Pursuant to Pre-Trial Chamber II's order, ICC-02/17-249, this document is transferred from the situation record ICC-02/17 into the situation record ICC-02/26.

Cour Pénale Internationale

International Criminal Court

Original: English

No. **ICC-02/17**
Date: **3 September 2026**

PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Presiding**
Judge Sergio Gerardo Ugalde Godínez
Judge Haykel Ben Mahfoudh

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Under seal, *ex parte*, only available to the Prosecution

Order to comply with the 'Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan'

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

☒ **The Office of the Prosecutor**	☐ **Counsel for the Defence**
☐ **Legal Representatives of the Victims**	☐ **Legal Representatives of the Applicants**
☐ **Unrepresented Victims**	☐ **Unrepresented Applicants (Participation/Reparation)**
☐ **The Office of Public Counsel for Victims**	☐ **The Office of Public Counsel for the Defence**
☐ **States' Representatives**	☐ **Amicus Curiae**

REGISTRY

Registrar Mr Osvaldo Zavala Giler	☐ **Counsel Support Section**
☐ **Victims and Witnesses Unit**	☐ **Detention Section**
☐ **Victims Participation and Reparations Section**	☐ **Other**

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PRE-TRIAL CHAMBER II of the International Criminal Court (the 'Chamber') issues this Order to comply with the 'Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan' of 15 July 2026 (the 'Decision'), which is now final, in application of article 82(1)(d) of the Rome Statute (the 'Statute') and rule 155 of the Rules of Procedure and Evidence (the 'Rules').[1] The present order is issued pursuant to regulation 29 of the Regulations of the Court (the 'Regulations'), 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.

I. PROCEDURAL HISTORY[2]

1. In 2006, the Prosecution opened a preliminary examination into the Situation in the Islamic Republic of Afghanistan (the 'Preliminary Examination' and the 'Situation in Afghanistan').[3]

2. On 5 March 2020, the Prosecution was authorised to open an investigation into the Situation in Afghanistan (the 'Article 15 Authorisation').[4]

3. On 28 November 2024, six States Parties submitted a referral, pursuant to articles 13 and 14 of the Statute, requesting the Prosecution to consider allegations of 'crimes committed against women and girls after the Taliban takeover in 2021 within its investigation into the Situation in Afghanistan' (the 'Referral').[5]

4. On 8 July 2025 and 9 September 2025, the Chamber issued warrants of arrest in relation to four suspects (the 'Warrants of Arrest').[6]

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[1] *Contra* Request for clarification and/or reconsideration of the 'Decision in relation to the investigation in the Situation in the Islamic Republic of Afghanistan', 6 August 2026, ICC-02/17-239-US-Exp ('Request'), paras 4, 47.
[2] The Chamber refers to ICC-02/17-238-US-Exp for the full procedural history.
[3] *See* Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7-Conf-Exp, confidential and *ex parte* (public redacted version filed on the same day ICC-02/17-7-Red), para. 22.
[4] Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138.
[5] ICC Press Release, Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in Afghanistan: receipt of a referral from six States Parties, 29 November 2024, containing the referral pursuant to articles 13(a) and 14(1) of the Statute, signed by the Republic of Chile, Republic of Costa Rica, Kingdom of Spain, French Republic, Grand Duchy of Luxembourg and United Mexican States, Nr.114.24.4.C.
[6] ICC-02/17-232-US-Exp, ICC-02/17-233-US-Exp, ICC-02/17-234-US-Exp, ICC-02/17-235-US-Exp.

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5. On 15 July 2026, the Chamber issued the Decision, directing the Prosecution to comply with regulation 45 of the Regulations without delay and to open a new investigation on the basis of the Referral, should it continue to consider that the requirements of article 53(1) of the Statute are met.[7]

6. On 6 August 2026, the Prosecution submitted the 'Request for clarification and/or reconsideration of the "Decision in relation to the investigation in the Situation in the Islamic Republic of Afghanistan"' seeking that 'the Chamber clarifies the critical reasoning in the Decision (the 'Clarifications Request')' and 'reconsiders the relief ordered by the Chamber in the Decision' (the 'Reconsideration Request').[8]

II. DETERMINATION

A. Clarifications Request

7. The Chamber notes that there exists no explicit statutory basis allowing a party to request a chamber to clarify a decision and/or order.[9] While in certain circumstances, it may be possible for a chamber to clarify uncertainties or ambiguities of the operative part of an order or decision, a party can under no circumstances seek clarification of a decision in order to convey disagreements with the reasoning and/or instructions of a chamber. In such circumstances, parties must use the appropriate remedies available within the statutory framework, *i.e.*, the procedure of appeal, when available and within the statutory time limits.

8. In light of the above, the Clarifications Request is dismissed *in limine*.

B. Reconsideration Request

9. The Chamber recalls that the mechanism of reconsideration is not a procedural remedy expressly provided for in the Court's statutory framework. However, as the

[7] ICC-02/17-238-US-Exp, under seal, *ex parte*, only available to the Prosecution ('Decision')
[8] ICC-02/17-239-US-Exp, under seal, *ex parte*, only available to the Prosecution ('Request'), paras 8, 46.
[9] *See*, *e.g.*, Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Prosecutors' Request for Clarification on the Non-Disclosure of Witnesses' Identities, 4 July 2018, ICC-01/12-01/18-66-tENG, para. 13; Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, Decision on the request for clarification by the OPCD, 3 October 2007, ICC-01/04-403, p. 3; Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions or Crimes From the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, ICC-02/04-01/05-60, para. 25.

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Chamber has previously found, chambers have the power to reconsider their own decisions, at the request of the parties or *proprio motu*,[10] albeit on an exceptional basis.[11] Reconsideration, therefore, is a remedy that shall be exercised only under strict and limited conditions and subject to the fulfilment of a twofold requirement: (i) the conditions upon which the decision was grounded have changed, and (ii) it is necessary to prevent an injustice.[12] New facts and arguments arising since the decision was rendered may be relevant to this assessment.[13] The Chamber notes that the Prosecution, while aware of the requirements for reconsideration,[14] does not attempt to satisfy the high threshold for reconsideration and merely expresses a disagreement with the reasoning and the conclusion of the Decision.

10. In light of the above, the Reconsideration Request is dismissed *in limine*.

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[10] *See*, *e.g.*, Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, Decision on the Defence request for reconsideration of the 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*' (ICC-02/04-01/05-532), 28 May 2025, ICC-02/04-01/05-608 ('*Kony* Reconsideration Decision'), para. 18; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Public redacted version of Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", 29 March 2022, ICC-02/05-01/20-650-Red, para. 10; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

[11] Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Decision on the 'Defence Request for Reconsideration of Decisions on Interim Release ICC-01/14-01/22-173-Conf and ICC-01/14-01/22-195-Conf' and the 'Defence Request for Leave to Reply to the "Prosecution's Response to Request for Reconsideration of Decisions on Interim Release"', 1 June 2023, ICC-01/14-01/22-218 ('*Mokom* Reconsideration Decision'), para. 15; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085, para. 4; Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.

[12] Pre-Trial Chamber II, *Situation in Ukraine*, Decision on Mongolia's request for reconsideration, 18 March 2025, ICC-01/22-123, para. 16; *Mokom* Reconsideration Decision, para. 15; Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Decision on Mr Mokom's requests for reconsideration and leave to appeal the 'Order on appointment of Mr Kaufman as Counsel for Mr Mokom', 14 April 2022, ICC-01/14-01/22-43, para. 19; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 11 March 2020, ICC-01/14-01/18-447, para. 16; Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters', 24 May 2019, ICC-01/14-01/18-206, para. 20.

[13] *See*, *e.g.*, Kony Reconsideration Decision, para. 19 and reference cited therein.

[14] Request, para. 10.

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C. Order to comply with Decision ICC-02/17-238-US-Exp

11. The Chamber recalls that on 15 July 2026 it issued the Decision directing the Prosecution to comply with regulation 45 of the Regulations without delay and to open a new investigation on the basis of the Referral, should it continue to consider that the requirements of article 53(1) of the Statute are met.[15] The Chamber notes that despite the clear instructions of the Chamber in the operative part of its Decision – which is now final[16] – the Prosecution has yet to implement it, invoking notably its independent mandate and discretion with regard to the conduct of the investigation.[17]

12. While the statutory framework grants the Prosecution with a degree of independence and discretion regarding the conduct of the investigation,[18] the Chamber considers that such prerogatives are not unfettered and are not shielded from judicial oversight. Article 42 of the Statute safeguards the independence of the Office of the Prosecutor in the exercise of the functions entrusted to it under the Statute. Such independence does not confer upon the Prosecution exclusive authority to determine the legal limits of the powers entrusted to the Office. Nor does it place the determination of those limits beyond the judicial function, where their resolution is necessary to a matter properly before the Chamber. The independence of the Office of the Prosecutor means that it shall not seek or act on instructions from any external source, it does not mean that it can act outside the judicial oversight of the Judiciary.

13. First, the Chamber observes that a holistic reading of the Statute does not point to the existence of an unfettered discretion of the Prosecution in the conduct of the investigation. To the contrary, the Statute contains a number of specific instances where the Pre-Trial Chamber exercises judicial oversight on the Prosecution's investigations and ensuing procedural developments, in order to safeguard the fairness and the legality of the proceedings. Notably, the Prosecution may not start an investigation on its own motion without the authorisation of the Pre-Trial Chamber pursuant to article 15 of the Statute. The Pre-Trial Chamber also exercises oversight over the Prosecution's decision not to initiate an investigation under article 53(3) of the Statute. The Pre-Trial Chamber

[15] Decision, paras 17-18.
[16] *See* page 1 above.
[17] Request, paras 2, 27, 41.
[18] *See*, *e.g.*, Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 44.

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decides on the existence of unique investigative opportunities and related appropriate measures to safeguard the efficiency and integrity of the proceedings, under article 56(1) and (2) of the Statute. The Pre-Trial Chamber may also initiate the preservation of evidence, pursuant to article 56(3) of the Statute, if the Prosecution has failed to take the necessary steps. Once the investigation has been initiated, it is for the Pre-Trial Chamber to issue arrest warrants or summons to appear under article 58 of the Statute, to oversee the disclosure of evidence and the confirmation proceedings and to decide on whether charges must be confirmed in accordance with article 61 of the Statute. The Pre-Trial Chamber may request the Prosecution to consider further investigation, pursuant to article 61(7)(c)(i) of the Statute.

14. In addition to instances where the statutory framework specifically provides for judicial oversight by the Pre-Trial Chamber, it is also well-settled jurisprudence that the chambers have inherent powers. These judicial powers 'while not explicitly conferred in the relevant constitutive instruments, are considered necessarily encompassed within ("inherent to") other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments'.[19] Where a matter properly before it requires a determination as to the legal limits governing the exercise of a power by an organ of the Court, it is inherent in the judicial function to determine whether the exercise of that power conforms to the applicable legal framework. This does not constitute a general or free-standing power of supervision over the activities of that organ, but follows from the Chamber's responsibility to determine the law applicable to matters falling within its competence.

15. Second, the Judiciary – Chambers – possesses exclusive jurisdictional function and are therefore competent to decide on the applicable law of the Court, as per article 39 of the Statute. As such, the Prosecution's discretionary powers are limited by and must be informed by the decisions of the Pre-Trial Chamber.[20] In the context of trial

[19] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba et al.*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red, para. 75.
[20] *See* Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", 15 November 2018, ICC-01/13-68 ('*Comoros* Judicial Review Decision'), para. 99.

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proceedings, the Appeals Chamber has held that when there is a conflict between the Prosecution's perception of his duties and the orders of a Chamber, the Chamber's orders must prevail. Importantly, '[t]he authority of the judges […] does not negate any Statutory duties of the Prosecutor',[21] as '[n]othing the Pre-Trial Chamber says in a judicial decision […] affects the Prosecutor's power'.[22] This, in the view of the Chamber, applies to the Pre-Trial Chamber's authority over the Prosecution within the context of its investigation.

16. The Prosecution, while acting independently from the other organs of the Court per Article 42 of the Statute, forms an integral part of the Court. The way in which it exercises its discretion impacts parties and participants, victims, affected communities, the legality of the Court's proceedings as well as the overall perception, understanding and legitimacy of the Court's functioning and achievements. In this context, the judicial oversight of chambers over investigative decisions constitutes an essential safeguard of accountability and transparency,[23] and ensures that subsequent stages of the proceedings are not negatively affected by errors or underestimations in the investigative and pre-trial stages. The determination by the Chamber of the legal parameters within which investigative powers may lawfully be exercised constitutes a supplementary element enabling the independence of the investigation as a whole to be guaranteed.[24]

17. Third, the oversight responsibility of the Pre-Trial Chamber is even more clear in the context of investigations triggered under article 15 of the Statute. As previously found by the Appeals Chamber in the context of article 15 investigations, 'the pre-trial

[21] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, para. 48.
[22] Appeals Chamber, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 4 November 2019, ICC-01/13-98-AnxI ('*Comoros* Separate and Partly Dissenting Opinion'), para. 69.
[23] *See* European Court of Human Rights (the 'ECtHR'), Fourth Section, *Case of Gürtekin and Others v. Cyprus*, Decision, 11 March 2014, Applications nos. 60441/13, 68206/13 and 68667/13, para. 28. *See also* ECtHR, Grand Chambre, *Case of Armani Da Silva v. United Kingdom*, Judgment, 30 March 2016, Application no. 5878/08, para. 277.
[24] *See* ECtHR, *Case of Mustafa Tunç and Fecire Tunç v. Turkey*, Grand Chamber, Judgment, 14 April 2015, Application no. 24014/05, para. 233.

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chamber has a role in respect of the Prosecutor's exercise of discretionary power'.[25] Indeed, the Pre-Trial Chamber has been created to, *inter alia*, exercise judicial oversight over the Prosecution's responsibilities during the early stages of the proceedings.[26]

18. All acts of the Prosecution, independently determined and implemented by that office, are nonetheless always subject to the oversight of the Judiciary of the Court where applicable. Accordingly, if, in the exercise of its oversight function, a Chamber issues an order or decision, the Prosecution is bound to comply. As noted by a Judge of the Appeals Chamber, 'the Prosecutor must comply with the Chambers' orders and direction in terms of judicial decisions issued within the mandate of the Rome Statute [and] cannot challenge, belittle, or gloss over the substance of final judicial decisions'.[27] Indeed, '[a]n order by the Court is inherently binding and imposes on parties a positive obligation recognised by international law'.[28] In cases of disagreement with the Chamber's reasoning and/or disposition, the Prosecution can generally avail itself of the statutory appeal remedy within the time limits provided in the legal framework.[29]

19. Turning to the matter at hand, the Chamber recalls that the investigation authorised pursuant to the Article 15 Authorisation started more than six years ago after more than 10 years of Preliminary Examination; that since the opening of the investigation, the Prosecution has submitted a limited number of applications under article 58; and that the circumstances of the situation have drastically changed since the Article 15 Authorisation, after the Taliban insurgents became the *de facto* authorities upon their takeover of Afghanistan in 2021. In addition, the Prosecution was seised of a subsequent Referral, which establishes without ambiguity the parameters it covers. This Referral also triggers obligations towards other organs of the Court[30] and relevant

[25] Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 32. *See also* Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138-Anx, para. 7(iii).
[26] *Comoros* Judicial Review Decision, para. 93.
[27] *Comoros* Separate and Partly Dissenting Opinion, para. 70.
[28] *Comoros* Separate and Partly Dissenting Opinion, para. 71.
[29] Appeals Chamber, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', 2 September 2019, ICC-01/13-98, para. 78 ('the Appeals Chamber observes that, where the Prosecutor disagrees with the pre-trial chamber's interpretation of the applicable law, she may avail herself of any available avenues to appeal the ruling').
[30] *See, e.g.,* regulation 45 of the Regulations.

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States pursuant to the Statute.[31] Since all of these factors have an impact on the proper functioning of the Court and could be invoked as procedural obstacles in potential future cases, the Chamber, by virtue of the Decision, exercised its oversight function and issued a clear instruction to the Prosecution.

20. As to the scope of the Chamber's oversight in the present situation, the Chamber recalls that it did not make any findings related to the jurisdiction of the Court in relation to the Situation in Afghanistan. It recalls the difference between the Court's jurisdiction 'generally understood to mean "[a] court's power to decide a case"'[32] and the mechanisms triggering the opening of an investigation. The Court's jurisdiction in the present situation *is not* questioned.

21. The mechanisms triggering the Court's exercise of jurisdiction are defined in article 13 of the Statute. They prescribe the procedure by which the Court is seised of a situation and may exercise its jurisdiction. This provision identifies three such mechanisms: (i) the referral of a situation by a State Party under article 14 of the Statute; (ii) the referral of a situation by the United Nations Security Council under article 13(b) of the Statute; and (iii) the initiation of an investigation by the Prosecutor *proprio motu* pursuant to article 15 of the Statute. The Chamber's intervention was prompted by the need to ensure the identification of the appropriate triggering mechanism. Further, the Chamber did not and is not reviewing the manner in which the Prosecution conducts the Afghanistan investigation, nor determining what conduct should be investigated.

22. In light of the above, the Chamber orders the Prosecution to comply by no later than 15 September 2026 with the Decision which, as noted above, by virtue of the elapsing of the time limits for any possible appeal, has become final.

D. Ancillary matters

23. The Chamber emphasises that the Warrants of Arrest were validly issued and remain valid. Therefore, following the opening of a new investigation, the Prosecution

[31] *See, e.g.,* article 18(1) of the Statute.
[32] *See* Appeals Chamber, *The Prosecutor v. Rodrigo Roa Duterte*, Judgment on the appeal of Mr Rodrigo Roa Duterte against Pre-Trial Chamber's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025, 22 April 2026, ICC-01/21-01/25-415, para. 78.

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will not need to submit new applications with regards to the Warrants of Arrest already issued.

24. Finally, the Chamber recalls of the lines of enquiry currently being pursued by the Prosecution,[33] and observes that the two first lines of investigations have resulted in the issuance of the Warrants of Arrest. Regarding other lines of investigation, the Chamber recalls 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 the Referral.

[33] *See* Request, para. 41.

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FOR THESE REASONS, THE CHAMBER HEREBY

DISMISSES the Clarifications Request;

DISMISSES the Reconsideration Request; and

ORDERS the Prosecution to comply with its Decision ICC-02/17-238-US-Exp by no later than 15 September 2026.

Done in English. A French translation will follow. The English version remains authoritative.

Judge Rosario Salvatore Aitala

Presiding

Judge Sergio Gerardo Ugalde Godínez

Judge Haykel Ben Mahfoudh

Dated this Thursday, 3 September 2026.

At The Hague, The Netherlands.

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