

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 November 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 on the requests for reconsideration or leave to appeal the ‘Decision regarding applications related to the Prosecutor’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

Mr Nema Milaninia

Ms Katherine Gallagher

Ms Megan Hirst

Mr Tim Moloney

Mr Mikołaj Pietrzak

Ms Nancy Hollander

Mr Ahmad Assed

Mr Steven Powles

Mr Conor McCarthy

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court issues the present ‘Decision on the requests for reconsideration or leave to appeal the “Decision regarding applications related to the Prosecutor’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’.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 request of 26 March 2020 seeking a deferral of the Prosecution’s investigation into the Islamic Republic of Afghanistan’s (the ‘Afghanistan’) pursuant to article 18(2) of the Rome 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 the Government of the Afghanistan in the context of the Deferral Request.⁶

5. On 3 September 2021, the Chamber rendered the ‘Decision regarding applications related to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request”’, in which it dismissed all the applications *in limine* for lack of standing (the ‘3 September 2021 Decision’).⁷

6. On 10 September 2021, the Registry transmitted⁸ to the Chamber an application dated 10 September 2021 from Spojmie Ahmady Nasiri and Nema Milaninia (the ‘First Applicants’), in which they request reconsideration of the 3 September 2021 Decision or, in the alternative, leave to appeal that same decision (the ‘First Request for Reconsideration or for Leave to Appeal’).⁹

7. On 17 September 2021, the Chamber received the Prosecution’s ‘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)”’.¹⁰

8. On 20 September 2021, the Registry transmitted¹¹ to the Chamber an application dated 17 September 2021 from Katherine Gallagher, Tim Moloney, Megan Hirst, Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed (the ‘Second Applicants’), in which they request reconsideration of the 3 September 2021 Decision (the ‘Second Request for Reconsideration’).¹²

⁶ [ICC-02/17-142](#).

⁷ [ICC-02/17-156](#).

⁸ [Transmission of “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”’ \(ICC-02/17-156\)”](#), ICC-02/17-157, with an annex.

⁹ [Annex to the Transmission of “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”’ \(ICC-02/17-156\)”](#), ICC-02/17-157-Anx.

¹⁰ [ICC-02/17-158](#).

¹¹ [Transmission of the “Request 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, with an annex.

¹² [Annex A to the Transmission of the “Request 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-Anx.

9. On 24 September 2021, the Registry transmitted¹³ to the Chamber an application dated 21 September 2021 from Steven Powles and Conor McCarthy (the ‘Third Applicants’), in which they request reconsideration of the 3 September 2021 Decision (the ‘Third Request for Reconsideration’).¹⁴

10. On 27 September 2021, the Chamber received the Prosecutor’s ‘Request to authorise resumption of investigation under article 18(2) of the Statute’ (the ‘Prosecutor’s Request to Authorise Resumption of Investigation’).¹⁵

11. On 30 September 2021, the Chamber received the Prosecutor’s ‘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)’.¹⁶

12. On 8 October 2021, the Chamber rendered the ‘Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor’s “Request to authorise resumption of investigation under article 18(2) of the Statute”’.¹⁷

II. Determination by the Chamber

13. The Chamber recalls that it dismissed *in limine* the First, Second, and Third Applicants’ (together, the ‘Applicants’) prior requests on the basis that the Applicants were deprived of standing in the context of the Prosecutor’s review of the Deferral Request under article 18(2) of Rome Statute (the ‘Statute’).¹⁸ The Chamber finds that this applies *mutatis mutandis* to the present applications. Accordingly, the First Request for Reconsideration or for Leave to Appeal, as well as the Second and Third Request for Reconsideration must be dismissed *in limine*.

¹³ Transmission of “Cross-Border Victims’ Request for Reconsideration of PTC II’s “Decision regarding applications related to the Prosecution’s Notification on status of the Islamic Republic of Afghanistan’s Article 18(2) deferral request”, ICC-02/17-160, with a public annex and a confidential annex.

¹⁴ Annex 1 to the Transmission of “Cross-Border Victims’ Request for Reconsideration of PTC II’s “Decision regarding applications related to the Prosecution’s Notification on status of the Islamic Republic of Afghanistan’s Article 18(2) deferral request, ICC-02/17-160-Anx.

¹⁵ [ICC-02/17-161](#), with a confidential annex.

¹⁶ [ICC-02/17-163](#).

¹⁷ [ICC-02/17-165](#).


¹⁸ [3 September 2021 Decision](#), para. 25.

14. In addition, the Chamber notes that, following the Prosecutor's Request to Authorise Resumption of Investigation, the proceedings pursuant to article 18(2) of the Statute have entered a new phase, governed by specific rules and principles; accordingly, any concerns relating to the situation will have to be expressed in full compliance with the specific framework applicable to that phase, as interpreted and applied by the Chamber.

FOR THESE REASONS, THE CHAMBER

DISMISSES *in limine* the First Request for Reconsideration or for Leave to Appeal, the Second Request for Reconsideration and the Third Request for Reconsideration.

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 Monday, 8 November 2021

At The Hague, The Netherlands