearing, 5 December 2019, [ICC-02/17-T-002-ENG](#), p. 3, lns. 18-21). *See also* Decision on the Prosecutor and Victims’ Requests for Leave to Appeal 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’, [ICC-02/17-62](#), 17 September 2019 (“17 September 2019 Decision”), paras. 20-24.

<sup>16</sup> [Motion](#), paras. 22-30.

<sup>17</sup> [Motion](#), paras. 27-28. *See also* *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, [ICC-01/18-2](#), 13 July 2018, para. 10 (“it is worth recalling that victims also have the right to provide information to, receive information from and communicate with the Court, regardless and



belonging to victims within the context of criminal proceedings, including at the investigation stage.<sup>18</sup> Fitted within this context, victims must constitute a “party” for purposes of article 82(1).

14. This contrasts with the Chamber’s recent decision to deny victims standing to appeal a decision rendered under article 15; that decision was context-specific. In that instance, this Chamber and a majority of the Appeals Chamber denied victims standing to seek leave to appeal under article 82(1) since “[t]he provisions [of article 15] make it clear that it is the Prosecutor who has the power to seek authorisation to initiate an investigation before a pre-trial chamber” and “nothing in article 15 of the Statute or the related Rules grants victims the power to request the pre-trial chamber to authorise the initiation of an investigation.”<sup>19</sup> The same is not true here. The rights at issue in this matter are expressly provided to victims and the affected communities, and there is no provision within the Court’s legal texts equivalent to article 15 limiting who can seek judicial resource for the denial of those rights.

15. Indeed, the Appeals Chamber expressly anticipated that victims should be able to seek leave to appeal this type of matter. The Appeals Chamber reasoned that victims generally have the right to an effective remedy emanating from international human rights law.<sup>20</sup> It also noted that “a right to an effective remedy can arise if it is an international organisation that has committed the violation or has a process by which rights have been restricted.”<sup>21</sup> The current circumstances present exactly that situation. In this instance, Petitioners have directly alleged that the Court, through the Prosecution and the Registry, has committed the underlying violations to their

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independently from judicial proceedings, including during the preliminary examination stage”); *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Order on Information and Outreach for the Victims of the Situation, [ICC-01/19-28](#), 20 January 2020, para. 7 (“The Chamber considers that a meaningful exercise of this obligation is premised on the victims having access to complete and accurate information about their role at the Court during the various stages of the proceedings”).

<sup>18</sup> [Motion](#), paras. 29-34.

<sup>19</sup> [4 March 2020 Appeals Chamber Decision](#), para. 20. *See also* [17 September 2019 Decision](#), para. 31.

<sup>20</sup> [4 March 2020 Appeals Chamber Decision](#), para. 20.

<sup>21</sup> [4 March 2020 Appeals Chamber Decision](#), fn. 47 (citation omitted).

rights. There is also no party able to vindicate the breach of that right but the victims themselves. Under these unique circumstances, victims must be considered a “party” for their right to an effective remedy to be protected.

***b. Two issues arise from the Decision and should be certified for appeal***

16. Petitioners identify two issues arising from the Decision for which it seeks certification to appeal:

*1) Whether victims and affected communities in situations have the right to information and effective outreach under the Court’s legal texts (“First Issue”).*

*2) Whether victims and affected communities have standing to seek judicial recourse where the Court is alleged to have violated the right to information and effective outreach (“Second Issue”).*

17. These issues are intertwined as the Second Issue would arguably be moot if the First Issue is answered in the negative. With that in mind, Petitioners address them jointly.

18. *First*, both Issues arise from the Decision.<sup>22</sup> Both Issues address a core element of the Decision, namely the Chamber’s determination that victims do not have the right to information and effective outreach or standing to remediate those rights. This is admittedly conditioned on whether the Chamber did in fact address those issues—which, as referenced in the request for reconsideration above, is unclear that it did. To the extent that the Chamber did faithfully address the Motion, however, then the Issues would be core to the Decision since they are core to the Motion.

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<sup>22</sup> [17 September 2019 Decision](#), para. 37. *See also Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, [ICC-02/11-01/11-464](#), 31 July 2013, para. 8.

19. *Second*, the Issues have serious implications on the fairness and expeditiousness of the proceedings.<sup>23</sup> As it stands, there are divergent decisions across the Court with regards to whether, if at all, victims have the right to information and effective outreach. Some Chambers have concluded that those rights exist and have implemented plans to afford those rights.<sup>24</sup> Others have not. That divergence creates an inherent unfairness for all victims, including those here, who have not been recognised as having such rights and for whom the Chamber has not taken steps to ensure the protection of those rights. Such disparate treatment is not only wholly unfair, but it also deepens the alienation and discrimination victims already experience for they become witnesses of their own disenfranchisement as compared to victims in other situations.

20. Appellate determination on the existence, parameters, and criteria regarding the rights to information and effective outreach would benefit all parties in all situations by providing legal certainty. It would provide victims the clarity they have been missing with regards to the scope of their rights at the investigation stage. That clarity would in turn contribute to materially advance proceedings in this situation (and others) by ensuring that the Registry, Prosecution, and all Chambers of the Court understand what obligations are owed to victims at this stage, and how those duties should be rendered. In doing so, immediate resolution of the Issues may materially advance the proceedings by preventing litigation by parties which might not otherwise have the right to participate, or otherwise ensuring that the process of participation is streamlined with clear expectations.

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<sup>23</sup> [17 September 2019 Decision](#), para. 35.

<sup>24</sup> See *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, [ICC-01/18-2](#), 13 July 2018; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Order on Information and Outreach for the Victims of the Situation, [ICC-01/19-28](#), 20 January 2020.

21. *Third*, the Issues cannot be described as a mere disagreement with the Decision,<sup>25</sup> but rather represent a legal issue of significant importance to Afghan victims and the affected communities. As noted throughout the Motion, information and effective outreach are fundamental rights on their own, and the gateway through which all other victim rights are achieved.<sup>26</sup> It is also the only way through which victims from particularly marginalised communities can participate at the Court—as highlighted on multiple occasions by the Assembly of State Parties.<sup>27</sup> The increasing attention to these rights by other Chambers of the Court demonstrates that this not a fringe matter and a core issue at the heart of victim participation at the Court.

22. *Finally*, the appeal should be granted given the impact that a decision denying victims standing in this instance would have in the context of these specific proceedings. To deny victims the opportunity to appeal the denial of information and effective outreach at this stage would likely deprive Afghan victims and the affected communities their last remaining opportunity to be heard before this Court. The Chamber should not deny this opportunity lightly. Afghans deserve better from this Court.

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<sup>25</sup> [17 September 2019 Decision](#), para. 37.

<sup>26</sup> [Motion](#), paras. 22-30.

<sup>27</sup> [Motion](#), paras. 31-34.

### III. CONCLUSION

23. For the foregoing reasons, Petitioners request that the Chamber reconsider its Decision or, in the alternative, certify for appeal the First and Second Issues.



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**Spojmie Ahmady Nasiri**



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**Nema Milaninia**

**Counsel for Petitioners**

Dated this 10<sup>th</sup> day of September 2021

At San Francisco, CA; Washington, D.C. USA