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Date: **25 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

with Under Seal and *EX PARTE*, Prosecution only, Annex A

Prosecution Appeal Brief against
"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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INTRODUCTION

1. The Prosecution hereby appeals the interconnected 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" of 15 July 2026 ("July Decision"),[1] and; (ii) "Order to comply with the 'Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan'" of 3 September 2026 ("September Order").[2]

2. Almost two years after the communication by six States Parties purporting to refer further allegations of crimes against women and girls committed by the Taliban in Afghanistan ("2024 Referral"),[3] and one year after it granted four Arrest Warrants on those facts within the context of the *existing* situation,[4] Pre-Trial Chamber II—summarily and *proprio motu*—held that the subject matter of the 2024 Referral warrants a separate investigation. As a result, and on the basis of its judicial oversight and inherent powers, it instructed the Prosecution: (i) to open a new investigation, should it consider that the requirements of article 53(1) continue to be met; and (ii) to notify the Presidency of the 2024 Referral by 15 September 2026.[5] In so doing, Pre-Trial Chamber II fundamentally erred.

3. In this Appeal, the Prosecution will demonstrate that the Chamber erred in finding that the conduct described in the 2024 Referral warrants a separate investigation (First Ground) and that, in any event, the Chamber was not statutorily authorised to issue the instructions it did (Second Ground). The latter error is inextricably linked to the first error because, without the Chamber's assumption that it was competent to issue the Decision, it could not have done so.

4. *First*, the Chamber erred in law, fact, procedure and/or abused any discretion with which it was vested in determining that the 2024 Referral warrants a separate investigation. The Chamber erred because it: (1) did not conduct the required analysis to determine whether a separate investigation was warranted; (2) misinterpreted the scope of the ongoing investigation in Afghanistan, as authorised by the Appeals Chamber; and (3) took into account (or gave too much weight to) irrelevant factors and disregarded (or gave too little weight to) relevant factors.

5. *Second,* the Chamber erred in law, procedure and/or abused any discretion with which it was vested in instructing the Prosecution: (i) to open a new investigation, should it consider

[1] ICC-02/17-238-US-Exp ("July Decision").
[2] ICC-02/17-241-US-Exp ("September Order"). Together, "the Decisions" or "Impugned Decisions".
[3] *See e.g.* 2024 Referral.
[4] *See* ICC-02/17-232-US-Exp; ICC-02/17-233-US-Exp; ICC-02/17-234-US-Exp; ICC-02/17-235-US-Exp.
[5] The Prosecution has notified the Presidency but requested that a Pre-Trial Chamber is not assigned until this Appeal is resolved.

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that the requirements in article 53(1) continue to be met; and (ii) to notify the Presidency of the 2024 Referral. In so doing, the Chamber acted beyond its powers (*ultra vires*). The Court's legal texts do not authorise the Chamber's intervention in this form and at this juncture. This is because: (1) the Chamber has no general statutory power of judicial supervision; (2) the Chamber has no inherent power of judicial supervision; (3) the Chamber's view of its "jurisdictional" function does not entitle it to disregard the Court's legal texts; and (4) the Chamber misunderstood regulation 45 of the Regulations of the Court. Finally, and alternatively, even if the Appeals Chamber did consider that the Chamber exercised any relevant statutory power, the Chamber nevertheless abused any relevant discretion with which it was vested by issuing the two Impugned Decisions in the form that it did, and at this juncture.

6. Had the Chamber not erred in either of these respects, it would not have issued the July Decision and/or the September Order. The effect of these Decisions, especially when implemented publicly (as they should be),[6] will be to reignite confusion as to the scope of investigation (as authorised,[7] and again confirmed[8] by the Appeals Chamber), and the Court's exercise of jurisdiction with respect to prior and future article 58 applications in the situation.[9] Accordingly, the Prosecution respectfully requests the Appeals Chamber to grant the Prosecution's two Grounds of Appeal, to reverse the July Decision and the September Order in their entirety, and to confirm the applicable law.[10]

CONFIDENTIALITY

7. This 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.[11]

SUBMISSIONS

8. The Prosecution presents the following two grounds of appeal. While they are inextricably linked, the Prosecution respectfully submits that error in respect of either of these

[6] *See also* ICC-02/17-239-US-Exp ("Request for Clarification and Reconsideration"), paras. 5-6.
[7] ICC-02/17-138 OA4 ("Article 15(4) Appeal Judgment"), para. 79.
[8] *See* ICC-02/17-218 OA5 ("Article 18(2) Appeal Judgment"), para. 53.
[9] *See* ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), paras. 82-83.
[10] On 23 September 2026, the Prosecution requested an extension of pages from 20 to 35 pages, to the extent that the Appeals Chamber considers that the 20 page limit applies to this Appeal, pointing to divergent practices in past cases: ICC-02/17-243-US-Exp. The Appeals Chamber has yet not ruled on the request. Considering the importance of the matters raised, the Prosecution files this Appeal at the length requested and respectfully requests that its page extension request be granted. However, should the Appeals Chamber reject this request, the Prosecution requests leave to refile the Appeal within the instructed page limit.
[11] *See further* ICC-02/17-242-US-Exp ("Notice of Appeal"), paras. 6-7 (deferring to the Appeals Chamber on whether these proceedings should be conducted under seal or publicly due to the importance of the matters raised).

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grounds of appeal would require reversal of the July Decision and the September Order in their entirety.

I. 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 (FIRST GROUND)

9. The Chamber erred in law and/or fact and/or procedure and/or abused any discretion with which it was vested in finding 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."[12] This determination led the Chamber to instruct the Prosecution to: (i) open a separate investigation on the basis of the Referral, should it continue to consider that the requirements of article 53(1) are met; and (ii) to "comply" with Regulation 45 by notifying the Presidency of the Referral.[13]

10. In so doing, the Chamber committed at least three errors materially affecting the July Decision and the September Order: (1) the Chamber did not conduct the required analysis to determine whether a new investigation was warranted; (2) it misinterpreted the scope of the ongoing investigation in the *Situation in Afghanistan*, as authorised by the Appeals Chamber; and (3) it considered (or gave too much weight to) irrelevant factors and disregarded (or gave too little weight to) relevant factors.

11. In order to determine whether certain allegations (such as those arising from a new referral) warrant a separate investigation, it must first be determined whether these allegations fall within the parameters of a pre-existing situation under investigation or are sufficiently linked to them.[14] Logically, there is no need to open a new investigation if the alleged conduct can all potentially be addressed within an ongoing investigation. This well established and fact-sensitive assessment—which is essentially the same as the assessment whether a concrete case falls within the scope of a situation—requires: (i) *first*, identifying the parameters of the pre-existing investigation; and (ii) *second*, determining whether the alleged conduct falls within these parameters, or is otherwise sufficiently linked to them considering all the relevant circumstances. In this regard:

[12] July Decision, para. 16. *See also* para. 13.
[13] July Decision, p. 8.
[14] *See also below* paras. 76-87.

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- If the answer is *positive* (that is, the 'new' allegations fall within the parameters of a pre-existing investigation or are sufficiently linked to them), there is no need to open a new investigation because the allegations can be investigated within the *existing* investigation.
- If the answer is *negative* (that is, the allegations do not fall within the parameters nor are sufficiently linked to them), the Prosecution must then determine whether a separate (and new) investigation is warranted by assessing the requirements of article 53(1) of the Statute. If they are met and there has been a State Party or Security Council referral, the Prosecution will open an investigation into a new situation.

12. Pre-Trial Chamber II erred because it did not conduct any such analysis. The Chamber did not assess whether the conduct identified in the 2024 Referral is encompassed within the parameters of the pre-existing *Situation in the Islamic Republic of Afghanistan* authorised by the Appeals Chamber on 5 March 2020, or is otherwise sufficiently linked to those parameters. Instead, and as demonstrated below, the Chamber considered the features of the alleged conduct in isolation, and also took into account irrelevant and unclear factors. It disregarded relevant considerations, and disregarded or misrepresented the scope of the existing investigation in the present situation. Notably:

- In the July Decision, the Chamber relied on (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.[15] It considered that the allegations underpinning the 2024 Referral, 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".[16]
- In the September Order, the Chamber again referred to its view of the change of circumstances in Afghanistan manifested in the Taliban assuming *de facto* authority in 2021.[17] It also noted the time elapsed since the opening of the preliminary examination and the authorisation of the present investigation.[18] It observed that "all these factors have an

[15] July Decision, para. 10.
[16] July Decision, para. 14.
[17] September Order, para. 19.
[18] September Order, para. 19.

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impact on the proper functioning of the Court and could therefore be invoked as procedural obstacles in potential future cases".[19]

13. Furthermore, the Chamber considered it "*unnecessary to determine* the precise limits of the authorisation for the purpose of the present decision" since, "having regard to the specific conduct described in the Referral, it would be *more appropriately* addressed through a separate investigation".[20] Accordingly, it determined 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".[21] The Chamber emphasised that "[t]his conclusion is reached irrespective of whether aspects of that conduct could otherwise be regarded as falling within the factual framework of the investigation authorised under article 15 of the Statute".[22] The Chamber further noted that "the terms of the [2024] Referral"—in particular, the Referring States' express view that the allegations fell *within* the parameters of the ongoing investigation—do not alter its "conclusion".[23]

14. Had the Chamber conducted the required analysis and considered the correct parameters of the authorised investigation as well as relevant factors, it would have concluded that the allegations described in the 2024 Referral—regarding alleged crimes committed against women and girls by the *de facto* Taliban regime—fall within the authorised parameters of the existing situation under investigation or are sufficiently linked to them.

15. The Prosecution will address the Chamber's three sub-errors in turn.

I.A. The Chamber erred in failing to consider whether the allegations described in the 2024 Referral fall within the parameters of the pre-existing investigation or are sufficiently linked to them

16. First, the Chamber erred by failing to assess whether the conduct alleged in the 2024 Referral could be investigated within the ongoing investigation in the *Situation in the Islamic Republic of Afghanistan*, either because it falls within the parameters of the situation or is otherwise sufficiently linked to them. Instead, the Chamber concluded that a separate investigation was warranted on the basis of the facts described in the Referral, considered in isolation, as well as by taking account of irrelevant and unclear considerations. This was

[19] September Order, para. 19.
[20] July Decision, para. 13 (emphasis added).
[21] July Decision, para. 16 (emphasis added). *See also* para. 13.
[22] July Decision, para. 16.
[23] July Decision, para. 15.

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incorrect and/or unreasonable. A separate investigation was (and is) not required because the allegations involving crimes against women and girls committed by the Taliban in Afghanistan fall squarely within the parameters of the ongoing authorised investigation. The Chamber found as much when issuing the arrest warrants in the situation.

17. A situation is defined by objective parameters which may be geographic, temporal, material, and/or personal.[24] None of these parameters is a *sine qua non.* Rather, the parameters "may vary depending on the circumstances of each specific situation".[25] 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.[26] This is the consistent practice of the Court,[27] and does not entail indefinite jurisdiction over a situation.[28] Rather, it calls for a careful appraisal of the relevant circumstances of a particular investigation.[29]

18. 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 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".[30] The Appeals Chamber authorised the investigation within the parameters requested by the Prosecution in its Article 15 Application of 20 November 2017,[31] which are also reproduced in the subsequent article 18 notification.[32]

19. In its Article 15(3) Request, the Prosecution presented information regarding the alleged large scale commission of multiple crimes against humanity and war crimes by various armed

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[24] *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"), paras. 58, 127.
[25] 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").
[26] Article 15(4) Appeal Judgment, paras. 1, 57-64; Article 18(2) Appeal Judgment, paras. 58-60.
[27] *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. 35-40; 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(4) Appeal Judgment, paras. 57-64 (rejecting a "closely linked" test).
[28] *Contra* July Decision, para. 13.
[29] *See Palestine* Art. 18 Appeal Judgment, Conc. Op. Judge Lordkipanidze, paras. 3-5.
[30] *See* Article 15(4) Appeal Judgment, para. 79; Article 18(2) Appeal Judgment, paras. 58-59.
[31] ICC-02/17-7-Red ("Article 15(3) Request"), para. 52.
[32] *See* Annex A.

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groups and actors involved in a long-standing conflict in Afghanistan, which began prior to the entry into force of the Rome Statute. The Prosecution described patterns of crimes by the Taliban movement in the context of an ongoing armed conflict against the Afghan Government and the international forces supporting it, as well as pursuant to an organisational policy against the Afghan civilian population. In that context, the Prosecution described how members of the Taliban and affiliated armed groups allegedly committed crimes against humanity and war crimes, as part of a widespread and systematic campaign of intimidation, persecution (including on gender and political grounds) and violent acts (such as killings and abductions) against civilians perceived to support the Afghan Government and/or foreign entities or to oppose Taliban rule and ideology.[33] The scope of the authorised investigation should be assessed with regard to the temporal, geographical, personal and material parameters described in the Article 15 Authorisation, which must be read together with the Prosecution's Request.[34]

20. Accordingly, allegations of persecution against women and girls by the Taliban after 15 August 2021 fall squarely within the parameters of the ongoing investigation. The conduct described in the 2024 Referral (and 2025 Arrest Warrant Applications) relates to: (i) the same territory (Afghanistan); (ii) the same type of criminality (persecution and other connected crimes against humanity against persons opposing, or being perceived to oppose, the Taliban rule and ideology, perpetrated pursuant to the Taliban policy), and; (iii) the same perpetrators (Taliban and affiliated groups) and victims (Afghan civilian population, specifically including women and girls).[35] The alleged crimes also display a continuity in pattern. This is despite the

[33] Article 15(3) Request, paras. 2, 4, 53-63, 72-160. The Prosecution further identified a reasonable basis to believe that members of the Afghan National Security Forces ("ANSF") engaged in patterns of violence against conflict-related detainees in Afghan detention facilities, and that members of United States of America ("US") armed forces and members of the Central Intelligence Agency ("CIA") engaged in acts of violence against conflict-related detainees in Afghanistan and other locations, principally in 2003-2004: paras. 4, 64-71, 161-252. *But see further* Request for Clarification and Reconsideration, para. 41 (outlining the three principal lines of inquiry currently pursued in the investigation, "consistent with the investigative priorities which were publicly stated by former Prosecutor Khan", citing ICC OTP, Statement of the Prosecutor 27 September 2021).
[34] *See also* Article 15(3) Request, para. 376, *see also* paras. 2, 38 (referring to the ongoing nature of related criminal activity); *see also* ICC-02/17-74 OA OA2 OA3 OA4 ("Prosecution Art. 15 Appeal"), para. 73.
[35] *Compare* Article 15(3) Request, paras. 87 ("both groups [Taliban and the Haqqani Network] [pursue] a shared policy to attack the civilian population in order to seize power from the Government of Afghanistan by lethal force. To reach this goal, the Taliban and the Haqqani Network appear to have deliberately targeted civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule, including women and girls who worked, took part in public affairs, and attended school past the age of puberty") and paras. 95-107 (describing deliberate killing of civilians perceived to support the Afghan Government and/or civilians perceived to support foreign entities, or civilians perceived to oppose Taliban rule and ideology by The Taliban and affiliated armed groups), 108-111 (describing a pattern of abductions), 112-121 (describing persecution against identifiable groups of civilians on political grounds and on gender grounds by members of the Taliban and affiliated groups), *with* ICC-02/17-224-Red ("*Akhundzada* Arrest Warrant Application (Redacted)"), paras. 31-127 (describing persecution against girls, women, persons whom the Taliban perceived as not conforming with their ideological expectations of gender identity or expression, and persons

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shift in circumstances as a result of the Taliban returning to power on 15 August 2021 (thus committing the crimes in the exercise of *de facto* authority, rather than as an insurgent).[36]

21. The Pre-Trial Chamber II did not consider any of this, or conduct any analysis at all of the relationship between the 2024 Referral and the scope of the present situation under investigation. To the contrary, it expressly stated that this was *not* required. Thus, it did not assess whether conduct against women and girls by the Taliban fell within (or is sufficiently linked to) the parameters of the *Afghanistan* situation. Instead, the Chamber considered: (i) the allegations described in the 2024 Referral in isolation, and; (ii) irrelevant and unclear considerations which, according to the Chamber, warranted a separate investigation.

22. In so doing, the Chamber erred. It defies legal logic, the Court's established practice,[37] the effective use of the Court's limited resources, and common sense to open a new investigation without first determining whether it is really needed. It is certainly not needed when the allegations can be investigated within a pre-existing situation. Yet the Chamber's approach foregoes this assessment, and implies that *any* request by State Parties to investigate specific events or perpetrators—labelled as a "referral"—will automatically lead to a new preliminary examination and (potentially) a new investigation, irrespective of the circumstances. This approach would result in multiple investigations into specific facts in the same territory involving overlapping parameters, as the Chamber conceded.[38] This cannot be correct. It would be contrary to the Prosecution's duties under article 54(1)—in particular its truth-seeking function—which the Appeals Chamber has held necessarily affects the scope of any investigation. To fulfil those duties, and to obtain a full picture of the relevant facts (including their potential legal characterisation as crimes within the Court's jurisdiction, and the responsibility of the various actors who may be involved), the Prosecution must carry out an investigation into the situation *as a whole*.[39]

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whom the Taliban perceived as allies of girls and women), 133-135 (describing the Taliban's state or organisational policy). *See further* ICC-02/17-232-US-Exp, paras. 14 (describing the "multiple acts referred to in article 7(1)(a) of the Statute [] carried out by Taliban members against the civilian population of Afghanistan as a result of the implementation of the Taliban's governmental policy informed by its ideology"), 24-39 (describing acts of persecution on gender and political grounds, as well as connected crimes of imprisonment, torture, rape and other forms of sexual violence, and other inhumane acts).

[36] *See above* fn. 35. *See similarly* *Palestine* Article 18 Appeal Judgment, paras. 132.

[37] *See above* fn. 27.

[38] July Decision, para. 16.

[39] Article 15(4) Appeal Judgment, para. 60. *See also* ICC-01/21-12 ("*Philippines* Article 15(4) Decision"), para. 117.

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23. Conversely, restricting the investigation to the factual information alleged by referring States would erroneously inhibit the Prosecutor's truth-seeking function.[40] It also disregards 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".[41] This approach would lead to confusion about the scope of the Court's activities. It would lead to an unduly burdensome and unwieldy approach to the conduct of investigations—which the Appeals Chamber has already cautioned the Pre-Trial Chamber against in this situation.[42]

24. In sum, had the Chamber conducted the required above-described analysis and, as demonstrated below, considered (i) the correct parameters of the pre-existing investigation, and (ii) relevant considerations (including after hearing from the Prosecution), the Chamber would have found that a separate investigation was *not* warranted. This is because the allegations of crimes against women and girls by the Taliban fall within the parameters of the pre-existing investigation in Afghanistan or are sufficiently linked to them.

I.B. The Chamber erred in assessing the parameters of the authorised investigation

25. Second, the Chamber erred in misinterpreting or disregarding the parameters of the pre-existing *Situation in Afghanistan*, as authorised by the Appeals Chamber. Although the Chamber stated at one point that "[t]he authorised investigation remains defined by the factual parameters established by the Amended Article 15 Decision", [43] the significance of this statement is unclear given the apparent inconsistency with other parts of its reasoning. Notably, the Chamber stated variously: that the Prosecution's interpretation of its investigation in this situation "raises questions as to the proper limits of an investigation",[44] that it was "unnecessary to determine the precise limits of the authorisation for the purposes of the present decision",[45] and that "aspects of that conduct [in the 2024 Referral] could otherwise be regarded as falling within the factual framework of the investigation authorised under article 15 of the Statute".[46] Notwithstanding this ambiguity, it is apparent that the Chamber erred in misrepresenting or disregarding the scope of the investigation, as authorised by the Appeals Chamber, and

[40] *Cf.* Article 15(4) Appeal Judgment, para. 61.
[41] *Palestine* Article 18 Appeal Judgment, para. 82; *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 25. *See also Mbarushimana* Jurisdiction Decision, para. 27.
[42] *See* Article 15(4) Appeal Judgment, para. 63.
[43] July Decision, para. 13.
[44] July Decision, para. 13.
[45] July Decision, para. 13.
[46] July Decision, para. 16.

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seemingly requiring a nexus between *any* conduct on the territory of Afghanistan and the armed conflict described in the Article 15 Authorisation.[47]

I.B.1. The Chamber misinterpreted or disregarded the scope of investigation, as authorised by the Appeals Chamber

26. Although the Pre-Trial Chamber did not elaborate on its understanding of the "precise limits of the authorisation", it is clear that the Chamber misinterpreted or disregarded the parameters previously defined by the Appeals Chamber and expressly affirmed as *res judicata*. It therefore erred. This is demonstrated by the Chamber's requirement of a nexus between alleged crimes occurring on the territory of Afghanistan and the armed conflict described in the Article 15 Authorisation.

27. In its 2025 Arrest Warrant Applications, the Prosecution had submitted that the crime of persecution described therein—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, namely "[…] an investigation 'in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003 […]'".[48] It submitted that the jurisdictional requirement for "a nexus to the armed conflict in Afghanistan" relates to crimes which are "committed on the territory of *other States Parties in the period since 1 July 2002*".[49] Accordingly, since the Applications concerned conduct in Afghanistan, such a nexus to armed conflict did not need to be established. The Prosecution further argued that, in any event and on the basis of the facts,[50] the alleged persecution *does* have a nexus (connection or link) with the armed conflict described in the Application,[51] since the requisite link is factual and does not necessarily require the alleged crime to have occurred while the conflict was ongoing.[52]

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[47] July Decision, para. 13.
[48] *Akhundzada* Arrest Warrant Application (Redacted), para. 160.
[49] *Akhundzada* Arrest Warrant Application (Redacted), para. 161.
[50] *See below* paras. 26-31.
[51] This is different than the general requirement for the purpose of article 8 of the Statute, which depends on a factual basis for the application of international humanitarian law. By contrast, there is no such requirement for the crimes under article 7 alleged in this Application. *See also* Article 15(4) Appeal Judgment, para. 61 (recalling the "Prosecutor's truth-seeking function").
[52] *Akhundzada* Arrest Warrant Application (Redacted), para. 161. The Prosecution has explained that it continues to monitor the situation in Afghanistan, without reaching a final view as to the continuation of the conflict. It notes that the Taliban presently controls the vast majority of the territory of Afghanistan, that members of the former *de jure* government of Afghanistan have fled, and former international partners have withdrawn. But fighting continued after 15 August 2021 in some regions, including by the National Resistance Front in the Panjshir valley, and in the context of sporadic attacks against the Taliban in locations such as Kabul, Kandahar, and Helmand, attributed to the Afghanistan Freedom Front. The Prosecution recalls that interruptions or fluctuations in the intensity of the hostilities, or changes in the configuration of the parties involved, do not necessarily imply the termination of a conflict. Rather, what is required is a "peaceful settlement", such as the complete victory of a

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28. Even though the Chamber seemed to accept the Prosecution's jurisdictional arguments when granting the Arrest Warrants in 2025,[53] the Pre-Trial Chamber *disagreed* with the Prosecution's position in the July Decision. This Decision was issued without prior notice or having given the Prosecution the opportunity to make submissions.

29. Thus, the Chamber noted that "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".[54] It observed that "[i]f the nexus to the armed conflict applied only to conduct outside Afghanistan, as the Prosecution suggests, the authorised investigation within the country would effectively be defined merely by the territory of Afghanistan and the starting date in 2003".[55] Further, it noted that "[a]lthough the authorisation did not identify an end date or limit the investigation to specific incidents, suspects or crime categories, the scope of the authorised investigation must be assessed in the light of the factual assessment and considerations included in said authorisation".[56] Even though the Chamber considered it "unnecessary to determine the precise limits of that authorisation for the purposes of the present decision",[57] it seemed to treat the nexus to the armed conflict as a defining parameter of the situation.[58] As a result, it concluded that the conduct described in the 2024 Referral warranted a separate investigation.[59]

30. This interpretation ignores the plain language of the jurisdictional parameters of the situation authorised by the Appeals Chamber, which are disjunctive. It also fails to consider that there is no legal requirement to establish a nexus between a crime against humanity and an armed conflict. Significantly, this interpretation would also be inconsistent with the Chamber's

party to the conflict, or a "lasting absence of armed confrontations" between the parties "without real risk of resumption". *See e.g.* ICRC *Challenges* Report, pp. 10-11; ICC-02/04-01/15-1762-Red ("*Ongwen* Trial Judgment"), para. 2684; C. Dwyer and T. McCormack, 'Conflict characterisation,' in R. Livoja and T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016), p. 56; ICTY, *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; ICC-01/04-01/06-2842 ("*Lubanga* Trial Judgment"), para. 533; ICRC, *Commentary on GCI* (2016), art. 3, paras. 489, 491, 494; S. Sivakumaran, *The Law of Non-International Armed Conflict*, 1st Ed. (OUP: 2012), pp. 253-254.

[53] The Chamber held that "based on the material before it, including in particular information contained in the [2024] 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" (emphasis added): *see* ICC-02/17-232-US-Exp, para. 9; 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: September Order, para. 23.

[54] July Decision, para. 13.

[55] July Decision, para. 13.

[56] July Decision, para. 13.

[57] July Decision, para. 13.

[58] July Decision, para. 14 (observing that "t[he allegations in the [2024] Referral therefore 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", emphasis added).

[59] July Decision, paras. 13-14, 16.

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previous finding that the Arrest Warrants (related to the same conduct) fell within the authorised investigation.[60] When asked by the Prosecution to clarify or reconsider this apparent contradiction,[61] the Chamber declined to do so in its September Order. Instead, it stated that "the Warrants of Arrest [related to the conduct described in the Referral] were validly issued and remain valid".[62] Thus, the Chamber affirmed that the Arrest Warrants were validly issued in the context of the authorised situation under investigation—but nonetheless also maintained the view that the same conduct described in the 2024 Referral warrants a separate investigation. This unexplained but expressly affirmed contradiction cannot be correct.

31. In sum, the Chamber erred in requiring a nexus between alleged crimes occurring on the territory of Afghanistan and the armed conflict described in the Article 15 Authorisation. In so doing, the Chamber altered the parameters of the situation in disregard of the Article 15 Appeal Judgment which, as demonstrated below, does not require such nexus for conduct on the territory of Afghanistan.

I.B.2. The nexus requirement only applies to conduct outside Afghanistan

32. The jurisdictional requirement in the authorised situation for a nexus to the armed conflict applies only to conduct outside Afghanistan. This can be established from: (1) the Prosecution's Article 15 Request, and; (2) the reasoning of the Appeals Chamber in the Article 15 Appeal Judgment, which authorised the investigation according to the parameters requested by the Prosecution.

33. In its Article 15 Application, the Prosecution had submitted that conduct on the territory of State Parties *other than Afghanistan* fell within the Court's jurisdiction because "such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan".[63] In the Article 15 Decision, the Pre-Trial Chamber disagreed and held that "the relevant nexus between the conflict and the alleged criminal conducts [sic] required by the Statute is only satisfied when victims were captured within the borders of Afghanistan".[64] The Appeals Chamber reversed this finding.[65] It defined the scope of the authorised investigation

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[60] *See above* fn. 53.
[61] Request for Clarification and Reconsideration, paras. 15-24.
[62] September Order, para. 23.
[63] Article 15(3) Request, paras. 49, 202.
[64] ICC-02/17-33 ("Article 15(4) Decision"), para. 53. *See also* paras. 54-56.
[65] Article 15(4) Appeal Judgment, para. 76. ("it is incorrect to assume that, merely because the alleged capture of the victim did not take place in Afghanistan and the alleged criminal act also occurred outside Afghanistan, the conduct cannot possibly have taken place in the context of, and have been associated with, the armed conflict of that State. Rather, a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus").

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as requested by the Prosecution.[66] This confirms that (for jurisdictional purposes) the nexus to the armed conflict relates only to criminal conduct committed on the territory of States Parties *outside* Afghanistan, as submitted by the Prosecution.

34. In any event, even if such a nexus is required for jurisdictional purposes, this is a question of fact rather than of law. In this regard, the conduct described in the 2024 Referral (and the Arrest Warrants) is sufficiently linked to the scope of the authorised investigation, as demonstrated below.

I.B.3. The allegations described in the 2024 Referral fall within the parameters of the authorised investigation or are sufficiently linked to them

35. As explained above, the facts described in the 2024 Referral (and the Arrest Warrants) involving crimes against humanity against women and girls allegedly committed by the Taliban fall within the parameters of the authorised investigation. They relate to the same criminality, the same perpetrators and the same victims, and display a continuity in the Taliban's relevant pattern of conduct. Notably, the Taliban attacked civilians (including women and girls) pursuant to their ideology, and this commenced long before their assumption of *de facto* authority on 15 August 2021 (and even the commencement of the armed conflict in 2002/2003). As such, the existence of a nexus with the prior (or ongoing) armed conflict described in the Article 15 Request is not a defining parameter of the situation. Consequently, it need not be established for the Court's exercise of jurisdiction over crimes against humanity committed in Afghanistan.

36. Even if the Appeals Chamber were to consider that a nexus to the armed conflict were required (for jurisdictional purposes), the Prosecution submits that there is a sufficient *factual* nexus (or connection or link) between the conduct described in the Arrest Warrants (and 2024 Referral) and the armed conflict. In other words, the persecution by the Taliban of women and girls is sufficiently linked to the armed conflict described in the Article 15 Authorisation. As explained above, for the purpose of the Court's jurisdiction in the context of article 15, the requisite link does not necessarily require the alleged crime to have occurred while the conflict was ongoing. The link is met because, as noted: (i) the suspects were (and are) senior members of the Taliban, which was a party to the conflict;[67] (ii) the Taliban's attack on the civilian population commenced during the conflict, pursuant to the Taliban ideology,[68] and (iii) the

[66] Article 15(4) Appeal Judgment, para. 79.
[67] *Akhundzada* Arrest Warrant Application (Redacted), para. 161. *See also* Article 15(3) Request, paras. 115-121.
[68] *Akhundzada* Arrest Warrant Application (Redacted), para. 161. *See also* Article 15(4) Decision, paras. 18-20.

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conflict further enabled and shaped the manner in which the criminal acts were or are being committed.[69] Indeed, the Taliban's stated purpose of imposing their ideology on the population of Afghanistan—now being implemented as *de facto* authority—was one of the main reasons for pursuing the insurgency against the authorities of the Republic.

37. In sum, had the Chamber conducted the required analysis, and considered the correct parameters of the authorised investigation, as demonstrated above, and assessed relevant factors as demonstrated below, it would have found that the 2024 Referral allegations fall within the parameters of the authorised investigation or are sufficiently linked to them. As a result, it would have found that a separate investigation is not warranted.

I.C. The Chamber erred in considering (or giving too much weight to) irrelevant and unclear factors and in failing to consider (or giving too little weight to) relevant factors

38. Third, the Chamber erred by considering (or giving too much weight to) irrelevant and unclear factors and by failing to consider (or giving too little weight to) relevant factors, including the terms of the Referral and the Prosecution's views. The Prosecution will address these two aspects in turn.

I.C.1. The Chamber relied on irrelevant and unclear factors

39. The Chamber concluded that a separate investigation was warranted by relying on irrelevant and unclear considerations such as: (i) the "materially different factual and institutional context" and the "distinct alleged modes of commission" of the crimes;[70] (ii) the Chamber's view of the number of article 58 applications filed by the Prosecution to date;[71] (iii) the Chamber's abstract view of "potential future challenges" or "procedural obstacles in potential future cases";[72] (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",[73] 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.[74]

[69] *Akhundzada* Arrest Warrant Application (Redacted), para. 161.
[70] July Decision, para. 14.
[71] September Order, para. 19.
[72] July Decision, para. 10; September Order, para. 19.
[73] July Decision, para. 16; September Order, para. 19.
[74] July Decision, fn. 16.

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40. These factors are irrelevant and unclear —and in any event could not properly have been relied upon by the Chamber to determine whether the allegations described in the 2024 Referral fall within the parameters of the existing situation or are otherwise sufficiently linked to them:

- *First*, merely because the Taliban are now committing the same crimes against the same persons as a *de facto* authority (rather than as an insurgent group) does not require the opening of a separate (and new) investigation. Considering the complexity of the situations before the Court, governments and/or political circumstances may change—but the alleged conduct triggering the Court's exercise of jurisdiction (and informing the objective parameters defining the situation) still remains. Notably, in this case, the Taliban continued (and continue) to resort to violence against the same civilian population, including by severely depriving numerous victims of their fundamental rights on gender and political grounds, as well as punishing those perceived as not conforming with the Taliban's rules and ideological expectations, including through physical violence.[75]

- *Second*, that the Prosecution has requested four Arrest Warrants in the situation is not a valid consideration to determine that a situation must be closed or that another is warranted. As noted, a Chamber must conduct a fact-sensitive analysis to determine whether a separate (new) investigation is warranted with regard to objective parameters, which are unrelated to the pace of the Prosecution's investigation and prosecutions.

- *Third*, the Chamber's erroneous view that the situation may be closed because "no proceedings are presently pending in relation to the conduct covered by that authorisation"[76] is as such irrelevant to determine whether a separate investigation is warranted. In any event, the Chamber was also incorrect in fact because there are pending proceedings in the Situation (the four Arrest Warrants). Moreover, as the Prosecution has informed the Chamber, it continues to pursue separate active lines of inquiry and therefore the Chamber should not presently anticipate any notification pursuant to regulation 66*ter*.[77]

- *Fourth*, the Chamber's view of "potential future challenges" or "procedural obstacles in potential future cases" is speculative, unfounded and irrelevant to determine whether a new investigation is warranted. In issuing the Warrants of Arrest, the Chamber confirmed that the conduct fell within the parameters of the authorised situation. In fact, it is the Impugned

[75] *Contra* July Decision, para. 14.
[76] July Decision, fn. 16.
[77] Request for Clarification and Reconsideration, para. 41.

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Decisions themselves that have now created confusion as to the jurisdictional basis of prior and future cases in this Situation, and—unless corrected on appeal—make "potential future challenges" much more likely than before they were issued.

- *Finally*, 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" is also unclear and unfounded, and again irrelevant to the fact-specific analysis to determine whether a separate investigation is warranted. Nor does the Chamber explain how "the proper administration of justice and the orderly management of the Court's proceedings" would be advanced by the opening of a new situation. The Court's jurisprudence has defined a clear process based on objective parameters to assess whether a separate situation is warranted.[78] This provides transparency and ensures consistency and equal treatment across situations. Instead, the Chamber erroneously chose to rely on its own unexplained perception of "administration" and "orderly management".

I.C.2. The Chamber omitted to consider relevant factors

41. Finally, the Chamber erred by giving no weight to the terms of the 2024 Referral and by not requesting nor considering the Prosecution's views[79]—as the entity with the exclusive competence to carry out the investigation[80] and preliminary examination.[81]

42. *First*, the Referring States provided their understanding of the scope of the Afghanistan situation.[82] They made abundantly clear that alleged conduct against women and girls by the Taliban fell within those parameters,[83] and requested the Prosecution to advance its investigation in this respect.[84] Thus, despite its framing as a "referral", the 2024 Referral solely pertains to the Prosecution's ongoing investigation in Afghanistan and urges the Prosecution

[78] *See e.g.* *Palestine* Article 18 Appeal Judgment, paras. 58, 74, 76, 82, 127, 134-135; ICC-02/18-89 OA ("*Venezuela* Article 18(2) Appeal Judgment"), paras. 114, 218, 227-228, 230; *Philippines* Article 18 Appeal Judgment, paras. 106-108; Article 18(2) Appeal Judgment, paras. 57-60; *Abd-Al-Rahman* Jurisdiction Appeal Judgment, paras. 25-27; Article 15(4) Appeal Judgment, paras. 57-64; *Georgia* Article 15(4) Decision, paras. 62-64; *Mudacumura* Article 58 Decision, para. 14; *Mbarushimana* Jurisdiction Decision, paras. 21, 41; *Mbarushimana* Article 58 Decision, para. 6.
[79] 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 ("*Jelisić* Appeal Judgment"), para. 27; *cf.* ICC-01/14-01/18-678-Red OA ("*Yekatom & Ngaïssona* Admissibility Judgment"), para. 46.
[80] 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(4) Appeal Judgment, para. 63.
[81] *Duterte* Jurisdiction Appeal Judgment, para. 125.
[82] 2024 Referral, p. 1.
[83] 2024 Referral, pp. 1, 4.
[84] 2024 Referral, p. 4.

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to advance one line of inquiry within it.[85] This is consistent with the Prosecution's objective assessment that persecutory conduct against women and girls by the Taliban falls within the parameters of its ongoing investigation or is sufficiently linked to it.

43. Accordingly, on receipt of the "referral", the (then) Prosecutor publicly and transparently confirmed in a Statement that the Office's active investigation in the situation already encompassed the alleged crimes described in the 2024 Referral. He reported that very considerable progress had already been made in the investigation of allegations of gender persecution in that context.[86] Neither the Presidency nor Pre-Trial Chamber II raised any concern in this respect, notwithstanding the public nature of the relevant events. Nor did Pre-Trial Chamber II address the matter when seised with the Arrest Warrant Applications in 2025.

44. In the Impugned Decisions, and unlike Chambers in other situations,[87] Pre-Trial Chamber II did not consider the terms of the 2024 Referral. It held that "the terms of the Referral [do not] alter [the] conclusion" that a separate investigation is warranted.[88] It noted that "[w]hile the manner in which the referring States framed the Referral is relevant for determining the scope of the situation referred pursuant to articles 13(a) and 14 of the Statute, it can neither affect the scope of an investigation previously authorised by the Court under article 15 of the Statute nor the manner in which situations under investigation are administered by the Court".[89]

45. The Chamber's remark not only underscores its erroneous approach to the analysis required (which it failed to conduct), but also to the parameters of the investigation twice confirmed by the Appeals Chamber (which it disregarded). While the Court must conduct its own independent analysis by assessing the features of the referred conduct and the parameters of the ongoing investigation, the terms of the referring document may be valuable in this analysis. In this case, the 2024 Referral was certainly helpful, and corroborated the Prosecution's independent assessment. In this respect, the Referring States: (i) relied on the

[85] In this respect the document could be more appropriately labelled as a "communication" to the Prosecution regarding factual allegations: *compare e.g.* ICC OTP, *The determination of the Office of the Prosecutor on the communication received in relation to Egypt*, 8 May 2014 (determining that a communication allegedly submitted as a declaration under article 12(3) was invalid, and therefore "should rather be treated as a communication pursuant to article 15 of the Statute"). *See also* ICC-RoC46(3)-01/14-3 ("*Morsi* Review Decision") (dismissing a request for review).
[86] 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.
[87] *See e.g. Palestine* Article 18 Appeal Judgment, paras. 102-105. *See also* ICC-01/11-01/25-142 ("*El Hishri* Jurisdiction Decision"), paras. 29-35 (considering the factual basis underlying the UNSC decision to refer the Situation in Libya to the Court, as well as the practice of the UNSC and other UN organs subsequent to the adoption of the Resolution 1970).
[88] July Decision, para. 15.
[89] July Decision, para. 15.

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Article 15 Authorisation as the basis for the exercise of the Court's jurisdiction and defined the parameters of the situation by reference to the Article 15 Authorisation;[90] (ii) considered that the allegations of crimes against women and girls by the Taliban regime since 15 August 2021 fall within the parameters of the ongoing investigation;[91] and (iii) made clear that the Referral was submitted with a view to urge the Prosecutor to advance the investigation in respect of the alleged crimes by the Taliban after 15 August 2021 within the pre-existing situation.[92]

46. The above considerations would have confirmed the Chamber's independent analysis—had the Chamber conducted it—that the facts alleged in the Referral fall within the parameters of the authorised investigation, or are sufficiently linked to them.

47. *Second,* the Chamber should have requested the views of the Prosecution prior to issuing the July Decision and September Order. This would not only have assisted the Chamber, but was necessary in fairness to the Prosecution.[93] As the entity investigating the Afghanistan situation and receiving the 2024 Referral, the Prosecution was well placed to meaningfully assist the Chamber in making the correct determination. Further, considering that the Prosecution has the prerogative to conduct preliminary examinations and investigations under the Statute, its rights have been fundamentally affected by the Chamber's instructions. Failure to hear from the Prosecution in these circumstances was inconsistent with the fair conduct of proceedings.

48. Further, the Chamber should have entertained the Prosecution's request for clarification. In the September Order, the Chamber dismissed *in limine* the Prosecution's request for clarification of the July Decision, because it considered that it was a means "to convey disagreements with the reasoning and/or instructions of a chamber".[94] It further dismissed the request for reconsideration, because it considered that the Prosecution did "not attempt to

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[90] 2024 Referral, p. 1.
[91] 2024 Referral, p. 4.
[92] 2024 Referral, p. 4. *Cf.* *Palestine* Article 18 Appeal Judgment, para. 105.
[93] *See* *Jelisić* Appeal Judgment, para. 27 ("In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide proprio motu entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. [] The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law"). *Cf.* *Yekatom & Ngaïssona* Admissibility Judgment, para. 46 ("general principle of law that those who will be affected by a decision must be provided with an opportunity to present their views and to be heard (*audi alteram partem*)"). This principle was not satisfied by the Prosecution's submissions in the Arrest Warrant Applications, where the Prosecution solely explained that the cases fell within the Court's jurisdiction.
[94] September Order, paras. 7-8.

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satisfy the high threshold for reconsideration and merely expresses a disagreement with reasoning and the conclusion" of the July Decision.[95]

49. Given the circumstances in which the July Decision was issued, the decision to dismiss the Prosecution's request *in limine* was erroneous and/or an abuse of discretion. In particular, no reasonable chamber could have reached this decision when the July Decision had been issued without warning and without opportunity for the Prosecution to make written submissions on matters central to its statutory mandate. Rejecting the Prosecution's request for clarification and reconsideration of the July Decision consolidated, rather than cured, the Chamber's prior breach of the *audi alteram partem* principle.

50. In sum, had the Chamber conducted the required analysis, correctly considered the scope of the authorised investigation, disregarded irrelevant and unclear factors and relied on relevant ones, it would have concluded that the allegations described in the 2024 Referral fall within the parameters of the authorised investigation or are sufficiently linked to them. As a result, it would have found that a separate investigation was not warranted.

51. The Prosecution respectfully requests the Appeals Chamber to grant the First Ground of Appeal and find that the Chamber erred in determining that a separate investigation was warranted.

II. THE CHAMBER ERRED IN EXERCISING ITS PURPORTED 'GENERAL' OVERSIGHT OF THE PROSECUTOR'S ACTIVITIES IN THE PRESENT CIRCUMSTANCES (SECOND GROUND)

52. The Chamber further erred in law and/or procedure and/or abused any discretion with which it was vested in directing the Prosecution: (i) to notify the Presidency of the 2024 Referral; and (ii) to open a new investigation, should it continue to consider that the requirements of article 53(1) of the Statute are met.

53. The Chamber issued these instructions based on its erroneous view of its own powers under the Statute. In particular, the Chamber purported to exercise a 'general' power of judicial oversight over "the Prosecution's investigations and ensuing procedural developments".[96] It sought to exercise this power: "to ensure that investigations conducted pursuant to article 15 of the Statute remain within the scope authorised by the Court";[97] to determine "the legal

[95] September Order, paras. 9-10.
[96] September Order, paras. 12-13.
[97] July Decision, para. 10; September Order, paras. 17-18.

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parameters within which investigative powers may lawfully be exercised",[98] and; "to ensure the identification of the appropriate triggering mechanism".[99] The Chamber erroneously concluded that it was vested with such a power based on an incorrect "holistic reading of the Statute",[100] misapplication of the 'inherent powers' doctrine,[101] and its own view of the exclusive "jurisdictional" function of the judiciary.[102] The Chamber's misunderstanding of its own powers was further compounded by its erroneous interpretation of regulation 45 of the Regulations of the Court.

54. Consequently, at the current stage of proceedings, there was no legal basis for the Chamber to issue the directions either in the July Decision or the September Order purporting to enforce the July Decision. In issuing these directions to the Prosecution, on the basis of the reasoning set out in these Decisions, the Chamber thus acted beyond its powers (*ultra vires*).

55. Specifically, as explained in the following paragraphs: (i) the Chamber has no *general* power to supervise the conduct of the Prosecution in carrying out preliminary examinations and investigations, but rather is vested with *specific* powers as set out in the Statute; (ii) the Chamber has no relevant 'inherent power' at this stage of proceedings because there is no lacuna in the Statute; (iii) the Chamber's view of the "jurisdictional" function of the judiciary does not alter the preceding principles; and (iv) regulation 45 did not require notification of the 2024 Referral, because all the relevant allegations already fell within the parameters of an existing situation under investigation.

56. Furthermore, alternatively, and even if the Appeals Chamber were to consider that the Chamber was vested with a relevant power, the Prosecution submits that the Chamber abused the discretion with which it was vested by issuing the directions in the July Decision and the September Order in the manner it did and at the present stage of proceedings.

II.A. The Chamber has no general power to supervise the conduct of the Prosecution investigations

57. The Chamber erroneously relied on the existence of a "general" power of judicial oversight over the "conduct of the [Prosecution's] investigation" to justify its instructions in the July Decision and September Order.[103] The Chamber reached this conclusion based not

[98] September Order, para. 16.
[99] September Order, paras. 18, 21.
[100] September Order, para. 13.
[101] July Decision, fn. 13; September Order, para. 14.
[102] September Order, para. 15.
[103] September Order, paras. 12-13.

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only on reliance on the 'inherent powers' doctrine and its view of its own "jurisdictional" function, as addressed below,[104] but also from a "holistic reading of the Statute".[105] According to the Chamber, the Statute "does not point to the existence of an unfettered discretion of the Prosecution in the conduct of the investigation",[106] but rather supports the existence of a general power of judicial oversight—based on "instances where the statutory framework specifically provides for judicial oversight" such as articles 15, 53(3), 56(1) to (3), 58 and 61.[107] Yet, as demonstrated below, this is contrary to the established interpretation of the Court's legal framework and disregards the express guidance of the Appeals Chamber.

58. Likewise, the Chamber's reasoning for the necessity for a "general" power of judicial oversight is unconvincing and incorrect. The concerns raised by the Chamber are already fully addressed by the existing statutory mechanisms, and do not require the tenuous reasoning adopted in the July Decision and September Order.[108] To the contrary, the Chamber's approach would not only undermine the careful and deliberate balance struck by the drafters of the Statute, but also potentially lead to more cumbersome and bureaucratic procedures of the kind that the Appeals Chamber has previously warned against.[109]

II.A.1. The Statute expressly allocates competence between the Prosecutor and the Pre-Trial Chamber for the conduct of investigations (and preliminary examinations)

59. In finding that it is vested with a general power of judicial oversight over the Prosecution in the conduct of the investigation, the Chamber misinterpreted the Statute.[110] If correctly interpreted in accordance with the Vienna Convention on the Law of Treaties,[111] it is clear that the Chamber is vested with specific powers which are applicable in defined situations. In this context, the absence of an express statutory power is not a licence to infer that further powers must be implied or inherent to the judicial function—rather, it reflects the careful balance struck by the drafters of the Statute in allocating powers between the Prosecution and Pre-Trial Chamber,[112] to which all organs of the Court should seek to adhere. The Prosecution further

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[104] *See below* paras. 71-73 (inherent powers), 74-75 (jurisdictional function).
[105] September Order, paras. 13-18.
[106] September Order, para. 13.
[107] September Order, paras. 13-14.
[108] *Contra* July Decision, para. 10; September Order, paras. 16-18.
[109] Article 15(4) Appeal Judgment, para. 63.
[110] *Contra e.g.* July Decision, para. 16.
[111] VCLT, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").
[112] *See e.g.* Article 15(4) 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 (mn. 3).

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stresses that its good faith efforts to apply the statutory scheme (and, specifically, to follow the guidance of the Appeals Chamber) should not be misunderstood, as the Chamber may have done, as a rejection of judicial power based on an over-broad concept of prosecutorial independence.[113] Rather, the point of disagreement is simply *how* the Statute provides for appropriate judicial review at this stage of proceedings.

60. In *Afghanistan*, the Appeals Chamber explained the general "statutory scheme regulating the respective functions and powers" of the Prosecutor and the Pre-Trial Chamber "with respect to investigations"[114]—that is, before the prosecution of a concrete case is initiated under article 58(1) of the Statute.[115] Until then, article 42(1) of the Statute recognises the Prosecutor's responsibility for the conduct of investigations, while articles 56 and 57 identify *specific functions* that may be exercised by the pre-trial chamber.[116]

61. These same principles necessarily apply, *mutatis mutandis*, to the conduct of a preliminary examination, which is the precondition to the opening of an investigation.[117] As the Appeals Chamber has affirmed in *Duterte*, the "preliminary examination phase" of proceedings entails the Prosecutor's "*autonomous*[]" determination whether there is a reasonable basis to proceed with an investigation.[118] Thus, while the Prosecutor has primary competence under articles 13, 14(1), 42(1) and 53(1) for the initiation and conduct of preliminary examinations of referred situations, article 53(3) identifies specific functions that may be exercised by the Pre-Trial Chamber.[119] Specifically, the Statute provides in article 53(1) that it is "[t]he Prosecutor" who is charged with "deciding whether to initiate an investigation" of situations referred to him or her by a State Party or the UN Security Council, in accordance with article 53(1)(a) to (c).[120] In turn, article 53(3) reflects the drafters' careful calibration of

[113] *Contra* September Order, para. 12.
[114] Article 15(4) Appeal Judgment, para. 63.
[115] In this case the July Decision and September Order were not triggered by the Chamber's oversight over the four Arrest Warrants, since the Chamber underscored that they had been validly issued within the authorised situation: September Order, para. 23.
[116] Article 15(4) Appeal Judgment, para. 63 (emphasis added).
[117] In the context of article 15 preliminary examinations, but applicable *mutatis mutandis* also to article 53(1) preliminary examinations of referred situations, *see also* *Duterte* Jurisdiction Appeal Judgment, para. 125 (referring to "the preliminary examination to be carried out by the Prosecutor as a precursor to his or her decision as to whether to submit a request […] to open an investigation").
[118] *Duterte* Jurisdiction Appeal Judgment, paras. 128-129.
[119] The same principle applies to preliminary examinations initiated *proprio motu* except insofar as article 15(1)-(3) and (5)-(6) illustrate the primary competence of the Prosecutor, while article 15(4) identifies specific functions that may be exercised by the Pre-Trial Chamber. *See e.g.* Article 15(4) Appeal Judgment, paras. 30-32 (distinguishing the discretion afforded to the Prosecutor under article 15 from the specific functions allocated to the Pre-Trial Chamber); ICC-RoC46(3)-01/22-6 ("*Colombia* Closure Decision"), paras. 6-7.
[120] Rules 104 and 105 further emphasise the primary competence of the Prosecutor in this regard, since they not only refer extensively to the powers and obligations of "the Prosecutor" but even stress this competence in their

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the appropriate scope and extent of judicial review powers in this context. In particular, as the Appeals Chamber stated in *Afghanistan*, article 53(3) "envisages judicial control" only "over the Prosecutor's decision *not* to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations."[121] Associated with the Prosecutor's primary competence to conduct preliminary examinations is the Prosecutor's primary competence to determine the validity of a referral, consistent with articles 14(1) and 42(1) and regulation 45.[122]

62. It is clear from these statutory provisions, and the Appeals Chamber's guidance, that the Statute does *not* provide the Pre-Trial Chamber with a general power to supervise the conduct of the Prosecution with regard to the conduct of preliminary examinations and investigations in a situation as a whole. This is contrasted with the fact that, at later stages of proceedings once a prosecution has been initiated and Chambers assume a much greater degree of control, the Statute provides broader powers to them.[123] No such powers are provided to the Pre-Trial Chamber at the investigation stage before a prosecution has been initiated. Indeed, in earlier decisions, Chambers of the Court have consistently rejected the existence of a general judicial oversight power at these early stages[124]—including Pre-Trial Chamber II itself, in a former composition.[125]

63. The statutory powers upon which the Chamber relied—articles 15, 53(3), 56(1) to (3), 58, and 61 of the Statute—*support* rather than contradict the scheme described above and affirmed by the Appeals Chamber. The Chamber thus misinterpreted the significance of these provisions.[126] In particular:

- As the Appeals Chamber has already held, the scope of judicial review in both articles 15(4) and 53(3) is subject to clear statutory limits. These provisions provide for judicial review only in *defined circumstances* of *specific aspects* of prosecutorial decision-making in preliminary examinations, namely, if the Prosecution decides not to open an investigation under article 53(1).[127]

titles: *see* ICC RPE, rules 104 ("Evaluation of information *by the Prosecutor*", emphasis added), 105 ("Notification of a decision *by the Prosecutor* not to initiate an investigation", emphasis added).
[121] Article 15(4) Appeal Judgment, para. 29 (emphasis added).
[122] *See further below* paras. 76-86.
[123] *See e.g.* Statute, art. 64(6).
[124] *See e.g.* ICC-02/18-9-Red ("*Venezuela* Judicial Control Decision"), paras. 9-16; *Colombia* Closure Decision, paras. 6-7; Article 15(4) Appeal Judgment, para. 63.
[125] ICC-02/17-156 ("Victims Deferral Decision"), paras. 21, 22, 26 , 27.
[126] *Contra* September Order, para. 13.
[127] *See e.g.* Article 15(4) Appeal Judgment, paras. 29, 31-32, 34-37.

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- Article 56 of the Statute gives the Pre-Trial Chamber *specific* powers to provide for the preservation of evidence arising from unique investigative opportunities—and the statutory logic for providing such powers is readily apparent, since article 56 creates judicial mechanisms which are compatible with the future "purposes of a trial".[128]
- While the powers of the Pre-Trial Chamber under articles 58, 60, and 61 of the Statute are uncontested, these have no implications for the existence of any general power at *prior stages of proceedings* before a prosecution is initiated (*i.e.,* preliminary examinations and investigations).[129] As previously stated, there is no doubt that the initiation of a prosecution in article 58 entails the assumption of judicial control over a particular *case*, consistent with the potentially more significant implications for the rights of the suspect.

64. In sum, therefore, nothing in the statutory scheme—when correctly interpreted—supports the Chamber's view of a *general* oversight power with regard to the Prosecution's conduct of a preliminary examination or investigation in the situation as a whole. To the contrary, both the Statute and the Court's jurisprudence implies a model of judicial review through the allocation of *specific* powers.

II.A.2. The Chamber's reasoning for a general supervisory power is erroneous

65. The further reasons offered by the Chamber for its perceived need for a general power of judicial power are likewise unconvincing.[130]

66. *First*, the Chamber was incorrect to suggest that a general supervisory power is necessary "to ensure that investigations conducted pursuant to article 15 of the Statute remain within the scope authorised by the Court".[131] The Appeals Chamber has previously cautioned the Pre-Trial Chamber in this situation that article 15 does not entail 'control' of an authorised investigation by the Pre-Trial Chamber, and should not be interpreted in a manner creating "cumbersome and unwieldy procedures […] likely to have a significant detrimental effect on the conduct of investigations."[132] Importantly, the statutory framework *already* provides an

[128] *See e.g.* Statute, art. 56(1)(a).
[129] *See* Bergsmo/Zhu, Art. 42, in Ambos K. (ed.), Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4th ed. 2022 (Beck, Nomos, Hart), p. 1512, nm. 9 (noting that even if the Pre-Trial Chamber may request the Prosecutor to consider further evidence under art. 61(7), "the Prosecutor remains exclusively responsible for prosecuting the case and cannot be instructed on how to charge"). *Compare with* September Order, para. 13.
[130] *Contra e.g.* July Decision, para. 10; September Order, paras. 16-18.
[131] July Decision, para. 10; September Order, paras. 17-18. The Prosecution also notes the apparent contradiction between this assertion, and the Chamber's view that "it is unnecessary to determine the precise limits of that authorisation for the purposes of the present decision": July Decision, para. 13.
[132] Article 15(4) Appeal Judgment, para. 63. *See also* paras. 60-61.

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adequate and appropriate means of regulating the scope of investigations—specifically, by the Pre-Trial Chamber's duty and prerogative to satisfy itself of the correct exercise of jurisdiction over each *concrete case* presented for potential prosecution under article 58.[133]

67. It is at that juncture that a Pre-Trial Chamber ensures that investigations are conducted within the scope authorised by the Court. In the present situation, the Chamber has *already* exercised this function with respect to the cases for which arrest warrants were issued. Nor is the reason for the Chamber's concern clear, since (when asked by the Prosecution) it held that "the Warrants of Arrest were validly issued and remain valid" (within the authorised situation).[134] This can only mean that the Chamber accepted that the Prosecution did not go beyond the authorised situation in investigating the facts underpinning the Arrest Warrants, which are also described in the 2024 Referral.

68. *Second,* there is no need in the present situation for the Chamber to intervene "to ensure the identification of the appropriate triggering mechanism" for the situation, either in relation to the existing cases or in relation to any further potential cases.[135] As noted, the Court's legal framework already authorises a Chamber to exercise judicial supervision over the Court's exercise of jurisdiction *in the context of concrete cases* when deciding on article 58 applications. The Chamber was fully cognisant of the 2024 Referral when it granted the Arrest Warrants and did not at that time consider it necessary to "identify" a different "triggering mechanism". Nor did the Chamber identify an intervening change of circumstances which it may have considered necessitated a re-evaluation of the appropriate "trigger mechanism". Moreover, once an arrest warrant or summons to appear has been initiated, the suspect has standing to challenge the Court's exercise of jurisdiction in their case as and when they are in a position to do so and consider it to be in their best interests.

69. *Third*, there is no need to determine further "the legal parameters within which investigative powers may lawfully be exercised".[136] This contradicts (at least in part) the Chamber's previous assertion that "it is unnecessary to determine the precise limits of that

[133] *See e.g.* Statute, arts. 19(1)-(2) (referring to a "case"); ICC-01/18-143 ("*Palestine* Article 19(3) Decision"), paras. 73, 82.
[134] September Order, para. 23.
[135] September Order, paras. 18, 21.
[136] September Order, para. 16.

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authorisation" for the purpose of the present decision(s).[137] In any event the Appeals Chamber has already *twice* affirmed these parameters and stated that that they are *res judicata*.[138]

70. In sum, there was no legal basis or forensic need for the July Decision and September Order. Rather than exercising a purported "judicial oversight" over the Prosecution's conduct of its investigations, the Chamber sought to exercise the Prosecution's functions by making a *proprio motu* jurisdictional ruling without being properly seised or informed.

II.B. The Chamber has no inherent power of judicial supervision

71. Likewise, contrary to the Chamber's assertion, there is no "inherent power" to exercise the general oversight function on which the July Decision and September Order depend.[139]

72. In *Bemba et al.*, the Appeals Chamber previously addressed the concept of 'inherent powers' and authoritatively determined the extent to which they may apply under the Statute—in principle, such powers should be "invoked in a *very restrictive manner*".[140] The Appeals Chamber endorsed the reasoning of Trial Chamber IV in *Banda* that this is essential because proceedings at the Court "are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail".[141] Consequently, the *Bemba et al.* Appeals Chamber emphasised, "when a matter is regulated in the primary sources of the law of the Court, there is also no room for chambers to rely on purported 'inherent powers' to fill in non-existent gaps".[142] Nor is every silence in the Statute a lacuna that permits resort to inherent powers.[143] There is certainly no lacuna "when a matter is exhaustively defined in the legal instruments of the Court".[144]

73. Applying these principles to the July Decision and September Order, there is no lacuna which would justify or permit resort to any inherent power of general judicial 'oversight'. To the contrary, as explained above, the statutory scheme is clear in allocating competence between the Prosecutor and the Pre-Trial Chamber in the conduct of preliminary examinations

[137] *See* July Decision, para. 13.
[138] Article 15(4) Appeal Judgment, paras. 1-2, 46, 64, 79 ; Article 18(2) Appeal Judgment, paras. 56-62. *See also above* paras. 18, 26.
[139] July Decision, fn. 23; September Order, para. 14.
[140] ICC-01/05-01/13-2276-Red A6 A7 A8 A9 ("*Bemba et al.* Sentencing Appeal Judgment"), para. 75 (emphasis added, citing ICC-02/05-03/09-410 ("*Banda* Stay of Proceedings Decision"), para. 78).
[141] *Banda* Stay of Proceedings Decision, para. 78.
[142] *Bemba et al.* Sentencing Appeal Judgment, para. 76.
[143] *Bemba et al.* Sentencing Appeal Judgment, para. 76.
[144] *Bemba et al.* Sentencing Appeal Judgment, para. 76.

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and investigations in the situation as a whole.[145] This careful balance was the product of detailed discussions among the drafters.[146] It resulted in the Statute giving *specific* powers to the Pre-Trial Chamber, but deliberately refraining from establishing a general supervisory role.[147] As demonstrated above, those powers are entirely adequate for any of the purported purposes espoused in the July Decision and September Order.[148] In this context, it would thus be not only inappropriate for the Chamber to re-write the Statute, but also unnecessary for it to do so.

II.C. The Chamber's view of its jurisdictional function does not justify the general power claimed

74. Finally, the Chamber sought to justify the July Decision and September Order by relying on its view of the judiciary's "exclusive jurisdictional function" and its competence "to decide on the applicable law of the Court". [149] According to the Chamber, the "Pre-Trial Chamber's authority over the Prosecution within the context of its investigation" does not affect the Prosecutor's statutory duties.[150]

75. The Prosecution does not (and would not) contest the nature of the judicial function. However, it respectfully submits that this does not justify departure from the applicable law in accordance with the Court's legal texts, and with due regard to the Court's jurisprudence.[151] The Prosecution further respectfully notes that the judicial function does not foreclose the right of the parties, including the Prosecution, to be heard or to exercise their rights under the Statute. Since the Statute provides for a clear scheme allocating competence between the Prosecutor and the Pre-Trial Chamber, the Chamber's view of its jurisdictional function cannot justify

[145] *See above* paras. 59-64. The reference to inherent powers in regulation 29 of the RoC should be interpreted consistently with the Appeals Chamber's jurisprudence, as well as regulation 1(1), providing that the Regulations must be read subject to the Statute and the Rules.
[146] *See above* fn. 112.
[147] Article 15(4) Appeal Judgment, para. 63; *Venezuela* Judicial Control Decision, paras. 9-16; Victims Deferral Decision, paras. 22, 26. *See also Morsi* Review Decision, paras 7-11.
[148] *See above e.g.* paras. 65-68. *Cf. Venezuela* Judicial Control Decision, para. 15 (finding no lacuna because article 18 allowed Venezuela's complaints to be addressed).
[149] September Order, para. 15.
[150] September Order, para. 15.
[151] For these reasons the Appeals Chamber will not depart from its previous decision "absent 'convincing reasons'" "given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions": ICC-02/11-01/15-172 OA6, para. 14; ICC-01/14-01/22-366-Red OA5, para. 19; *see also* ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, paras. 107-110; *see also* para. 113 (finding that a proper construction of the Statute requires that the *ratio decidendi* of its [Appeals Chamber] decisions is binding on Trial Chambers); *see also* Article 18(2) Appeal Judgment, para. 59.

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departing from (or modifying)[152] that scheme—not least, when the Appeals Chamber has also previously exercised its own superior jurisdictional function in explaining that scheme.

II.D. The Chamber misinterpreted regulation 45

76. Finally, compounding its error as to its own powers, the Chamber also erred in interpreting regulation 45, which it purported to enforce in accordance with regulation 29.[153] However, if regulation 45 did not in fact require notification of the 2024 Referral to the Presidency, then regulation 29 did not provide any basis for the Chamber's intervention.

77. Although its reasoning is scant, the Chamber's approach appears to suggest that the Prosecution must *automatically* notify the Presidency of any written communication that it receives which is described as a State Party "referral".[154] This would in turn invariably lead to a new situation,[155] and the subsequent assessment by the Prosecution of the requirements under article 53(1) of the Statute as to whether an investigation is warranted.[156]

78. The Prosecution respectfully submits that this interpretation of regulation 45 is incorrect, and inverts the order of the analysis, as foreseen in the Statute. The Prosecutor—who is responsible for conducting preliminary examinations[157] and investigations,[158]—also has an express statutory duty under article 42(1) to receive referrals and to "examine" them. On that basis, the Prosecutor determines whether the communication is a "referral" within the terms of the Statute and assesses whether the referred allegations fall within the scope of an existing situation under investigation or not.

II.D.1. The Prosecutor's examination of a "referral" is statutorily required

79. The Regulations must be read in accordance with the Statute.[159] Articles 13 and 14 provide that an authorised entity—that is, a State Party or the UN Security Council—seeking to trigger the Court's exercise of jurisdiction as of right "may refer *to the Prosecutor* a situation" in which one or more article 5 crimes "appear to have been committed requesting *the*

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[152] In dismissing a victims' request for judicial oversight over the Prosecution's investigations on 3 September 2021, PTC II acknowledged that an amendment of the legal texts was necessary in order to expand the judicial oversight powers over the Prosecution's investigations: Victims Deferral Decision, para. 27.
[153] *See* September Order, p. 3 (preface to the operative paragraphs, reading "The present order is issued pursuant to regulation 29 […] for the sole purpose of ensuring the Prosecution's compliance with the Chamber's final [July Decision]").
[154] July Decision, para. 18.
[155] Regulations of the Court, reg. 45(1).
[156] July Decision, paras. 17-18, p. 8; September Order, para. 22, p. 12.
[157] *Duterte* Jurisdiction Appeal Judgment, para. 125.
[158] *Lubanga* Regulation 55 Appeal Judgment, para. 94; *DRC* Victim Participation Appeal Judgment, para. 52; Article 15(4) Appeal Judgment, para. 63.
[159] Regulations of the Court, reg. 1(1) ("These Regulations [] shall be read subject to the Statute and the Rules").

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Prosecutor to investigate the situation".[160] Article 42(1) likewise states that "[t]he Office of the Prosecutor […] shall be responsible for receiving referrals" and "*for examining them* and for conducting investigations and prosecutions".[161] Regulation 45(1) states materially that *"[t]he Prosecutor* shall inform the Presidency in writing as soon as a situation has been *referred to the Prosecutor* by a State Party.[162]

80. It follows from these provisions (and the broader principles described above concerning the primary competence of the Prosecutor to conduct preliminary examinations) that the Prosecutor has the primary competence to determine whether a communication received from a State Party constitutes a valid referral within the meaning of article 14.[163] Further, and consistent with its powers under article 53(1), it will also assess whether the alleged conduct falls within the scope of a situation already under investigation or not. Only in the latter scenario does a regulation 45 notification serve any forensic purpose. In the former regard, not only is the Prosecutor already in a position to investigate the relevant allegations directly, but a Pre-Trial Chamber is already assigned. Consequently, it would be detrimental to procedural economy to make a new assignment to a Chamber. The Prosecutor therefore only has the duty to notify the Presidency when required by regulation 45(1), as correctly interpreted.

81. 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. 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). Thus for example:

- In this situation, and in the *Venezuela I* and *Palestine* situations, where the Prosecutor considered it to be *immediately* clear that the subject-matter of a new referral fell within the scope of an existing investigation, the Prosecution immediately (and transparently)

[160] Statute, art. 14(1). *See also* art. 13(a) ("referred to the Prosecutor by a State Party"), 13(b) ("referred to the Prosecutor by the Security Council"). *See further* ICC RPE, rule 45 ("[a] referral *to the Prosecutor* shall be in writing", emphasis added).
[161] Statute, art. 42(1) (emphasis added). *See* Bergsmo/Zhu, Art. 42, in Ambos K. (ed.), Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4th ed. 2022 (Beck, Nomos, Hart), p. 1513, nm. 11 ("the information on alleged crimes within the jurisdiction of the Court is to be addressed to the Prosecutor and not to other organs of the Court. It is only the Prosecutor who has statutory competence to analyse the seriousness of the information received").
[162] Regulations of the Court, reg. 45(1) (emphasis added).
[163] *See above* paras. 59-64.

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proceeded on this basis.[164] It did not make a regulation 45 notification to the Presidency. Nor was the absence of such notification queried by the Presidency or, when it later became seised of relevant issues, by the Appeals Chamber.[165]

- In the *CAR II*, *Venezuela II* and *DRC II* situations, where the Prosecutor did *not* consider it to be *immediately* clear that the subject-matter of a new referral fell within the scope of an existing investigation, the Prosecution made a regulation 45 notification to the Presidency, and then proceeded to conduct a preliminary examination.[166] On the basis of such an examination, the Prosecution either determined that the conduct did fall within the scope of an existing investigation (as in *DRC II*)[167] or that it did not fall within the scope of an existing investigation and considered whether a new investigation should be opened according to article 53(1) of the Statute (as in *CAR II* and *Venezuela II*).[168]

82. The Prosecution emphasises that it has conducted the above practice in good faith and in application of the Court's legal texts. Moreover, the Prosecution's examination of a referral is not without judicial review by a Pre-Trial Chamber.[169] Notably, this may occur when the Chamber decides on article 58 applications with respect to cases arising from such referrals, or if a jurisdictional challenge is subsequently brought in such a case. Additionally, should the Prosecutor consider it necessary, he or she may always seek the assistance of the Chamber pursuant to article 19(3) and regulation 46(3) if necessary.

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[164] *See e.g.* ICC OTP, Statement of ICC Prosecutor , 29 November 2024 (confirming that the Office "has been and continues to conduct an active investigation in the Situation in Afghanistan which *already encompasses* the alleged crimes described in the referral", emphasis added). For the approach in *Venezuela I* and *Palestine*, *see e.g.* ICC-01/18-440 OA3 ("*Palestine* Article 18 Appeal Response"), para. 44.
[165] *See e.g.* *Palestine* Article 18 Appeal Judgment, paras. 87, 91-92, 99-110.
[166] *See e.g.* ICC-01/14-1-Anx1 ("*CAR II* Regulation 45 Notification"); ICC-01/14-1 ("*CAR II* Assignment Decision"); ICC-01/20-1-AnxI ("*Venezuela II* Regulation 45 Notification"); ICC-01/20-1 ("*Venezuela II* Assignment Decision"); ICC-01/23-1-Anx ("*DRC II* Regulation 45 Notification"); ICC-01/23-1 ("*DRC II* Assignment Decision").
[167] *See* ICC-01/23-4-Red ("*DRC II* Investigation Decision"), paras. 2, 7-8.
[168] *See* ICC OTP, *Situation in the Central African Republic II: Article 53(1) Report*, 24 September 2014, paras. 8-10; ICC-01/20-10 ("*Venezuela II* Closure Notice").
[169] Specifically, if the Prosecution were to *decline* to make a regulation 45 notification to the Presidency of a purported referral (and hence *not* to conduct a preliminary examination thereafter) for any reason *other* than the fact that the subject matter of the purported referral falls within the scope of an existing situation under investigation, the Prosecution recognises that judicial review could be appropriate at the motion of the State Party concerned. This would be consistent with the 'negative' judicial review power provided in article 53(3) of the Statute, and could be triggered through a request for assignment of a Pre-Trial Chamber *ad hoc* under regulation 46(3). Conversely, consistent with the principle in article 53(3), there would seem to be no right of judicial review where the Prosecutor *affirms* the validity of a referral by making a regulation 45 notification.

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II.D.2. The Prosecutor's statutory duty to examine a "referral" is also consistent with the correct interpretation of regulations 45 and 46

83. The Prosecution's interpretation of articles 42(1) and 53(1) of the Statute, and its implications for the correct interpretation of regulation 45, is further supported by a contextual and teleological reading of this provision alongside regulation 46. This suggests that both provisions seek to facilitate the Presidency's administrative arrangements, rather than to impose a substantive procedural obligation.[170]

84. Regulations 45 and 46 were conceived as interconnected provisions governing the internal allocation of situations for the purpose of the Court's own procedural administration, consistently with the functions allocated to the Presidency under article 38(3)(a) of the Statute. Regulation 45(1) thus ensures that the Presidency is apprised when there is a need for a Pre-Trial Chamber to be assigned to a new situation, while regulation 46 empowers the Presidency, upon receipt of that information, to make the required assignment.

85. Regulation 45 does not on its face allow any express exception to the notification obligation. Nevertheless, it is implicit that it applies only to a "referral"—and article 42(1) of the Statute makes clear that it is the Prosecutor who is charged with examining such communications to validate their status as such. This is consistent with the Prosecutor's competence subsequently to determine under article 53(1)(a) *inter alia* whether allegations fall within the Court's jurisdiction. Furthermore, the internal and institutional purpose of regulations 45 and 46 supports the view that notifications need not be made when they serve no purpose (i.e., the assignment of a Pre-Trial Chamber). As such, notifications are unnecessary if the subject matter of a purported "referral" plainly falls within the scope of a situation already under investigation and to which a Pre-Trial Chamber is assigned. Thus, for example, when a "referral" is a request to the Prosecution to advance its investigation with respect to certain facts or lines of inquiry within the scope of a situation already under investigation, such as in *Palestine* or *Afghanistan*, there is no administrative need for the Presidency to open a new situation record and assign it to a Pre-Trial Chamber. The "referred" allegations can, and should, be investigated within the pre-existing investigation. Such a communication is not, strictly speaking, a "referral" at all but more akin to an article 15 communication to the Prosecutor.[171]

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[170] *See also*, *mutatis mutandis*, *Morsi* Review Decision, para. 5 (noting, in the context of regulation 46(3), that it "is a purely administrative provision" from which "no substantive rights can be deduced").
[171] *See above* fn. 85.

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86. The contrary approach implied by the July Decision and the September Order—that is, to *always* notify the Presidency (which will *always* assign the subject matter of a new referral to a Pre-Trial Chamber) and only afterwards determine whether a new situation exists—is unconvincing. It reverses the logical sequence of the analysis, complicates the institutional allocation of situations and/or places unforeseen burdens on the Presidency and/or Pre-Trial Chambers to manage potentially overlapping situations. In this regard:

- *First*, the substantive question—whether a new situation is warranted because the referred allegations fall (or not) within the parameters of a pre-existing investigation or are (or are not) sufficiently linked to them—must logically precede the question of whether a new assignment is required. There is no need to assign a Chamber if there is one already assigned. Article 42(1) makes clear that it is the Prosecutor who is charged with the duty to "examine" such referrals, including for this purpose.
- *Second*, if the Prosecutor were obliged to notify the Presidency of all communications labelled as "referrals" irrespective of their objective nature, the Presidency may be required to determine *substantively* whether it is appropriate to assign a Pre-Trial Chamber to the new situation, for which it is not readily equipped.[172]
- *Third*, this approach would mean that successive purported article 14 referrals could potentially be misused and result in narrowly defined situations undermining the Prosecutor's investigative duties—an approach which the Appeals Chamber has already found impermissible under the Statute.[173] Clearly, a 'filtering' role is required, and this function is vested in the Prosecutor under article 42(1).
- *Fourth*, this approach would not serve the principle of complementarity. Not only has the Prosecution an ongoing obligation to assess complementarity, but States can challenge admissibility with respect to concrete cases under article 19(2) of the Statute. Conversely, by triggering article 18 notifications and allowing for deferral requests with respect to specific conduct in narrowly defined situations, the operation between articles 18 and 19 would be blurred.

II.D.3. The Prosecutor was not required to notify the Presidency of the 2024 Referral

87. For all the reasons above, the Prosecution therefore respectfully submits that it was correct not to notify the Presidency of the 2024 Referral, based on its examination under article

[172] Statute, art. 38(3).
[173] Article 15(4) Appeal Judgment, para. 63.

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42(1), because it falls outside the scope of regulation 45. As a consequence, in the July Decision and September Order, the Chamber was not correct to rely on regulation 29. Rather, it erred in appreciating its own competence under the Statute, and thus acted beyond its powers (*ultra vires*).

II.E. In the alternative, the Chamber abused any discretion with which it was vested by issuing the July Decision and September Order in the present circumstances

88. Finally, even if the Appeals Chamber were to consider that the Chamber acted on the basis of a relevant statutory power in the July Decision and/or September Order, the Prosecution respectfully submits that the Chamber abused any discretion with which it was vested in issuing these Decisions in the prevailing circumstances. Consequently, the July Decision and September Order must likewise be reversed. In particular:

- The Decisions were issued almost two years after the 2024 Referral and over one year after the Chamber granted the Prosecution's Arrest Warrant Applications, where the Chamber already reviewed the Court's exercise of jurisdiction with respect to allegations against women and girls by the Taliban after 15 August 2021.
- The Prosecution's position with respect to the 2024 Referral was publicly known shortly after the Referring States submitted it.
- The Pre-Trial Chamber issued the Decisions without prior warning nor requesting Prosecution's submissions, thus in violation of the principle *audi alteram partem.*
- The Decisions are unclear, contradictory and scantly reasoned, making it difficult to ascertain important aspects related to the scope and exercise of the Court's jurisdiction in Afghanistan. In particular, it is contradictory and unclear:
    - To determine that the 2024 Referral warrants a separate investigation, while holding that the 2025 Warrants (related to the same conduct) were validly issued in the authorised investigation.
    - To consider "unnecessary to determine the precise limits of [the Appeals Chamber's authorisation] for the purposes of the present decision" and noting that "aspects of that conduct could otherwise be regarded as falling within the factual framework" of the authorised investigation, while concluding that the conduct in the Referral warrants a separate investigation.

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- As described in the Prosecution's First Ground of Appeal, the Chamber erred in concluding that a separate investigation was warranted.

89. The Prosecution respectfully submits that the reasoning provided in the July Decision and September Order is difficult to reconcile with the fundamental principle that "justice should not only be done, but must also be seen to be done". No reasonable Chamber could have issued these two Decisions in these circumstances.

90. The Prosecution respectfully requests the Appeals Chamber to grant the Second Ground of Appeal and find that the Pre-Trial Chamber acted *ultra vires* in issuing the two Decisions. In the alternative, it requests the Appeals Chamber to find that the Pre-Trial Chamber abused its discretion.

CONCLUSION

91. The Chamber's errors described in the First and Second Ground of Appeal materially affected the Decisions. But for these errors—which are inextricably linked—the Decisions would not have been issued at all. These errors affect the scope and exercise of the Court's jurisdiction in the Afghanistan situation and require appellate correction.

92. For the reasons above, the Prosecution respectfully requests the Appeals Chamber:

i. to grant the Prosecution's two Grounds of Appeals,

ii. to reverse the July Decision and September Order in its entirety, and

iii. to affirm the applicable law.



Mame Mandiaye Niang
Acting Prosecutor

Dated this 25th day of September 2026
At The Hague, the Netherlands

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