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No.: ICC-02/17
Date: **30 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

Response to Requests for Reconsideration 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-02/17-159-AnxA and ICC-02/17-160-Anx1)

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Introduction

1. Legal representatives of victims who participated in the litigation under article 15(4) of the Statute seek reconsideration of the Pre-Trial Chamber's subsequent decision¹ on their motions for orders to require the Prosecutor to clarify the scope of the deferral request by the Government of Afghanistan ("Deferral Request"), and to set a deadline for his review.² These requests for such an exceptional remedy should be dismissed because: a) the Applicants lack standing for the reasons set out in the Decision; b) all matters pertaining to their concerns about the exercise of the Prosecutor's discretion under article 18(2) of the Statute are now moot; and c) the Applicants fail in any event to justify the relief sought.

2. Specifically, the Prosecutor's recent request for authorisation to resume the investigation has made all relevant matters publicly known, and answered the Applicants' concerns pertaining to the exercise of his discretion under article 18(2).³ Consequently, their applications now serve no forensic purpose. In any event, the Pre-Trial Chamber was correct in determining its powers prior to an article 18(2) request by the Prosecutor, and was therefore correct to conclude that the Applicants had no standing to participate at that time. It caused no injustice. In these circumstances, reconsideration is not warranted.

Submissions

3. The Prosecution had opposed the Applicants' initial motions to the extent that the requested remedies relied on any claim that they had standing to participate in non-judicial proceedings,⁴ and in any event because they were premature,

¹ [ICC-02/17-156](#) ("Decision").

² See [ICC-02/17-159-AnxA](#) ("Guantanamo Applicants' Request"). The Cross-Border Applicants "agree with, and respectfully adopt, the submissions set out" in the Guantanamo Applicants' Request: [ICC-02/17-160-Anx1](#) ("Cross-Border Applicants' Request"). The Pre-Trial Chamber referred to the Guantanamo Applicants as the "Second Applicants" and the Cross-Border Applicants as the "Third Applicants": [Decision](#), paras. 8, 10.

³ [ICC-02/17-161](#) ("Request to Resume Investigation").

⁴ [ICC-02/17-152](#) ("Prosecution Response to Applicants' Initial Motions"), paras. 11-18.

speculative and inconsistent with the statutory independence of the Prosecutor in conducting investigations.⁵

4. Re-affirming that the Statute does not provide for judicial oversight of the Prosecution's compliance with article 54(1) as such, and that article 18(2) confers upon the Prosecution the *exclusive* power to review the Deferral Request *with the modalities and the timing it regards as appropriate*, the Pre-Trial Chamber found no legal basis for it "to intervene" in the context of the Prosecution's review of the Deferral Request and, consequently, of the lack of standing of the Applicants.⁶

5. While the Applicants now seek reconsideration of this decision, they fail to show that this is necessary to prevent an injustice.⁷

6. First, the concerns underlying the Applicants' original motions, and therefore also underlying their requests for reconsideration, have now been addressed.⁸ As such, reconsideration no longer serves any forensic purpose. Thus, on 27 September 2021, the Prosecution filed a request for an authorisation to resume the investigation.⁹ This satisfies the Applicants' desire for "transparency" and a prompt decision by the Prosecutor.¹⁰

7. Second, and in any event, reconsideration of a chamber's decision is an exceptional measure,¹¹ which is not justified in these circumstances. The Applicants cannot demonstrate that the Decision caused any injustice, or was flawed by a clear error of reasoning, because the Decision was not only correct¹² but served to preserve the statutory independence of the Prosecutor—including the essential power to maintain the confidentiality of his investigative activities in order to ensure their

⁵ [Prosecution Response to Applicants' Initial Motions](#), paras. 19-26.

⁶ [Decision](#), paras. 22-23, 25.

⁷ *Contra* [Guantanamo Applicants' Request](#), para. 10.

⁸ See [Guantanamo Applicants' Request](#), paras. 12, 37-42.

⁹ [Request to Resume Investigation](#).

¹⁰ See [Guantanamo Applicants' Request](#), para. 12.

¹¹ This is expressly recognised by the Applicants: see e.g. [Guantanamo Applicants' Request](#), para. 13.

¹² *Contra* [Guantanamo Applicants' Request](#), paras. 9-10, 16-25.

effectiveness, as required by article 54(1) itself.¹³ To the extent that the Applicants merely disagree with the reasoning in the Decision, this is inappropriate. A request for reconsideration is not a means to enter into a debate with the Pre-Trial Chamber about the applicable law, or to raise novel arguments,¹⁴ and such requests should not be entertained.

8. In particular, the Applicants fail to show any error in the Pre-Trial Chamber’s reasoning that it has no power to “request clarity and/or additional details” from the Prosecutor concerning the exercise of his discretion under article 18(2), or to “manage” non-judicial proceedings of this kind, if it has no power to intervene.¹⁵ Their submissions are, to say the least, highly contentious. In particular:

- While the Applicants resort to their view of the intent of the drafters of the Statute, subsidiary rules and regulations, and inherent or implied powers, this can never suffice to justify an interpretation of the Statute contrary to the ordinary meaning of its provisions, read in context and consistent with its object and purpose. The Decision cannot be faulted for such an approach.¹⁶
- Likewise, the Pre-Trial Chamber correctly interpreted the reasoning of the Appeals Chamber which it quoted¹⁷—especially the last sentence—which was consistent with the broader principle (recognised by the Pre-Trial Chamber) that “neither article 54 of the Statute nor any other provision provides for judicial oversight of the Prosecutor’s compliance with article

¹³ *Contra* [Guantanamo Applicants’ Request](#), para. 13. *See also* [ICC-02/17-158](#) (“Response to Request for Reconsideration or Leave to Appeal”), para. 6.

¹⁴ *See e.g.* [Guantanamo Applicants’ Request](#), paras. 26-33, 43-48.

¹⁵ *Contra* [Guantanamo Applicants’ Request](#), paras. 16, 34-36.

¹⁶ *Contra* [Guantanamo Applicants’ Request](#), paras. 26-36, 43-48. *See also* [Prosecution Response to Applicants’ Initial Motions](#), paras. 16-17.

¹⁷ *See* [Decision](#), para. 22 (quoting [ICC-02/17-138 OA4](#) (“Afghanistan Appeal Judgment”), para. 63). *Contra* [Guantanamo Applicants’ Request](#), paras. 19-21.

54(1) as such”¹⁸ and that the Statute expressly defines the competences of the Pre-Trial Chamber.

- In the absence of any express conferral by the Statute, it cannot be argued that the issue of standing is unrelated to the existence of a judicial power of intervention—even if it is correct that standing can be a matter of implication in certain circumstances, this is manifestly not the case where it would be futile due to the absence of any available remedy.¹⁹

Conclusion

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



Karim A. A. Khan QC, Prosecutor

Dated this 30th day of September 2021

At The Hague, The Netherlands

¹⁸ [ICC-01/09-159](#) (“Kenya Decision”), para. 13. Cf. [Guantanamo Applicants’ Request](#), paras. 24-25.

¹⁹ *Contra* [Guantanamo Applicants’ Request](#), paras. 51-52.