

Annex A

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**International
Criminal
Court**

Original: **English**

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

Date: **15 August 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

Urgent Request for Ruling on the “Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1)”

Source: Legal Representative for Victims

Document 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, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Ms Spojmie Ahmady Nasiri

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae Representatives

REGISTRY

Registrar

Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill, Chief

Detention Section

Victims Participation and Reparations Section

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. Today, 15 August 2021, Taliban leaders entered the Afghan presidential palace. Soon thereafter the President of the Islamic Republic of Afghanistan and his team were flown out of Kabul. In the last two weeks, the Taliban have swept through and ransacked Afghanistan and the Afghan people. Deceased bodies can be seen on the streets throughout the provinces, girls and woman are being kidnapped and raped (a practice many Western media outlets are describing as Afghan women being “taken as brides by Taliban fighters”), and executions of human rights activists and individuals associated with the Afghan Government are being reported across the country. These incidents are evidenced by videos and other sources in Petitioners’ possession and depicted in media outlets across the world. The Taliban are clear in their demands – the Afghan Government is no more, and the Taliban are only negotiating what the transfer of power to them will entail. The Court has wasted over a year and a half since the investigation in this situation was authorised by the Appeals Chamber on 5 March 2020. Petitioners implore the Court to not waste another moment.

2. Petitioners, individuals and Afghan civil society organisations who are victims of crimes under investigation by the Office of the Prosecutor (“OTP”), request an urgent decision on their 20 April 2021 “Motion Seeking Remedies for Information and Effective Outreach” (“Motion”).¹ The Afghan Government’s complete collapse clearly obviates any merit to the Government’s article 18(2) deferral request. Further, now, more than ever, victims and the affected communities need information and outreach concerning the rights afforded to them under the Court’s legal texts, particularly those registered as “victims” with the Court and intermediaries who helped the Court in outreach activities throughout these proceedings.

¹ Motion Seeking Remedies for Information and Effective Outreach, [ICC-02/17-143-Anx1](#), 20 April 2021.

3. Alternatively, should this Chamber consider that Petitioners lack standing to bring the Motion or this filing, or intends to reserve such determination for a future date, then Petitioners request that the Chamber exercise its broad authority under the Statute, *sua sponte*, to ensure the protection of Afghan victims and the affected communities.

4. Finally, Petitioners request that this motion be filed urgently and publicly. Urgent filing of this motion is necessary to give effect to the requested remedy. Public filing of this motion is justified because the underlying Motion it relates to was classified as “public” by this Chamber on 28 April 2021.

II. STATEMENT OF FACTS

5. On 20 April 2021, Petitioners filed their Motion. Noting the absence of transparency and outreach by the Registry and the OTP to-date, the Motion requested that the Chamber order the OTP and Registry to: (1) issue quarterly reports on their outreach efforts and the OTP’s investigative activities; (2) provide more information concerning the Afghan Government’s article 18(2) deferral request, including the OTP’s legal understanding of article 18(2); and (3) order a deadline for the OTP’s review of the Afghan Government’s request. The Motion was made public on 28 April 2021 following the Chamber’s granting of Petitioners’ “Motion for Clarification and Reclassification”.²

6. On 17 May 2021, the OTP filed its response to the Motion asking that the Chamber reject the Motion, arguing, in part that the remedies are premature since “the Prosecutor is reaching a critical stage in its assessment of the Deferral Request”

² Transmission of a “Motion for Clarification and Reclassification of “Motion Seeking Remedies for Information and Effective Outreach”(ICC-02/17-143-Conf-Exp-Anx 1), [ICC-02/17-144](#), 30 April 2021, para. 10.

and that “[n]o decision with regard to article 18(2) has yet been taken by the Prosecutor”.³

7. On 11 August 2021, noting the seriously deteriorating security situation in Afghanistan, a counsel for the Petitioners contacted the Victims Participation and Reparations Section (“VPRS”) by email urgently requesting: (1) information concerning any protective services the Registry could provide victims and civil society intermediaries at this stage; and (2) whether the Registry had a list of organisations which may be able to assist Afghans victims and their representatives.⁴

8. On 13 August 2021, following the lack of response or acknowledgment of receipt by VPRS, counsel for the Petitioners again contacted VPRS by email requesting a response and further noting that the victims had physical and digital evidence relevant to the OTP’s investigation. Counsel requested any support that could be provided “to get those removed from the country before the Taliban arrive in Kabul.”⁵ On the same day, the VPRS responded indicating that they were working on providing answers and that counsel could contact the OTP regarding questions relating to evidence.⁶

9. As of this filing, no further information has been provided by the Registry.

³ Response to Motion Seeking Remedies for Information and Effective Outreach (ICC-02/17-143-Anx1), [ICC-02/17-151](#), 17 May 2021 (“Response”), paras. 35-36.

⁴ Email from Counsel to VPRS, 11 August 2021, 16:05 CEST.

⁵ Email from Counsel to VPRS, 13 August 2021, 14:19 CEST.

⁶ Emails from VPRS to Counsel, 13 August 2021, 15:25 and 15:31 CEST.

III. SUBMISSIONS

A. Exceptional circumstances necessitate an urgent decision on the Motion

10. As of today, the Afghan Government has collapsed and the Taliban have taken over every provincial capital in Afghanistan as well as Kabul.⁷ Public information, including videos and photos, show that the Taliban have begun summarily executing unarmed Government soldiers,⁸ forcibly marrying women and girls off to young male fighters,⁹ plundering civilian homes and properties,¹⁰ and targeting civilians, including human and civil rights activists and civilian Government officials.¹¹ Afghanistan's President, Ashraf Ghani, and his staff have fled the country.¹² Any law enforcement structure capable of law and order has been rendered inoperative.

11. Whatever credence could be offered to the fiction that the Afghan Government was or could investigate and prosecute war crimes has been shattered by the realities on the ground, which are on clear display on every news site around the world.¹³ There can no longer be any credible claim (even if one existed) that the Afghan Government is "investigating or has investigated" criminal acts which may

⁷ The Afghan government collapses as the president flees the country and the Taliban enter Kabul, NY Times, 15 August 2021, available at <https://nyti.ms/3yP9t2x>.

⁸ Taliban fighters execute 22 Afghan commandos as they try to surrender, CNN, 14 July 2021, available at <https://cnn.it/3g2icqM>; Afghans Tell of Executions, Forced 'Marriages' in Taliban-Held Areas, Wall Street Journal, 12 August 2021, available at <https://on.wsj.com/3xJoEJf>.

⁹ Afghanistan: Taliban offensive forces thousands to flee, DW News, 14 August 2021, available at <https://youtu.be/XfbVH0JC5OE> (beginning at time stamp 2:20); As Taliban Expand Control, Concerns About Forced Marriage and Sex Slavery Rise, Foreign Policy, 23 July 2021, available at <https://bit.ly/3maSeFr>.

¹⁰ Afghanistan: Taliban Forcibly Displace Civilians, Human Rights Watch, 7 July 2021, available at <https://bit.ly/3m2II8g>.

¹¹ Afghanistan: Advancing Taliban Execute Detainees, Human Rights Watch, 3 August 2021, available at <https://bit.ly/3z3fCs5>; Afghanistan: Mounting Taliban Revenge Killings, Human Rights Watch, 30 July 2021, available at <https://bit.ly/3iL5uhE>; Afghanistan: Taliban Target Journalists, Women in Media, Human Rights Watch, 1 April 2021, available at <https://bit.ly/3D0oCk2>.

¹² Afghan President Ashraf Ghani Leaves Country As Taliban Forces Enter Kabul, NPR, 15 August 2021, available at <https://n.pr/2VPYiII>.

¹³ See Fareed Zakaria, CNN, 15 August 2021, available at <https://bit.ly/3xPLsXu> ("let's first dispense with the fantasy that the United States was maintaining the peace there with just a few thousand troops and that the situation could have been managed with this small commitment [...] for the Afghans the war had been intensifying" since 2019).

constitute crimes under the Court's jurisdiction such as to warrant continued consideration of its article 18(2) deferral request – now almost *17 months in consideration*.

12. Additionally, now, more than ever, victims who have registered with the Court and civil society organisations who risked themselves on the frontlines to ensure the provision of information and outreach in support of the Registry's efforts have the right to know what protections they are afforded by the Court, if any, in a manner that is responsive to the situation's urgency. Time was of the essence when the Motion was filed in April when the deteriorating security situation was in plain sight. It is even more so at this moment, however belated.

13. Victims and their affected communities need to know what rights they have under the Court's legal texts to assess the resources available to them to best determine how to secure their own well-being and that of others who have engaged with this Court. No information concerning those rights and resources have been provided to Afghan victims so far. Indeed, no such information has been provided in the over *five years* since Afghan civil society leaders began informing Registry and OTP representatives as to the "absence of information and outreach relating to the Court's investigation into crimes committed in Afghanistan, and the rights of victims and affected communities under the Rome Statute."¹⁴ There is an urgent need to rectify that issue now given the Government's collapse and the particular vulnerability of Afghan victims and civil rights organisations at this time.

¹⁴ See Annex D to Motion, [ICC-02/17-143-AnxD-Red](#), 21 April 2021 (made public on 17 June 2021), para. 7. See also paras. 8-36.

B. The Chamber can provide the requested relief without rendering any determination on standing

14. Petitioners are aware that the OTP disputes their standing to seek the relief sought in the Motion.¹⁵ Petitioners note that the facts underlying the Motion and this filing highlight the necessity of allowing victims to directly obtain judicial recourse in the exceptional circumstances, as here, where the clear rights of victims and that of affected communities are being violated during an investigation and no other party has stepped forward to vindicate those rights.

15. Notwithstanding that fact, even were the Chamber to entertain the OTP's standing arguments or require more time to consider it, the Chamber has the power to *sua sponte* render the relief requested by the Motion. The Chamber has the authority under article 68(1) to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Article 57(3)(c) of the Statute also gives the Chamber the general authority to "[w]here necessary, provide the protection and privacy of victims and witnesses [and] the preservation of evidence". Finally, nothing in the Court's legal texts precludes the Chamber from requesting that the OTP and the Registry disseminate information to witnesses and victims as to the rights afforded to them under the Court's legal texts or to request information from the OTP as to whether an investigation in this situation is being pursued given the complete collapse of the Afghan Government.

16. Even without deciding on the Motion's merits, or this filing, the Chamber is within its authority to ensure that the rights of victims and witnesses are being protected such as through the dissemination of time-appropriate information,

¹⁵ See Response, paras. 16-23. *But see* Motion, paras. 16-21.

particularly when exceptional moments, like the current one, is presented. We ask that the Chamber exercise that broad authority.

C. Request that this motion be filed urgently and publicly

17. For the reasons previously articulated by the Petitioners,¹⁶ Petitioners request that this motion be filed urgently and publicly. Given the situation on the ground and the rapid pace of developments in Afghanistan, it is essential that this request be filed urgently to give effect to the requested remedy. Further this motion should be filed publicly as it relates to a public filing – the Motion. Classifying this filing as “public” also ensures that the Chamber safeguards and serves as a steward for transparency and victim rights, as it has done so in this Situation to-date.

IV. CONCLUSION

18. Petitioners request that the Chamber urgently issue a decision on the Motion. In the alternative, Petitioners request that the Chamber execute its broad authority to ensure that the rights of Afghan victims and affected communities are protected.



Spojmie Ahmady Nasiri
Lead Counsel for Petitioners

Dated this 15th day of August 2021
At San Francisco, USA

¹⁶ Motion for Clarification and Reclassification of “Motion Seeking Remedies for Information and Effective Outreach” (ICC-02/17-143-Conf-Exp-Anx1), [ICC-02/17-144-Anx1](#), 30 April 2021, paras. 11-15.