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: **15 July 2026**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

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

Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan

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

☒ **The Office of the Prosecutor**

☐ **Counsel for the Defence**

☐ **Legal Representatives of the Victims**

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants (Participation/Reparation)**

☐ **The Office of Public Counsel for Victims**

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

☐ **States' Representatives**

☐ **Amicus Curiae**

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations Section**

☐ **Other**

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PRE-TRIAL CHAMBER II of the International Criminal Court (the 'Chamber') issues this Decision in relation to the investigation in the situation in the Islamic Republic of Afghanistan (the 'Situation in Afghanistan').

I. PROCEDURAL HISTORY

1. On 20 November 2017, the Prosecution submitted to Pre-Trial Chamber III a 'Request for authorisation of an investigation pursuant to article 15 of the Statute in the Situation in Islamic Republic of Afghanistan' (the 'Article 15 Request').[1]

2. On 12 April 2019, Pre-Trial Chamber II, in a different composition, issued a decision rejecting the Article 15 Request (the 'Article 15 Decision').[2]

3. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised an investigation into the Situation in Afghanistan (the 'Amended Article 15 Decision').[3]

4. On 31 October 2022, following a deferral request by the Government of Islamic Republic of Afghanistan ('Afghanistan') and the temporary suspension of the Prosecution's investigative activities,[4] the Chamber granted the Prosecution's request to authorise the resumption of its investigation into the Situation in Afghanistan (the 'Article 18(2) Decision').[5]

5. On 4 April 2023, following an appeal from the Prosecution,[6] the Appeals Chamber amended the Article 18(2) Decision to align with the scope of the

[1] ICC-02/17-7-Conf-Exp, confidential and *ex parte* (a public redacted version of the decision was filed on the same day ICC-02/17-7-Red).
[2] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33. On 31 May 2019, Judge Mindua issued the Concurring and Separate Opinion of Judge Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx-Corr, annexed to the Afghanistan Article 15 Decision, and a public annex.
[3] Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138.
[4] Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute, 15 April 2020, ICC-02/17-139, with public annex 1 containing the deferral request.
[5] Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, ICC-02/17-196.
[6] Prosecution appeal of 'Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation', 22 November 2022, ICC-02/17-198.

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Prosecution's investigation, as determined in the Amended Article 15 Decision (the 'Amended Article 18 Decision').[7]

6. On 28 November 2024, six States Parties[8] submitted a referral, pursuant to articles 13 and 14 of the Statute, requesting the Prosecution to consider allegations of 'crimes committed against women and girls after the Taliban takeover in 2021 within its investigation into the Situation in Afghanistan' (the 'Referral').[9]

7. On 23 January 2025, the Prosecution filed applications for warrants of arrest under article 58 of the Statute in relation to four suspects, for their alleged responsibility for the crime against humanity of persecution on gender and political grounds, committed by the Taliban as the *de facto* governmental authority in Afghanistan, from at least 15 August 2021 until at least 20 January 2025 (the 'Article 58 Applications').[10]

8. On 8 July 2025 and 9 September 2025, the Chamber issued warrants of arrest in relation to four suspects (the 'Arrest Warrants').[11]

II. ANALYSIS

9. The Chamber recalls that the Appeals Chamber authorised an investigation into the Situation in Afghanistan in relation to

> 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.[12]

10. The Chamber, consistent with the principle of judicial oversight, has an inherent responsibility to ensure that investigations conducted pursuant to article 15 of the

[7] Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled 'Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation', ICC-02/17-218.
[8] The Republic of Chile, the Republic of Costa Rica, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, and the United Mexican States.
[9] ICC Press Release, Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in Afghanistan: receipt of a referral from six States Parties, 29 November 2024, containing the referral pursuant to articles 13(a) and 14(1) of the Statute, signed by the Republic of Chile, Republic of Costa Rica, Kingdom of Spain, French Republic, Grand Duchy of Luxembourg and United Mexican States, Nr.114.24.4.C.
[10] See e.g. Public redacted version of 'Prosecution's application under article 58 for a warrant of arrest against Haibatullah Akhundzada', ICC-02/17-224-Red; Public redacted version of 'Prosecution's application under article 58 for a warrant of arrest against Abdul Hakim Haqqani', ICC-02/17-225-Red; ICC-02/17-230-US-Exp; ICC-02/17-231-US-Exp.
[11] ICC-02/17-232-US-Exp, ICC-02/17-233-US-Exp, ICC-02/17-234-US-Exp, ICC-02/17-235-US-Exp. At the time of issuance of this Decision, the arrest warrants remained under seal.
[12] Amended Article 15 Decision, para. 79.

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Statute remain within the scope authorised by the Court.[13] In light of the foregoing and in order to prevent any potential future challenges concerning the proper trigger mechanism for the Court's jurisdiction in relation to criminal allegations occurring in the context of the Afghanistan situation, the Chamber has examined whether, having regard to the particular features of the conduct described in the Referral, those allegations should be addressed within the existing investigation into the Situation in Afghanistan or in a separate investigation.

11. The Referral submitted by the six States Parties 'under the provisions of Articles 13(a) and 14(1) of the Rome Statute of the International Criminal Court' requested the Prosecution to consider 'crimes committed against women and girls after the Taliban takeover in 2021 within its investigation into the Situation in the Islamic Republic of Afghanistan'.

12. In the Article 58 Applications, the Prosecution submitted that the alleged persecution carried out in Afghanistan from 15 August 2021 falls within the parameters of the investigation authorised under article 15 of the Statute. It sustained that the requirement of a nexus to the armed conflict in Afghanistan in the authorisation apply only to conduct committed on the territory of *other* States Parties, and not to conduct in Afghanistan. It further argued that, in any event, the alleged persecution remained factually connected to the armed conflict since it constituted a continuation of the Taliban's long-standing campaign against the civilian population and was enabled by the conflict itself.[14] Finally, it relied on the fact that the referring States had themselves requested that those allegations be investigated within the existing Afghanistan investigation.

13. The Chamber observes 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. If the nexus to the armed conflict applied

[13] The Chamber notes that the Appeals Chamber has recognised, although in a different context, the notion of a 'inherent powers', indicating that they should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure. See Judgment on the appeals against the Decision on Sentence pursuant to Article 76 of the Statute, 8 March 2018, ICC-01/05-01/13-2276-Red, para. 75.
[14] Public redacted version of "Prosecution's application under article 58 for a warrant of arrest against Haibatullah Akhundzada", ICC-02/17-224-Red, paras 160-161; Public redacted version of "Prosecution's application under article 58 for a warrant of arrest against Abdul Hakim Haqqani", ICC-02/17-225-Red, paras 161-162.

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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. Although 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. The authorised investigation remains defined by the factual parameters established by the Amended Article 15 Decision. In any event, it is unnecessary to determine the precise limits of that authorisation for the purposes of the present decision. For the reasons that follow, the Chamber considers that, having regard to the specific conduct described in the Referral, it would be more appropriately addressed through a separate investigation.

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 allegedly committed by the Taliban as an insurgent armed group during the armed conflict. As the Prosecution itself has recognised, after seizing power in August 2021, '[r]ather than relying on armed attacks, kidnappings, and suicide bombings to impose their ideology upon the civilian population, the Taliban could impose their discriminatory rules and prohibitions on the population directly, and punish those whom they considered did not conform'.[15] The allegations in the 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.

15. Nor does the Chamber consider that the terms of the Referral alter that conclusion. While 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

[15] See e.g. Public redacted version of "Prosecution's application under article 58 for a warrant of arrest against Haibatullah Akhundzada", ICC-02/17-224-Red, para 128; Public redacted version of "Prosecution's application under article 58 for a warrant of arrest against Abdul Hakim Haqqani", ICC-02/17-225-Red, para.128.

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Court under article 15 of the Statute nor the manner in which situations under investigation are administered by the Court.

16. In light of the above, the Chamber considers that the conduct identified in the 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. This 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. This 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.

17. Accordingly, the Chamber directs the Prosecution, should it continue to consider that the requirements of article 53(1) of the Statute are satisfied, to open a separate investigation on the basis of the Referral. In that event, the Prosecutor shall also comply with the notification regime under article 18(1) of the Statute.[16]

18. Furthermore, Regulation 45 of the Regulations of the Court requires the Prosecutor to inform the Presidency in writing as soon as a situation has been referred by a State Party pursuant to article 14 of the Statute. There is no indication on the record that such notification was made in respect of the Referral. The Chamber therefore directs the Prosecutor to comply with such obligation without delay so that the appropriate administrative measures can be taken.

[16] 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.

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FOR THESE REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution, should it continue to consider that the requirements of article 53(1) of the Statute are met, to open a new investigation on the basis the Referral submitted by the six States Parties on 28 November 2004;

DIRECTS the Prosecution to comply with Regulation 45 of the Regulations of the Court by notifying the Presidency of the Referral without delay.

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

Judge Rosario Salvatore Aitala

Presiding

Judge Sergio Gerardo Ugalde Godínez

Judge Haykel Ben Mahfoudh

Dated this Wednesday, 15th of July 2026.

At The Hague, The Netherlands.

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