

# Annex 1



Original: **English**

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

Date: **26 April 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**

**Motion for Clarification and Reclassification of “Motion Seeking Remedies for  
Information and Effective Outreach” (ICC-02/17-143-Conf-Exp-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**

Ms Fatou Bensouda, 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

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**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. Petitioners, Afghan individuals and organisations who are victims of crimes under investigation by the Office of the Prosecutor (“OTP”), respectfully request that Pre-Trial Chamber II (“Chamber”) clarify its reclassification of Petitioner’s 20 April 2021 “Motion Seeking Remedies for Information and Effective Outreach” (“Motion”)<sup>1</sup> from “public” to “confidential *ex parte*, Registry and Lead Counsel for Petitioners only”. As of the time of this filing, no explanation has been provided for why the Motion was reclassified as such.

2. In addition, Petitioners request that the Motion, its annexes D to G, and this filing, be classified as “public”. The general principle of public proceedings is a core tenet of this Court and is embedded throughout the Court’s legal texts. It is also the vehicle through which this Court maintains the public’s trust and confidence, including that of victims. In this instance, neither the Motion, the aforementioned annexes, nor this filing, contain sensitive or confidential information such to warrant a non-public classification and therefore should not be withheld from public view.

3. Classifying the Motion and its annexes as “public” also ensures that the Chamber safeguards and serves as a steward for transparency and victim rights, as it has endeavoured to do in this Situation to-date. Thus far, Petitioners have been denied access to basic information about an investigation concerning their direct interests. As a result, Petitioners sought this Chamber’s intervention through the Motion because of Petitioners’ trust and belief that this Chamber would engage openly and fairly in relationship to the role of victims. Further ensconcing the Afghanistan investigation in secrecy by reclassifying public filings as confidential only amplifies the issues brought forth in the Motion.

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<sup>1</sup> ICC-02/17-143-Conf-Exp-Anx1.

## II. STATEMENT OF FACTS

4. On 20 April 2021, Petitioners filed the Motion with the Court Management Section (“CMS”).<sup>2</sup> The motion was classified as “public” and contained seven annexes, four designated as “public” and three designated as “confidential, only available to the Prosecution”. Petitioners also provided courtesy copies of the Motion to the Registrar and the OTP.

5. On the same day, Petitioners were informed by CMS that “[a]fter further consultation [...] your filing will be submitted through a Registry transmission filing, tomorrow.”<sup>3</sup>

6. On 21 April 2021, the Registry transmitted the Motion and its annexes to the Chamber as “*ex parte*, Registry and Lead Counsel for Petitioners only”.<sup>4</sup> The Registry transmission was also designated as “confidential *ex parte*, Registry and Lead Counsel for Petitioners only.”

7. On 22 April 2021, Petitioners requested, by e-mail, clarification as to the reason behind the changed security designation.<sup>5</sup> To-date, no clarification has been provided.

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<sup>2</sup> Email from Petitioners to CMS, 20 April 2021 at 04:39 CEST.

<sup>3</sup> Email from CMS to Petitioners, 20 April 2021 at 17:23 CEST.

<sup>4</sup> Transmission of a “Motion Seeking Remedies for Information and Effective Outreach”, ICC-02/17-143-Conf-Exp, 21 April 2021. In its transmission letter the Registry also noted that CMS had informed the Chamber that the Motion “did not comply with the ICC format requirements” (*Id.*, para. 2). CMS later clarified to Petitioners that the formatting issue being referred to in the letter had nothing to do with the document’s formatting, but rather that the digital signature, an image file, was “moving around” in the Word version of the Motion whenever it was opened (Email from CMS to Petitioners, 22 April 2021 at 16:29 CEST). Petitioners note that a PDF version of the Motion, which did not contain a similar issue, had also been provided to CMS and that the Word version had only been provided as a courtesy.

<sup>5</sup> Email from Petitioners to CMS, 22 April 2021 at 16:39 CEST.

### III. SUBMISSIONS

#### A. Request for clarification

8. Petitioners respectfully request that the Chamber clarify its reasoning as to why the Motion and its annexes had their security designations changed from “public” to “confidential *ex parte*”. 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. In this case, it is unclear whether there is an order on record that the Motion be reclassified from “public” to “confidential *ex parte*.” Even if such order exists, one was never transmitted to the Petitioners. Finally, no explanation has been provided, either by CMS or the Chamber, for why the Motion and its annexes were reclassified.

9. The Court’s legal texts anticipate a stated justification for any non-public classification. Regulation 23 *bis*, in particular, 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, 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).

10. The Petitioners appreciate that the Chamber may have requested the “confidential *ex parte*” designation to first assess the Motion’s legal propriety before making it public and instigating the OTP’s time to respond. Notwithstanding the question as to whether such assessment should be done under seal, without knowledge as to why the Chamber designated the Motion as “confidential *ex parte*”, the Petitioners have no way of ensuring that the Chamber’s concerns are addressed in future filings or when similar matters are occasioned.

## B. Request for reclassification of Motion and annexes D to G

11. Petitioners respectfully request that the Motion and its annexes D to G be reclassified as “public”. Neither the Motion, nor annexes D to G, contain sensitive information such as to warrant their “confidential *ex parte*” classification. The Motion was deliberately drafted to ensure that private information concerning the represented individuals and organisations were not made public, given the threat posed by ongoing violence in Afghanistan, especially as directed against civil society organisations.

12. Reclassifying these documents as “public” also accords with the general principle of public proceedings.<sup>6</sup> That principle has been a cardinal and 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.

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<sup>6</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.”).

13. Importantly, the principle of publicity is necessary to maintaining public confidence, including that of Afghan victims, in the Court's proceedings. As noted by the European Court of Human Rights in *Werner v. Austria*:

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character 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 can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.<sup>7</sup>

14. This Chamber has traditionally been receptive to the views of victims. It permitted vibrant legal exchanges by multiple victim representatives, even when those submissions were critical of this Chamber's article 15 decision. It has until now allowed victims' counsels to file motions directly with the Chamber, rather than through transmission by the Registry. It was one of the first Chambers at the ICC to permit an *amicus curiae* brief by indigenous civil society groups at the Pre-Trial Chamber stage. It was also one of the few Chambers to openly recognise the Rome Statute's victim-centric framework. That receptiveness of victim viewpoints has served this Chamber well towards regaining the trust and confidence of Afghan victims. Indeed, maintaining that openness to victims was the core reason Petitioners

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<sup>7</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.").



sought the Chamber's intervention through the Motion, and is all the more essential now for the reasons articulated in that filing.

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

15. Finally, for the reasons outlined above, should the Chamber decide not to accept this filing directly, but instead ask that the Registry file it as part of a Registry transmitted document, as it did with the Motion, Petitioners request that this filing and the Registry's transmittal letter be filed as "public".

**IV. CONCLUSION**

16. For the aforementioned reasons, Petitioners request: (1) clarification of the Chamber's reclassification of the Motion and its annexes to "Confidential, *ex parte*"; (2) that the Chamber reclassify the Motion and annexes D to G as "public"; and (3) that the Chamber maintain the "public" classification of this filing.



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**Spojmie Ahmady Nasiri**  
**Lead Counsel for Petitioners**

Dated this 26<sup>th</sup> day of April 2021  
At San Francisco, USA