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Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-02/17**
Date: **11 November 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

Public

Prosecution notice of appeal, and request for suspensive effect, of "Order to transfer court records to the Situation in Afghanistan II" (ICC-02/17-249)

Source: **Office of the Prosecutor**

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Notice of Appeal

1. Proceedings are already pending before the Appeals Chamber concerning two decisions of Pre-Trial Chamber II ("the Chamber") which directed the Prosecution to treat the subject-matter of the purported referral by six States Parties made on 28 November 2024 ("the Referral") *separately* from its existing investigation in this situation arising from the Appeals Chamber's Article 15 Authorisation of 5 March 2020 ("the First Appeal").[1] As a consequence of the Chamber's decisions, the Presidency by majority ordered the opening of a new situation record (the "*Situation in the Islamic Republic of Afghanistan II*" or "situation 02/26").[2]

2. In a further decision on 5 November 2026, notwithstanding the First Appeal, the Chamber directed the Registry immediately to transfer a significant number of filings from the record of this situation into the record of situation *Afghanistan II* (02/26).[3] This included the arrest warrants for Mr Haibatullah Akhundzada, Mr Abdul Hakim Haqqani, Mr Habibullah Agha and Mr Neda Mohammad Nadim (the "Four Warrants"), which the Chamber considered to "pertain to the newly opened Situation in Afghanistan II (02/26)" and to have been "issued on the basis of the Referral"—rather than the Appeals Chamber's Article 15 Authorisation.[4]

3. The Prosecution respectfully gives notice of its appeal against this further decision of Pre-Trial Chamber II in the *Situation in the Islamic Republic of Afghanistan* entitled "Order to transfer court records to the Situation in Afghanistan II" (filing number ICC-02/17-249, dated 5 November 2026) ("Transfer Decision")).[5] This appeal is brought under article 82(1)(a) of the Statute, rule 154 of the Rules of Procedure and Evidence and regulation 64 of the Regulations of the Court. It will demonstrate that:

(i) the Chamber erred in law and/or fact and/or procedure, and/or abused any material discretion with which it is vested, by holding that "certain filings currently registered

[1] *See e.g.* ICC-02/17-242 ("First Notice of Appeal"); ICC-02/17-244 ("First Appeal Brief"). The Registry confirmed on 10 November 2026 that these documents have now been reclassified as "public" even though they are not yet (at the time of filing this Notice) posted on the Court's website. The First Appeal concerns two decisions of the Chamber: ICC-02/17-238 ("July Decision"); ICC-02/17-241 ("September Order"). For the purposes of this Notice, the Prosecution will refer to the "*Situation in the Islamic Republic of Afghanistan*" based on the parameters approved in the Appeals Chamber's judgment of 5 March 2020 (ICC-02/17-138 OA4 ("Article 15(4) Appeal Judgment")), authorising the investigation, as "*Afghanistan I* (02/17)".
[2] *See* ICC-02/26-1-Red ("Presidency Decision"). For the purposes of this Notice, while not necessarily accepting the substantive correctness of any distinction which is implied, the Prosecution will refer to the *"Situation in the Islamic Republic of Afghanistan II*" based on the subject-matter of the Referral as "*Afghanistan II* (02/26)".
[3] ICC-02/17-249 ("Transfer Decision"), para. 10 ("the Chamber orders the Registry to transfer filing ICC-02/17-219-US-Exp and all subsequent filings (including the present order) to the situation record 02/26"), and Disposition.
[4] *See* Transfer Decision, para. 10.
[5] The Prosecution further notes that, as a consequence of the Transfer Decision (which expressly pertains *inter alia* also to "the present order"), the Transfer Decision may also be assigned a filing number in situation 02/26.

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in the record of the Situation in Afghanistan (02/17) pertain to the newly opened Situation in Afghanistan II (02/26)", in particular, "filing ICC-02/17-219-US-Exp and all subsequent filings" including the Four Warrants;[6] and

(ii) the Chamber erred in law and/or fact and/or procedure, and/or abused any material discretion with which it is vested, by holding that the Four Warrants "were issued on the basis of the Referral",[7] without the Prosecution having decided to open a separate investigation of this conduct in the situation in *Afghanistan II* (02/26) based on the Referral, which the Prosecution considers already forms part of its existing investigation in the situation in *Afghanistan I* (02/17).

4. Had the Chamber not erred in these respects, it would not have issued the Transfer Decision. The Prosecution respectfully requests the Appeals Chamber to confirm the applicable law, and to reverse the Transfer Decision in its entirety.

5. The issues identified in this Appeal arise from the Transfer Decision in its own right, and as such are in principle distinct from the issues identified in the First Appeal.[8] However, they remain very closely related to the decisions and findings challenged in the First Appeal concerning the Chamber's determination to treat the subject-matter of the Referral separately from the existing investigation in the present situation authorised by the Appeals Chamber (*Afghanistan I* (02/17)). As such, the issues in this Appeal raise related errors to those in the First Appeal. In the interest of efficiency and judicial economy, the Prosecution respectfully submits that the Appeals Chamber could in its discretion join these proceedings and decide upon them in a single judgment. Alternatively, were the Appeals Chamber for any reason to consider itself unable to determine the First Appeal on its merits, the matters raised in this Appeal would remain to be decided separately.

6. In the interim, and as explained further below, the Prosecution also requests suspensive effect of the Transfer Decision pursuant to article 82(3) and rule 156(5) because, by ordering the Registry immediately to "transfer" the Four Warrants and associated filings into "the situation record 02/26",[9] it could "lead to consequences that 'would be very difficult to correct and may be irreversible'" even if the Appeals Chamber eventually were to uphold the appeal.[10]

[6] Transfer Decision, para. 10.
[7] Transfer Decision, para. 10.
[8] *See* First Notice of Appeal; First Appeal Brief.
[9] Transfer Decision, para. 10, and Disposition.
[10] *See below* paras. 25-31.

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Grounds of Appeal

7. The Prosecution has reviewed the Transfer Decision carefully with reference to the established standards of appellate review. On this basis, the Prosecution identified the following two grounds of appeal.

FIRST GROUND OF APPEAL: THE CHAMBER ERRED IN FINDING THAT "CERTAIN FILINGS CURRENTLY REGISTERED IN THE RECORD OF THE SITUATION (02/17) PERTAIN TO THE NEWLY OPENED SITUATION IN AFGHANISTAN II (02/26)"

8. The Chamber erred in holding that the Four Warrants, and consequently various filings associated with them, "pertain to the newly opened Situation in Afghanistan II (02/26)".[11]

9. As the Prosecution will demonstrate in its Appeal Brief, the Chamber erred because: (1) it was incorrect and/or unreasonable to find that the Four Warrants pertain to the situation in *Afghanistan II* (02/26) rather than the situation in *Afghanistan I* (02/17); and (2) it failed to provide any adequate reasoning in support of its assessment. The Transfer Decision not only contradicts the Court's jurisdictional legal framework and its jurisprudence but also the Chamber's own previously stated position.

10. *First*, the Chamber erred in finding that "certain filings", including the Four Warrants and filings associated with them, "pertain to the newly opened Situation in Afghanistan II (02/26)".[12] In so doing, the Chamber disregarded the Court's jurisdictional framework and its well-settled jurisprudence which require Chambers to assess whether cases fall within the objective parameters of a pre-existing situation or are otherwise sufficiently linked to them. The Chamber carried out no such evaluation at all.

11. Consistent with the Prosecution's submissions in support of the First Appeal,[13] a situation is defined by objective parameters which may be geographic, temporal, material, and/or personal.[14] None of these parameters is a *sine qua non*. Rather, the parameters "may vary depending on the circumstances of each specific situation".[15] Following the opening of an

[11] Transfer Decision, para. 10.
[12] Transfer Decision, para. 10.
[13] *See* First Notice of Appeal, para. 13; First Appeal Brief, para. 17.
[14] *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.
[15] 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

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investigation within a situation, the Court may exercise its jurisdiction over cases concerning conduct which falls within those parameters, or which is otherwise sufficiently linked to them.[16]

12. Irrespective of the Chamber's apparent view that the Transfer Decision was purely administrative in nature,[17] it was therefore required to take account of the parameters of the present situation in *Afghanistan I* (02/17) in which the Four Warrants were issued, and any other circumstances establishing the sufficiency of the links between those cases and the situation—as, indeed, it had previously found.[18] If the Chamber had conducted the required assessment in the Transfer Decision, it would not have reached its erroneous conclusion. Rather, it would have reaffirmed that the Four Warrants fall within the parameters of the situation in *Afghanistan I* (02/17) or are sufficiently linked to those parameters, and would not have issued the Transfer Decision.

13. Notably, as the Appeals Chamber has previously found, and confirmed as *res judicata*, the parameters of the present situation 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".[19] The Four Warrants fall within these parameters or are sufficiently linked to them because they relate to conduct: (i) in the same territory (Afghanistan); (ii) of 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) by the same perpetrators (Taliban and affiliated groups) and against the same victims (Afghan civilian population, specifically including women and girls).[20] Further, notwithstanding the

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crimes, potential alleged perpetrators, the starting point of the relevant timeframe, as well as reference to further relevant information").

[16] Article 15(4) Appeal Judgment, paras. 1, 57-64; ICC-02/17-218 OA5 ("Article 18(2) Appeal Judgment"), paras. 58-60.

[17] *But see further below* paras. 19-20 (concerning the absence of any statutory basis for a procedural decision of this kind).

[18] On 8 July and 9 September 2025, the Chamber issued the Four Warrants. It held that "based on the material before it, including in particular information contained in the Referral, the case[s] [..], as alleged by the Prosecution, fall[] within the jurisdiction of the Court. This is without prejudice to any future determination on the matter": *see* ICC-02/17-232-Red ("*Akhundzada* Warrant"), para. 9; ICC-02/17-233-Red ("*Haqqani* Warrant"), para. 9; ICC-02/17-234-Red ("*Agha* Warrant"), para. 9; ICC-02/17-235-Red ("*Nadim* Warrant"), para. 9. The Chamber appeared to confirm this assessment in its September Order, para. 23; *see also* July Decision, para. 16.

[19] *See* Article 15(4) Appeal Judgment, para. 79; Article 18(2) Appeal Judgment, paras. 58-59.

[20] *Compare* ICC-02/17-7-Red ("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

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change in circumstances associated with the Taliban's return to *de facto* authority on 15 August 2021, the alleged crimes also display a continuity in pattern.[21]

14. *Second*, the Chamber not only erred by reaching a conclusion on the Four Warrants which was incorrect and/or unreasonable, but also by failing to provide adequate reasoning in support of its decision. The right to a reasoned decision is an essential element of the right to a fair trial[22] and protects parties from arbitrariness.[23] As the Appeals Chamber has held, "[t]he reasons for a decision must be comprehensible from the decision itself"[24] and must enable the Appeals Chamber (and parties) to understand the factual and legal basis upon which it is taken.[25]

15. As the Prosecution will demonstrate in its Appeal Brief, the Transfer Decision does not meet this standard. To the contrary, because it disregards the Court's legal framework and jurisprudence and appears to contradict the Chamber's own decisions (finding the Four Warrants were validly issued within the situation in *Afghanistan I* (02/17), notwithstanding the Referral),[26] the Chamber's obligation to provide clear reasoning was heightened. Yet the Chamber treated the decision as if it were a mere administrative matter that required no legal foundation or reasoning.

16. The Chamber's inadequate reasoning in the Transfer Decision cannot be justified by the recent procedural history. The Chamber's prior—and, in the Prosecution's respectful submission, erroneous[27]—conclusion in the July Decision and September Order that the subject-matter of the Referral should be investigated by the Prosecution separately (in a new situation) did not require or pre-suppose that the Chamber would *further* disregard the Court's

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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"), 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* Application"), 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 whom the Taliban perceived as allies of girls and women), 133-135 (describing the Taliban's state or organisational policy). *See further* *Akhundzada* Warrant, 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).

[21] *See above* fn. 20 *See similarly* *Palestine* Article 18 Appeal Judgment, paras. 132.

[22] ICC-01/14-01/21-111-Red OA, para. 41, ICC-01/04-01/06-773 OA5, para. 20.

[23] ICC-02/05-01/20-236 OA5, para. 20.

[24] ICC-01/04-01/06-774 OA6, para. 33.

[25] ICC-01/14-01/21-111-Red OA, para. 43.

[26] *See above* fn. 18.

[27] This is the subject-matter of the First Appeal: *see* First Notice of Appeal; First Appeal Brief.

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legal framework and "transfer" the Four Warrants into a non-existent investigation, since the Prosecution has not decided to open it yet.[28] To the contrary, the Prosecution had expressly asked the Chamber whether it intended such a step, and raised concerns in that regard, which the Chamber declined to address.[29] The Chamber neither requested further submissions from the Prosecution before the Transfer Decision, nor addressed in the Transfer Decision the concerns which the Prosecution had previously expressed. This further illustrates the inadequacy of the reasoning provided by the Chamber, and also underlines the unreasonableness of the decision.

SECOND GROUND OF APPEAL: THE CHAMBER ACTED *ULTRA VIRES* IN HOLDING THAT THE FOUR WARRANTS "WERE ISSUED ON THE BASIS OF THE REFERRAL" WHEN A SEPARATE INVESTIGATION HAS NOT YET BEEN OPENED IN AFGHANISTAN II (02/26)

17. The Chamber erred in holding that the Four Warrants "were issued on the basis of the Referral",[30] and also by acting on the basis that there was already an open investigation in the situation in *Afghanistan II* (02/26) even though the Prosecutor has not yet decided to open it.

18. The Chamber erred because: (i) it disregarded the Court's statutory framework regarding the allocation of powers between the Prosecution and Pre-Trial Chamber in the exercise of the Court's jurisdiction, and (ii) it failed to provide a reasoned decision.

19. *First*, the Four Warrants were not issued on the basis of the Referral. Instead, the Prosecution requested the Four Warrants based on the Appeals Chamber's article 15 authorisation of March 2020[31]—and the Chamber granted the warrants on that basis.[32] Irrespective of the Chamber's view that the subject-matter of the Referral *should* fall within the scope of a separate situation (as addressed in the First Appeal), and the opening of the situation record in *Afghanistan II* (02/26) by the Presidency, the statutory conditions for opening a separate investigation in the situation in *Afghanistan II* (02/26) have not yet been satisfied. In particular:

[28] *See below* paras. 17-21 (Second Ground of Appeal).
[29] *Compare* Request for Clarification and/or Reconsideration, paras. 7, 34-39, *with* September Order.
[30] Transfer Decision, para. 10.
[31] *See* *Akhundzada* Application, para. 160; ICC-02/17-225-Red ("*Haqqani* Application"), para. 161; ICC-02/17-230-Red ("*Agha* Application"), para. 151; ICC-02/17-231-Red ("*Nadim* Application"), para. 156.
[32] *See above* fn. 18.

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- the Acting Prosecutor has not yet determined that the requirements of article 53(1) are met, and this competence is reserved to him alone. It may not be exercised or pre-judged by the Chamber;

- relatedly, and further illustrating that no positive determination has yet been made under article 53(1), the Prosecutor has not yet notified relevant States as required by article 18(1).

20. In the July Decision and September Order, the Chamber had previously acknowledged that opening a new situation record did not equate to opening an investigation. In particular, it directed the Prosecution to open a new investigation on the basis of the Referral "*should it continue to consider that the requirements of article 53(1) of the Statute are met*".[33] Nothing in the Transfer Decision explains why the Chamber apparently no longer considers this to be a pre-requisite, or the procedural basis for its apparent assumption that the Four Warrants can be transferred into a situation where it is not yet established that the Court's investigative powers will be exercised at all.

21. *Second*, the Chamber failed to provide adequate reasoning in support of its apparent view of the statutory powers of the Chamber and the Prosecutor respectively. Nor does the Chamber explain why it now considers the Four Warrants to have been issued "on the basis of the Referral", or why the Transfer Decision can be made at the present time as opposed to after the opening of any investigation in the situation in *Afghanistan II* (02/26). More generally, beyond a brief allusion to regulation 46(2),[34] the Chamber does not even explain the statutory basis for any power to transfer cases between situations at all.

Admissibility of the Appeal

22. The appeal is admissible under article 82(1)(a) because the Transfer Decision constitutes a decision "with respect to jurisdiction".

23. While the operative part of the impugned decision must pertain to a question on the jurisdiction of the Court,[35] this "must be read with the corresponding reasoning that led to it",[36] and the impugned decision or impugned part of the decision assessed in its broader context.[37]

[33] *Compare e.g.* Transfer Decision, para. 10, and Disposition, *with* July Decision, para. 17, and Disposition ("Direct[ing] 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 of the Referral", emphasis added).
[34] Transfer Decision, para. 9.
[35] ICC-01/09-78 OA ("*Kenya* Admissibility Decision"), para. 15; ICC-01/18-423 OA ("*Palestine* Admissibility Decision"), para. 31.
[36] Article 18 Appeal Judgment, para. 53.
[37] *Palestine* Admissibility Decision, para. 31.

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Ultimately, it is the objective nature of a decision, rather than its effect or implication, that determines whether it may be appealed under article 82(1)(a) of the Statute.[38] The Appeals Chamber in this situation has already accepted that a decision may be subject to direct appeal under article 82(1)(a) where "the impugned passage[s], read together with the operative part of the decision […] create[s] uncertainty as to the scope of the authorised investigation and the Court's jurisdiction in the Afghanistan situation".[39]

24. Applying these principles, the Transfer Decision is jurisdictional in nature. It disregards the Appeals Chamber's finding regarding the jurisdictional scope of the present situation in *Afghanistan I* (02/17). By transferring the Four Warrants from the situation in *Afghanistan I* (02/17) to *Afghanistan II* (02/26) (where there is not yet even an open investigation), it effectively removes the cases to which the Four Warrants relate from the Court's jurisdiction exercised on the basis of the situation in *Afghanistan I* (02/17). In so doing, it may also affect the validity of the Court's exercise of jurisdiction in these four cases. Certainly, and in any event, the Transfer Decision creates substantial public confusion and uncertainty "as to the scope of the authorised investigation and the Court's jurisdiction in the Afghanistan situation", which the Appeals Chamber had previously (and repeatedly) made clear.[40]

Request for Suspensive Effect

25. Article 82(3) provides that "[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request".[41] Such a request shall be made "[w]hen filing the appeal".[42] The decision whether to grant suspensive effect is discretionary, in light of the individual circumstances of the case.[43]

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[38] *Kenya* Admissibility Decision, para. 17. This requires an assessment of whether the impugned decision substantially relates to a question of jurisdiction, independently of whether the Chamber issuing the impugned decision formally asserts that it does or does not. Furthermore, as the Appeals Chamber recently affirmed in *Duterte*, decisions pertaining to the *exercise* of the Court's jurisdiction—which typically concern compliance with the procedural regime of the Statute—may be 'jurisdictional' in nature and appealed under article 82(1)(a) of the Statute: ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), paras. 82-83; *see also* paras. 2-5, 88, 93, 113. As such, the operative part of a decision need not concern any of the four substantive dimensions of jurisdictions (*ratione temporis*, *ratione personae*, *ratione loci*, or *ratione materiae*) if the operative part determines whether the Court may or may not seise itself of a situation or case according to the terms of the Statute.
[39] Article 18 Appeal Judgment, para. 53.
[40] *See above* fn. 19 (as to the parameters of *Afghanistan I*); *see below* para. 27 (as to the confusion and uncertainty regarding the parameters).
[41] Statute, art. 82(3).
[42] ICC RPE, rule 156(5).
[43] *See e.g.* ICC-02/11-01/15-1243 OA14 ("*Gbagbo and Blé Goudé* Suspensive Effect Decision"), para. 20; ICC-01/13-43 OA ("*Comoros* Suspensive Effect Decision"), para. 7; ICC-01/05-01/13-718 OA9 ("*CAR Article 70* Suspensive Effect Decision"), paras. 5-6; ICC-01/09-01/11-1370 OA7 OA8 ("*Ruto and Sang* Suspensive Effect Decision"), para. 6; ICC-01/05-01/08-499 OA2 ("First *Bemba* Suspensive Effect Decision"), para. 11.

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26. The Prosecution respectfully requests the Appeals Chamber to suspend the effect of the Transfer Decision in whole or in part because, by ordering the Registry immediately to "transfer" numerous filings—including the Four Warrants—into "the situation record 02/26",[44] it could "lead to consequences that 'would be very difficult to correct and may be irreversible'" even if the Appeals Chamber eventually were to uphold the appeal.[45]

27. First, suspensive effect is warranted because of the potential practical impact of the Transfer Decision in creating an administrative *fait accompli*. The Prosecution refrained from seeking suspensive effect of the July Decision and September Order addressed in the First Appeal because, at that time, there was no certainty that those decisions would necessarily and immediately result in concrete practical steps. This was particularly so since the Chamber had declined to confirm, when specifically asked by the Prosecution, whether it in fact intended to transfer the existing cases into the anticipated new situation. However, following the Presidency Decision creating a new situation record in *Afghanistan II* (02/26) and the Transfer Decision, the circumstances are now different. By ordering the transfer of filings including the Four Warrants from one situation record to another, the Transfer Decision not only creates a significant administrative burden for the Registrar (which may need to be undone) but—even more importantly—suggests to external stakeholders (including victims and affected communities) that an important (if procedurally obscure) change in the Court's jurisdictional posture is already a definitive reality. This will exacerbate the significant concern already shared with the Prosecution by external partners, and which may in turn affect cooperation with its ongoing investigation. Once lost, confidence in the Court's commitment to the existing investigation in the situation in *Afghanistan I* (02/17) may not easily be regained.

28. Second, suspensive effect is warranted because of the potential impact of the Transfer Decision on the validity of the Four Warrants, pending the Appeals Chamber's resolution of this appeal.

29. As the Prosecution has previously explained, "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*

[44] Transfer Decision, para. 10, and Disposition.
[45] *See e.g.* *Gbagbo and Blé Goudé* Suspensive Effect Decision, para. 20; *Comoros* Suspensive Effect Decision, para. 7; *CAR Article 70* Suspensive Effect Decision, para. 5; *Ruto and Sang* Suspensive Effect Decision, para. 6; ICC-01/05-01/08-817 OA3 ("Second *Bemba* Suspensive Effect Decision"), para. 11. *But see further* *Gbagbo and Blé Goudé* Suspensive Effect Decision, para. 21 (noting that, notwithstanding the criteria previously addressed by the Appeals Chamber when considering whether to grant suspensive effect—which in different ways reflect the risk that the impugned decision may create an irreversible situation or otherwise defeat the purpose of the appeal—"it is important to consider *all* circumstances that are relevant to the exercise of the Appeals Chamber's discretion", emphasis added).

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it was initiated"—and, logically, these links may well be threatened if an arrest warrant pre-dates the opening of the situation to which it is supposedly associated.[46] This may now be the case because:

- the Prosecution has not yet done the preliminary examination required by article 53(1)—and acknowledged by the Chamber—to determine whether a second investigation may even be opened,[47] and, in any event;
- the Transfer Decision assumes that there is a legal basis for the opening of an investigation in the situation in *Afghanistan II* (02/26), despite the unresolved arguments to the contrary in the First Appeal, which may in turn affect the validity of the warrants if they are transferred into the situation in *Afghanistan II* (02/26).[48]

30. Accordingly, the Transfer Decision creates potentially serious legal risks for the validity of the Four Warrants, unless and until the Appeals Chamber has verified that the underlying procedural and legal basis is correct. In particular, the suspects are now entitled, if they wish, to challenge the Court's exercise of jurisdiction under article 19(2)(a) of the Statute.[49] If this were to occur while the present appeal is still pending, it cannot be excluded that a chamber seised of that challenge—which is not necessarily the Chamber—could conclude that the Transfer Decision invalidated the Four Warrants. Even if such a decision could in principle be appealed, and its effect suspended pending resolution by the Appeals Chamber, the consequences of this eventuality would still be very difficult to correct and could exacerbate the existing and significant public confusion. Likewise, if a suspect were to be arrested during the appeal proceedings,[50] some or all of the errors raised in the present appeal could potentially

[46] *See* Request for Clarification and/or Reconsideration, para. 38 (emphasis supplied).
[47] *Compare e.g.* Transfer Decision, para. 10, and Disposition, *with* July Decision, para. 17, and Disposition ("Direct[ing] 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 of the Referral", emphasis added). Likewise, no investigation in situation 02/26 may be considered to be open until the Prosecutor has complied with article 18(1) of the Statute.
[48] *See e.g.* First Appeal Brief, paras. 9-51. *See also* Request for Clarification and/or Reconsideration, paras. 15 (fn. 11: explaining that *if, alternatively,* the subject-matter of the 2024 referral were determined to have exceeded the objective parameters of situation 02/17, and was not otherwise sufficiently linked to them, *then* the proper remedies would be to quash the warrants, open the investigation of a new situation based on the 2024 referral, and then for the Acting Prosecutor to renew the applications for warrants of arrests for the relevant suspects in the context of the new situation), 37 (noting that "neither the Statute nor 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", and further doubting 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").
[49] *See e.g.* Statute, art. 19(2)(a) ("An accused or a person for who a warrant of arrest […] has been issued"). *See further e.g.* ICC-01/04-01/10-47 ("*Mbarushimana* Disclosure Decision"), para. 12.
[50] While there is no immediate prospect of arrest and surrender of the suspects, to the best of the Prosecution's knowledge, this cannot be excluded.

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be raised in national proceedings as precluding surrender.[51] In this event, the consequences would be very difficult to correct and may indeed be irreversible (for example, if a suspect were released as a consequence).

31. For all these reasons, in considering whether to suspend the effect of the Transfer Decision, the Prosecution respectfully requests the Appeals Chamber to consider the balance of relevant interests. On the one hand, the Transfer Decision identifies no pressing need for transfer of the Four Warrants into the record of the situation in *Afghanistan II* (02/26). To the contrary, the Chamber was content to issue the warrants in the situation in *Afghanistan I* (02/17), and they have remained effective in that context for many months. By contrast, if allowed to remain in effect, the Transfer Decision not only contributes to the creation of a *fait accompli* but also creates a substantially greater risk of legal consequences for the arrest warrants that would be very difficult to correct and may be irreversible.

32. Finally, the Prosecution notes that the Registry appears already to be in the process of implementing the Transfer Decision, including with respect to filings related to the First Appeal.[52] As such, the Appeals Chamber may consider it appropriate to determine this matter on an expedited basis.

[51] This is without prejudice to the Prosecution's view that the Statute does not permit national authorities to determine the validity of an arrest warrant issued by the Court. In this respect, the Prosecution recalls that States Parties requested to arrest and surrender a person on or entering their territory are to adopt procedures under their national law which are, at least, "not more burdensome than those applicable to requests for extradition […] and should, if possible, be less burdensome, taking into account the distinct nature of the Court". *See e.g.* Statute, arts. 89(1), 91(2)(c). *See also* art. 102 (expressly distinguishing between the legal concepts of "surrender" and "extradition"). *See further e.g.* C. Kreβ and K. Prost, 'Article 89: surrender of persons to the Court,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck, Hart, Nomos: 2022), pp. 2497 (mn. 1: article 89(1) contains no ground *stricto sensu* for a State Party's refusal of a request for arrest and surrender), 2499 (mns. 6-10: while there is no ground for refusal *stricto sensu*, the applicable statutory provisions, "varying in form and degree, provide for means to take State concerns into account without putting the obligation to surrender in question"), 2501 (mn. 24: "national procedures must be used to meet, not defeat, the obligation to comply with a request for surrender"); C. Kreβ and K. Prost, 'Article 91: contents of request for arrest and surrender,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck, Hart, Nomos: 2022), p. 2523 (mn. 14: recalling that any "evidentiary" assessment of the basis for an arrest warrant issued by the Court should be "limited to that which is absolutely essential" and "the bare minimum necessary" to address any constitutional requirements).

[52] *See e.g.* First Notice of Appeal (now also ICC-02/26-25-US-Exp) and First Appeal Brief (now also ICC-02/26-27-US-Exp). The Transfer Decision has also already been implemented with regard to documents such as the Prosecution applications which led to the issue of the Four Warrants: *Akhundzada* Application (now also ICC-02/26-7-Red), *Haqqani* Application (now also ICC-02/26-8-Red), *Agha* Application (now also ICC-02/26-13-Red), *Nadim* Application (now also ICC-02/26-14-Red).

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Relief requested

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

(a) to grant suspensive effect of the Transfer Decision;

and, after considering the further submissions in the Prosecution's Appeal Brief to be filed under regulation 64(2) on 27 November 2026,

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

(c) considering the merits of the appeal, to confirm the applicable law with respect to the errors outlined, and on that basis reverse the Transfer Decision in its entirety under article 83(2) and rule 158(1).



Mame Mandiaye Niang
Acting Prosecutor

Dated this 11th day of November 2026
At The Hague, the Netherlands