

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/17

Date: 17 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

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"'

Source: Legal Representatives of Victims

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

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I. Introduction

1. This 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”’ (the “Decision”)¹ dated 3 September 2021 is made by the Legal Representatives of Victims (“LRVs”) who represent Ahmed Rabbani (r/00638/18), Sharqawi Al Hajj (r/00751/18), Guled Hassan Duran (r/00750/18) and Abd Al Rahim Hussayn Muhammad Al-Nashiri (r/60009/17).
2. The Decision made by Pre-Trial Chamber II (“the Chamber”) rejected requests made in three separate applications filed on behalf of victims. The present request for reconsideration is particularly made in respect of those aspects of the Decision which concern the requests made by Ms Katherine Gallagher, Ms Margaret L. Satterthwaite, Ms Megan Hirst, and Mr Tim Moloney QC. They are referred to in the Decision as the ‘Second Application’ and ‘Second Applicants’.²
3. On 15 April 2020 the Prosecution filed a ‘Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18(2) of the Statute’,³ which informed the Chamber of Afghanistan’s request of 26 March 2020 seeking a deferral of the Prosecution’s investigation (the “Deferral Request”).⁴ On 16 April 2021, the Prosecutor filed its Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral (“Notification”), which provided the

¹ [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, 3 September 2021.

²In an apparent oversight, the Chamber omitted from the Decision reference to one of the legal representatives who signed and submitted the Second Application, who was thus not notified of the decision, namely Katherine Gallagher – and by extension, the victims on whose behalf she made the submission. *See* Second Application, paras. 19-21. The LRVs ask that all undersigned counsel be included in further filings or decisions in relation to this matter, and be notified of such filings by the Registry.

³ [Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18\(2\) of the Statute](#), ICC-02/17-139, 15 April 2020.

⁴ [Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18\(2\) of the Rome Statute](#), ICC-02/17-139-Anx1, 26 March 2020.

information to the Chamber on the status of the article 18(2) Deferral Request,⁵ but omitted key information such as what the Prosecution understood to be the scope of the deferral request, and when a decision on it would be taken.

4. On 20 April 2021 a request (referred to in the Decision as the “First Application”) was filed by Afghan victims, seeking orders that certain steps be taken by the Prosecutor and Registry in relation to outreach in Afghanistan.⁶
5. On 29 April 2021 the Second Application was filed on behalf of victims of crimes authorised for investigation by the Prosecutor arising out of the US detention, interrogation, rendition and torture program. It was transmitted to the Chamber as an annex to a Registry filing on 6 May 2021.⁷ The Second Application requested the Chamber to order the Prosecutor to clarify the scope of the Deferral Request, and particularly whether it includes the US component of the investigation (and either the basis for the conclusion that it does, or in the alternative, an update on the status of the investigation of the US component), and set a deadline for the Prosecutor’s review of the Deferral Request.⁸
6. Also on 29 April, a request was filed by another group of victims, the “cross-border victims” (referred to in the Decision as the “Third Application”), asking the Chamber to confirm certain matters regarding the status and scope of the Prosecutor’s investigation and steps it is taking to obtain cooperation of other States Parties.⁹

⁵ [Notification on the status of the Islamic Republic of Afghanistan’s article 18\(2\) deferral request](#), ICC-02/17-142, 16 April 2021.

⁶ [Motion Seeking Remedies for Information and Effective Outreach](#), ICC-02/17-143-Anx1, 20 April 2021.

⁷ [Victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18\(2\) deferral request” and request for compliance with Part 5 of the Statute](#), ICC-02/17-146-Anx, 29 April 2021.

⁸ [Second Application](#), paras 1, 49.

⁹ [Cross-Border victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18\(2\) deferral request”](#), ICC-02/17-148-Anx, 29 April 2021.

7. The Prosecution filed its responses to the First Application, the Second Application and the Third Application on 17 May 2021.¹⁰
8. On 3 September 2021, the Chamber refused the First, Second, and Third Applications on the basis that:
 - i. The Chamber does not have the power to generally oversee an investigation conducted by the Prosecutor as article 18(2) of the Statute only contemplates a pre-trial chamber's intervention upon the application of the Prosecutor;¹¹
 - ii. The Prosecutor has the sole discretion to decide whether, and to what extent, to provide information to potential victims and the general public on the procedure under article 18(2) of the Statute;¹² and
 - iii. In the absence of a legal basis to intervene, the First, Second, and Third Applicants are deprived of legal standing at this stage of the proceedings.¹³
9. Fundamental to the Chamber's conclusions is an extremely narrow view of judicial powers, whether procedural or substantive in nature, during the investigation phase.¹⁴
10. Reconsideration is necessary in this case to prevent an injustice, in light of at least two factors.
11. First, the Decision appears to misconstrue the Second Application, and also to misapply previous caselaw on the powers of pre-trial chambers. The Decision's conclusions on these issues set a precarious precedent on the Chamber's role at the investigation stage, as well as on victims' standing. The LRVs respectfully request the Chamber to reconsider its findings in order to protect the rights of victims and

¹⁰ [Response to Submissions on Behalf of Certain Victims Who Participated in the Litigation Under Article 15\(4\) \(ICC-02/17-146-Anx and ICC-02/17-148-Anx\)](#), ICC-02/17-152, 17 May 2021.

¹¹ [Decision](#), paras 21, 22-23.

¹² [Decision](#), para. 23.

¹³ [Decision](#), para. 25.

¹⁴ [Decision](#), para. 25.

ensure timely justice, and to make clear the Chamber's own ability to request clarity and/or additional details regarding a pending deferral request.

12. Secondly, as set forth in detail by the Afghan victims in their recent filings,¹⁵ the recent developments in Afghanistan reinforce the need for a judicial role in managing the deferral proceedings, in order to ensure transparency and that they are conducted in a timely manner. More than one month after the fall of the Afghan government (and the United States withdrawal), there has been no public information regarding the Deferral Request, which was made more than 17 months ago.

II. Legal basis for requesting reconsideration

13. Although an exceptional measure, chambers of the Court have reconsidered their own decisions “where, for instance, ‘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’”.¹⁶ These criteria do not need to be demonstrated cumulatively.¹⁷

¹⁵ [Motion Seeking Remedies for Information and Effective Outreach](#), ICC-02/17-143-Anx1, 20 April 2021; and [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 September 2021.

¹⁶ *Prosecutor v Abd-Al-Rahman*, [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, 23 September 2020, para. 12. See also *Prosecutor v Abd-Al-Rahman*, [Decision on the Defence alternative request for reclassification of a document or reconsideration of a decision and subsidiary request for leave to appeal a decision](#), ICC-02/05-01/20-372, 3 May 2021, para. 8; *Prosecutor v Ntaganda*, [Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal](#), ICC-01/04-02/06-519, 18 March 2015, para. 12; *Prosecutor v Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), ICC-02/04-01/15-468, 15 June 2016, para. 4; *Prosecutor v Ongwen*, [Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its list of Evidence](#), ICC-02/04-01/15-1547, 20 June 2019, paras 6-7; *Prosecutor v Yekatom and Ngaïssona*, [Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice Edouard Ngaïssona’](#), ICC-01/14-01/18-447, 11 March 2020, para. 16; *Prosecutor v Ntaganda*, [Decision on Prosecution’s requests relating to in-court protective and special measures for Witness P-0039](#), ICC-01/04-02/06-1049-Red, 10 December 2015, para. 12.

¹⁷ *Prosecutor v Ntaganda*, [Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal](#), ICC-01/04-02/06-519, 18 March 2015, para. 12; *Prosecutor v Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), ICC-02/04-01/15-468, 15 June 2016, para. 4;

III. Submissions concerning the Chamber's powers

14. The Chamber reasoned that the Second Application is premised on an assumption that the Chamber has general judicial oversight over an investigation conducted by the Prosecutor.¹⁸ On examining that question, the Chamber concluded that the Statute does not provide for judicial oversight during investigations at all, and specifically, not with regard to the Prosecutor's compliance with his obligations to investigate under article 54(1)¹⁹ or of a deferral request made under 18, unless and until the Chamber is seized by a request of the Prosecutor.²⁰
15. The LRVs respectfully submit that in this process the Chamber made two errors.
16. First, it misconstrued the Second Application, understanding it to be dependent on a generalized judicial oversight power regarding investigations or a power to direct the Prosecutor's decision under article 18(2). In fact, the Second Application did not request the Chamber to *intervene* in the investigation or to *review* the Prosecutor's decision in relation to the Deferral Request. Nor did it request the Chamber to monitor the scope of the Prosecutor's investigation. The Decision misunderstands the requests in the Second Application. The Chamber equates *management* of the proceedings concerning the Deferral Request with *intervention* in, or review of, the Deferral Request or the Prosecutor's decision on the same. Ensuring that proceedings are conducted in a timely manner and related case management does not constitute intervention in the investigation or the Deferral Request and – as set out below – falls squarely within the remit of the Chamber.

Prosecutor v Ntaganda, [Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039](#), ICC-01/04-02/06-1049-Red, 10 December 2015, para. 12; *Prosecutor v Abd-Al-Rahman*, [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, 23 September 2020, para. 12.

¹⁸ [Decision](#), para. 21.

¹⁹ [Decision](#), para. 22.

²⁰ [Decision](#), para. 23.

17. Relatedly, the Decision generalises the position concerning the Chamber's powers during this stage.²¹ To do so, it misapplies the Court's jurisprudence. The Chamber relies on the Appeals Chamber authorization decision in the article 15 proceedings in this Situation,, but fails to account for the different context it referred to. As set out below, ICC case law to date has taken a nuanced position on judicial oversight of investigations. While limitations have been set, particularly on the possibility to scrutinise the content of Prosecutorial decisions on discretionary matters, judicial oversight has been allowed on procedural matters.

(a) ICC caselaw concerning judicial powers vis-à-vis an investigation

18. As authority for its position, the Chamber referred to the Appeals Chamber decision of 5 March 2020 on the appeal against the decision on the authorization of an investigation into the Situation in Afghanistan.²² Additionally, the Chamber considered that article 18(2) of the Statute only permits the Chamber to act on the application of the Prosecutor. On this basis, the Chamber reached its decision that there was no legal basis for the Chamber to "intervene in the context of the Prosecution's review of the Deferral Request".²³

19. However, reliance on the Appeals Chamber decision on 5 March 2020 to dismiss the Second Application misapplies the Appeals Chamber's reasoning. The paragraph referred to relates to the Appeals Chamber's rejection of the view that in order to undertake investigations into specific matters the Prosecutor should be required to submit repeated specific requests to a pre-trial chamber (including with specifically defined limitations on the contours of the investigation), such that positive authorization was required from a pre-trial chamber before investigations could proceed on any particular event:

²¹ [Decision](#), para. 25 ("the Chamber is not competent to intervene at this stage of the proceedings"); para. 26 ("the Chamber's absence of oversight powers at this stage of the proceedings").

²² [Decision](#), para. 22.

²³ [Decision](#), para. 25.

The Appeals Chamber considers that the alternative proposed by the Pre-Trial Chamber – that investigation of incidents not closely related to those authorized would be possible if they were the subject of a new request for authorization under article 15 – is unworkable in practice in the context of an investigation into large-scale crimes of the type proposed by the Prosecutor. First, the Appeals Chamber is of the view that it would be impossible for the Prosecutor to determine in the course of investigating, which incidents could safely be regarded as ‘closely linked’ to those authorized and which would require the submission of a new request for authorization. As a result, the Prosecutor would be required to submit repeated and sometimes unnecessary requests for authorization of investigation as new facts are uncovered. Second, the Appeals Chamber considers that *such continuous monitoring of the scope of the Prosecutor’s investigation* by the pre-trial chamber is contrary to the statutory scheme regulating the respective functions and powers of these two organs with respect to investigations. In this regard, the Appeals Chamber notes that article 42(1) recognises the independence of the Prosecutor and her responsibility for the conduct of investigations, while articles 56 and 57 of the Statute identify specific functions that may be exercised by the pre-trial chamber during the investigation.²⁴ [emphasis added]

20. The “monitoring” which the Appeals Chamber rejected referred to an approach which would have required repeated requests for authorization to investigate. The Appeals Chamber’s explanation makes clear that the Prosecution is not required to seek repeated authorisation from a Pre-Trial Chamber before investigating specific matters.
21. The Appeals Chamber did not make any broader pronouncement on judicial powers during the investigation stage. It certainly did not state that a Pre-Trial Chamber may not request information or fix time frames for the taking of decisions or steps required of the Prosecutor by the Statute during the investigation phase. Indeed, the Appeals Chamber explicitly referred to specific areas in which pre-trial chambers *are required* by the Statute to exercise oversight during an investigation, specifically mentioning articles 56 and 57.

²⁴ [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), ICC-02/17-138, 5 March 2020, para. 63.

22. Notably, other decisions of the Appeals Chamber have indicated that Pre-Trial Chambers do have powers – which may be explicit in the Court’s texts or implied from them – regarding the process by which the Prosecutor takes key decisions concerning investigations. For example, the Appeals Chamber rejected the Prosecutor’s appeal against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’. There the Appeals Chamber considered a situation where a pre-trial chamber had acted under article 53(3)(a) and rule 108 to review the Prosecutor’s decision not to open an investigation and to request the Prosecutor to reconsider that decision. Neither article 53(3)(a) nor rule 108 stated that the pre-trial chamber was empowered to review the “final decision” made by the Prosecutor following that reconsideration. However, the Appeals Chamber held that such a power could be inferred:

...neither article 53(3)(a) of the Statute nor rule 103(3) of the Rules preclude a pre-trial chamber from reviewing whether a decision of the Prosecutor that she considers to be ‘final’ pursuant to rule 108(3) of the Rules actually amounts to a proper ‘final decision’. Indeed, if the pre-trial chamber lacked such power, the Prosecutor could simply decide to ignore the basis for the pre-trial chamber’s request for reconsideration. This would in turn negate the effectiveness of the procedure under article 53(3)(a) of the Statute as a whole.²⁵

23. To the extent that there are decisions by pre-trial chambers declining to rule on Prosecutorial conduct during an investigation, these all concerned matters clearly distinguishable from the matters addressed in the Second Application.

24. In the *Situation in Kenya* victims requested Pre-Trial Chamber II, *inter alia*, to find that the Prosecutor had failed to properly investigate in accordance with article 54, and to review the Prosecutor’s decision not to conduct further investigations at that time. The Pre-Trial Chamber held that the Statute did not permit judicial

²⁵ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’](#), ICC-01/13-98, 2 September 2019, para. 59.

oversight in this way and, as a result, it did not have the competence to review the Prosecutor's conduct of the investigation.²⁶ In reaching its conclusions Pre-Trial Chamber II relied on two earlier decisions which had been taken in the context of confirmation of charges proceedings. In those decisions, Pre Trial Chambers I and II held that a Prosecutor's alleged failure to comply with his or her article 54 investigative obligations in accordance with article 54(1) of the Statute could not be ruled on during confirmation proceedings as this question did not fall within the scope of the Chamber's determination pursuant to article 61(7).²⁷ It is noted that in neither of those two decisions did the Pre-Trial Chamber state that there is never power to review the Prosecutor's compliance with article 54 obligations. Rather, they held that this was not within the scope of a decision on the confirmation of charges.

25. The Second Application sought relief that is entirely different from the matters under consideration in those scenarios. The Second Application did not ask the Chamber to rule on the conduct of the investigation by the Prosecutor or its compliance with article 54. Regardless of the correct position regarding judicial review of article 54 duties and their implementation, separate powers exist which enable the Chamber to grant the relief sought in the Second Application. The legal bases for these are elaborated below.

(b) Inherent or implied powers relevant to the Second Application

26. There is no question that chambers of the Court have judicial powers which exceed those explicitly listed in the legal texts. This has been recognised by several chambers of the Court, including the Appeals Chamber.

²⁶ *Situation in Kenya*, [Decision on the "Victims' request for review of Prosecution's decision to cease active investigation"](#), ICC-01/09-159, 5 November 2015, paras 13, 15, 18, 28.

²⁷ *Prosecutor v Abu Garda*, [Decision on the Confirmation of Charges](#), ICC-02/05-02/09-243-Red, 8 February 2010, para. 48; *Prosecutor v Muthaura, Kenyatta and Ali*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-02/11-382-Red, 23 January 2012, para.63.

27. In its judgment on the appeal against sentence in the *Bemba et al. Case*, the Appeals Chamber observed that the notion of ‘inherent powers’ or ‘incident jurisdiction’, refers to judicial powers:

which, while not explicitly conferred in the relevant constitutive instruments, are considered necessarily encompassed within (“inherent to”) other powers specifically provided for, in that they are essential to the judicial body’s ability to perform the judicial functions assigned to it by such constitutive instruments.²⁸

28. The existence of inherent judicial powers is also recognised by the Regulations of the Court, which when setting out express judicial powers states that its provisions “are without prejudice to the inherent powers of the Chamber”.²⁹

29. Several chambers of this Court have relied on concepts of inherent jurisdiction, or incidental or implied judicial powers to identify judicial powers which are not spelled out in the Statute, Rules or Regulations. Examples include rulings which have recognised the existence of judicial powers to stay proceedings,³⁰ to subpoena witnesses,³¹ to determine the limits of the Court’s jurisdiction,³² and to review a Prosecutor’s “final decision” under Rule 108(3).³³

²⁸ *Prosecutor v Bemba et al.*, [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”](#), ICC-01/05-01/13-2276-Red, 8 March 2018, para. 75.

²⁹ Regulations of the Court, regulations 28(3) and 29(2).

³⁰ *Prosecutor v Banda and Jerbo*, [Decision on the defence request for a temporary stay of proceedings](#), ICC-02/05-03/09-410, 26 October 2012, para.77.

³¹ *Prosecutor v Ruto and Sang*, [Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation](#), ICC-01/09-01/11-1274-Corr2, 17 April 2014, paras 63-100.

³² *Request under Regulation 46(3) of the Regulations of the Court*, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), ICC-RoC46(3)-01/18-37, para.32.

³³ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’](#), ICC-01/13-98, 2 September 2019.

30. While the Appeals Chamber has held that such inherent or implied powers should be invoked in a restrictive manner and, in principle, only with respect to matters of procedure,³⁴ the Court's jurisprudence clearly supports the fact that chambers have powers conferred on it by necessary implication. The question is whether such powers are essential to the performance of the chamber's functions.
31. The LRVs submit that the Chamber's inherent or implied powers provide a legal basis to make the requests sought in the Second Application for informed clarification regarding the Prosecutor's Notification and the annexed Deferral Request and to set a deadline for the Prosecutor to act on the Deferral Request. This represents the exercise of a basic judicial function that is necessary for the expeditious management of proceedings.
32. The imperative for expedition applies across the work of the Court. Rule 101(1) of the Rules of Procedure and Evidence provides that:

In making any order setting time limits regarding the *conduct of any proceedings*, the Court shall have regard to the need to *facilitate fair and expeditious proceedings*, bearing in mind in particular the rights of the defence and the *victims*. [emphasis added]

Indeed, the Appeals Chamber recently approved this Chamber's finding that it has a "general obligation to ensure the fairness and expeditiousness of the proceedings."³⁵

33. In addition to this general principle which exists across all of the Court's proceedings, the need for expedition is specifically made clear in respect of article

³⁴ *Prosecutor v Bemba et al.*, [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"](#), ICC-01/05-01/13-2276-Red, 8 March 2018, para.75.

³⁵ *Prosecutor v Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation"](#), ICC-01/14-01/21-171, 14 September 2021, para. 64.

18 proceedings. This is clear from the terms of article 18, and from rules 52-57 which elaborate upon them.³⁶

34. Article 18 requires that a State wishing to defer an investigation must inform the Court *within one month* of receiving notification of the investigation from the Prosecutor.³⁷ While a State may request additional information, doing so shall not affect the one-month time limit, and the Prosecutor is required to respond *on an expedited basis*.³⁸ Where the Prosecutor defers his investigation, this may be reviewed *six months* after the deferral.³⁹ Where litigation arises, an appeal from it may be heard *on an expedited basis*.⁴⁰ Where the Prosecutor has decided to defer an investigation pursuant to article 18(2), he may request progress on domestic investigations, and States Parties must respond *without undue delay*.⁴¹
35. The clear intention of article 18 and its supporting rules is that requests for deferral under article 18(2) must be dealt with promptly. Article 18(3)'s reference to a review within *six months* gives an indication of the timeframes that the Statute's drafters had in mind. The provisions require timely action not only from the Prosecution, but also from the concerned State.
36. This unambiguous statutory intent would be thwarted if the pre-trial chamber did not possess basic judicial powers for the management of the proceedings, including matters such as setting deadlines and requiring the provision of information. To follow the reasoning of the Appeals Chamber as set out above in paragraph 22,⁴² if the pre-trial chamber lacked powers to manage the proceedings,

³⁶ See [Second Application](#), paras. 38-39, 45-48.

³⁷ Rome Statute, article 18(2).

³⁸ Rules of Procedure and Evidence, rule 52(2)

³⁹ Rome Statute, article 18(3).

⁴⁰ Rome Statute, article 18(4).

⁴¹ Rome Statute, article 18(5).

⁴² See *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"',](#) ICC-01/13-98, 2

the Prosecutor could simply decide to not take a decision on a deferral request, thus negating the effectiveness of the procedure under article 18(2) as a whole.

37. Indeed, the course of the current proceedings serves as a useful example of precisely what the Court's texts did *not* intend as permitted, and precisely why powers to manage the proceedings must be vested in the pre-trial chambers.

38. A year-and-a-half has now passed since the investigation was authorised – an already long-delayed milestone. The Deferral Request made some 17 months ago remains outstanding, after nearly three times the presumptive timeframe for reviewing a deferral under article 18(3). Not only has no decision been taken, but it is not clear that the Prosecutor has even formed a view on the scope of the Deferral Request, so as to allow investigation of matters outside its scope to proceed. Several consequences follow. First and foremost, critically necessary and long overdue investigations are not proceeding. But just as importantly, there is also an absence of circumstances which would exist even if the Deferral Request had been granted and the Prosecutor's investigations were put on hold. If the deferral had been agreed, victims would at least necessarily know its scope, meaning that they would know which parts of the investigation were deferred and which were proceeding. And even in respect of matters which were deferred, the Prosecutor would be empowered by article 18(5) to request periodic updates on investigations and prosecutions, with a resulting obligation on the concerned State Party to respond without undue delay. Likewise, the Prosecutor could decide to proceed with the investigation if a change in circumstances occurred that would undermine the feasibility of justice at the national level – as is the case in Afghanistan now.

September 2019, para. 59: "...if the pre-trial chamber lacked such power, the Prosecutor could simply decide to ignore the basis for the pre-trial chamber's request for reconsideration. This would in turn negate the effectiveness of the procedure under article 53(3)(a) of the Statute as a whole."

39. In the present instance, proceedings have fallen into a procedural lacuna through the simple failure of article 18(2) proceedings to progress. As set out in paragraphs 18 – 24 of the Second Application, for those who continue to be held in Guantánamo, they are there without charge and cut off from the outside world. Further delays, or inaction by the Prosecutor, results in continued uncertainty regarding the possibility of an ICC investigation into these ongoing crimes. Without management of the proceedings by the Chamber, it is evident that such a scenario could continue indefinitely.
40. This is clearly not the situation which article 18 intended. Ensuring that such a situation does not arise as a result of simple inaction by the Prosecutor (or, for that matter, a State Party) simply requires that the Chamber is empowered to manage proceedings, so as to ensure that relevant information is filed and procedural steps are taken within a reasonable time. This is, as set out above, distinct from judicial intervention in the substance of the same. An order requesting the Prosecutor to review the Deferral Request within a fixed timeframe is consistent with the Chamber's inherent powers to manage the proceedings and ensure that the rights of victims to transparency and legal certainty are preserved.
41. This would not amount to judicial intervention in the investigation or challenge to the same. The Chamber would not be making any decision on the Deferral Request for the Prosecutor. Rather, the order will ensure that the Prosecutor reviews the Deferral Request expeditiously.
42. In light of recent developments and the current situation in Afghanistan, which as the Decision accepts is "a reason for concern",⁴³ the Chamber can and should order the Prosecutor to review of the Deferral Request and set a deadline for this. In the circumstances of this case, it would be contrary to the interests of justice to allow the Deferral Request to remain pending and unresolved indefinitely.

⁴³ [Decision](#), para. 27.

(c) Express powers under the Regulations of the Court relevant to the Second Application

43. In any event, regardless of the position taken by the Chamber on its inherent powers concerning an investigation, at least part of the relief sought in the Second Application is explicitly contemplated by the Regulations of the Court. The Second Application requested the Chamber to order the Prosecutor to clarify his understanding of the scope of the 15 April 2020 Deferral Request made by Afghanistan.⁴⁴ This is in effect a request that the Prosecutor clarify the Notification.

44. Pursuant to Regulation 28 of the Regulations of the Court:

1. A Chamber *may order the participants to clarify or to provide additional details* on any document within a time limit specified by the Chamber.

2. A Chamber *may order the participants to address specific issues in their written or oral submissions* within a time limited specified by the Chamber.

3. These provisions are without prejudice to the inherent powers of the Chamber.

45. The definition of ‘documents’ provided in Regulation 22 “shall include any motion, application, request, response, reply, observation, representation, and any other submission in a form capable of delivering a written record to the Court”.

46. Section 1 of the Regulations of the Court is entitled ‘Provisions relating to all stages of the proceedings’. Regulations 22, 28 and 29 fall within this and apply to all chambers.

47. The Chamber therefore clearly has the power to order the Prosecutor to clarify the Notification, and to provide additional information relating to the same. Regulation 28 does not provide for *intervention* per se or *review* of a document by a chamber, rather *clarification*.

⁴⁴ [Second Application](#), para. 49.

48. With the collapse of the Afghan government, the Chamber may consider that victims, as well as the general public, would benefit from clarification and additional information in relation to the Deferral Request. The Chamber has the power to decide what relief would be most appropriate in this regard.

(d) Conclusion regarding the Chamber's powers

49. The relief sought in the Second Application was rejected “due to the Chamber’s absence of oversight powers at this stage of the proceedings.”⁴⁵

50. Given that the Chamber dismissed the Second Application on an erroneous understanding of the basis upon which the requests in the Second Application were made, the scope of such requests, and its powers in relation to the same, reconsideration is necessary in this case to prevent an injustice arising from this.

IV. Submissions concerning the Second Applicants’ standing

51. The Chamber concluded that absent a legal basis for the Chamber to intervene in the context of the Prosecutor’s review of the Deferral Request, the First, Second and Third Applicants are deprived of procedural standing at this stage.⁴⁶ As such, the Chamber decided that standing was lacking simply as a corollary to its decision on the merits of the request.

52. This approach is incorrect: the issue of standing is independent from that of judicial powers to act. Thus it is possible for a chamber to find that victims *do* have standing to request judicial action, but that nonetheless the chamber is *not* empowered to act. This situation is exemplified by the decision of this Chamber (as it was then constituted) in the *Situation in Kenya* of 5 November 2015.⁴⁷ Ordinarily standing would be decided before the merits of a request. However

⁴⁵ [Decision](#), para. 26.

⁴⁶ [Decision](#), para. 25.

⁴⁷ *Situation in Kenya*, [Decision on the “Victims’ request for review of Prosecution’s decision to cease active investigation”](#), ICC-01/09-159, 5 November 2015.

even if merits are considered first, they are not determinative of the question of standing. As was argued in the Second Application, victims have standing to seek the relief requested therein.

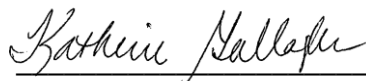
53. Reconsideration is required to remedy the unsatisfactory consequences of the Decision and prevent an injustice to the victims in this situation.

V. Relief Sought

54. For the reasons stated above, the Single Judge is requested to:

- (a) **RECONSIDER** the Decision insofar as it concerns the Second Application; and,
- (b) **GRANT** the requests made at paragraph 49 of the Second Application.

Respectfully submitted,



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Dated this 17 September 2021

At New York, USA; London, UK; Warsaw, Poland.