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

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/17**
Date: **6 October 2026**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Public redacted version of "Request for clarification and/or reconsideration of the 'Decision in relation to the investigation in the Situation in the Islamic Republic of Afghanistan', 6 August 2026, ICC-02/17-239-US-Exp

Source: **Office of the Prosecutor**

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☐ **The Office of Public Counsel for Victims**	☐ **The Office of Public Counsel for the Defence**
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INTRODUCTION

1. On 15 July 2026, Pre-Trial Chamber II issued a decision "direct[ing]" the Prosecution: (i) "to open a new investigation on the basis [of] the Referral submitted by the six States Parties on 28 November 2004", should it "continue to consider that the requirements of article 53(1) of the Statute are met", and; (ii) "to comply with Regulation 45 of the Regulations of the Court by notifying the Presidency of the Referral without delay."[1]

2. The Prosecution has reviewed the Decision carefully, in particular since it was handed down without prior notice or opportunity to address the issues potentially arising from it. While the Prosecution seeks as always to engage constructively with the Chamber, within the scope of the applicable law, the independent mandate of the Prosecutor (especially with regard to the conduct of investigations) means that he or she has unique information and relevant perspectives on the issues raised in the Decision.

3. The Decision raises several matters of significant importance—including with regard to: the Court's present exercise of jurisdiction over cases in which prosecutions have already been initiated ("the Cases"); the future disposition of the situation as a whole, and; procedural issues of broader relevance to the work of the Court. Accordingly, before acting as the Chamber directs,[2] the Prosecution respectfully requests clarification and/or reconsideration of the Decision.

4. Since this motion is brought promptly following issuance of the Decision and in the spirit of engagement with the Chamber—and in the absence of any prior opportunity for such engagement through legal submissions on these important issues—the Prosecution respectfully notes that this motion is without prejudice to any further exercise of its rights under the Statute to seek appeal of the outcome(s) of this motion including with regard to principles or understandings also previously expressed in the Decision.

CONFIDENTIALITY

5. This request is filed under seal and *ex parte*, available to the Prosecution only, consistent with the classification of the Decision and in accordance with regulation 23*bis*(2) of the

[1] ICC-02/17-238-US-Exp ("Decision"), Disposition.
[2] In particular, the Decision directs the Prosecution to make a regulation 45 notification in respect of the Referral "without delay". However, since this direction is inter-related with the Chamber's view of its competence to direct the opening of a separate investigation of the subject-matter of the Referral, of which the Prosecution respectfully seeks clarification and/or reconsideration, the Prosecution awaits the Chamber's further ruling before acting upon this direction.

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

Regulations of the Court. However, the Prosecution stands ready to file a public redacted version of this request promptly once a public redacted version of the Decision is available.

6. The Prosecution also respectfully requests that any decision issued as a result of this request is filed publicly, or together with a public redacted version.

SUBMISSIONS

7. The following paragraphs set out the Prosecution's understanding of the procedural framework of this request,[3] followed by the Prosecution's submissions on the critical matters arising from the Decision. These are: the jurisdictional implications of the Chamber's reasoning; the statutory basis for the relief ordered in the Decision if the Chamber has *not* made a jurisdictional ruling, and; the statutory basis for the future disposition of the Cases apparently anticipated in the Decision.[4] Finally, the Prosecution provides certain information which may be relevant to the disposition of the Decision, in particular with regard to the likelihood of any notification under regulation 66*ter*(2)(a).[5]

A. The Prosecution seeks clarification and/or reconsideration in order to engage more fully and in good faith with the Chamber's concerns

8. This request seeks the following relief:

a. clarification of the critical reasoning in the Decision, namely—

   i. the validity or otherwise of the Court's present exercise of jurisdiction over the Cases, and by implication the subject-matter of the Referral;

   ii. the statutory basis for the Chamber's order directing the Prosecution to open a new investigation concerning the Referral, if the Chamber is of the view that the Court's present exercise of jurisdiction over this subject-matter is valid;

   iii. the statutory basis for the Chamber's apparent intention to 'transfer' the Cases into any new situation for which an investigation is opened into the subject-matter of the Referral; and

b. reconsideration of any of these matters as necessary, and in any event with regard to the relief ordered by the Chamber in the Decision.

[3] *See below* paras. 8-12.
[4] *See below* paras. 13-39.
[5] *See below* paras. 40-45.

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

9. While the Statute does not provide for a specific procedure by which a party may seek clarification of a judicial decision, this recourse is integral and necessary—even if exceptionally—to a party's obligation to act in good faith in accordance with judicial directions.[6] In order to discharge this obligation, circumstances may arise where the party requires additional clarification from the Chamber to enable it to take the appropriate course of action, including any limits of that course of action. This is particularly apposite where such matters have not been discussed in the course of litigation.

10. Furthermore, as a corollary to their judicial authority, and particularly in light of articles 64(2) and 67 of the Statute, chambers of the Court are empowered to reconsider their own decisions in appropriate circumstances, either at the request of the parties or *proprio motu*. Some chambers have characterised this power as "exceptional", and only to be exercised "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice", including with regard as necessary to any "[n]ew facts" or "arguments" which have arisen since the initial decision was rendered.[7] Other chambers have recognised a similar principle, but expressed somewhat differently.[8]

11. In the present circumstances, irrespective of the test adopted, the Prosecution respectfully submits that there is a good faith basis to seek clarification of the Decision, and the reasonable possibility that—in considering the requested clarifications—the Chamber may determine that there is a proper basis to reconsider the Decision, in whole or in part.

12. The Prosecution underscores that, even if the Chamber considers it necessary to reconsider the Decision, this is without prejudice to the Prosecution's continued willingness to engage further with the Chamber on appropriate matters concerning the conduct of the investigation in this situation. The Prosecution stands ready for that purpose.

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[6] *See e.g.* ICC-01/04-403 ("*DRC* Clarification Decision"), p. 3 ("only in exceptional circumstances where clarification is necessary will this Chamber allow it"). *A contrario*, *see also e.g.* ICC-02/18-127 ("*Venezuela I* Clarification Decision"), para. 17 (rejecting a request for clarification based on the absence of sufficiently concrete grounds).

[7] *See e.g.* ICC-01/12-01/18-734 ("*Al Hassan* Reconsideration Decision"), para. 11; ICC-02/04-01/15-468 ("*Ongwen* Reconsideration Decision"), para. 4; ICC-01/05-01/13-1282 ("*Bemba et al.* Reconsideration Decision"), para. 8; ICC-01/04-02/06-519 ("*Ntaganda* Reconsideration Decision"), para. 12; ICC-01/09-01/11-1813 ("*Ruto and Sang* Reconsideration Decision"), para. 19. *See also* ICC-02/05-01/20-517 ("*Abd-Al-Rahman* Reconsideration Decision"), para. 10; ICC-01/04-01/06-2705 ("*Lubanga* Reconsideration Decision"), para. 18.

[8] *See e.g.* ICC-01/14-01/22-43 ("*Mokom* Reconsideration Decision"), para. 19 (to the effect that reconsideration "may be allowed only under strict and limited conditions and subject to the fulfilment of a two-fold requirement: (i) 'the conditions upon which the decision was grounded have changed', and (ii) 'it is necessary to prevent an injustice'"); ICC-01/14-01/18-447 ("*Yekatom and Ngaïssona* Second Reconsideration Decision"), para. 16; ICC-01/14-01/18-206 ("*Yekatom and Ngaïssona* First Reconsideration Decision"), para. 20.

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

B. The Decision warrants clarification and/or reconsideration

13. From the Prosecution's perspective, the threshold question arising from the Decision is whether the Chamber has formed the view that the Cases—and, by implication, the subject-matter of the Referral—exceed the scope of the investigation authorised under article 15 ("the Authorisation"), thereby exceeding the scope of the Court's *present* exercise of jurisdiction. As set out further below in sub-section B.1., the *ratio decidendi* of the Decision appears to reflect such a view. On the other hand, certain *obiter dicta*—and the implication of the Chamber's previous decisions in initiating the Cases—suggest the opposite conclusion.

14. In the Prosecution's respectful view, this jurisdictional question is key. Resolution is necessary not only to ensure that the proceedings with respect to the Authorisation and/or the Referral continue on the correct footing, but also to safeguard the proper conduct of the Cases and to ensure that they proceed to trial in the event of the suspects' arrest. In this regard, the Prosecution notes, it is likely that a future chamber of the Court may be called to interpret the record of these proceedings without the benefit of the present Chamber's own insight—and, therefore, may consider the exercise of jurisdiction over the Cases to have been doubted by the Decision. Furthermore, the Statute specifically recognises that the Prosecutor may in any event have reason to clarify jurisdictional matters, insofar as the Prosecutor is uniquely afforded a right to request such a ruling from the Pre-Trial Chamber.[9]

15. Depending on the Chamber's view of the jurisdictional question, on which the Prosecution seeks clarification, there are two alternative scenarios for resolution of the matters arising from the Decision:

- If it ***is*** the Chamber's view that the Cases (and, by implication, the subject-matter of the Referral) exceed the jurisdictional scope of the Authorisation, then the statutory basis for the procedural relief ordered in the Decision is clear—and, consequently, the questions addressed below in sub-sections B.2. and B.3. of this request do not arise. In this scenario, while the Prosecution and the Chamber may differ in their substantive views on jurisdiction,[10] that question may properly be resolved in accordance with the established

[9] *See e.g.* Statute, art. 19(3).
[10] As the Prosecution has previously submitted to the Chamber, the Prosecution considers that the subject-matter of the Referral (including the Cases) falls squarely within the objective parameters of the Authorisation, or is otherwise sufficiently linked to them. This is based not only on the Prosecution's submission that the Authorisation does not require a nexus to an armed conflict for alleged crimes occurring on the territory of Afghanistan after May 2003, but also on its further submission that in any event the subject-matter of the Referral (including the Cases) *does* have such a nexus if it were required. The Chamber at least partly accepted this in its prior decisions concerning the Cases, but "without prejudice" to any future determinations by it: *see below* fn. 23.

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

principles of the Statute—including recourse to the Appeals Chamber under article 82(1)(a) and/or, ultimately, if necessary, through the opening of a new investigation as the Decision already contemplates.[11]

- Alternatively, if the Chamber does ***not*** consider that the Cases (and, by implication, the subject-matter of the Referral) exceed the jurisdictional scope of the Authorisation, then the Prosecution further seeks clarification from the Chamber of the statutory basis for the procedural relief ordered in the Decision—in particular, the questions addressed below in sub-sections B.2 and B.3 of this request. Clarification and, if necessary, reconsideration will both safeguard the proper conduct of the proceedings in the Cases and the present situation as a whole, as well as ensure legal consistency with other situations where related considerations have previously arisen and been adjudicated. Furthermore, in this scenario—if the Decision is not underpinned by jurisdictional concerns but rather *other* considerations pertaining to proper management of the situation—the Prosecution shares information with the Chamber in section C. which may be relevant to the further disposition of these proceedings.

B.1. The ratio decidendi *of the Decision implies that the Chamber is of the view that the Court's present exercise of jurisdiction over the Cases (and, by implication, the subject-matter of the Referral) is invalid*

16. The case law of the Court has come to distinguish between the *jurisdiction of the Court* (that is, the material, temporal, territorial, and personal competence of the Court) and the proper *exercise of the jurisdiction of the Court* (typically, compliance with the procedural regime of the Statute).[12] While both of these aspects are "jurisdictional", they differ in their nature and consequences. Nothing in the Decision casts doubt on the former aspect[13]—that there is a proper basis for the jurisdiction of the Court over the Cases, as well as any other conduct falling

[11] Specifically, in this scenario, if it were correct that the Cases (and, by implication, the subject-matter of the Referral) exceed the objective parameters of the situation based on the Authorisation, and are not otherwise sufficiently linked to them, then the Prosecution submits that the necessary remedies would be: (a) to quash the decisions initiating prosecution of the Cases; (b) to trigger the Court's exercise of jurisdiction over the subject-matter of the Referral by creating a new situation and then opening a new investigation thereof, subject to articles 53(1) and 18, and; (c) to renew the Prosecution's requests for the issue of warrants for the arrest of the suspects named in the Cases in the context of that new investigation. Nevertheless, the Prosecution reiterates and maintains that such remedies are not necessary because the Cases (and the subject-matter of the Referral) fall within the objective parameters of the situation based on the Authorisation, or are otherwise sufficiently linked to them: *see above* fn. 10.

[12] *See e.g.* ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), paras. 82-83. *See further* paras. 77-81.

[13] *See e.g.* Decision, para. 16 (stating that "[t]his finding is without prejudice to the Court's jurisdiction over the conduct described in the Referral, which is governed by articles 13(a) and 14 of the Statute").

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

within the scope of the situation(s), however defined.[14] This is important, since the Court cannot itself cure any defect of jurisdiction—unlike a defect in the Court's *exercise* of jurisdiction, which may be cured by the Court's own procedural steps.

17. The Prosecution respectfully seeks clarification of the Decision on the latter aspect, concerning the Court's present *exercise* of jurisdiction over the Cases (and, by implication, the subject-matter of the Referral). In particular, while the *ratio decidendi* of the Decision suggests that the Chamber has concluded that the present exercise of jurisdiction over the Cases (and, by implication, the subject-matter of the Referral) is invalid, this seems to be contradicted by at least some *obiter dicta*. The Chamber's view on this question is important not only for the future disposition of the Cases (in particular, in the context of litigation if one or more suspects are arrested and surrendered to the Court), but also bears significantly upon the statutory basis of the procedural relief ordered in the Decision.

18. In support of the Prosecution's view that the *ratio decidendi* of the Decision suggests that the Chamber has concluded that the Court's present exercise of jurisdiction over the Cases (and, by implication, the subject-matter of the Referral) is invalid—because the subject-matter exceeds the objective parameters of the Authorisation, or is not sufficiently linked to it—the Prosecution recalls the following statements in the Decision, namely that:

- The Chamber issued the Decision "*in order to prevent any potential future challenges concerning the proper trigger mechanism for the Court's jurisdiction* in relation to criminal allegations" presently addressed in the situation;[15]
- The Chamber considered "the Prosecution's interpretation of its investigation in the situation in Afghanistan *raises questions* as to the proper limits of an investigation authorised pursuant to article 15 of the Statute",[16] and further contrasted its view of the subject-matter of the Referral with its view of the circumstances falling within the scope of the Authorisation,[17] and;

[14] Notably, Afghanistan is a State Party, having acceded to the Statute in 2003.
[15] Decision, para. 10 (emphasis added).
[16] Decision, para. 13 (emphasis added).
[17] *See e.g.* Decision, para. 14 ("The Referral concerns allegations of gender and political persecution through the adoption, implementation and enforcement of discriminatory decrees, policies and restrictions made possible by the Taliban's exercise of *de facto* governmental authority, rather than conduct alleged committed by the Taliban as an insurgent armed group during the armed conflict"). *See also* para. 13 ("Although the [A]uthorisation 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 light of the factual assessment and considerations included in said authorisation. The authorised investigation remains defined by the factual parameters established by the Amended

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

- The Chamber concluded that a new investigation should be opened into the subject-matter of the Referral because "the conduct identified in the Referral constitutes a *sufficiently distinct* subset of alleged events that […] warrants a separate investigation",[18] and based on the Chamber's view that "[t]he allegations in the Referral […] 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".[19]

19. By contrast, militating against this understanding of the Decision, the Prosecution notes that:

- The Chamber elsewhere stated that the Decision was issued "in the interests of the proper administration of justice and the orderly management of the Court's proceedings";[20]
- The Chamber considered it "*unnecessary* to determine the precise limits of [the Authorisation] for the purposes of the present decision";[21] and reiterated that its "conclusion is reached *irrespective* of whether aspects" of the subject-matter of the Referral "could otherwise be regarded as falling within the factual framework of [the Authorisation]",[22] and;
- The Chamber did *not* expressly disclaim or overturn its previous decisions issuing warrants of arrest and thereby initiating prosecutions in the Cases, where it had found that the conduct alleged therein "falls within the jurisdiction of the Court", based on "the material before it, including in particular information contained in the Referral."[23]

20. In attempting to interpret the Decision properly, the Prosecution has considered whether the Statute permits the Chamber to rule on jurisdictional matters at the present stage of proceedings—since, if the Statute does not permit a jurisdictional ruling at this stage, then the Decision cannot properly be understood as such.

Article 15 Decision"). *Cf.* ICC-02/17-138 OA4 ("Article 15 Appeal Judgment"), para. 79; ICC-02/17-218 OA5 ("Article 18 Appeal Judgment"), paras. 59, 62.
[18] Decision, para. 16 (emphasis added).
[19] Decision, para. 14 (emphasis added).
[20] Decision, para. 16.
[21] Decision, para. 13.
[22] Decision, para. 16 (emphasis added).
[23] *See* ICC-02/17-232-US-Exp, para. 9 (emphasis added); ICC-02/17-233-US-Exp, para. 9; ICC-02/17-234-US-Exp, para. 9; ICC-02/17-235-US-Exp, para. 9. The Prosecution notes, however, that consistent with the typical approach in such decisions, the Chamber included the express qualification that these findings were "without prejudice to any future determinations on this matter".

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

21. In this regard, the Prosecution respectfully disagrees with some of the terms in which the Decision articulates the Chamber's competence, since it overlooks the important distinction between the Chamber's competence to assess the Court's exercise of jurisdiction over the *situation* (where the Prosecutor has "responsibility for the conduct of investigations"[24]) and the *Cases* (in which prosecutions are initiated by decision of the Chamber under article 58). While the Statute does not provide the Chamber either expressly or implicitly with competence to make *proprio motu* jurisdictional determinations in the context of an *investigation*,[25] once initiated,[26] the Prosecution agrees that the Chamber "shall satisfy itself that it has jurisdiction in any *case* brought before it".[27] It follows that, in "exceptional" circumstances, the Chamber may subsequently also be entitled to reconsider such a finding in accordance with the applicable test.[28]

22. Consequently, the Prosecution seeks clarification as to whether the Decision amounts to a new ruling on the Court's exercise of jurisdiction in the Cases, reconsidering the affirmation

[24] Article 15 Appeal Judgment, para. 63. *See further below* para. 27.
[25] *Contra* Decision, para. 10 (fn. 13). *See* ICC-01/05-01/13-2276-Red A6 A7 A8 A9 ("*Bemba et al.* Sentencing Appeal Judgment"), paras. 75 ("in the legal framework of the Court, 'inherent powers' should be invoked in a *very restrictive manner*", emphasis added, citing ICC-02/05-03/09-410 ("*Banda* Stay of Proceedings Decision"), para. 78: "[t]his caveat is important for the reason, among others, that its proceedings 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"), 76 ("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 […] not every 'silence' in the legal framework of the Court constitutes a lacuna"). In particular, since the Statute provides a comprehensive scheme for jurisdictional assessments, there is no lacuna: *see below* paras. 27-29. Furthermore, the Appeals Chamber has specifically held that "continuous monitoring of the scope of the Prosecutor's investigation by the pre-trial chamber is *contrary* to the statutory scheme regulating the respective functions and powers of these two organs with respect to investigations": Article 15 Appeal Judgment, para. 63 (emphasis added). For similar reasons, the Pre-Trial Chamber may not rely on its article 19(1) power, prior to the initiation of a prosecution in a case, to attempt to pre-empt potential jurisdictional challenges: *contra* Decision, para. 10. *See, mutatis mutandis*, ICC-01/04-169 OA ("*DRC* Arrest Warrants Appeal Judgment""), paras. 46-53. In the context of admissibility—which the Statute treats according to the same scheme, in relevant part, as jurisdictional matters (for example, in article 19)—the Appeals Chamber expressly stated that "[i]t is not necessary for a Pre-Trial Chamber to 'come to the aid' of a suspect" by anticipating potential challenges and that, at least "when deciding on an application for a warrant of arrest […] the Pre-Trial Chamber should exercise its discretion [under article 19(1)] only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect".
[26] For the limited purpose of *opening* an investigation, the Statute provides for a bifurcated process. If the Prosecutor has sought to open an investigation *proprio motu*, and requested authorisation from the Pre-Trial Chamber under article 15(3)—as originally occurred in this situation—the Pre-Trial Chamber is mandated under article 15(4) to determine "whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction": Article 15 Appeal Judgment, para. 46. By contrast, if the subject-matter of the investigation is referred to the Court by a State Party or the UN Security Council, the Prosecutor has primary competence to determine whether there is a reasonable basis to believe that "a crime within the jurisdiction of the Court has been or is being committed" under article 53(1)(a). Only if the Prosecutor decides *not* to open an investigation does the possibility arise, at the motion of the referring entity, that the Pre-Trial Chamber might review this preliminary jurisdictional determination under article 53(3)(a).
[27] Statute, art. 19(1) (emphasis added). *See further below* para. 28.
[28] *See above* fns. 7-8.

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

of jurisdiction in the decisions issuing warrants of arrest.[29] *As a factual matter*, in the present circumstances, such a ruling would necessarily bear further implications for the Court's exercise of jurisdiction over the subject-matter of the Referral more generally.[30]

23. Considering the Decision as a whole, therefore, it is reasonably open to question whether the dominant rationale for the relief ordered by the Chamber is its view that the Cases—and, by implication, the subject-matter of the Referral—exceed the scope of the Authorisation. In particular:

- If the Decision *does* amount to a jurisdictional ruling of this kind, this would have significant implications (and would be respectfully contested by the Prosecution on its substance), yet it would clarify the statutory basis of the relief ordered in the Decision.
- On the other hand, if the Decision is *not* intended as a jurisdictional ruling, then it is important to clarify this to avert unfounded future jurisdictional challenges (especially if an arrest warrant is executed)—an aim which the Chamber expressly sought to achieve.[31] Furthermore, if not a jurisdictional ruling, then the statutory basis of the relief ordered in the Decision requires additional clarification, as addressed below.[32]

24. For all these reasons, the Prosecution therefore respectfully requests the Chamber to clarify and/or confirm whether it has decided that the Court is not properly exercising its jurisdiction over the Cases (and, by implication, the subject-matter of the Referral more generally), or whether it maintains the view expressed in its prior decisions on the arrest warrants affirming this exercise of jurisdiction.

B.2. If the Court's present exercise of jurisdiction over the Cases (and the subject-matter of the Referral) is not invalid, there is no statutory basis to open a new investigation

25. If the Chamber clarifies that the Decision did *not* determine that the Cases (and, by implication, the subject-matter of the Referral) exceed the objective parameters of the Authorisation, or are not sufficiently linked to them, the Prosecution respectfully seeks clarification of the statutory basis relied upon by the Chamber to direct the Prosecution to open a new investigation in such circumstances.

[29] *See above* fn. 23.
[30] This remains consistent with the legal principle that this would not be the object of the ruling: *see above* para. 21 (*especially* fn. 25).
[31] *See* Decision, para. 10. *But see also above* fn. 25.
[32] *See further below* paras. 25-39.

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

26. For the reasons set out in the following paragraphs, the Prosecution respectfully submits that there is no such basis. This is both in light of the distinct competences of the Prosecutor and the Pre-Trial Chamber, and the statutory purpose of opening investigations into "situations" (rather than specified "cases") as a procedural means to facilitate the Prosecutor's independence in carrying out investigations with a view to potential prosecutions.

27. First, the Prosecution recalls the Appeals Chamber's guidance that the Statute vests the Prosecutor with "responsibility for the conduct of investigations", once initiated.[33] Specifically, articles 42, 53(2), 54, and 58 of the Statute vest the Prosecutor with broad discretion to determine which cases should be presented to the Pre-Trial Chamber for potential prosecution, by way of applications for an arrest warrant or a summons to appear. In the exercise of that discretion, as the Appeals Chamber has underlined, the Prosecutor is entitled to investigate "the situation as a whole".[34] This means all relevant conduct which may fall within the objective parameters of the situation, as well as that which is sufficiently linked to those parameters. Since this is an *investigative* process, it may well be necessary at this stage for the Prosecution to resolve "[f]acts which are difficult to establish, or which are unclear, or the existence of conflicting accounts".[35] In this context, recourse to the supervision of the Pre-Trial Chamber "as new facts are uncovered" would likely be counter-productive and inefficient.[36]

28. Second, while the Pre-Trial Chamber may only exercise "specific functions" during investigations as set out in "articles 56 and 57",[37] the Statute provides for judicial supervision of the Court's exercise of jurisdiction but only *in the context of concrete cases*—that is, following an investigation, once the Prosecutor has requested the initiation of a prosecution under article 58.[38] This is set out expressly in articles 19(1) and (2), which refer to a "case".[39] In this context, the Pre-Trial Chamber may satisfy itself that the Court is properly exercising

[33] Article 15 Appeal Judgment, para. 63.
[34] Article 15 Appeal Judgment, para. 60.
[35] ICC-01/13-34 ("*Comoros* First Review Decision"), para. 13.
[36] *See* Article 15 Appeal Judgment, para. 63.
[37] Article 15 Appeal Judgment, para. 63.
[38] This is when a "case" first becomes legally defined: *see e.g.* ICC-01/04-101-tEN-Corr ("*DRC* Victim Participation Decision"), para. 65 ("Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or summons to appear"). *See also* ICC-01/09-01/11-307 OA ("*Ruto et al.* Admissibility Appeal Decision"), para. 40.
[39] *See* Statute, art. 19(1) and (2). *See further* e.g. ICC-01/04-93 ("*DRC* Jurisdiction Submission Decision"), p. 4; ICC-01/04-169 OA ("*DRC* Arrest Warrant Appeal Judgment"), paras. 46-52; ICC-RoC46(3)-01/18-37-Anx ("*Bangladesh/Myanmar* Regulation 46 Decision, Partially Dissenting Opinion of Judge Perrin de Brichambaut"), para. 10; ICC-01/18-143 ("*Palestine* Article 19(3) Decision"), paras. 68, 73-74; ICC-02/18-45 ("*Venezuela* Article 18(2) Decision"), paras. 34-35; ICC-02/05-01/20-503 OA8 ("*Abd-Al-Rahman* Jurisdiction Appeal Judgment"), para. 45. *See also* W.A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (OUP: 2016), pp. 487-488.

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jurisdiction over a case based on whether the relevant conduct falls within the objective parameters of a situation, or is sufficiently linked to them.[40] Since by definition a case presented to the Pre-Trial Chamber for potential prosecution should have been sufficiently investigated by the Prosecution, there would then be a sufficient evidentiary basis for the Pre-Trial Chamber to make its jurisdictional assessment.[41] Until that point, the Pre-Trial Chamber would not have such a basis.[42]

29. Third, it follows from these principles that—in the course of investigation—it is the Prosecutor, and not the Pre-Trial Chamber, who initially determines whether alleged criminal conduct (whether arising as a potential case or as the subject-matter of a new referral) falls within the objective parameters of a situation, or is sufficiently linked to them. The Pre-Trial Chamber is neither empowered, nor even provided with the evidentiary means, to scrutinise this question unless and until either: (i) it is expressly requested by the Prosecutor under article 19(3) of the Statute to provide such a ruling, or; (ii) a concrete case arising from the relevant alleged conduct is presented by the Prosecutor for potential prosecution under article 58. The Appeals Chamber has expressly cautioned against "cumbersome and unwieldy procedures […] not required by the Statute", which "are likely to have a significant detrimental effect on the conduct of investigations."[43]

30. Fourth, the consistent practice of the Court has reflected the role of the Prosecutor in determining whether the subject-matter of a new referral falls within the objective parameters of a situation, or is sufficiently linked to them.[44] 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

[40] *See e.g.* ICC-01/11-01/25-142 ("*El Hishri* Jurisdiction Decision"), paras. 36-40; ICC-01/04-01/12-1-Red ("*Mudacumura* Article 58 Decision"), paras. 14-17; ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), paras. 21, 39, 41-43, 50; ICC-01/04-01/10-1 ("*Mbarushimana* Article 58 Decision"), paras. 4-7. *See also* ICC-01/18-481 OA3 ("*Palestine* Article 18 Appeal Judgment"), para. 135; Article 15 Appeal Judgment, paras. 57-64 (rejecting a "closely linked" test). *See further e.g.* ICC-01/04-575 ("*DRC* Request for Information (Mbarushimana)"), paras. 12-15 (requesting information from the Prosecution concerning the link between a case and the situation, having regard to factors such as the "fundamental" and "complex" nature of this issue).
[41] *See also e.g. El Hishri* Jurisdiction Decision, para. 42 (having affirmed jurisdiction in that case, observing that "[t]he question of whether the Court would continue to have jurisdiction over *other* potential cases […] will depend on the specific facts and circumstances of each case", emphasis added); *Bangladesh/Myanmar* Regulation 46 Decision, Partially Dissenting Opinion of Judge Perrin de Brichambaut, para. 13 (warning against "hypothetical or abstract questions of jurisdiction that do not arise from a concrete case").
[42] *See also above e.g.* fns. 35-36.
[43] Article 15 Appeal Judgment, para. 63.
[44] *See also* ICC-01/18-481 OA3 ("*Palestine* Article 18 Appeal Judgment"), para. 105 (affirming that subsequent referrals may simply be submitted "with a view to urging the Prosecutor to advance the investigation" rather than necessarily implying any view that a new investigation is warranted). *Cf.* Decision, para. 15.

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the scope of an existing investigation, the Prosecution immediately (and transparently) proceeded on this basis.[45] 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.[46]

- 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 proceeded to conduct a preliminary examination.[47] On the basis of such an examination, the Prosecution then still either determined that the conduct did fall within the scope of an existing investigation (as in *DRC II*)[48] 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*).[49]

31. The statutory scheme described above is incompatible with any implied or inherent power for the Pre-Trial Chamber to direct the opening of a new investigation purely "in the interests of the proper administration of justice and the orderly management of the Court's proceedings".[50]

32. To the contrary, the Prosecution respectfully submits that any power to direct the opening of situations for the purpose of investigating conduct already falling within an existing situation would undermine the delicate balance of interests struck in the Statute. In particular, it would be inconsistent with the purpose of a situation as a means "to extend[] enough flexibility to the Prosecutor to investigate independently and impartially",[51] because it would enable subsequent referrals to be used as a means to narrow or divide the scope of particular investigations, and to impose further procedural constraints upon them. This would also risk impeding the efficient

[45] *See e.g.* ICC OTP, *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 (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 (explaining the practice in *Venezuela I*).
[46] *See e.g.* *Palestine* Article 18 Appeal Judgment, paras. 87, 91-92, 99-110.
[47] *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").
[48] *See* ICC-01/23-4-Red ("*DRC II* Investigation Decision"), paras. 2, 7-8.
[49] *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").
[50] *Contra* Decision, para. 16.
[51] *See e.g.* *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 25; *Palestine* Article 18 Appeal Judgment, para. 82.

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

conduct of investigations and management of the Court's limited resources, including but not limited to: (i) the unnecessary repetition of preliminary examinations; (ii) the unnecessary repetition of article 18(1) notifications (entailing the consequential suspension of investigative activity, and potential litigation), and; (iii) increased confusion about the scope of the Court's activities. This would be contrary to the interests of victims, affected communities, and cooperating States.

33. For all these reasons, if the Chamber clarifies that the Decision did *not* determine that the Cases (and, by implication, the subject-matter of the Referral) exceed the objective parameters of the Authorisation, or are not sufficiently linked to them, the Prosecution respectfully requests that the Chamber clarifies its view of the statutory basis for directing the Prosecution to open a new investigation and, if necessary, reconsider this direction.

B.3. While the Decision appears to anticipate transferring the Cases into a new situation based on the Referral, there is no statutory basis for such a procedure

34. The Prosecution notes footnote 16 of the Decision, which states:

> Considering that more than three years have elapsed since the Chamber authorised the resumption of the investigation into the Situation in Afghanistan and that *no proceedings are presently pending* in relation to the conduct covered by that authorisation, the Chamber draws the Prosecution's attention to the recently implemented regulation 66*ter* of the Regulations of the Court, which allows the Prosecution to request the closure of a situation record when it does not anticipate any further investigatory or prosecutorial activities in relation thereto. [Emphasis added.]

35. At present, the Prosecution respectfully notes that—contrary to the italicised text above—concrete proceedings *are* presently pending in the situation: namely, the Cases.[52] It seems to be implicit in footnote 16, therefore, that the Chamber anticipates that the Cases might in some way be 'transferred' from the situation in which they were issued (*i.e.*, the situation based on the Authorisation) into an hypothetical new situation (based on the Referral). Otherwise, the Cases themselves preclude any possibility that regulation 66*ter* might be triggered unless and until the prosecutions of these Cases are completed.[53]

[52] This is also without prejudice to the Prosecution's ongoing investigation: *see further below* paras. 40-45.
[53] In this sense, the Prosecution notification contemplated by regulation 66*ter*(2)(a)—which encompasses the anticipated conclusion of "prosecutorial" as well as "investigatory" activities—is not the same as the Prosecution determination that it has completed its investigation, in the sense that it does not anticipate seeking to initiate further prosecutions for alleged article 5 crimes in the situation: *see e.g.* ICC OTP, *Policy on Situation Completion*, 2021.

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

36. On the assumption that the Chamber confirms that the Decision does not rule that the Court's present exercise of jurisdiction over the Cases is invalid,[54] the Prosecution respectfully seeks clarification of the statutory basis for 'transferring' the Cases into an hypothetical new situation based on the Referral. The possibility of such a measure is of particular concern due to the potential implications of such a novel procedure for the conduct of future litigation in the Cases, especially if a suspect is arrested and surrendered to the Court and brings a jurisdictional challenge on this basis.

37. The Prosecution notes that neither the Statute not any of the Court's legal texts makes any express reference to the possibility that a case may be transferred out of one situation (where it was initiated) and into another, by any organ of the Court.[55] Nor does the Prosecution consider that such a power may be implied into any relevant provision, or that it could be exercised as an inherent power, given the potential significance of such a procedure.[56]

38. In particular, in this regard, the Prosecution recalls that it is the constant practice of the Court to verify the exercise of jurisdiction over a *case* by reference to its links to the *situation in which it was initiated*.[57] Consequently, the Prosecution regards with potential concern any novel procedural measure to alter those jurisdictional links which is not clearly founded in the Statute, since this could give rise to a future challenge under article 19(2) of the Statute. At the very least, if the Cases were to be 'transferred' into any new situation based on the Referral, this would lead to the anomaly that the arrest warrants would *pre-date* the opening of the situation to which would (presumably) be linked for the purpose of verifying the Court's exercise of jurisdiction.

39. Accordingly, if the Chamber clarifies that its Decision did *not* determine that the Cases exceed the objective parameters of the Authorisation, or are not sufficiently linked to them, and therefore that the Cases remain within the jurisdictional scope of the present situation, the Prosecution requests that the Chamber clarifies and, if necessary, reconsiders its view of the statutory basis for 'transferring' the Cases from the present situation (based on the Authorisation) into any potential new situation which is opened (based on the Referral).

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[54] *See above* paras. 13-24 (including fn. 11).
[55] To the contrary, the Court's legal texts appear to regulate expressly and exhaustively the power of the Presidency to assign (whole) situations to Pre-Trial Chambers, and the power of the Presidency to assign a case to a newly constituted Trial Chamber, once charges are confirmed: *see e.g.* Regulations of the Court, reg. 46(2); ICC RPE, rule 130. Accordingly, if a power to transfer cases between situations had been contemplated, it would likewise have been seen out expressly, together with a clear specification of the competent organ, and the circumstances in which such a procedure would be applicable.
[56] *See above* fn. 25.
[57] *See above* fn. 40.

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

C. Even if a new investigation were to be opened in a distinct situation based on the Referral, the Prosecution does not presently anticipate a regulation 66*ter*(2)(a) notification concerning the investigation in the situation based on the Authorisation

40. Further to the above submissions concerning the disposition of the Cases, and in any event, the Prosecution also considers it necessary to provide the Chamber with certain information relevant to the likelihood of any regulation 66*ter*(2)(a) notification in the present situation in the near term.[58]

41. Within the exercise of its discretion, and consistent with the investigative priorities which were publicly stated by former Prosecutor Khan[59]—and on which the Prosecution does not presently consider it apposite to comment further—the Prosecution is pursuing three principal lines of inquiry in the situation based on the Authorisation, namely:

- Crimes allegedly committed by the Taliban since August 2021 against women and girls;[60]
- Crimes allegedly committed by the Taliban since August 2021 against other persons, not limited to women and girls, such as persecution on political, ethnic, and/or religious grounds,[61] and;
- Crimes allegedly committed by the Islamic State in Khorasan Province ("IS-K") since 2016.[62]

42. [REDACTED]. [REDACTED].[63]

43. The Prosecution further notes that it is actively engaged in monitoring and supporting national investigations and prosecutions [REDACTED].[64] The Prosecution does not anticipate that any regulation 66*ter*(2)(a) notification would be appropriate until these proceedings have concluded.

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[58] *See above* para. 34 (quoting Decision, fn. 16).
[59] *See* ICC OTP, *Statement of the Prosecutor […] following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, 27 September 2021.
[60] To date, these alleged crimes are presently reflected, for example, in the Cases.
[61] At least some of these alleged crimes are, likewise, implied by the Chamber's findings in the decisions initiating prosecutions in the Cases: *see e.g.* ICC-02/17-232-US-Exp, paras. 34-39. Furthermore, and in any event, the Prosecution is presently investigating the responsibility of suspects other than those prosecuted in the Cases for such crimes.
[62] The Prosecution recalls that the Appeals Chamber has expressly affirmed that these alleged crimes may in principle fall within the scope of the Authorisation: Article 18 Appeal Judgment, para. 60.
[63] *See e.g. Mbarushimana* Jurisdiction Decision, para. 27 (recalling that "a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date"). *See also e.g.* ICC-02/04-01/05-68 ("*Uganda* Status Conference Decision"), paras. 4-5 (referring to the Prosecutor's conclusion that the scope of the *Situation in Uganda*, read compatibly with the Statute, was not limited to the particular group (the LRA) named in the referral).
[64] [REDACTED].

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

44. Likewise, the Prosecution recalls the 2025 decision of the UN Human Rights Council to create the Independent Investigative Mechanism for Afghanistan ("IIMA"), which is mandated "to collect, consolidate, preserve and analyse evidence of international crimes […] committed in Afghanistan" and to "[c]ooperate closely with ongoing and future investigations by national, regional or international courts or tribunals, including those conducted by the International Criminal Court".[65] This mechanism has a broad mandate which is specifically informed by the scope of the Authorisation, and expressly includes but is not limited to the scope of the Referral.[66] It would be counter-productive for the Prosecution to limit its ability to receive and act upon information from the mechanism by means of a regulation 66*ter*(2)(a) notification.

45. Accordingly, in the present circumstances, even if the Cases were to be 'transferred' to a potential new situation based on the Referral,[67] the Prosecution does not anticipate making a regulation 66*ter*(2)(a) notification in the situation based on the Authorisation in the near term.

CONCLUSION

46. For all the reasons above, the Prosecution respectfully requests that:

a. the Chamber clarifies the critical reasoning in the Decision, namely—

i. the validity or otherwise of the Court's present exercise of jurisdiction over the Cases, and by implication the subject-matter of the Referral;

ii. the statutory basis for the Chamber's order directing the Prosecution to open a new investigation concerning the Referral, if the Chamber is of the view that the Court's present exercise of jurisdiction over this subject-matter is valid;

iii. the statutory basis for the Chamber's apparent intention to 'transfer' the Cases into any new situation for which an investigation is opened into the subject-matter of the Referral; and

[65] *See* UN HRC Res. 60/2, UN Doc. No. A/HRC/60/L.9, paras. 25, 26(i). *See also* UN, *Establishment of independent investigative mechanism for Afghanistan answers the call of Afghan victims, says UN expert*, 7 October 2025.
[66] *See e.g.* UN HRC Res. 60/2, UN Doc. No. A/HRC/60/L.9, para. 21 (noting "the [Article 15 Appeal Judgment] and the statement made on 29 November 2024 by the Prosecutor of the said Court regarding alleged crimes under the jurisdiction of the Court in relation to the situation in Afghanistan, and also of [the Referral], urging the consideration of gender-based persecution within the scope of the Court's existing probe on Afghanistan, and request[ing] the mechanism to cooperate fully with any of its ongoing and possible future investigations pertaining to human rights violations and abuses in Afghanistan"). *See also* Terms of Reference, including paras. 3, 7, 17.
[67] *But see above* paras. 34-39.

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

b. the Chamber reconsiders any of these matters as necessary, and in any event reconsiders the relief ordered by the Chamber in the Decision.

47. In any event, and notwithstanding any further procedural remedies which may be open to it under the Statute,[68] the Prosecution remains ready and willing to engage further with the Chamber (in formal or informal consultations) on any aspect of the Decision, or this request, or other appropriate matters concerning the conduct of the investigation in this situation, as the Chamber considers appropriate, and in accordance with the statutory framework.

Mame Mandiaye Niang
Acting Prosecutor

Dated this 6th day of October 2026
At The Hague, the Netherlands

[68] *See also above* para. 4 (recalling the Prosecution's understanding that this motion is without prejudice to any further exercise of its rights under the Statute to seek appeal of the outcome(s) of this motion including with regard to principles or understandings also previously expressed in the Decision).