

# Annex 1

Public



Original: **English**

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

Date: **11 March 2022**

**THE PRESIDENCY**

**Before:** Judge Piotr Hofmański, President  
Judge Luz del Carmen Ibáñez Carranza, First Vice-President  
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**Public**

**Motion for Reclassification of Annexes 1 and 2 of Filing ICC-02/17-183**

**Source:** Legal Representatives of Victims

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

**The Office of the Prosecutor**

Karim A. A. Khan, Prosecutor

Nazhat Shameen Khan, Deputy Prosecutor

**Legal Representatives of the Victims**

Spojmie Ahmady Nasiri and Nema Milaninia

Haydee Dijkstal

Katherine Gallagher

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**The Office of Public Counsel for Victims**

Paolina Massidda

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Xavier-Jean Keita

**States Representatives**

*Amicus Curiae* Representatives

**REGISTRY**

**Registrar**

Peter Lewis, Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill, Chief

**Detention Section**

**Victims Participation and Reparations Section**

Philipp Ambach, Chief

**Other**

## I. INTRODUCTION

1. Counsel for victims in the Afghanistan Situation (“Victims”) respectfully request that the Presidency reclassify to “public” annexes 1 and 2 of the “Registry Transmission of a Document submitted before the Presidency, dated 28 January 2022” (“Transmission”).<sup>1</sup> Both annexes were initially filed as “public”. The Registry fails to justify reclassifying them as “confidential” in its transmission filing, as required by regulation 23 *bis* of the Regulations of the Court. Neither of the annexes contain sensitive or confidential information warranting their “confidential” designation. And there is no rule that filings before the Presidency be designated “confidential” by default. Making the filings “public” also accords with this Court’s bedrock principle of public proceedings.

2. This is now the second time in this Situation that the Registry has *sua sponte* departed from the stated classification of a victims’ filing without cause or explanation, or a ruling by the Court.<sup>2</sup> In the first instance, Pre-Trial Chamber II promptly ordered that the filing be classified as “public” in accordance with its original designation.<sup>3</sup> The Victims request that the Presidency similarly render such an order in this instance.

## II. SUBMISSIONS

### A. Request that annexes 1 and 2 be reclassified as “public”

3. The Victims request that annexes 1 and 2 of the Transmission be reclassified as “public”, in accordance with their original designation. There is no confidential information in the annexes, nor any information that could potentially put in harm’s

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<sup>1</sup> [ICC-02/17-183](#), 4 March 2022.

<sup>2</sup> 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.

<sup>3</sup> 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.

way any party, participant or third party. Both filings reference public filings and decisions. There is simply nothing that justifies their confidential designation, and, importantly, there is no rule or regulation that requires filings before the Presidency to be “confidential” by default pending a ruling by the Presidency as to the merits of the filing.

4. To the contrary, the Court’s rules and regulations create a presumption of publicity. Regulation 23 *bis* of the Regulations of the Court states that a filing be treated according to the designation stipulated on the document unless otherwise ordered by the Chamber – typically to ensure the safety and security of witnesses and victims. Here, both annexes were filed with a “public” designation.

5. The regulation does not give the Registry *sua sponte* authority to alter the designation of a filing as it wishes. The Court’s legal texts anticipate a stated justification for any non-public classification. Regulation 23 *bis* requires that when a filing is classified as non-public that there be an articulated “factual and legal basis for the chosen classification”. This interpretation finds support in sub-section 3 of the same regulation, which states that “[w]here the *basis* for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to re-classify the document.” (emphasis added). Here, there is no stated factual and legal justification by the Registry for why the filings were filed as “confidential” annexes. The Registry notes that the annexes were filed as “confidential pending determination by the Presidency for reclassification”.<sup>4</sup> But that statement fails to explain or provide reasoning for why the Registry itself reclassified the filings as “confidential” to begin with.

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<sup>4</sup> Transmission, para. 7.

6. Finally, reclassifying these documents as “public” accords with the general principle of public proceedings.<sup>5</sup> That principle has been a bedrock principle of this Court since its foundation. Manifestations of it appear throughout the Court’s legal texts, including in rule 15 of the Rules of Procedure and Evidence, which requires the Registrar to “keep a database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data.” The same rule emphasises that “[i]nformation on the database shall be *available to the public* in the working languages of the Court.” (emphasis added). The principle of public proceedings also features in regulation 20 of the Regulations of the Court, which notes that “[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber” and regulation 23 *bis*(1), which requires a “factual and legal basis” for any non-public classification. The principle of publicity is also necessary to maintaining public confidence, including that of victims, in the Court’s proceedings as highlighted by the European Court of Human Rights in *Werner v. Austria*.<sup>6</sup>

7. For all these reasons, reclassifying the annexes as “public” in accordance with their original designation is necessary and justified.

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<sup>5</sup> See e.g. *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on request of the Legal Representative of Victims for a public Legal Representative of Victims for a public redacted version of the pre-trial brief, [ICC-01/09-02/11-988](#), 11 December 2014, para. 13 (“The Chamber notes the principle of publicity of proceedings that underpins the Court’s statutory framework [...]”); *Prosecutor v. Germain Katanga*, Decision on the application for registration in the record of decisions and motions transmitted solely by e-mail, [ICC-01/04-01/07-3237-tENG](#), 8 February 2012, para. 3 (“The Chamber nonetheless shares the Legal Representative’s concern with respect to safeguarding the fundamental principle of public hearings and ensuring that the record of the case is as complete as possible, particularly in view of a prospective appeal.”).

<sup>6</sup> *Werner v. Austria*, Judgment, App. No. [21835/93](#), 24 November 1997, para. 45 (citing *Diennet v. France*, Judgment, App. No. [18160/91](#), 26 September 1995, para. 33). See also *Schlumpf v. Switzerland*, Judgment, App. No. [29002/06](#), 8 January 2009, paras. 62-63 (“La Cour rappelle que la publicité des débats judiciaires constitue un principe fondamental consacré par l’article 6 § 1 de la Convention. Elle protège les justiciables contre une justice secrète échappant au contrôle du public et constitue ainsi l’un des moyens qui contribue à la préservation de la confiance dans les tribunaux.”); *Pretto and Others v. Italy*, Judgment, App. No. [7984/77](#), 8 December 1983, para. 21 (“The public character of proceedings before the judicial bodies referred to in Article 6 § 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained.”).

**B. Request that this motion be filed publicly**

8. For the same reasons as are outlined above, the Victims request that this filing and the Registry's transmission document, if any, also be filed as "public".

**III. REMEDIES REQUESTED**

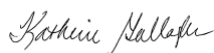
9. For the above-mentioned reasons, the Victims request that this filing and annexes 1 and 2 of the Transmission be classified as "public".



Spojmie Ahmady Nasiri and Nema Milaninia



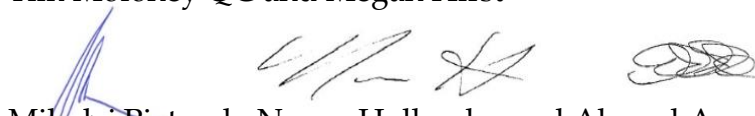
Haydee Dijkstal



Katherine Gallagher



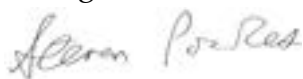
Tim Moloney QC and Megan Hirst



Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed



Margaret Satterthwaite



Steven Powles QC and Conor McCarthy

Dated this 11<sup>th</sup> day of March 2022

At Albuquerque, London, New York, Dili, San Francisco, Warsaw and Washington, D.C.