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No.: **ICC-02/17**
Date: **7 July 2022**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Marc Perrin de Brichambaut, Acting Second Vice-President

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public, with two public annexes

Decision on ‘Motion Seeking Remedies for Repeated Administrative Violations’, dated 28 January 2022, (ICC-02/17-183-Conf-Anx1) *annexed to* ‘Registry Transmission of a Document submitted before the Presidency’, dated 4 March 2022 (ICC-02/17-183)

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

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims
Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**
Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Other
Pre-Trial Chamber II

**Victims Participation and Reparations
Section**
Mr Philipp Ambach

Ms Spojmie Ahmady Nasiri
Mr Nema Milaninia
Ms Haydee Dijkstal
Ms Katherine Gallagher
Mr Tim Moloney
Ms Megan Hirst
Mr Mikołaj Pietrzak,
Ms Nancy Hollander
Mr Ahmad Assed
Ms Margaret Satterthwaite
Mr Steven Powles
Mr Conor McCarthy

The Presidency of the International Criminal Court (the ‘Court’) has before it a motion seeking remedies for alleged repeated administrative violations (the ‘Motion’) which has been submitted by a group of counsel representing victims of crimes alleged to have been committed in the Afghanistan situation (the ‘Counsel’).¹

I. BACKGROUND

1. On 27 September 2021, the Prosecutor filed before Pre-Trial Chamber II (the ‘Chamber’) a ‘Request to authorise resumption of investigation under article 18(2) of the Statute’ in the Afghanistan situation (the ‘Prosecutor’s Request’).²
2. On 1 October 2021, two of the Counsel who submitted the present Motion filed a ‘Response to “Request to authorise resumption of investigation under article 18(2) of the Statute”’ before the Chamber (the ‘1 October 2021 Submission’).³
3. On 8 October 2021, the Chamber issued a ‘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”’, dismissing the 1 October 2021 Submission *in limine*,⁴ noting that:

22. As regards the 1 October 2021 Submission, the Chamber notes that, pursuant to article 18(2) of the Statute, ‘pursuant to article 18(2) of the Statute, the sole parties to the proceedings triggered by the Prosecutor’s request to be authorised to resume an investigation notwithstanding a State’s request for deferral, are the Prosecutor, on the one hand, and the relevant State, on the other. The statutory framework neither provides an opportunity for *potential* victims to intervene at this stage nor for the participation of other persons or entities without leave of the Chamber. Accordingly, the Submitters, who style themselves as ‘Legal Representative for Victims’ and ‘Counsel for Respondents’, namely ‘the Afghan civil society and Afghan victims of war’, lack legal standing to participate in the proceedings triggered by the Prosecutor’s Request and, as a result, the 1 October 2021 Submission must be dismissed *in limine*.

¹ Counsel, *Situation in the Islamic Republic of Afghanistan*, Motion Seeking Remedies for Repeated Administrative Violations, 28 January 2022, ICC-02/17-183-Conf-Anx1, annexed to Registry, *Situation in the Islamic Republic of Afghanistan*, [Registry Transmission of a Document submitted before the Presidency, dated 28 January 2022](#), 4 March 2022, ICC-02/17-183 (the ‘Registry Transmission’). The document is dated 28 January 2022, but was formally filed before the Presidency, at the instruction of the latter, on 4 March 2022.

² Prosecution, *Situation in the Islamic Republic of Afghanistan*, [Request to authorise resumption of investigation under article 18\(2\) of the Statute](#), 27 September 2021, ICC-02/17-161.

³ Ms Spojmie Ahmady Nasiri and Mr Nema Milaninia, *Situation in the Islamic Republic of Afghanistan*, Response to “Request to authorise resumption of investigation under article 18(2) of the Statute” (ICC-02/17-161), 1 October 2021, ICC-02/17-164.

⁴ Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [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’](#), 8 October 2021, ICC-02/17-165 (the ‘8 October 2021 Decision’), para. 22, p. 9.

23. In addition, the Chamber regrets that the 1 October 2021 Submission was filed directly into the record (instead of through a transmission filing) and understands that this was due to a clerical error within the Registry. Whilst there would be no reason to now create a new transmission filing, the Chamber expects the Registry to carefully comply with its instructions in this matter.⁵

4. On 11 and 13 October 2021, the Registry transmitted further submissions from some of the Counsel who submitted the present Motion, seeking to respond to the Prosecutor's Request (the 'Counsel Submissions').⁶
5. On 8 November 2021, the Chamber issued a 'Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute' (the '8 November 2021 Decision') reiterating its finding that potential victims do not enjoy, as a matter of right, standing to participate in the proceedings pursuant to article 18(2) of the Rome Statute (the 'Statute') without leave of the Chamber, or to seize and request the Chamber to take certain measures in their context and founded that the relevant victim representatives lacked legal standing.⁷ In light of this, the Chamber ordered the Registry to refrain from filing into the record of the situation in Afghanistan, including by way of transmission, any document emanating from persons or entities other than the Prosecutor and the relevant State in the proceedings pursuant to article 18(2) of the Statute, unless those persons and entities can be considered to enjoy legal standing in the proceedings pursuant to article 18(2) of the Statute on the basis of a decision of the Chamber.⁸ The Counsel Submissions were dismissed *in limine*.⁹

⁵ 8 October 2021 Decision, ICC-02/17-165, paras 22-23.

⁶ Registry, *Situation in the Islamic Republic of Afghanistan*, [Transmission of "Victims' Request for Leave to Submit Observations"](#), 13 October 2021, ICC-02/17-168 ; Registry, *Situation in the Islamic Republic of Afghanistan*, [Transmission of "Response to the Prosecution's "Request to authorise resumption of investigation under article 18\(2\) of the Statute"](#), 11 October 2021, ICC-02/17-167.

⁷ Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18\(2\) and 68\(3\) of the Statute](#), 8 November 2021, ICC-02/17-171 (the '8 November 2021 Decision'), para. 10

⁸ 8 November 2021 Decision, ICC-02/17-171, para. 11, p. 9. Some of the victim representatives for which the Chamber determined that they lacked standing, are submitters of the present Motion. See 8 November 2021 Decision, ICC-02/17-171, paras 7-8. Furthermore, the Chamber has previously determined that other victim representatives who submitted the present Motion lacked standing in the context of the Prosecutor's review of a deferral request under article 18(2) of the Statute. See Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [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"'](#), 8 November 2021, ICC-02/17-170, para. 13; Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18\(2\) deferral request'](#), 3 September 2021, ICC-02/17-156, para. 25.

⁹ 8 November 2021 Decision, ICC-02/17-171, p. 9.

6. On 28 January 2022, Counsel attempted to file both a document substantively similar to the Motion before the Chamber, as well as the Motion itself, to be filed before the Presidency.¹⁰ On 31 January 2022, Counsel were informed by the Registry that neither document could be filed in the record of the Afghanistan situation in light of the 8 November 2021 Decision ordering the Registry to refrain from filing into the record of the situation in Afghanistan, including by way of transmission, any document emanating from persons or entities other than the Prosecutor and the relevant State.¹¹
7. On 31 January 2022, Counsel requested the Registry to transmit the Motion to the Presidency.¹² On 18 February 2022, pursuant to an instruction of the Presidency conveyed by the *Chef de Cabinet*, the Registry informally provided a copy of the Motion to the Presidency, without yet filing it. On 1 March 2022, the Presidency instructed the Registry that the Motion before the Presidency may be filed.¹³ On 4 March 2022, the Registry formally transmitted the Motion to the Presidency.¹⁴ On 11 March 2022, Counsel requested the Presidency to reclassify the annexes of the Registry Transmission, including the Motion, as public (the ‘Request for Reclassification’).¹⁵
8. On 9 June 2022, Second Vice-President Mindua, by way of confidential internal memorandum, requested to be excused, in his capacity as Second Vice-President from all further functions of the Presidency in connection with the Motion to ensure the appearance of impartiality (the ‘Request for Excusal’).¹⁶ He noted in his Request for Excusal that on several occasions, the Motion directly asked the Presidency to declare invalid certain acts performed by the Chamber and that as a member of said Chamber he participated in the decision-making at the pre-trial level which now underlay the claim before the Presidency.

¹⁰ [Registry Transmission](#), ICC-02/17-183, paras 2, 7. See also Counsel, *Situation in the Islamic Republic of Afghanistan*, Request for Leave and Victims’ Submissions Concerning the Prosecutor’s Application under Article 18(2) and on Victim Participation in the Afghanistan Situation, ICC-02/17-183-Conf-Anx2, annexed to [Registry Transmission](#), ICC-02/17-183.

¹¹ [Registry Transmission](#), ICC-02/17-183, para. 4, referring to [8 November 2021 Decision](#), ICC-02/17-171.

¹² [Registry Transmission](#), ICC-02/17-183, para. 5.

¹³ [Registry Transmission](#), ICC-02/17-183, para. 6.

¹⁴ [Registry Transmission](#), ICC-02/17-183, para. 8. The annexes to the Registry Transmission are the Motion and a document Counsel attempted to file before the Chamber.

¹⁵ Counsel, [Motion for Reclassification of Annexes 1 and 2 of Filing ICC-02/17-183](#), 11 March 2022, ICC-02/17-184-Anx1, paras 1, 7, 9, annexed to Registry, [Registry Transmission of a Document submitted before the Presidency, dated 11 March 2022](#), 11 March 2022, ICC-02/17-184.

¹⁶ Second Vice-President, Request for excusal in connection with the “Motion Seeking Remedies for Repeated Administrative Violations”, 9 June 2022, 2022/PRES/00095. The Request is attached as Annex I to the present decision.

9. Pursuant to regulation 11(2) of the Regulations of the Court, if a member of the Presidency is unavailable or disqualified, his or her responsibilities shall be carried out by the next available judge having precedence in accordance with regulation 10 of the Regulations of the Court. The next available judge in accordance with the latter regulation is Judge Perrin de Brichambaut. Accordingly, on 10 June 2022, Judge Perrin de Brichambaut assumed the responsibilities of the Second Vice-President as member of the Presidency for the purpose of the Request for Excusal. On 14 June 2022, the *ad hoc* Presidency granted that Request for Excusal by way of confidential internal memorandum.¹⁷ As a result of the granting of the excusal request, the Presidency henceforth considered the Motion in the following *ad hoc* composition: Judge Hofmański, President; Judge Ibáñez Carranza, First Vice-President; and Judge Perrin de Brichambaut, Acting Second Vice-President.

II. MOTION

10. The Motion submits that the Registry has systematically violated the Court's regulatory regime on filings by: (i) routinely failing to transmit filings submitted by victims; (ii) failing to notify some filings to victims' counsel; and (iii) entirely excluding some filings made by victims from the record of the proceedings.¹⁸ In addition, it is claimed that the Registry and the Chamber have failed to transmit decisions to victims, or to provide reasoned decisions.¹⁹ The Motion argues that these actions have largely been undertaken due to a 'system of transmission filings' put in place by the Chamber that has no legal basis and unduly filters out and discourages submissions by victims and avoids their publicity.²⁰ It is further argued that, over the course of a year, the Chamber and the Registry have effectively excluded and silenced victims and without the Presidency's intervention, victims will continue to be excluded from the Afghanistan situation.²¹
11. The Presidency is requested to: (i) find that the Registry and the Chamber have violated the Court's administrative rules and regulations; (ii) declare that the Chamber's 'system of transmission filings' violates the Court's rules and regulations; (iii) direct the Registry

¹⁷ Presidency, Decision on your request of 9 June 2022 to be excused from the Presidency, 14 June 2022, 2022/PRES/00095-02. This decision is attached as Annex II to the present decision.

¹⁸ Motion, ICC-02/17-183-Conf-Anx1, paras 10-25.

¹⁹ Motion, ICC-02/17-183-Conf-Anx1, paras 26-34.

²⁰ Motion, ICC-02/17-183-Conf-Anx1, para. 2. *See also* Motion, ICC-02/17-183-Conf-Anx1, para. 23.

²¹ Motion, ICC-02/17-183-Conf-Anx1, paras 1, 3.

to notify and transmit all future filings by victims in accordance with the Court's legal texts, record and communicate all decisions by the Chamber in the manner prescribed by the Court's legal texts, and register and transmit filings submitted by victims that were either removed from the record in the situation or denied transmission; and (iv) remind the Chamber of its obligation to provide a reasoned decision and notify the parties and participants accordingly.²²

12. The Motion submits that the Presidency has jurisdiction over these actions under article 38(3) of the Statute, because all of the impugned actions concern the proper administration of the Court and the non-compliance by the Registry and the Chamber with legal requirements concerning the proper administration of the Court.²³ It is argued that the Presidency's general jurisdiction over conduct of an administrative nature is not limited to the specific circumstances enumerated in the Regulations of the Court or elsewhere and that article 38(3)(a) of the Statute is deliberately broad in its terms.²⁴ Article 38(3)(b) of the Statute makes clear that this general jurisdiction is complemented, not reduced, by 'other functions conferred upon it in accordance with the Statute'.²⁵ Further, the Motion claims that the Presidency has jurisdiction over administrative actions even if those actions are taken pursuant to a decision by a chamber.²⁶ Finally, noting that appellate review for the alleged conduct is impossible and that there is no other entity at the Court empowered to adjudicate administrative issues where fault lies with the Registry or a chamber, it is submitted that the governing texts should be read as ensuring some avenue for review in the absence of an explicit provision to the contrary.²⁷

III. DETERMINATION OF THE PRESIDENCY

A. Applicable law

13. Pursuant to article 38(3) of the Statute, the Presidency shall be responsible for: (a) the proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) the other functions conferred upon it in accordance with the Statute. Article 68(3)

²² Motion, ICC-02/17-183-Conf-Anx1, paras 4, 35.

²³ Motion, ICC-02/17-183-Conf-Anx1, paras 3, 5. The Presidency notes that the Motion also refers to article 43(2) of the Statute to support this argument. *See* Motion, ICC-02/17-183-Conf-Anx1, para. 5.

²⁴ Motion, ICC-02/17-183-Conf-Anx1, para. 6.

²⁵ Motion, ICC-02/17-183-Conf-Anx1, para. 6.

²⁶ Motion, ICC-02/17-183-Conf-Anx1, para. 7.

²⁷ Motion, ICC-02/17-183-Conf-Anx1, para. 9.

of the Statute provides that where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence (the ‘Rules’).

B. Merits

14. The Presidency recalls that the Motion concerns an array of conduct which Counsel allege to be inconsistent with various procedural provisions throughout the Court’s legal texts or inconsistent with more general precepts of the Statute, particularly those which may be derived from the right of victims to have their views and concerns to be presented and considered where their personal interests are affected pursuant to article 68(3) of the Statute. Concretely, the Motion refers to incidents in which the Registry has not notified victims of filings, delayed filings, removed filings from the record and refused to transmit filings. The Motion also argues that the Chamber, together with the Registry, has acted in violation of the Court’s legal texts due to the system put in place for the transmission of filings made by victims, the lack of proper notification of decisions by the Chamber and the alleged rendering of decisions without reasoning.²⁸

15. The Motion argues that the Presidency’s jurisdiction over these issues can be derived from article 38(3) of the Statute which provides that ‘the Presidency [...] shall be responsible for (a) [t]he proper administration of the Court with the exception of the Office of the Prosecutor; and (b) [t]he other functions conferred upon it in accordance with this Statute’.²⁹ The Motion emphasises the cumulative nature of the above paragraph, submitting also that the Presidency has jurisdiction over administrative actions even when taken pursuant to a decision of a Chamber.³⁰

²⁸ Motion, ICC-02/17-183-Conf-Anx1, para. 8.

²⁹ Motion, ICC-02/17-183-Conf-Anx1, para. 5.

³⁰ Motion, ICC-02/17-183-Conf-Anx1, paras 6-7.

16. The Motion seeks to both directly impugn actions taken by the Chamber³¹ and categorise certain other actions as being matters pertaining to filings conducted by the Registry.³² Nonetheless, it is entirely evident from the context that the Registry's decision-making in respect of filings stems from its attempt to implement instructions given by the Chamber in April 2021³³ and October 2021,³⁴ a fact acknowledged in the Motion itself.³⁵ Even in the limited circumstances where this is not the case, it is evident that any issues concerning the manner in which the Registry is handling filings in a case may be directed at the Chamber responsible for the proceeding. More broadly, the Presidency must acknowledge that the issues raised by the Motion, while couched as being individual and distinct 'administrative' decisions are, in reality, inextricably related to Counsel's dissatisfaction with the Chamber's decision concerning their lack of legal standing to participate in the proceedings pursuant to article 18(2) of the Statute and the Chamber's decision not to receive direct submissions from persons including Counsel.
17. The Presidency, by majority consisting of Judge Piotr Hofmański and Judge Marc Perrin de Brichambaut, cannot consider that its authority for the 'proper administration of the Court with the exception of the Office of the Prosecutor' under 38(3)(a) of the Statute provides any legal basis for it to interfere with procedural decision-making by the Chamber or, by extension, the implementation thereof by the Registry. The Presidency considers that the issues raised do not pertain to "the administration" of the Court or the judiciary, but to the procedural conduct of a specific judicial proceeding by a Chamber. The Motion impermissibly confounds administration and procedural law. The procedural aspects of the conduct of proceedings within the situation in Afghanistan falls under the authority of the Chamber or, where applicable, the Appeals Chamber. Further, no other provision of the Court's legal framework authorises the Presidency to review decisions of either the Registrar or a Chamber on these matters. The Presidency, by majority consisting of Judge Piotr Hofmański and Judge Marc Perrin de Brichambaut, considers that no jurisdictional basis has been established for it to consider the Motion.

³¹ Motion, ICC-02/17-183-Conf-Anx1, paras 23-25, 28-34.

³² Motion, ICC-02/17-183-Conf-Anx1, paras 10-18, 26-27, 30.

³³ See Registrar, *Situation in the Islamic Republic of Afghanistan*, [Transmission of a "Motion Seeking Remedies for Information and Effective Outreach"](#), 21 April 2021, ICC-02/17-143, para. 3.

³⁴ [8 October 2021 Decision](#), ICC-02/17-165, para. 23.

³⁵ Motion, ICC-02/17-183-Conf-Anx1, para. 23.

18. Judge Luz del Carmen Ibáñez Carranza concurs with the majority that article 38(3)(a) of the Statute provides no basis for the Presidency to interfere with the procedural decision-making by the Chamber but considers that this does not preclude the Presidency from reviewing administrative functions performed by the Registry. Judge Luz del Carmen Ibáñez Carranza recalls that the Presidency has previously observed that “[a]rticle 38(3)(a) of the Statute clearly grants an administrative power to the Presidency”. While “[s]uch responsibility for the proper administration of the Court is non-judicial in nature”, it “extends to matters involving the administration of the Court as an institution, as well as administrative aspects specific to the functioning of the judiciary including the composition of judicial chambers, the calling of judges to full-time service and the management and support of judicial resources”.³⁶

19. Accordingly, for Judge Luz del Carmen Ibáñez Carranza it is necessary to draw a distinction between those aspects of the Motion pertaining to actions taken by the Chamber and those which pertain to actions taken by the Registry. In this regard, the first remedy requested, to the extent that it pertains to the Chamber’s alleged violations, as well as the second and fourth requested remedies, raise specific issue not pertaining to the administration of the Court or the judiciary, but to the procedural conduct of a specific judicial proceeding by a Chamber. Accordingly, Judge Luz del Carmen Ibáñez Carranza fully agrees with the majority that these aspects of the Motion impermissibly confound administration and procedural law. However, Judge Luz del Carmen Ibáñez Carranza considers that the Presidency *is* competent to entertain the rest of the submissions to the extent that they refer to the Registrar’s actions and omissions. This is because such actions are non-judicial in nature and form part of the institutional administration of the Court. Noting that the Presidency’s capacity to review administrative actions of the Registrar is similar in nature to other forms of judicial review expressly attributed to the Presidency by the Court’s legal texts,³⁷ Judge Luz del Carmen Ibáñez Carranza considers

³⁶ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the ‘Demande de clarification de la Défense concernant la marche à suivre pour engager une procédure en déni de justice du fait du silence opposé pendant huit mois à la requête de Laurent Gbagbo datée du 7 octobre 2019 visant à ce qu’il recouvre l’intégralité de ses droits’ dated 28 May 2020 \(ICC-02/11-01/15-1354-Red\)](#), 18 June 2020, ICC-02/11-01/15-1360, para. 15.

³⁷ See regulations 72, 85 and 106 of the Regulations of the Court and regulations 56, 125 and 220 of the Regulations of the Registry.

that the applicable legal standard to the review of the Registrar's actions should be that which applies in the judicial review context.³⁸

20. The Presidency, by majority consisting of Judge Piotr Hofmański and Judge Marc Perrin de Brichambaut, also finds entirely untenable the assertion in the Motion³⁹ that it should understand its authority under article 38(3)(a) of the Statute as permitting it to interfere with decisions taken in judicial proceedings by a chamber simply because there is an absence of an explicit provision to the contrary. Judge Luz del Carmen Ibáñez Carranza, however, takes the view that, given the fundamental human rights of victims at stake, the Presidency should assume authority over the administrative aspects of the situation, as set out at paragraphs 18 and 19 above, as the situation has transpired in such a way that no other avenue is available to ensure that such victims are able to effectively exercise their right of access to justice and to an effective remedy. Article 21(3) of the Statute is entirely clear in this regard that the interpretation of law by the Court must occur with full respect for internationally recognised human rights, including those of victims of the most serious crimes of concern to the international community.
21. The Presidency, by majority consisting of Judge Piotr Hofmański and Judge Marc Perrin de Brichambaut, dismisses the Motion due to a lack of jurisdiction.
22. Judge Luz del Carmen Ibáñez Carranza, considering her view that the Presidency has jurisdiction to review the administrative actions taken by the Registry considers that several legal errors can be readily identified. In the case at hand, the Registry first refrained from registering on the record the Motion, despite the fact that it seizes the

³⁸ Namely, a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached. The standard of judicial review was defined by the Presidency in its Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel, 20 December 2005, ICC-RoC72-02-05, para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying [REDACTED] privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. See also Presidency, [Reasons for the "Decision on the 'Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel'"](#), 10 July 2008, ICC-RoC72-01-8-10, para. 20; Presidency, [Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts](#), 6 August 2009, ICC-RoR56-01/09-2, para. 11.

³⁹ Motion, ICC-02/17-183-Conf-Anx1, para. 9.

Presidency rather than the Chamber, stating the following by way of justification for such action:

In compliance with Pre-trial Chamber I's Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute, dated 8 November 2021 (ICC-02/17-171), the Registry is not in a position to "file into the record of the situation in Afghanistan any document emanating from persons or entities other than the Prosecutor and the relevant State in the proceedings pursuant to article 18(2) of the Statute, unless those persons and entities can be considered as enjoying legal standing in the proceedings pursuant to article 18(2) of the Statute on the basis of a decision of the Chamber".

Accordingly and considering that the matter at stake is *inter alia* linked to the proceedings pursuant to article 18(2) and 68(3) of the Statute, absent any new developments on the issue of your legal standing in the Afghanistan situation, the documents attached to your email cannot be filed in the record of the said Situation.⁴⁰

23. Judge Luz del Carmen Ibáñez Carranza recalls that, pursuant to rules 15(1) and 121(10) of the Rules of Procedure and Evidence and regulation 21(2) of the Regulations of the Registry, it is the responsibility of the Registry to ensure that a situation or case record be a full and accurate record of all proceedings.⁴¹ Although the Presidency notes that the Registry indicated to Counsel that it was acting in compliance with the 8 November 2021 Decision, it observes that this decision cannot have a binding effect on filings where the Presidency is seized of a request. Otherwise, the Presidency would be prevented from exercising its statutory functions by virtue of a decision issued by a chamber. Judge Luz del Carmen Ibáñez Carranza emphasises, therefore, that the Registry should not understand an instruction from a chamber as inhibiting the capacity for a document to be filed before another body potentially capable of exercising a relevant judicial function, such as the Appeals Chamber or the Presidency. This would affect the integrity of the record.

24. Judge Luz del Carmen Ibáñez Carranza observes the entanglement and potential obstruction to the proper administration of the Court that would result from the Registry's decision not to file into the case record documents from persons other than the Prosecutor or the State, as set out at paragraph 22 above.⁴² Regardless of the correctness of the 8

⁴⁰ Email to Nema Milaninia dated Friday 31 January 2022 at 11:34.

⁴¹ See rule 15(1) of the Rules of Procedure and Evidence and regulation 21(2) of the Regulations of the Registry.

⁴² Email to Nema Milaninia dated Friday 31 January 2022 at 11:34.

November 2021, which is not under review, the Registry's interpretation of it would necessarily include submissions intended to challenge the 8 November 2021 Decision itself. Although any decision should only be final after any remedies against it are addressed by a chamber, in this case the administrative actions of the Registry would effectively shield the 8 November 2021 Decision from any remedy coming from Counsel. This deprives the Court of the possibility of any judicial resolution of the matter and, for this reason, Judge Luz del Carmen Ibáñez Carranza considers that it was not a reasonable or sensible choice of administrative action.

25. More generally, for Judge Luz del Carmen Ibáñez Carranza, it is difficult to reconcile the non-filing of documents originating from Counsel with the obligation incumbent on the Registrar to 'keep a database containing all the particulars of each case brought before the Court' under rule 15(1) of the Rules or equally with the Registrar's more specific obligation to 'create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber [...]' under rule 121(10) of the Rules.⁴³ The integrity of the case record must be understood as connected to the right of access to justice and to an effective remedy, with transparency and accessibility of justice core components of the sound administration of justice. Judge Luz del Carmen Ibáñez Carranza further considers that the Registry's failure to comply with rule 121(10) constitutes a legal error.
26. Judge Luz del Carmen Ibáñez Carranza does not find that this situation is justified by the Registry's consideration that "the matter at stake is *inter alia* linked to the proceedings pursuant to article 18(2) and 68(3) of the Statute", and that for that reason "absent any new developments on the issue of [counsel's] legal standing in the Afghanistan situation, the documents attached to [counsel's] email cannot be filed in the record of the said Situation".⁴⁴ For one, the Registry demonstrates confusion between the standing of victims under articles 18(2) and 68(3) of the Statute and the capacity of counsel to make submissions on behalf of the victims that counsel represent. In this regard, Judge Luz del Carmen Ibáñez Carranza observes that prior to 8 November 2021 Decision, a number of such Counsel had previously been allowed to appear as legal representatives before both

⁴³ See also regulation 21(2) of the Regulations of the Registry.

⁴⁴ Email to Nema Milaninia dated Friday 31 January 2022 at 11:34..

the Chamber and the Appeals Chamber, in the proceedings leading to the judgment issued in March 2020, and the Appeals Chamber expressly took their submissions into account.⁴⁵

27. Notwithstanding the above, the Presidency understands that, from counsel's perspective, it may appear that there has been a lack of clarity as to how to present the views and concerns of victims at the current stage of proceedings. It should be encouraged that, as a matter of best practice, clear guidelines on victims' participation, including the manner in which requests can be filed and received by a chamber, should be established and be publicly accessible at the earliest possible stage of proceedings. Furthermore, in light of its function to guarantee the proper administration of justice, the Presidency considers that, in the circumstances of this case, even if the status of the individuals who are represented by counsel will not be determined immediately, chambers have the responsibility to take into account the submissions with which they are seized, and allow the counsel to make submissions before the status of their clients is determined. Such submissions should relate to the rights that their clients would have if they are granted victims status without prejudice to the final determination to be adopted by the trial chamber. The Presidency notes that such practice should be strongly encouraged for a range of reasons, including to alleviate the need for issues pertaining to filings to be addressed through instructions originating from the Chamber, which appear to have at times occurred informally and in a manner which has not been accessible to Counsel.

28. Judge Luz del Carmen Ibáñez Carranza concurs with the guidance set out in paragraph 27 above and further emphasises that it is for chambers to take into account the submissions with which they are seized and allow counsel to make submissions before the status of their clients is determined, as well as to enable the Registry to comply with its responsibilities to ensure that a situation or case record be full and accurate in all proceedings.⁴⁶ If a chamber deems that a party cannot make a filing before it, the responsibility of the Registry to preserve the record shall remain unaffected, but it is for a chamber to take its own decision as to whether to engage with a particular document on the record.

⁴⁵ See *Situation in the Islamic Republic of Afghanistan*, [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 10 March 2020, ICC-02/17-138, paras 11, 14, 15, 18, 22, 44, 55.

⁴⁶ See rule 15(1) of the Rules of Procedure and Evidence and regulation 21(2) of the Regulations of the Registry.

29. Judge Luz del Carmen Ibáñez Carranza observes in particular that the Registry's inhibition to file documents, following the Chamber's order not to register filings from Counsel, included challenges to such order itself. While the Chamber remains competent for all procedural aspects of the judicial proceedings in the situation, it is observed that an approach closely guided by the right of access to justice and to an effective remedy, as required by article 21(3) of the Statute and earlier emphasised at paragraph 20 above, and noting equally the fundamental nature of such rights, may have considered exceptionally permitting certain limited filings, such as those challenging the order that filings not be registered. This, of course, is without prejudice to the Pre-Trial Chamber's determination of any such filings not to any related procedural rights including, if applicable, to appeal.
30. Noting the views expressed at paragraphs 18-20 and 22-29, Judge Luz del Carmen Ibáñez Carranza considers that the Presidency should have ordered a remedy aimed at the preservation of the case record, namely, an instruction to the Registrar to register all filings which have been made by Counsel until the 8 November 2021 Decision becomes final, including a specification that any attempts by Counsel to seek leave to appeal or appeal directly in respect of that decision should be duly registered and notified.

IV. CLASSIFICATION

31. In the Request for Reclassification, Counsel submit that the two annexes to the Registry Transmission, including the Motion, were initially filed as public and that the Registry *sua parte* departed from this classification without valid justification.⁴⁷ The Registry notes that the annexes are classified as confidential pending determination by the Presidency for reclassification.⁴⁸ The Presidency hereby orders that the Motion (ICC-02/17-183-Conf-Anx1) be reclassified as public. Further, the Presidency decides that it is not appropriate for it to determine the classification of any document that was intended for the Chamber.

⁴⁷ [Request for Classification](#), ICC-02/17-184-Anx1, paras 1-2.

⁴⁸ [Registry Transmission](#), ICC-02/17-183, para. 7.

In light of the above, the Presidency, hereby:

DISMISSES the Motion, acting by majority consisting of Judge Piotr Hofmański and Judge Marc Perrin de Brichambaut, with Judge Luz del Carmen Ibáñez Carranza dissenting in this regard;


ORDERS the Registry to reclassify the Motion (ICC-02/17-183-Conf-Anx1) as public;
and

DISMISSES the remainder of the Request for Reclassification;

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Marc Perrin de Brichambaut
Acting Second Vice-President

Dated this 7 July 2022

At The Hague, The Netherlands