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Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/17**
Date: **9 September 2026**

THE APPEALS CHAMBER

Before: **Judge Tomoko Akane**
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Under seal and *ex parte*, Prosecution only

Prosecution notice of appeal of
"Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan" (ICC-02/17-238-US-Exp)
and
"Order to comply with the 'Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan'" (ICC-02/17-241-US-Exp)

Source: **Office of the Prosecutor**

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Notice of Appeal

1. The Prosecution hereby respectfully gives notice of its appeal against the decisions of Pre-Trial Chamber II in the *Situation in the Islamic Republic of Afghanistan* entitled: (i) "Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan" (filing number ICC-02/17-238-US-Exp, dated 15 July 2026),[1] and; (ii) "Order to comply with the 'Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan'" (filing number ICC-02/17-241-US-Exp, dated 3 September 2026).[2]

2. These decisions are appealed together given their interlocking nature, and in light of the unique circumstances of the situation—including the unclear and unusual nature of the July Decision, which was issued without prior notice and without giving the Prosecution an opportunity to make written submissions. This necessitated the Prosecution first to seek clarification from the Chamber as to the nature and purported effect of the Decision, so that it could determine the potential need and basis for any appeal.[3] Despite purporting to reject the Prosecution's request for clarification,[4] and to exclude any possibility of appeal,[5] the September Order nonetheless expanded the Chamber's reasoning in the July Decision.[6] As such, the

[1] ICC-02/17-238-US-Exp ("July Decision").
[2] ICC-02/17-241-US-Exp ("September Order").
[3] *See* ICC-02/17-239-US-Exp ("Request for Clarification and Reconsideration"). The Prosecution expressly stated that, while it was appropriate in the circumstances first to endeavour to resolve the novel issues arising from the July Decision with the Chamber itself, this was "without prejudice to any further exercise of its rights under the Statute to seek appeal of the outcome(s) of this motion including with regard to principles or understandings also previously expressed in the Decision": para. 4; *see also* para. 15. Concerning the need for a decision to have sufficient reasoning to found an appeal, *see e.g.* ICC-01/05-01/08-3636-Red A ("*Bemba* AJ"), para. 50 (underlining the importance of reasoning in allowing the accused person to usefully exercise available rights to appeal); ICC-01/14-01/21-111-Red OA ("*Said* Restrictions Judgment"), para. 42; ICC-02/04-01/15-2023-Anx1 A2 ("*Ongwen* Sentence AJ, Partly DO of Judge Ibáñez Carranza"), para. 45 ("the requirement of a reasoned decision constitutes an indispensable element of the appellate process"); ICC-01/04-02/06-2908-OPI ("*Ntaganda* Reparations AJ, SO Judge Ibáñez Carranza"), para. 31; *see also* ICC-01/13-98-AnxI (*Comoros*, Sep. and partly DO of Judge Ibáñez Carranza), paras. 78 ("The reasoning of a decision or the *ratio decidendi* has been defined as: '[t]he principal proposition or propositions of law determining the outcome of a case, or necessary for the decision of a particular case'. In other words, *ratio decidendi* are the reasons of law and fact that are necessary for the decision") and 79 ("Without reasons there is no decision. The authority of a decision comes from its being reasoned. The reasoning contains the conclusions of law on the facts").
[4] *See e.g.* September Order, paras. 7-8. *See also* paras. 9-10.
[5] *See e.g.* September Order, p. 1 ("The present order is issued pursuant to regulation 29 […] for the sole purpose of ensuring the Prosecution's compliance with the Chamber's final decision. Accordingly, it does not contain any additional legal determination on, or interpretation of, the Decision itself").
[6] *See e.g.* September Order, paras. 12-18 (clarifying the Chamber's view of the "oversight" power it purported to exercise in the July Decision), 19 (clarifying the Chamber's view of the circumstances it considered relevant to its disposition in the July Decision), 20-21 (clarifying the Chamber's view that it did "*not*" question the Court's exercise of jurisdiction in the present situation while stating that the July Decision sought "to ensure the identification of the appropriate triggering mechanism" for the Court's exercise of jurisdiction over allegations addressed in the 2024 referral by six States Parties), 23 (clarifying the Chamber's view that the warrants of arrest issued in the present situation but pertaining to allegations also falling within the 2024 referral remained valid). *See further* 2024 Referral (referral by Chile, Costa Rica, Spain, France, Luxemburg and México).

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Prosecution respectfully submits that this appeal is admissible and filed within the statutory time limits both with respect to the September Order and the July Decision—of which the September Order forms an integral part.[7]

3. This appeal is brought under article 82(1)(a) of the Statute, rule 154 of the Rules of Procedure and Evidence and regulation 64 of the Regulations of the Court. It will demonstrate that:

(i) the Chamber erred in law and/or fact and/or procedure, and/or abused any material discretion with which it is vested, by holding that the "specific conduct" described in the 2024 Referral "constitutes a sufficiently distinct subset of alleged events" warranting a separate investigation;[8] and

(ii) the Chamber erred in law and/or fact and/or procedure, and/or abused any material discretion with which it is vested, by considering that it has power under the Statute (or inherently) to direct the Prosecutor at this juncture, (1) "to comply with Regulation 45 of the Regulations of the Court by notifying the Presidency of the [2024] Referral" by 15 September 2026; and (2) "should it continue to consider that the requirements of article 53(1) of the Statute are met, to open a new investigation on the basis of the Referral submitted by the six States Parties on 28 November 2004[sic]".[9]

4. Had the Chamber not erred in either of these respects, which are inextricably linked, it would not have issued the July Decision and/or the September Order. Accordingly, the Prosecution respectfully requests the Appeals Chamber to confirm the applicable law, and to reverse the July Decision and the September Order in their entirety.

[7] ICC-02/11-01/15-1400 SL A ("*Gbagbo and Blé Goudé* Appeal Judgment"), para. 157 (holding that "[t]he 15 January 2019 Decision and the Reasons for the 15 January 2019 Decision, issued on 16 July 2019, with their three accompanying opinions, must, therefore, be read together"). *See also* ICC-02/17-218 OA5 ("Article 18 Appeal Judgment"), paras. 53 (where the Appeals Chamber observed that "the operative part of a decision must be read with the corresponding reasoning that led to it", due to "the importance of coherence and certainty in a judicial decision").
[8] *See* July Decision, paras. 13-16; September Order, paras. 19, 22.
[9] *See* July Decision, paras. 10, 17, 18, and p. 8; September Order, paras. 12-18, and p. 12. The Pre-Trial Chamber also ordered that in the event that the Prosecutor opens a new investigation, he shall also comply with the notification regime in article 18(1) of the Statute: July Decision, para. 17.

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5. The Prosecution recalls that this appears to be the *third* attempt by Pre-Trial Chamber II to limit (and potentially close)[10] the Prosecution's investigation in the *Situation in the Islamic Republic of Afghanistan* arising from the Article 15 Authorisation in Afghanistan. It also appears to be the *second* attempt by the Chamber to disregard the Appeals Chamber's judgment defining the scope of the Court's jurisdiction in this situation arising from the Article 15 Authorisation[11]—a matter which is *res judicata* and binding on the Pre-Trial Chamber.[12]

Confidentiality

6. This notice of appeal is filed "Under seal, *ex parte*", pursuant to regulation 23*bis*(2), since this is the classification of the July Decision and the September Order. However, with the exception of certain information concerning the warrants of arrest already issued in this situation,[13] the July Decision and September Order otherwise refer to publicly available information. Accordingly, subject to relevant redactions concerning the existence and/or content of the warrants, there appears to be no reason justifying the classification of the July Decision and September Order.

7. The Prosecution defers to the Appeals Chamber as to whether this appeal should be heard and decided under seal or publicly. The July Decision and the September Order raise issues of fundamental importance regarding the Court's exercise of jurisdiction and the respective

[10] *See* July Decision, fn. 16. In a footnote to the July Decision, the Chamber noted that the Prosecution could close the presently open *Situation in the Islamic Republic of Afghanistan*, stating that it "draws the Prosecution's attention to […] regulation 66*ter* of the Regulations of the Court, which allows the Prosecution to request the closure of a situation record when it does not anticipate further investigatory or prosecutorial activities in relation thereto." This remark appears to have been made based on the Chamber's erroneous premise that there "no proceedings are presently pending" within the situation.

[11] *First*, on 12 April 2019, Pre-Trial Chamber II rejected the Prosecution's request to open an investigation in the Situation in Afghanistan because it would not serve the interest of justice, considering *inter alia* the time elapsed since the opening of the preliminary examination in 2006 and the operational difficulties in conducting an investigation caused by the politically changing scene in Afghanistan: *see* ICC-02/17-33 ("Article 15 Decision"), paras. 91-96.The PTC also made observations limiting the scope of any potential investigation; *see* paras. 40, 69. This was reversed by the Appeals Chamber by an Appeals Judgment that clearly defined the parameters of the investigation: ICC-02/17-138 OA4 ("Article 15 Appeal Judgment"), paras. 1-2, 46, 64, 79. *Second*, on 31 October 2022, PTC II granted the Prosecution's request to resume the investigation in Afghanistan, after the Afghanistan authorities had requested deferral of the investigation under article 18, but again limited the scope of the investigation: ICC-02/17-196 ("Article 18 Decision"), para. 59. This was again reversed by the Appeals Chamber which made clear that the parameters of the situation were those described in the Article 15 Appeal Judgment, that is: "alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002": Article 18 Appeal Judgment, paras. 56-62.

[12] Article 18 Appeal Judgment, paras. 59.

[13] In particular the two warrants of arrest that have not been publicly disclosed: ICC-02/17-230-US-Exp; ICC-02/17-231-US-Exp. Redactions should also be needed regarding any reference to these warrants as well as the Prosecution's lines of inquiry in the Prosecution Request for Clarification and Reconsideration and the September Order.

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competences of the Prosecution and the Pre-Trial Chamber, which are relevant beyond this situation. Due publicity may also be appropriate to enable the observations of other participants, should they wish.

Grounds of Appeal

8. The Prosecution has reviewed the Decision carefully with reference to the established standards of appellate review. On this basis, the Prosecution identified the following two grounds of appeal. While they are inextricably linked,[14] error in respect of either of these grounds of appeal would require reversal of the July Decision and/or the September Order in their entirety.

FIRST GROUND OF APPEAL: THE CHAMBER ERRED IN FINDING THAT THE CONDUCT IDENTIFIED IN THE 2024 REFERRAL CONSTITUTES A "SUFFICIENTLY DISTINCT SUBSET OF ALLEGED EVENTS" WARRANTING A SEPARATE INVESTIGATION

9. In the July Decision and the September Order, the Chamber articulated its view as to why investigation of the conduct referred to in the 2024 Referral warranted a new investigation. This was notwithstanding that: (i) there is *already* an open investigation in the situation of Afghanistan which was opened after judicial authorisation under article 15 of the Statute, and; (ii) the conduct alleged in the 2024 Referral falls within the parameters of the authorised situation, or such conduct is at least sufficiently linked to those parameters as assessed by the Prosecution,[15] as apparently confirmed by the Pre-Trial Chamber.[16] Thus:

[14] *See above* para. 2.
[15] In its article 58 applications filed on 23 January 2025 with respect to the crime against humanity of persecution chiefly against women and girls on gender grounds committed by the Taliban as the *de facto* governmental authority in Afghanistan from at least 15 August 2021 until at least 20 January 2025, the Prosecution provided its assessment that "The crime of persecution described in this Application - carried out in Afghanistan from 15 August 2021 at least until the present - falls within the parameters of the investigation authorised by the Appeals Chamber": ICC-02/17-224-Red, para. 160; *see also* ICC-02/17-225-Red, para. 161; ICC-02/17-230-US-Exp, para. 151; ICC-02/17-231-US-Exp, para. 156.
[16] On 8 July and 9 September 2025, the Chamber issued the requested four warrants of arrest for gender persecution against women and girls, and political persecution against perceived "allies" of women and girls ("2025 Warrants"). It held that "based on the material before it, including in particular information contained in the Referral, the case[s] [..], *as alleged by the Prosecution*, fall[] within the jurisdiction of the Court. This is without prejudice to any future determination on the matter": *See* ICC-02/17-232-US-Exp, para. 9 (emphasis added); ICC-02/17-233-US-Exp, para. 9; ICC-02/17-234-US-Exp, para. 9; ICC-02/17-235-US-Exp, para. 9. The Chamber appeared to confirm this assessment in its September Order, para. 23; *see also* July Decision, para. 16 (noting that "[t]his conclusion [to open a new investigation] is reached irrespective of whether aspects" of the subject-matter of the Referral "could otherwise be regarded as falling within the factual framework of [the Authorisation]").

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- In the July Decision, the Chamber anticipated (what it considered to be) "potential future challenges concerning the proper trigger mechanism for the Court's jurisdiction" in relation to cases concerning allegations in the 2024 Referral—which in its view, when compared to the existing investigation in the *Situation in the Islamic Republic of Afghanistan*, "arise in a materially different factual and institutional context, involve distinct alleged modes of commission, do not appear to be related to any armed conflict, and concern conduct occurring after the Taliban's assumption of governmental *de facto* authority".[17]

- Likewise, in the September Order, the Chamber again referred to the change of circumstances in Afghanistan with the Taliban insurgents becoming the *de facto* authorities in 2021, as well as the time elapsed since the opening of the preliminary examination and the authorisation of the present investigation. It observed that "all these factors have an impact on the proper functioning of the Court and could therefore be invoked as procedural obstacles in potential future cases".[18]

10. On this basis, the Chamber determined in the July Decision that "the conduct identified in the [2024] Referral constitutes a sufficiently distinct subset of alleged events that, in the interests of the proper administration of justice and the orderly management of the Court's proceedings, warrants a separate investigation."[19] Accordingly, and notwithstanding that the referral was received almost two years ago, the Chamber only now directed the Prosecution to "comply with Regulation 45 […] by notifying the Presidency of the [2024] Referral without delay", and to open a separate (new) investigation based on the Referral, should the Prosecution continue to consider that the requirements of article 53(1) are satisfied.[20] In its September Order, the Chamber endorsed its earlier Decision and ordered the Prosecution to comply with it, including providing the notification to the Presidency by 15 September 2026.[21]

11. The Chamber's determinations are erroneous in several respects.

12. *First*, the Chamber's approach is incompatible with the Court's established law concerning the scope of a situation and the Court's resulting exercise of jurisdiction over cases (and potential cases) which are within a situation or sufficiently linked to the situation. It also

[17] *See* July Decision, paras. 10, 14.
[18] September Order, para. 19.
[19] July Decision, para. 16. *See also* para. 13.
[20] July Decision, para 17.
[21] September Order, paras. 19, 22.

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disregards the Appeals Chamber's *dicta* regarding the scope of the investigation in this situation.[22] The July Decision and the September Order thus introduce significant ambiguity and confusion into an area where both the Statute and the practice of the Court were hitherto clear, with minimal legal reasoning and no clear objective beyond the Chamber's own present view of what may be most desirable.

13. Typically, a situation is defined by objective parameters which may be geographic, temporal, material, and/or personal.[23] None of these parameters is a *sine qua non.* Rather, the parameters "may vary depending on the circumstances of each specific situation".[24] Following the Prosecution's conduct of an investigation in a situation, the Court may exercise its jurisdiction over cases against a suspect or suspects for conduct which falls within those parameters, or which is otherwise sufficiently linked to them.[25] The cases need not be limited to specific incidents identified in the preliminary examination or to events, crimes or perpetrator groups already operating at the time of the authorised investigation or mentioned therein. This is the consistent practice of this Court[26] and does not entail indefinite jurisdiction over a situation.[27] Rather, it calls for a careful appraisal of the relevant circumstances of a particular investigation.[28]

14. In this situation—as the Appeals Chamber found, and later confirmed as *res judicata*—the parameters encompass "alleged crimes committed on the territory of Afghanistan in the

[22] Article 15 Appeal Judgment, para. 79; Article 18 Appeal Judgment, paras. 58-60.
[23] *See e.g.* ICC-02/05-01/20-503 OA8 ("*Abd-Al-Rahman* Jurisdiction Appeal Judgment"), paras. 25-26; ICC-01/04-01/12-1-Red ("*Mudacumura* Article 58 Decision"), para. 14. *See also* ICC-01/18-481 OA3 ("*Palestine* Article 18 Appeal Judgment"), para. 58.
[24] ICC-01/21-01/25-77 OA ("*Philippines* Article 18 Appeal Judgment"), para. 106; *Palestine* Article 18 Appeal Judgment, para. 127. (noting the parameters considered by the *Palestine* Pre-Trial Chamber: "the types of alleged crimes, potential alleged perpetrators, the starting point of the relevant timeframe, as well as reference to further relevant information").
[25] Article 15 Appeal Judgment, paras. 1, 57-64; Article 18 Appeal Judgment, paras. 58-60.
[26] *See e.g. Palestine* Article 18 Appeal Judgment, paras. 132 ("the alleged crimes display a continuity in pattern, even though a certain shift in circumstances may have occurred"), 135; ICC-01/18-481-OPI3 ("*Palestine* Art. 18 Appeal Judgment, Conc. Op. Judge Lordkipanidze"), paras. 3-5; ICC-01/11-01/25-142 ("*El Hishri* Jurisdiction Decision"), paras. 35 ("the alleged crimes, whilst other than those specifically committed in the context of the fall of the regime of Muammar Mohammed Abu Minyar Gaddafi ('the Gaddafi regime'), are sufficiently linked to the existence of the situation of crisis that triggered Resolution 1970"); 36-40 (the PTC considered as relevant factor that the "SDF/RADA emerged as a result of the 2011 crisis that triggered Resolution 1970, and the aftermath of the crisis" and that "some of the persons held at the Mitiga Prison were detained for reasons related to the fighting or tensions between different groups involved in the ongoing situation of crisis in Libya, which 'further illustrates a link between the crimes alleged by the Prosecution and the situation that triggered the jurisdiction of the Court'"); ICC-01/15-12 ("*Georgia* Article 15(4) Decision"), paras. 62-64; *Mudacumura* Article 58 Decision, para. 14; ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), para. 21. *See also* Article 15 Appeal Judgment, paras. 57-64 (rejecting a "closely linked" test).
[27] *Contra* July Decision, para. 13.
[28] *See Palestine* Art. 18 Appeal Judgment, Conc. Op. Judge Lordkipanidze, paras. 3-5.

period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002".[29] Although the Chamber in the July Decision and September Order purported to affirm these parameters[30] (albeit not unequivocally[31]), and last year issued four Warrants of Arrest in the present situation against suspects for conduct falling within the 2024 Referral (thus suggesting that this conduct *is* encompassed in the present situation/ongoing investigation),[32] the Chamber's July Decision and September Order seemingly conflict with the Appeals Chamber's established law and practice, and raise questions about the jurisdictional basis of the issued Arrest Warrants.[33] Had the Pre-Trial Chamber properly considered the scope of the investigation in *Afghanistan* (as confirmed twice by the Appeals Chamber) and applied the Court's consistent jurisprudence to assess the existence of a connection or "sufficient link" between the facts described in the 2024 Referral and the pre-existing investigation, it would have not concluded that the Referral warrants a new investigation.

15. Consequently, the July Decision and the September Order raise questions—again— about the scope (or parameters) of this situation arising from the Article 15 Authorisation. They also raise questions about the Court's exercise of jurisdiction over the *existing* cases in this situation, the Court's exercise of jurisdiction over potential future cases, and whether future cases may be brought by the Prosecution within the present situation or only within a separate (new) situation. As the Prosecution will demonstrate in its Appeal, if the established case-law is applied, the July Decision and the September Order are procedurally flawed and jurisdictionally unsound.

16. *Second*, the Chamber's approach further disregards that, considering the complex situations before the Court, it is not uncommon that governments (and their policies) may change, and criminality may evolve and/or escalate. Nor is it uncommon for States Parties to use the referral mechanism under articles 13(a) and 14 to urge the Prosecution to investigate

[29] *See* Article 15 Appeal Judgment, para. 79; Article 18 Appeal Judgment, paras. 58-59.
[30] *See* July Decision, para. 13; *see also* September Order, para. 20 (recalling that "it did not make any findings related to the jurisdiction of the Court in relation to the Situation in Afghanistan).
[31] July Decision, paras. 13 ("the Prosecution's interpretation of its investigation in the situation in Afghanistan raises questions as to the proper limits of an investigation authorised pursuant to article 15 of the Statute"), 16; September Order, para. 24 (raising questions as to the need of a new article 15 application regarding IS-K cases).
[32] *See above* fn. 16.
[33] This is notwithstanding the Pre-Trial Chamber's attempt to portray its decisions as not "jurisdictional": July Decision, para. 13; September Order, para. 20.

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certain events, within the context of a pre-existing investigation, as in this instance.[34] As such, and as demonstrated further below in the Second Ground of Appeal, referrals by a State Party do not automatically entail the opening of an investigation.

17. *Third*, the Chamber further erred in deciding that a separate (new) investigation was warranted by considering irrelevant factors and disregarding relevant ones.[35] Notably, the Chamber gave no weight to the motivation of the States Parties which made the 2024 Referral (which makes clear that they understood that the relevant allegations *already* formed part of the present investigation, and merely wished to underscore their view of the importance of the allegations). Nor did it request the views of the Prosecution[36]—as the entity with the exclusive competence to carry out the investigation[37] (and preliminary examination).[38] Conversely, and without explanation, the Chamber appeared to take account of and give weight to irrelevant, intangible or hypothetical considerations such as: (i) the alleged "modes of commission of the crimes";[39] (ii) the Chamber's view of the number of article 58 applications filed by the Prosecution to date;[40] (iii) the Chamber's abstract view of "potential future challenges" or "procedural obstacles in potential future cases";[41] (iv) the Chamber's view of "the proper administration of justice and the orderly management of the Court's proceedings", and the "impact on the proper functioning of the Court",[42] and; (v) the Chamber's apparent view that opening a new investigation of the allegations in the 2024 Referral might lead to the potential closure of the present investigation.[43]

18. If the Chamber had not erred by finding that the conduct alleged in the 2024 Referral constitutes a "sufficiently distinct subset of alleged events" warranting a separate investigation

[34] 2024 Referral, pp. 1,4. In *Palestine*, *see*: South Africa et al. Article 14 Referral, p. 1, Chile and Mexico Article 14 Referral, p. 1. *See* *Palestine* Article 18 Appeal Judgment, para. 105 ("Instead of identifying a new situation, the two referrals were submitted with a view to urging the Prosecutor to advance the investigation in respect of the alleged crimes committed before 7 October 2023, as well as those committed on and after that date, as forming part of a single situation arising from the 2018 Referral. This is sufficiently apparent from the explicit terms of the 2023 and 2024 referrals"); *see also* para. 102.
[35] July Decision, paras. 10, 14, 16; September Order, para. 19.
[36] This is in violation of the principle of *audi alteram partem* since the Prosecution's rights are significantly affected, in particular considering the Prosecution's principal and driving role in the conduct of investigations: ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para. 27; *cf.* ICC-01/14-01/18-678-Red OA ("*Yekatom & Ngaïssona* Admissibility Judgment"), para. 46.
[37] ICC-01/04-01/06-2205 OA15 OA16 ("*Lubanga* Regulation 55 Appeal Judgment"), para. 94; ICC-01/04-556 OA4 OA5 OA6 ("DRC Victim Participation Appeal Judgment"), para. 52; Article 15 Appeal Judgment, para. 63.
[38] ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), para. 125.
[39] July Decision, para. 14.
[40] September Order, para. 19.
[41] July Decision, para. 10; September Order, para. 19.
[42] July Decision, para. 16; September Order, para. 19.
[43] July Decision, fn. 16.

in the situation in Afghanistan, the Chamber would not have issued the July Decision and the September Order directing the Prosecutor (i) to notify the Presidency of the 2024 Referral and (ii) to open a separate (new) investigation on the basis of the 2024 Referral should it continue to consider that the requirements of article 53(1) are satisfied.

SECOND GROUND OF APPEAL: THE CHAMBER ACTED *ULTRA VIRES* IN DIRECTING THE PROSECUTION AT THIS JUNCTURE TO NOTIFY THE PRESIDENCY OF THE 2024 REFERRAL, AND TO OPEN A NEW INVESTIGATION SHOULD IT CONTINUE TO CONSIDER THAT THE REQUIREMENTS OF ARTICLE 53(1) ARE SATISFIED

19. In the July Decision (concisely) and the September Order (more fulsomely), the Chamber set out its reasoning on why it was competent to direct the Prosecution to notify the Presidency of the 2024 Referral and to open a new investigation, should it continue to consider that the requirements of article 53(1) of the Statute are met. It did so based on its view of the principle of "judicial oversight" and the "inherent powers" of the Pre-Trial Chamber. Thus:

- In the July Decision, the Chamber referred to "the principle of judicial oversight" and its "inherent responsibility to ensure that investigations conducted pursuant to article 15 of the State remain within the scope authorised by the Court".[44]

- In the September Order, the Chamber expanded on the basis of its competence for the July Decision, referring *inter alia* to its understanding of the statutory independence of the Prosecutor under article 42(1), express provisions in the Rome Statute where the Pre-Trial Chamber is expressly endowed with relevant powers, the doctrine of inherent powers, the "exclusive jurisdictional function" of the judiciary, and the need to ensure the identification of the appropriate triggering mechanism.[45]

20. This reasoning, and the Chamber's resulting determinations, were erroneous for several reasons. In particular, disregarding the prior guidance of the Appeals Chamber in this situation,[46] the Chamber misinterpreted the relevant statutory provisions governing the

[44] July Decision, para. 10.
[45] *See* September Order, paras. 11-18, 20.
[46] Article 15 Appeal Judgment, para. 63 ("the Appeals Chamber notes that article 42(1) recognises the independence of the Prosecutor and her responsibility for the conduct of investigations, while articles 56 and 57 of the Statute identify specific functions that may be exercised by the pre-trial chamber during the investigation"); *see also* para. 29 (referring to article 53(3) and the judicial review of the Prosecution's decision not to investigate referred situations).

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allocation of competences between the Prosecutor and the Pre-Trial Chamber, and accordingly acted *ultra vires*. A Pre-Trial Chamber has *specific* powers and functions *vis-à-vis* the Prosecution's investigations. But these must be exercised in accordance with the Statute.[47] Likewise, while Chambers have "exclusive jurisdictional function and are therefore competent to decide on the applicable law of the Court",[48] they cannot legislate or disregard the Court's legal framework.[49] In its Appeal Brief, the Prosecution will demonstrate that:

21. *First*, the Prosecutor has the sole prerogative to decide whether to initiate an investigation in a situation which has been referred by a State Party or the UN Security Council, after determining that the requirements under article 53(1) are satisfied.[50] The Court's legal framework allows for judicial supervision over the Prosecutor's determinations at this early stage of the proceedings, but only in certain circumstances and as provided in the Rome Statute. For sound reasons of law and principle, such oversight is limited to the following: (i) when the Prosecutor decides to exercise his *proprio motu* powers and requests the Pre-Trial Chamber's authorisation to open an investigation pursuant to article 15;[51] (ii) if the Prosecutor decides not to open an investigation of a referred situation, the Pre-Trial Chamber may review that decision under the conditions in article 53(3);[52] (iii) when the Prosecutor expressly requests a ruling on jurisdiction under article 19(3);[53] and (iv) when, following an investigation, the Prosecutor requests from the Pre-Trial Chamber the issuance of an arrest warrant under article 58.[54] Beyond these scenarios, a Pre-Trial Chamber has no authority to intervene in the Prosecutor's determinations under article 53(1).

22. Significantly, in the present situation, the Chamber already confirmed that the Prosecution correctly exercised its jurisdiction in the authorised investigation in relation to the four arrest warrant cases.[55] Yet, by *now* further purporting to exercise "oversight" over the

[47] Article 15 Appeal Judgment, paras. 29, 63. *See also* ICC-01/13-98 OA2, para. 58 (recalling that in the context of article 53(3): "while judicial review of the Prosecutor's decision not to investigate should be possible, the 'ultimate decision' as to whether to initiate an investigation is that of the Prosecutor"); ICC-01/13-51 OA, paras. 59, 64 (recalling also in the context of art. 53(3)(a): "the final decision [to initiate an investigation] in this regard being reserved for the Prosecutor").
[48] September Order, para. 15.
[49] *Cf.* ICC-01/09-01/11-2024 OA10, para. 41 ("Amendments to the Rules are adopted by the States Parties who, together, make up the Court's legislative body).
[50] Article 15 Appeal Judgment, para. 29. *See also* ICC-01/13-98 OA2, para. 58; ICC-01/13-51 OA, paras. 59, 64.
[51] Article 15 Appeal Judgment, paras. 32, 34, 39, 46.
[52] Article 15 Appeal Judgment, para. 29.
[53] Palestine Article 19(3) Decision, paras. 73, 82.
[54] *See e.g.* Statute, arts. 19(1)-(2) (referring to a "case"); ICC-01/18-143 ("*Palestine* Article 19(3) Decision"), paras. 73, 79, 82.
[55] *See above* fn. 16. *See* September Order, para. 23. *See also* July Decision, para. 16.

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Court's exercise of jurisdiction in the situation—and seemingly *proprio motu* reconsidering its earlier position— the Chamber erred.

23. *Second*, the Pre-Trial Chamber also erred in its interpretation of Regulation 45 of the Regulations of the Court. Although its reasoning is scarce, the Pre-Trial Chamber's approach appears to suggest that the Prosecution must *automatically* notify the Presidency of any document described as a State Party "referral".[56] This would invariably lead to a new situation,[57] and the subsequent assessment by the Prosecution of the requirements under article 53(1) of the Statute as to whether an investigation is warranted.[58] By contrast, the Prosecution respectfully understands that it must first affirm that a communication received from a State Party falls within the terms of article 13(a) and article 14. This includes an assessment of whether the conduct referred to in the referral falls within a pre-existing investigation, or whether the conduct does not and thus requires that a new investigation be opened. In the former situation the Prosecution would not need to make a Regulation 45 notification to the Presidency, but in the latter it would need to.

24. This is why, in practice, new referrals within pre-existing situations have not invariably led the Prosecution to make a Regulation 45 notification to the Presidency—notably, in circumstances where it is immediately clear to the Prosecution that the allegations in a new referral fall *within* an existing investigation.[59] Otherwise a new situation record would be created—and a Pre-Trial Chamber assigned—when there is no need to conduct a new preliminary examination in which to assess the requirements of article 53(1).

25. By contrast, the Chamber's approach in the July Decision and the September Order implies that *any* document self-labelled as a "referral" will need to be automatically notified to the Presidency, and a situation record and Pre-Trial Chamber assigned. This would then lead to the conduct of a new preliminary examination and (potentially) a new investigation dealing with a specific set of events, irrespective of the circumstances. This cannot be correct. The

[56] July Decision, para. 18.
[57] Regulations of the Court, reg. 45(1).
[58] July Decision, paras. 17-18, p. 8; September Order, para. 22, p. 12.
[59] In addition to the jurisdictional matters requiring resolution, this appeal will afford the Appeals Chamber the opportunity to clarify this procedural question, which will assist both the Court and also entities which may make such referrals. The Prosecution has explained its understanding of the operation of this provision: *see e.g.* Request for Clarification and Reconsideration, para. 30; ICC-01/18-440 OA3 ("*Palestine* Article 18 Response"), para. 44. At least two judges of the Appeals Chamber have highlighted the need to address this question: ICC-01/18-481-OPI ("*Palestine* Art. 18 Appeal Judgment, DO Judge Ibanez Carranza"), paras. 36-41; ICC-01/18-481-OPI2 ("*Palestine* Art. 18 Appeal Judgment, DO Judge Solomy Balungi Bossa"), paras. 7-8.

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Prosecution—the body responsible for conducting investigations[60] (and preliminary examinations)[61] must itself conduct a preliminary assessment as to whether the document is a "referral" within the terms of the Statute, including whether the referred conduct falls within the parameters of any pre-existing investigation. The Chamber's approach would increase confusion about the scope of the Court's activities and lead to an unduly burdensome and unwieldy approach to the management of investigations which the Appeals Chamber has already cautioned the Pre-Trial Chamber against in this situation.[62] It would likewise undermine the Prosecutor's duty and prerogative to investigate each situation "as a whole",[63] and the jurisprudence affirming that referrals must "be interpreted such as to '[extend] enough flexibility to the Prosecutor to investigate independently and impartially' […] rather than limiting the Prosecutor's future investigation to crimes or cases described in the referral".[64]

26. *Finally,* the Chamber further erred in interpreting and relying upon the doctrine of "inherent powers" as previously addressed—authoritatively —by the Appeals Chamber.[65] In particular, the Appeals Chamber has held that "in the legal framework of this court, inherent powers' should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure".[66] Further, not every silence in the Statute is a *lacuna* that permits resort to inherent powers.[67] Certainly, there is no *lacuna* "when a matter is exhaustively defined in the legal instruments of the Court".[68] The division of powers between the Prosecutor and the Pre-Trial Chamber—especially in the early stages of proceedings, in particular in the initiation of investigations—was subject to detailed discussions among the drafters, who struck the delicate balance reflected in the Statute.[69] Accordingly, in the circumstances relevant to the

[60] *Lubanga* Regulation 55 Appeal Judgment, para. 94; DRC Victim Participation Appeal Judgment, para. 52; Article 15 Appeal Judgment, para. 63.
[61] *Duterte* Jurisdiction Appeal Judgment, para. 125.
[62] *See* Article 15 Appeal Judgment, para. 63.
[63] Article 15 Appeal Judgment, paras. 60-61.
[64] *Palestine* Article 18 Appeal Judgment, para. 82; *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 25; *see also Mbarushimana* Jurisdiction Decision, para. 27.
[65] July Decision, fn. 23; September Order, para. 14.
[66] ICC-01/05-01/13-2276-Red A6 A7 A8 A9 ("*Bemba et al.* Sentence AJ"), para. 75.
[67] *Bemba et al.* Sentence AJ, para. 76 ("The Appeals Chamber recalls that in order to determine whether the absence of a power constitutes a "lacuna", it has previously considered whether "[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions". The nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether there are gaps justifying recourse to subsidiary sources of law or invocation of "inherent powers"").
[68] *Bemba et al.* Sentence AJ, para. 76.
[69] *See e.g* Article 15 Appeal Judgment, paras. 29, 41; ICC-01/13-51 OA, para. 59, 64; *see also* Bergsmo/Bekou, Art. 53, in Ambos K. (ed.), Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4th ed. 2022 (Beck, Nomos, Hart), p. 1626, nm.3.

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July Decision and the September Order, there was no *lacuna* or room for the Pre-Trial Chamber to resort to "inherent powers".[70]

27. These errors had a material impact on the Pre-Trial Chamber's decisions. If the Chamber had not made these errors concerning its own competence and powers, it would not have made the above error concerning the 2024 Referral, and would not have issued the July Decision and the September Order in which it directed the Prosecution to open a separate (new) investigation should it continue to be satisfied that the requirements in article 53(1) are met.

Admissibility of the Appeal

28. The appeal is admissible under article 82(1)(a) because the July Decision and the September Order constitute decisions "with respect to jurisdiction". The Chamber's own apparent view—that its July Decision and/or September Order are not "jurisdictional" for the purpose of article 82(1)(a)[71]—is unconvincing. It does not displace the Appeals Chamber's objective assessment.

29. While the operative part of the impugned decision must pertain to a question on the jurisdiction of the Court,[72] this "must be read with the corresponding reasoning that led to it",[73] and the impugned decision or impugned part of the decision assessed in its broader context.[74] Ultimately, it is the objective nature of a decision, rather than its effect or implication, that determines whether it may be appealed under article 82(1)(a) of the Statute.[75]

30. Furthermore, as the Appeals Chamber recently affirmed in *Duterte*, decisions pertaining to the *exercise* of the Court's jurisdiction—which typically concern compliance with the procedural regime of the Statute—may be 'jurisdictional' in nature and appealed under article 82(1)(a) of the Statute.[76] The operative part of a decision need not concern any of the four substantive dimensions of jurisdictions (*ratione temporis*, *ratione personae*, *ratione loci*, or

[70] *Bemba et al.* Sentence AJ, paras. 76-77.
[71] July Decision, para. 13 ("it is unnecessary to determine the precise limits of that authorisation for the purposes of the present decision"); September Order, para. 20 ("the Chamber recalls that it did not make any findings related to the jurisdiction of the Court in relation to the Situation in Afghanistan").
[72] ICC-01/09-78 OA ("*Kenya* Admissibility Decision"), para. 15; ICC-01/18-423 OA ("*Palestine* Admissibility Decision"), para. 31.
[73] Article 18 Appeal Judgment, para. 53.
[74] *Palestine* Admissibility Decision, para. 31.
[75] *Kenya* Admissibility Decision, para. 17. This requires an assessment of whether the impugned decision substantially relates to a question of jurisdiction, independently of whether the Chamber issuing the impugned decision formally asserts that it does or does not.
[76] *Duterte* Jurisdiction Appeal Judgment, paras. 82-83; *see also* paras. 2-5, 88, 93, 113.

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ratione materiae) if the operative part determines whether the Court may or may not seise itself of a situation according to the terms of the Statute.

31. Relevantly, the Appeals Chamber in this situation has already accepted that a decision may be subject to direct appeal under article 82(1)(a) where "the impugned passage[s], read together with the operative part of the decision […] create[s] uncertainty as to the scope of the authorised investigation and the Court's jurisdiction in the Afghanistan situation".[77]

32. Applying these principles, both the July Decision, and the September Order expanding upon and requiring the Prosecutor's compliance with the July Decision, are jurisdictional in nature. Specifically, they concern the proper exercise of the Court's jurisdiction in the present situation in Afghanistan opened pursuant to the article 15 authorisation, and the potential exercise of the Court's jurisdiction in a potential separate new situation based on the 2024 Referral, if opened. As such, these decisions not only purport to determine the procedure by which the Court's jurisdiction in the situation may be exercised, but also seek to determine the scope of the Court's exercise of jurisdiction in the situation under investigation. For example, by the implicit requirement that the prosecution of any cases concerning allegations in the 2024 Referral may only be initiated in a separate *new* investigation in a new situation, the Chamber has necessarily *de facto* excluded such cases from the scope of the investigation in the *present* authorised situation.

33. Likewise, by expressing its view in the September Order that the Court is properly exercising its jurisdiction over the cases *already* initiated within the present situation, the Chamber has underscored the jurisdictional anomaly inherent in the Chamber's insistence that a separate new investigation must nevertheless be opened for any further prosecutions of that same conduct arising from the 2024 Referral. Alternatively, if the Chamber's view of the significance of the 2024 Referral is correct, then the basis for its affirmation of the Court's exercise of jurisdiction over the existing cases may be cast in doubt. These are clear jurisdictional decisions which fall within an appeal under article 82(1)(a)

34. Other aspects of the Chamber's reasoning in the July Decision and September Order likewise suggest and support the jurisdictional nature of these decisions, when assessed objectively. Notably, for example, the Chamber observed in the July Decision that "the Prosecution's interpretation of its investigation in the situation in Afghanistan raises questions

[77] Article 18 Appeal Judgment, para. 53.

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as to the proper limits of an investigation authorised pursuant to article 15 of the Statute".[78] Further, having received additional information from the Prosecution as to the lines of inquiry currently prioritised in the investigation in the present situation—which include crimes allegedly committed by IS-K since 2016,[79] and which the Appeals Chamber has already expressly affirmed to fall within the parameters of the situation[80]—the Chamber recalled in the September Order that "the Prosecution may apply as many times as necessary under article 15 of the Statute for the opening of a new investigation that may not be covered by the Article 15 Authorisation and/or Referral".[81] This suggestion underscores that, pervading its July Decision and September Order, the Chamber has again sought to narrow the parameters of the present situation in Afghanistan, despite the Appeals Chamber's binding past instruction. It also disregards the Appeals Chamber's express guidance that the parameters of situations authorised under article 15 are not to be interpreted so narrowly as to require the repetition of such applications.[82]

Relief requested

35. For the reasons above, and after considering the further submissions in the Prosecution's Appeal Brief to be filed under regulation 64(2) on 25 September 2026, the Prosecution respectfully requests the Appeals Chamber:

(a) to receive the appeal under article 82(1)(a) of the Statute; and

(b) considering the merits of the appeal, to confirm the applicable law with respect to the errors outlined in paragraphs 3, 9 to 27, and on that basis reverse the July Decision and/or September Order, as appropriate, in their entirety under article 83(2) and rule 158(1).

[78] July Decision, para. 13.
[79] Request for Clarification and Reconsideration, para. 41.
[80] Article 18 Appeal Judgment, para. 60.
[81] September Order, para. 24.
[82] Article 15 Appeal Judgment, para. 63.

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Mame Mandiaye Niang
Acting Prosecutor

Dated this 9th day of September 2026

At The Hague, the Netherlands