

# Annex 1

Confidential

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **28 January 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  
with Public Annex A**

**Motion Seeking Remedies for Repeated Administrative Violations**

**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

James Stewart, Deputy Prosecutor

**Legal Representatives of the Victims**

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

**The Office of Public Counsel for  
Victims**

Paolina Massidda

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Defence**

Xavier-Jean Keita

**States Representatives**

***Amicus Curiae* Representatives**

**REGISTRY**

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**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. This motion is brought on behalf of hundreds of victims of crimes alleged to have been committed by the former Afghan government, Taliban, Islamic State-Khorasan ("IS-K"), and international forces operating in Afghanistan and elsewhere.<sup>1</sup> The victims request that the Presidency remedy systematic violations of the Court's administrative rules and regulations committed by the Registry and Pre-Trial Chamber II ("Chamber") in this Situation. Over the course of a year, the Chamber and the Registry have effectively excluded and silenced victims through repeated violations of the Court's regulatory regime regarding filings, notifications and the publicity of proceedings, all to the detriment of victims and contrary to the regime of victim participation set forth in the Court's legal texts.

2. In a virtually unprecedented manner, the Registry has repeatedly failed to transmit filings by victims on time, or at all, and on one occasion even removed from the record a filing that was transmitted. Decisions by the Chamber have not been communicated to victims through the Court's formal channels. And when they are communicated, victims have been denied any reasoning. These actions have largely been undertaken due to a "system of transmission filings" created by the Chamber<sup>2</sup> – a process that has no legal basis and serves to filter out filings submitted by victims (and no other party), discouraging such filings and avoiding their publicity.

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<sup>1</sup> Ms Nasiri and Mr Milaninia represent over 100 individual victims of crimes allegedly committed by the Taliban, IS-K and the former Afghan security forces and approximately 30 Afghan human rights organisations; Ms Dijkstal represents Afghan victims a/00001/21 through a/00007/21; Ms Katherine Gallagher represents victims of the U.S. torture program: Sharqawi Al Hajj (r/00751/18) and Guled Hassan Duran (r/00750/18); Mr Tim Moloney QC and Ms Megan Hirst represent Ahmed Rabbani (r/00638/18); Mr Mikołaj Pietrzak, Ms Nancy Hollander and Mr Ahmad Assed represent Abd Al Rahim Hussayn Muhammad Al-Nashiri (r/60009/17); Ms Margaret Satterthwaite represents Mohammed Abdullah Saleh al-Asad (r/00749/18); and Steven Powles QC and Conor McCarthy represent Kareem Khan, Rafiq ur Rehman and family, Fahim Qureshi, Noor Khan, Mohammad Ramazan Khan, Abdul Qayyum, Khairullah Jan, Akthar Zaman, Janatullah, and Ahmed Jan on behalf of the Foundation for Fundamental Rights and Reprieve.

<sup>2</sup> Explained further below at paragraph 23. This term was used by the Chamber in: 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, [ICC-02/17-171](#), 8 November 2021, para. 13.

3. 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. Moreover, without the Presidency's intervention victims will continue to be subject to exclusion in this Situation. It has proved impossible for victims to address these issues through the Chamber itself because, as detailed below, the Chamber refuses to even receive submissions (or even request for leave to receive submissions) from victims.

4. For these reasons, the victims request that the Presidency direct that the Registry comply with the Court's legal texts and ensure that filings and decisions in the Afghanistan Situation are transmitted on-time, placed on the record of the Situation, and properly notified to the relevant parties and participants. The Presidency is also requested to declare the Chamber's "transmissions" protocol to be in violation of the Court's rules and regulations.

## **II. THE PRESIDENCY HAS JURISDICTION OVER THE IMPUGNED CONDUCT**

5. The Presidency has jurisdiction over the conduct addressed by this filing as it concerns non-compliance by the Registry and the Chamber with legal requirements concerning the proper administration of the Court. This authority arises directly from the Statute:

- (i) Article 38(3) of the Statute grants the Presidency broad jurisdiction over all matters pertaining to the "proper administration of the Court, with the exception of the Office of the Prosecutor." By its terms, article 38 provides the Presidency authority over issues of an administrative nature where they arise from the Registry or from any Chamber. Only actions by the Prosecutor are excluded.

(ii) Article 43(2) of the Statute explicitly notes that the “Registrar shall exercise his or her functions under the authority of the President of the Court.”

6. 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 (“RoC”) or elsewhere. Article 38(3)(a), as discussed below, is deliberately broad in its terms. Further, article 38(3)(b) makes clear the Presidency’s general jurisdiction over administrative matters is complemented, not reduced, by “other functions conferred upon it in accordance with the Statute.”

7. The Presidency has jurisdiction over administrative actions even if those actions are taken pursuant to a decision by the Chamber.<sup>3</sup> As the Presidency has previously noted, “[t]he Registrar acts under the authority of the President, who is in turn a member of the Presidency: the organ responsible for the proper administration of the Court.”<sup>4</sup>

8. The Registrar’s and Chamber’s actions implicated by this filing, as detailed below, are all administrative in nature. These actions are also systematic and pervasive, with substantive and serious effects that specifically impact victims by making it increasingly difficult for them to effectively access the Court, or for their grievances to be publicly known. These actions (which are elaborated further in the following sections of this filing) include:

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<sup>3</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the “Demande urgente en vertu de la Regie 21-3 du Reglement de procedure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May n° ICC-01/04-01/06 2007 and 10 May 2007, respectively, [ICC-01/04-01/06-937](#), 29 June 2007, para. 17 (exercising jurisdiction “[n]otwithstanding that the Registrar’s decision was taken pursuant to orders of Chambers” since the action of the Registrar in the actual appointment of duty counsel are administrative in nature.”). See also *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the ‘Motion for Judicial Review of Registrar’s Decision’ dated 10 August 2021 (ICC-RoR220-04/21-1), [ICC-RoR220-04/21-3](#), 18 October 2021, para. 13 (affirming that the when reviewing acts by the Registrar, pursuant to article 21(3) of the Statute, the Presidency’s application and interpretation of applicable law must be consistent with internationally recognized human rights).

<sup>4</sup> *Ibid.* See also, para. 21.

- (i) *Lack of notifications to victims*: several times the Registry has failed to notify filings made in the Situation even where they clearly concern victims, including responses to and decisions on motions filed by victims through their counsel, in contravention of rule 16(1)(a) of the Rules of Procedure and Evidence ("Rules") and regulation 31 of the RoC.
- (ii) *Delayed filings*: the Registry has routinely failed to notify other parties or participants of the public documents filed with the Registry by victims within the period provided for under regulation 33 of the RoC.
- (iii) *Removal of filings from the record*: in at least one instance, the Registry completely removed a filing by victims from the record of the Situation, in contravention of regulation 26 of the RoC and the principle of publicity embodied in regulation 103 of the Regulations of the Registry ("RoR").
- (iv) *Refusal to transmit a filing*: in one instance the Registry refused to transmit to the Chamber or put on the record a filing by victims, in violation of rules 15 and 121(10) of the Rules and regulation 26 of the RoC.
- (v) *Institution of a "transmission" regime that masks filings by victims*: despite the absence of any judicial decision on the record, filings by victims have been annexed to Registry filings, instead of being placed directly on the record.
- (vi) *Decisions are not properly notified to victims*: decisions by the Chamber have not been communicated to victims and their counsel in the manner laid out by regulation 34 of the RoR.
- (vii) *Decisions are rendered without reasoning*: the Chamber has rendered numerous decisions regarding victims without providing the reasoning required for the impartial exercise of justice.

9. Even if there were any doubt as to whether article 38 confers jurisdiction upon the Presidency over these issues, the governing texts should be read as ensuring some avenue for review in the absence of an explicit provision to the contrary – of which there is none. Were the situation otherwise, victims, and theoretically any party or participant whose rights are systematically and repeatedly disregarded and violated in this way, would be unable to seek redress for their harms. This is particularly the case given that appellate review for the conduct alleged here is impossible: not only has the Chamber itself refused to receive submissions on the issue,<sup>5</sup> but the Appeals Chamber has previously disclaimed responsibility for administrative matters unless expressly provided for in the Court's legal texts (here there is no such provision): "[n]o jurisdiction is vested in the Appeals Chamber to review decisions pertaining to the administration and servicing of the Court except where specific authority to do so is conferred."<sup>6</sup> Simply put, there is no other entity at the Court empowered to adjudicate administrative issues where fault lies with the Registry or the Chamber. In such circumstances, the only entity with jurisdiction is the Presidency, which has express authority over such matters under article 38(3).

### **III. THE REGISTRY IS RESPONSIBLE FOR SYSTEMATIC VIOLATIONS OF THE COURT'S ADMINISTRATIVE RULES AND REGULATIONS**

#### **A. The Registry has systematically violated the Court's regulatory regime on filings**

10. Over the course of the past year, the Registry has systematically violated the Court's regulatory regime on filings as it relates to those submitted by victims in this Situation.

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<sup>5</sup> See below at paragraphs 17-18.

<sup>6</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007, [ICC-01/04-01/06-873](#), 27 April 2007, para. 7.



11. *First*, the Registry has routinely failed to transmit filings submitted by victims within the time provided for by the Court's legal texts. Regulation 33(2) of the RoC is clear that filings submitted prior to 16:00 CEST shall be notified the same day, or the next working day if filed after 16:00. In this Situation, the Registry has repeatedly failed to comply with this requirement in relation to filings by victims. For instance:

- (i) A filing by the "Cross-Border Victims" was submitted to the Court Management Section ("CMS") on Thursday, 29 April 2021, but transmitted and notified only on Thursday, 6 May 2021.<sup>7</sup> Similarly, a 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" was submitted to CMS on 29 April 2021, but transmitted and notified only on 6 May 2021.<sup>8</sup>
- (ii) A response to the Prosecution's "Request to authorize resumption of investigation under article 18(2) of the Statute" was submitted to CMS on Thursday, 7 October 2021, but only transmitted and notified on Monday, 11 October 2021.<sup>9</sup>
- (iii) A "Request for Leave to Submit Observations" was submitted to CMS on Tuesday, 12 October, but only transmitted and notified on Thursday, 14 October 2021.<sup>10</sup>

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<sup>7</sup> Transmission of a "Cross-Border Victim's response to the Prosecutor's "Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request", [ICC-02/17-148](#), 6 May 2021, para. 2 (noting that the filing was received on 29 April 2021, at 15:35). All times referenced in this filing are in CEST.

<sup>8</sup> Transmission of a "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](#), 5 May 2021, para. 2 (noting that the filing was received on 29 April 2021, at 15:58).

<sup>9</sup> Transmission of "Response to the Prosecution's "Request to authorise resumption of investigation under article 18(2) of the Statute", [ICC-02/17-167](#), 11 October 2021, para. 2 (noting that the filing was received on 7 October 2021, at 15:50).

<sup>10</sup> Transmission of "Victims' Request for Leave to Submit Observations", [ICC-02/17-168](#), 14 October 2021, para. 2 (noting that the filing was received on 12 October 2021, at 13:50).

(iv) A 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’” was submitted to CMS on Friday, 17 September 2021, but only transmitted and notified on Monday, 20 September 2021.<sup>11</sup>

12. All of these filings were submitted to CMS before 16:00 CEST and, under the relevant administrative rules and regulations, should have been transmitted and notified on the same day. In none of these cases does it appear that the Chamber expressly permitted the Registrar to file late, even if the Chamber had such authority. There is no explicit decision by the Chamber granting the Registry an extension on the record, none was shared with the victims submitting the above-mentioned filings, and none is referenced in any of the Registry’s transmission filings. Even if the Chamber’s new transmission protocol were permissible, it does not follow that documents transmitted as annexes to a Registry cover filing may be transmitted and notified late in violation of the Court’s legal texts or that an extension is automatically assumed. Simply put, in all of these cases it appears that the Registry decided *sua sponte* to file late without permission from the Chamber and without any legal basis.

13. *Second*, the Registry has failed to notify some filings to victims’ counsel at all, in direct contravention of regulation 31 of the RoC and rule 13 of the Rules. The former regulation requires that “all participants in the relevant proceedings shall be notified of any document registered by the Registry” while rule 13 states that “the Registry shall serve as the channel of communication of the Court.” In effect these provisions “impose on the Registry a positive obligation to transmit and notify documents to participants”.<sup>12</sup> That would necessarily include the victims’ counsel who submitted

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<sup>11</sup> Transmission of the “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’”, [ICC-02/17-159](#), 20 September 2021, para. 2 (noting that the filing was received on 17 September 2021, at 15:56).

<sup>12</sup> *Situation in Darfur*, Decision on the Request for Leave to Appeal to the Decision Issued on 23 September 2007, [ICC-02/05-109](#), 31 October 2007, p. 4.

the filing or is otherwise known by the Registry to be engaged in the proceedings and on the issue.

14. In this Situation, the Registry has violated that core administrative duty. For instance, a Prosecution response to a victims' request for reconsideration, or alternatively leave for appeal, was notified to over 50 individuals (including staff who were no longer employed by the Court), but *not* to the counsel who had filed motion being responded to.<sup>13</sup> This, even though counsel were listed on the notification page.<sup>14</sup> The filing was notified to counsel four days later (notably after the time within which others would have expected to see any request for leave to reply),<sup>15</sup> and only after victims' counsel detected the response on the Court's public website and complained about the issue to CMS.<sup>16</sup>

15. Again, none of the Registry's actions for failing to notify a filing appears to be at the direction of the Chamber – no such decision is on the record nor has any been shared with the parties.

16. *Finally*, some filings made by victims have been entirely excluded from the record of the proceedings. One filing was removed from the Court record and one filing was never even transmitted or placed on the record at all. In the former case, the Registry directly on the record filed a response by victims to a Prosecution motion, with the response filing also appearing on the Court's website.<sup>17</sup> The Registry

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<sup>13</sup> Response to "Request for Reconsideration or, Alternatively, Leave to 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-02/17-158](#), 17 September 2021.

<sup>14</sup> *Ibid.*, p. 2.

<sup>15</sup> Email from CMS to Spojmie Nasiri and Nema Milaninia on 21 September 2021 at 16:53 ("Kindly be informed that you were omitted from below notification on 17 September 2021 by accident.").

<sup>16</sup> Email from Nema Milaninia to CMS on 21 September 2021 at 16:14 ("Despite being on the notification page for filing ICC-02/17-158, I never received notification of the filing - only learning about it once it was posted on the website.").

<sup>17</sup> 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', ICC-02/17-165, 8 October 2021, para. 23. The filing was initially transmitted as: Request to authorize resumption of investigation under article 18(2) of the Statute" (ICC-02/17-161), ICC-02/17-164, 1 October 2021.

subsequently removed the filing with the intention of filing it again as an annex to a Registry filing – *i.e.* as a “transmission” filing.<sup>18</sup> The Chamber subsequently decided that a transmission was no longer necessary after citing and dismissing the response *in limine* in a public decision<sup>19</sup> and the Registry took no action to put the filing back into the record. As a result, the response has all but disappeared from the Court record. Although it is referenced in the Chamber’s decision, a member of the public – or even an interested party before the Court – is now unable to access the document which the Chamber refers to.

17. Compounding the issue, the Registry has more recently refused to put on the record, in any form, a joint submission by all victims active in the Situation requesting leave from the Chamber to make submissions concerning the Chamber’s practice regarding filings by victims as well as on the Prosecution’s article 18(2) authorization request.<sup>20</sup> The filing was provided to CMS on 13 December 2021. At the same time a copy was provided to the Victims Participation and Reparations Section (“VPRS”) which was directed by the Chamber to solicit, collect and transmit victims’ views on the Prosecutor’s article 18(2) request. The victims requested VPRS to include their joint submission as an annex to VPRS’ report to the Chamber along with other submissions received regarding the article 18(2) process and that the document be classified as “public.”

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<sup>18</sup> Email from CMS to Spojmie Nasiri and Nema Milaninia on 7 October 2021, at 20:18 (“Due to a clerical oversight your document as sent on 01 October per accident got published without a transmission filing to the Chamber. The Chamber has been informed of this and the request for appropriate submission is under consideration of the Chamber.”)

<sup>19</sup> 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’, ICC-02/17-165, 8 October 2021, para. 23.

<sup>20</sup> See Annex A.

18. CMS refused to transmit or notify the parties of the filing;<sup>21</sup> VPRS also refused to annex the filing to its report.<sup>22</sup> The victims only learned of that fact when the VPRS, not CMS, informed them as such four days later and only after enquiry by counsel.<sup>23</sup> CMS only confirmed the decision 10 days later,<sup>24</sup> again only after counsel requested clarification as to whether the filing had been transmitted.<sup>25</sup> In response to further enquiries by one of the victims' counsel VPRS confirmed that the non-transmission was the consequence of a decision from the Chamber, offering as reasons only that the document "was drafted by way of a filing and raising a number of different issues besides presenting victims' views and concerns."<sup>26</sup> No actual decision by the Chamber was relayed by VPRS or CMS.

19. The conduct of the Registry in these circumstances goes beyond the non-transmission of the document in question. The Registry's cover filing annexing four victims' submissions and its report of the same day refer to four transmitted submissions as being the only ones received, making no reference to the fact that it had received an additional submission containing victims' representations on the article 18(2) request or to the fact that the Chamber directed it not to transmit that document.<sup>27</sup> The result is that neither the victims' submissions nor the request for

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<sup>21</sup> Email from CMS to Megan Hirst on 23 December 2021, at 14:52 ("We kindly refer to the e-mail sent by VPRS to you on Friday 17 December 2021, 17:47. As stated in that e-mail your submission will not be filed on the case record.").

<sup>22</sup> Email from VPRS to Megan Hirst on 17 December 2021, at 18:47 ("[...], the Registry is unable to file the document you sent on 13 December. The Registry can only file victims views and concerns on the resumption of the Prosecutor's investigation, per the Chamber's 8 November 2021 decision.")

<sup>23</sup> Email from Megan Hirst to VPRS on 15 December 2021, at 19:20 (requesting confirmation that the filing will be transmitted to the Chamber as a public annex).

<sup>24</sup> Email from CMS to Megan Hirst on 23 December 2021, at 14:52 ("We kindly refer to the e-mail sent by VPRS to you on Friday 17 December 2021, 17:47. As stated in that e-mail your submission will not be filed on the case record.").

<sup>25</sup> Email from Megan Hirst to CMS on 22 December 2021, at 15:59 ("We have heard nothing further from you about the filing submitted last Monday night, 13 December 2021, now more than a week ago. Could you kindly update us?").

<sup>26</sup> Email to Katherine Gallagher from VPRS on 6 January 2022, at 9:57. Ms Gallagher had inquired about the status of the transmission of the joint submission by VPRS because the separate and additional representations of victims Al Hajj and Duran that she submitted to VPRS explicitly incorporated views and concerns made in the 13 December 2021 joint submission – views and concerns that she believed to already have been transmitted to the Chamber, but which have in fact were filtered out from reaching the Chamber.

<sup>27</sup> First Registry Transmission of Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-02/17-171 and ICC-02/17-173, [ICC-02/17-174](#), 17 December 2021, para. 1; Public redacted version of "First Registry Report on Article 18 (2) Victims' Representations Pursuant to the Pre-Trial Chamber's Orders ICC-

leave to make these submissions ever reached the Chamber – at least formally and on the record, in accordance with the Court’s rules and regulations. Effectively the request for leave was decided without consideration of the arguments presented. Additionally, it appears that every effort was made not only to prevent the submissions themselves from appearing on the Court record, but also to prevent any acknowledgment of their existence in the Registry’s filing, thus obfuscating the conduct engaged in by the Chamber and the Registry to block victims’ submissions.

20. Beyond violating the principle of publicity, the practice also violates rules 15 and 121(10) of the Rules, which require the Registry to maintain a full and accurate record of all proceedings before the Chamber, and regulation 26 of the RoC which mandates that “[d]ocuments, decisions and orders shall, whenever possible, be submitted in electronic version for registration by the Registry.” As it stands, the Registry’s actions, even if directed by the Chamber, has left gaps in the record for no valid reason. Notably, it has frustrated the very process of even seeking leave to make submissions before the Court, despite victims enjoying the statutory right under article 68(3) to have their views and concerns presented where their personal interests are affected.

21. The consequence of these administrative actions, individually and collectively, are substantive and serious: the creation of immense uncertainty for victims, discriminatory treatment, and a sense that victims (or their counsel) are being ostracised, and ultimately, an effective denial of victims’ rights to access to the Court. In contrast to the treatment victims are receiving, for example, the Registry and the Chamber have continued to permit applicants for *amicus curiae* status to file directly onto the record, and without any of these filing irregularities.<sup>28</sup> The Chamber’s disparate treatment of victims has the effect of granting greater standing and

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02/17-171 and ICC-02/17-173”, 17 December 2021, ICC-02/17-175-Conf, [ICC-02/17-175-Red](#), 17 December 2021, para. 21.

<sup>28</sup> See e.g. Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence, [ICC-02/17-150](#), 10 May 2021.

procedural rights to those seeking (but not yet granted) *amicus curiae* status than it does to victims, who have statutory rights to participate and be heard. The practice is not justified by any relevant circumstances or proportionate to any perceived risk of a flood of victims' submissions (no such flood has occurred – to the contrary, victims' counsel have repeatedly filed jointly where possible in this Situation).

22. These administrative irregularities have also prevented efficient responses and replies to victims' filings because the Prosecution (and presumably any other interested person) has been unable to determine what filings have been made and whether and when they will be notified. In one instance, for example, the Prosecution was forced to file two separate responses to filings submitted on the same day, simply because the Registry delayed notification of the filings and eventually transmitted and notified them on separate days.<sup>29</sup>

23. Many of these administrative practices appear to arise from an instruction by the Chamber to the Registry to not file in the record any written submissions received from victims, but rather as an annex to a Registry filing.<sup>30</sup> This apparent new instruction or directive has since been referred to in passing by the Chamber as a "system of transmission filings".<sup>31</sup> It has no basis in the Court's legal text or the Chamber's Practice Manual, directly and indirectly undermines several administrative rules at the Court, as well as several statutory rights owed to victims. Moreover, although the Chamber has since made public reference to this direction,<sup>32</sup> it was originally made without any public notice or information and without any

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<sup>29</sup> Request to file a consolidated response, [ICC-02/17-147](#), 6 May 2021; Addendum to request to file a consolidated response, [ICC-02/17-149](#), 7 May 2021.

<sup>30</sup> Transmission of a "Motion Seeking Remedies for Information and Effective Outreach", [ICC-02/17-143](#), 21 April 2021, para. 3.

<sup>31</sup> This term was used by the Chamber in: 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, ICC-02/17-171, 8 November 2021, para. 13.

<sup>32</sup> 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, [ICC-02/17-171](#), 8 November 2021, para. 13.



opportunity for the affected persons to be heard on the issue. It remains the case that no reasons have been given for the direction.

24. The Chamber's new protocol, implemented by the Registry, has the effect that filings made by victims are no longer readily identifiable, because all are now referenced as "Registry transmissions", if filed at all. The metadata for each of these filings read as if they come from the Registry, not from victims' counsel. In addition to creating unnecessary confusion, the new practice makes any search for filings made by victims in the Situation difficult, if not impossible,<sup>33</sup> muddying the Court's aim for clear and appropriate record-keeping. While the Chamber can certainly reject filings and deny requests to appear, its current practice goes one step further. It creates a filtering process prejudging whether a participant even has the right to appear on the record, without the requirement of issuing a decision or providing any modicum of reasoning.

25. The practical effect is to hide victims' submissions from members of the public and erode the ability of victims to have their voices heard and views considered in these proceedings. The practice also prevents the Chamber from being directly challenged for its decisions. And ultimately, the practice prevents the Court from meeting its obligations to victims. The Chamber instituted these new changes after victims played an active and important part in the appeal process that led to the reversal of the Chamber's article 15 decision, making clear that the victims have concrete interests in the Situation. The Court is not served by silencing victims and denying them administrative processes that every other participant, including putative ones, enjoys.

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<sup>33</sup> Notably, the filings are not included in the Court's searchable database as filings from "legal representatives of victims".



**B. The Registry and the Chamber have failed to transmit decisions to victims,  
or to provide reasoned decisions**

26. In addition to the above filing irregularities, the Registry has stopped communicating decisions pertaining to victims' filings in the manner prescribed by the Court's regulatory regime. This includes regulation 34 of the RoR which requires that all decisions be notified electronically using the required notification form and be "stored and indexed in the relevant situation or case record." In some instances, the Registry has refused to relay the Chamber's decisions at all, causing confusion and delays in the proceedings. As it stands, in this Situation, numerous judicial decisions concerning victim participation appear to rest solely within the inboxes of various Court officials, or exist only in undocumented form.

27. For instance, on 20 April 2021, victims' counsel filed a "Motion Seeking Remedies for Information and Effective Outreach".<sup>34</sup> The filing was classified as "public". The Registry instead classified the filing as "confidential *ex parte*, Registry and Lead Counsel for Petitioners only". After the Registry ignored repeated requests for clarification by victims' counsel, counsel filed a "Motion for Clarification and Reclassification" five days later.<sup>35</sup> On 28 April 2021, the Registry finally relayed the Chamber's decision, which had apparently been rendered on 20 April, that instructed the Registry to alter the filing classification due to the "confidentiality of some of the annexes".<sup>36</sup> Had the Chamber's decision properly been communicated, it would have

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<sup>34</sup> Transmission of a "Motion Seeking Remedies for Information and Effective Outreach", [ICC-02/17-143](#), 21 April 2021.

<sup>35</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, para. 7 ("On 22 April 2021, Petitioners requested, by e-mail, clarification as to the reason behind the changed security designation. To-date, no clarification has been provided.").

<sup>36</sup> Email from CMS on 28 April 2021, at 20:13 (forwarding, by email, decision by the Chamber noting "[t]he Chamber instructed the Registry to proceed via transmission filing, on the assumption that this would provide an opportunity for the Registry to clarify the situation.").

obviated the need for counsel's motion for clarification and permitted counsel to address the Chamber's concerns in a more efficient manner.

28. More recently, as detailed above, on 13 December 2021, the victims submitted to CMS a "Request for Leave and Victims' Submissions Concerning the Prosecutor's Application under Article 18(2) and on Victim Participation in the Afghanistan Situation".<sup>37</sup> The filing was also submitted to VPRS to annex to its report on the views and concerns of victims. On 17 December 2021, VPRS, not CMS, informed the undersigned by email that the Chamber had ordered that the filing not be transmitted to the Chamber.<sup>38</sup> Only on 23 December 2021, and only after repeated follow-up communications by the participants, did CMS confirm that the non-transmission decision referred to by VPRS also included a decision that CMS would not file and notify the submission in the record of the case.<sup>39</sup> To date, the parties and participants have not been notified by VPRS or the Chamber of the Chamber's actual decision. And although the Chamber had apparently decided that victims' filings should not be registered in the record of the case, it had reserved the discretion to grant leave; counsel accordingly requested leave, giving reasons why it was appropriate for such leave to be granted.<sup>40</sup> The undersigned have still not been notified of any decision by the Chamber or the Registry denying leave; nor have they been given any reasons, whether from the Chamber or via the Registry, as to why leave was apparently denied.

29. The Registry's practices not only conflate and confuse the roles of VPRS – the section dedicated to facilitating victim participation – with CMS – the section dedicated to court management including filings, but also runs afoul of rules 15 and

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<sup>37</sup> See Annex A.

<sup>38</sup> Email from VPRS to Megan Hirst on 17 December 2021, at 18:47 ("The Registry, in the circumstances in which the letter of 12 November was conveyed to it, sought clarification from the Chamber, which reiterated the aforementioned decision.").

<sup>39</sup> Email from CMS to Megan Hirst on 23 December 2021, at 14:52 ("We kindly refer to the e-mail sent by VPRS to you on Friday 17 December 2021, 17:47. As stated in that e-mail your submission will not be filed on the case record.").

<sup>40</sup> 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, [ICC-02/17-171](#), 8 November 2021, para. 10.

121(10) of the Rules and regulation 26(1) of the RoC which require decisions to be submitted in electronic form for registration by the Registry to ensure a “reliable, secure, efficient electronic system” governing the Court’s “judicial and operational management and its proceedings.” The purpose of these requirements is to ensure that there is a dedicated repository of decisions issued in any given situation for the benefit of the public, and to ensure that decisions and filings in the matter are being properly recorded. Due process is equally impacted where no process is provided and the Court’s records fail to reflect the filings of victims.

30. VPRS exacerbated these difficulties by refusing to reference the victims’ filing of 13 December 2021 expressing the views and concerns of victims in its report to the Court concerning documents received after soliciting the views and concerns of victims. The undersigned submitted the filing to VPRS as part of its process of collecting those views as ordered by the Chamber in its 8 November 2021 and 24 November 2021 decisions. Not only did VPRS refuse to annex the filing to their report to the Chamber, but it also skewed the public record by suggesting that it had only received four submissions from victims and their counsel, not five as would have been the case had they accounted for the joint submission.<sup>41</sup> Such conduct goes well beyond the Registry’s authority. By picking and choosing which submissions are appropriate to annex, which are appropriate to identify in their report, and which are appropriate to flag for the Chamber, the Registry effectively exercised discretion in excess of its administrative functions.

31. These problems are compounded by the fact that the Chamber has frequently chosen to render decisions with no apparent reasoning at all. The Chamber has repeatedly rejected victims *in limine* as lacking standing to make submissions.<sup>42</sup> In its

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<sup>41</sup> First Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Orders ICC-02/17-171 and ICC-02/17-173, [ICC-02/17-174](#), 17 December 2021, para. 1.

<sup>42</sup> 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, para. 25; Decision on the requests for reconsideration or leave to appeal the ‘Decision regarding applications related to the Prosecutor’s

decisions, the Chamber has offered almost no reasoning. It makes no reference to and engages in no analysis of the extensive arguments of the victims on standing,<sup>43</sup> neither does it give any reason for departing from the Court's jurisprudence that has permitted victims to participate in proceedings at the situation level without having been through an application process under rule 89.<sup>44</sup>

32. For instance, a request for *leave* to make submissions filed on 13 October 2021 was rejected *in limine* on the basis that "victims do not enjoy, as a matter of right, standing to participate in the proceedings pursuant to article 18(2) of the Statute without leave of the Chamber".<sup>45</sup> The Chamber entirely ignored that leave was exactly what was being requested and provided no analysis for why leave was not appropriate in the given case. It also failed to even summarise or engage with the merits of the filing.

33. In another instance, on 20 April 2021, victims filed a "Motion Seeking Remedies for Information and Effective Outreach", requesting remedies for the Registry's and Prosecution's failure to provide effective outreach throughout the proceedings.<sup>46</sup> The Chamber refused to meaningfully decide any of the arguments on standing and

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"Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request", [ICC-02/17-170](#), 8 November 2021, para. 13; 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, [ICC-02/17-171](#), 8 November 2021, para. 10.

<sup>43</sup> See e.g. 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, paras. 25-34; Victims' Request for Leave to Submit Observations, [ICC-02/17-168-AnxA](#), 12 October 2021, paras. 4-15; 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"', [ICC-02/17-159-Anx](#), 17 September 2021, paras 51-52; Motion Seeking Remedies for Information and Effective Outreach, [ICC-02/17-143-Anx1](#), 20 April 2021, paras. 16-21; 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, paras 13-15.

<sup>44</sup> See e.g. 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](#), 6 September 2018, para. 21; *Situation in Palestine*, Order setting the procedure and the schedule for the submission of observations, [ICC-01/18-14](#), 28 January 2020, para. 13.

<sup>45</sup> 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, [ICC-02/17-171](#), 8 November 2021, para. 10.

<sup>46</sup> Motion Seeking Remedies for Information and Effective Outreach, [ICC-02/17-143-Anx1](#), 29 April 2021.

denied the motion, together with others, on the basis that victims had no standing to file on issues pertaining to article 18(2), despite the fact that the motion had nothing to do with article 18.<sup>47</sup> When the Chamber was asked to reconsider its decision (because the underlying motion did not concern article 18),<sup>48</sup> the Chamber rejected the application – again offering no reasoning except to say that victims had no standing in relation to article 18 matters.<sup>49</sup>

34. Rather than determining the arguments on their merits, the Chamber has opted for the route of least resistance, retaining the keys to any appellate review. In these regards, the Chamber has singled out and prevented participation by victims, going so far as to prevent victims from even enjoying any of the administrative guarantees provided for in the Court's legal texts. Apart from running afoul some of the most basic principles underlying the Rome Statute, the Chamber's conduct also breaches numerous administrative rules and regulations as discussed above. In such circumstances, the victims have no recourse but to seek the Presidency's intervention.

#### IV. REMEDIES REQUESTED

35. For the above-mentioned reasons, it is requested that the Presidency:

- (i) Find that the Registry and the Chamber have violated the Court's administrative rules and regulations;

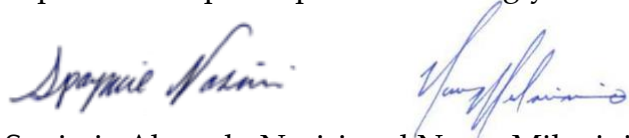
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<sup>47</sup> Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request', [ICC-02/17-156](#), 3 September 2021, para. 25.

<sup>48</sup> 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.

<sup>49</sup> 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"', [ICC-02/17-170](#), 8 November 2021, para. 13.

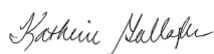
- (ii) Declare that the Chamber's "system of transmission filings" violates the Court's rules and regulations;
- (iii) Direct the Registry to notify and transmit all future filings by victims in accordance with the Court's legal texts; record and communicate all decisions by the Chamber in the manner 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.



Spojmie Ahmady Nasiri and Nema Milaninia



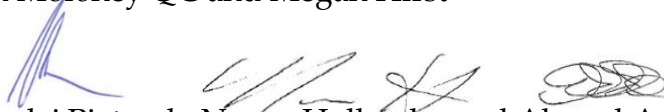
Haydee Dijkstal



Katherine Gallagher



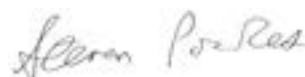
Tim Moloney QC and Megan Hirst



Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed



Margaret Satterthwaite



Steven Powles QC and Conor McCarthy

Dated this 28<sup>th</sup> day of January 2022

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