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No.**: ICC-02/26**
Date: **13 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 II

Public

Prosecution notice of appeal, and urgent request for suspensive effect, of "Decision closing the situation in the Islamic Republic of Afghanistan" (ICC-02/17-253)

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] and;

- a further decision of the Chamber which directed the Registry immediately to transfer filings from the record of the situation in *Afghanistan I* (02/17)[2] into the newly opened record of the situation in *Afghanistan II* (02/26),[3] including arrest warrants (the "Four Warrants") for Mr Haibatullah Akhundzada, Mr Abdul Hakim Haqqani, Mr Habibullah Agha and Mr Neda Mohammad Nadim ("the Second Appeal").[4]

2. On 12 November 2026, without prior notice or any opportunity for the Prosecution to make written submissions on the matter, the Chamber issued a decision to "close the record" of the situation in *Afghanistan I* (02/17) and to order the Registrar "to take the necessary steps to implement [that] decision."[5]

3. While the Closure Decision did not state expressly that it was intended to have the effect of terminating the Acting Prosecutor's exercise of investigative powers in *Afghanistan I* (02/17), this was implicit in the Chamber's statement that the decision "does not preclude the Prosecution's ongoing investigation in [*Afghanistan II* (02/26)]."[6] The Closure Decision apparently overlooked that no investigation has yet been opened in *Afghanistan II* (02/26), and failed to acknowledge the pending proceedings in either the First or Second Appeals.

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[1] *See e.g.* ICC-02/17-242 ("First Notice of Appeal"); ICC-02/17-244 ("First Appeal Brief"); ICC-02/17-251 ("Order Inviting States' and Victims Representatives' Submissions"). 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-02/17-249 ("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.

[3] *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)".

[4] *See* ICC-02/17-252 ("Second Notice of Appeal").

[5] *See* ICC-02/17-253-Red ("Closure Decision"), Disposition.

[6] Closure Decision, para. 25.

4. The Prosecution therefore 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 "Decision closing the situation in the Islamic Republic of Afghanistan" (filing number ICC-02/17-253, dated 12 November 2026) ("Closure Decision")). 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 finding that the pre-condition for closing a situation record, required by regulation 66*ter*(2)(a) is satisfied; and

(ii) the Chamber erred by exceeding its powers (acting *ultra vires*) in holding that it has the power in the present circumstances to order the closure of the situation record in *Afghanistan I* (02/17), and to exercise it.

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

6. The issues identified in this Appeal arise from the Closure Decision in its own right, and as such are in principle distinct from the issues identified in the First and Second Appeals.[7] However, they remain very closely related to the decisions and findings challenged in the First and Second Appeals 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, at least in part, to those in the First and Second Appeals.[8] 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 and/or Second Appeals on their individual merits, the matters raised in this Appeal would remain to be decided separately.

[7] *See* First Notice of Appeal; First Appeal Brief.
[8] In this regard, since the Chamber's reasoning in the Closure Decision depends in part on the correctness of its reasoning and determination in the Transfer Decision (the subject-matter of the Second Appeal), which in turn depends on the correctness of its reasoning and determination in the July Decision and September Order (the subject-matter of the First Appeal), the Appeals Chamber may consider that some or all of the issues to be determined in the Second Appeal or the present appeal will follow necessarily from its reasoning concerning the First Appeal.

7. In the interim, and as explained further below, the Prosecution also requests suspensive effect of the Closure Decision pursuant to article 82(3) and rule 156(5) because, by ordering the Registry immediately to "close the record" of the situation in *Afghanistan I* (02/17),[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] The Prosecution will also request the Chamber to grant an interim stay of the Closure Decision pending the Appeals Chamber's consideration of the suspensive effect request.

Grounds of Appeal

8. The Prosecution has reviewed the Closure 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 THE PRE-CONDITION FOR CLOSING A SITUATION RECORD, REQUIRED BY REGULATION 66*TER*(2)(A), IS SATISFIED

9. The Chamber erred in analysing regulation 66*ter*(2), which pertains to the closure of a situation record, and in determining that the pre-condition in regulation 66*ter*(2)(a)—triggering the application of this provision—is satisfied in the present circumstances.

10. In particular, as the Prosecution will demonstrate in its Appeal Brief, the Chamber erred because: (1) it was incorrect to find that regulation 66*ter*(2)(a) is not a "*substantive* condition for the closure of a situation record";[11] (2) it was incorrect and/or unreasonable to find that "the *procedural* obligation to inform the Chamber under regulation 66*ter*(2)(a) […] has been fulfilled",[12] and; (3) it was incorrect and/or unreasonable to find that "the Prosecution has not been shown to be able to effectively carry out any further investigative or prosecutorial activities in the Situation in Afghanistan".[13]

11. First, the Chamber erred in finding regulation 66*ter*(2)(a) is "a *procedural* obligation" on the Prosecution that aims to "ensure[] procedural clarity and transparency" but not to "establish[] an additional *substantive* condition for the closure of a situation record".[14] The

[9] Closure Decision, Disposition.
[10] *See below* paras. 28-35.
[11] Closure Decision, para. 18 (emphasis added).
[12] Closure Decision, para. 23 (emphasis added).
[13] Closure Decision, para. 23.
[14] Closure Decision, para. 18 (emphasis added).

significance of the Chamber's distinction between "procedural" and "substantive" conditions is not spelled out in so many words. However, the plain implication is the Chamber's view that regulation 66*ter*(2)(a) may be satisfied even when the Acting Prosecutor has *not* expressly determined—as the provision expressly requires—that "he or she does not anticipate any further investigatory or prosecutorial activities in a situation in relation to which an investigation has been initiated". Rather, in the view of the Chamber, it is only necessary to identify that the Acting Prosecutor has provided *some* form of "inform[ation] in writing" to the Chamber. Once the Acting Prosecutor has provided such information, as the Chamber stated, "[w]hat matters" is that the Chamber can "make its *own* determination."[15] In this way, the Chamber erred in law by misinterpreting regulation 66*ter*(2)(a).

12. Second, the Chamber erred in determining that the procedural obligation in regulation 66*ter*(2)(a) had actually been fulfilled in this situation. No reasonable Chamber could have interpreted the express and repeated statement in writing by the Acting Prosecutor that he "does *not* anticipate making a regulation 66*ter*(2)(a) notification in the situation [in *Afghanistan I* (02/17)] in the near term" as providing any basis for the *opposite* conclusion.[16] Furthermore, the Chamber abused its discretion by misinterpreting the Prosecution's submissions made in good faith in the context of requesting clarification and/or reconsideration of the Chamber's initial July Decision.[17]

13. Third, the Chamber erred in determining that "the Prosecution has not been shown to be able to effectively carry out any further investigative or prosecutorial activities in the Situation in Afghanistan", and relying on this determination to decide to close *Afghanistan I* (02/17).[18] The Chamber plainly did not have a sufficient evidentiary basis to draw this conclusion, based merely on the limited information volunteered by the Prosecution (and *not* in fact expressly requested by the Chamber) in its Request for Clarification and/or Reconsideration of the July Decision.[19] Further and in any event, the Chamber failed to place sufficient weight on relevant circumstances—such as the express views of the Acting Prosecutor—and gave excessive weight to irrelevant, erroneous and/or vague and subjective considerations.[20]

[15] Closure Decision, para. 18.
[16] *Contra* Closure Decision, paras. 21-22. *See* Request for Clarification and/or Reconsideration, para. 45 (emphasis added). *See also* para. 43, and sub-title preceding para. 40.
[17] *See* Request for Clarification and/or Reconsideration, paras. 40-45.
[18] *Contra* Closure Decision, para. 23.
[19] *See* Closure Decision, paras. 21, 23. *See also* Request for Clarification and/or Reconsideration, paras. 40-45.
[20] *See below* para. 20.

14. Moreover, and in any event, nothing in regulation 66*ter*(2) empowers the Chamber to undertake its own assessment of the progress of the investigative activities carried out by the Prosecution, or to place a burden of proof on the Prosecution in this regard. The Chamber abused its discretion by issuing the Closure Decision (and the related decisions) without requesting the Prosecution's views. Notably, the Chamber did *not* request the Prosecution "to clarify the status of its investigation".[21] Rather, the Prosecution provided information regarding aspects of its investigation in good faith to assure the Chamber that the Acting Prosecutor did *not* intend to provide information in writing for the purpose of regulation 66ter(2)(a). The Chamber thus erred in making this unsubstantiated representation of the procedural record.

15. Finally, the Chamber likewise erred in considering that the Four Warrants "pertain to the Situation in Afghanistan II".[22] As the Prosecution has previously argued, the Chamber disregards 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 was therefore required to take into account the parameters of the 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.[23] If the Chamber had conducted the required assessment in the Closure 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. Further, the Chamber apparently again overlooked that there is no open investigation in *Afghanistan II* (02/26) because, as the Prosecution has argued in its Second Appeal, the Acting Prosecutor has not yet decided to open it. Accordingly, the assumption that further "applications" could now be made in *Afghanistan II* (02/26) was incorrect.

[21] Closure Decision, para. 21.
[22] Closure Decision, para. 20.
[23] 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.

SECOND GROUND OF APPEAL: THE CHAMBER ACTED *ULTRA VIRES* IN HOLDING THAT IT HAS THE POWER IN THE PRESENT CIRCUMSTANCES TO ORDER THE CLOSURE OF THE SITUATION RECORD IN *AFGHANISTAN I* (02/17)

16. The Chamber further erred by concluding in the circumstances that it has the power to exercise "*proprio motu* authority", whether under "regulation 66*ter*(2)(b)" or any other provision of the Court's legal texts, to "order[] the Registrar to close the records of the Situation in Afghanistan".[24] In so doing, the Chamber exceeded its authority under the Statute, and acted *ultra vires*.

17. First, related to the errors set out in the First Ground of Appeal above (namely, that the Chamber erred in concluding that the pre-condition in regulation 66*ter*(2)(a) is met), the Chamber erred by assuming for itself a power expressly reserved to the Acting Prosecutor under articles 42 and 54 of Statute and regulation 66*ter*(2). Specifically, the Acting Prosecutor has sole authority to determine the extent of the investigatory or prosecutorial activities to be carried out in the context of a situation under investigation, and specifically whether any further such activities can no longer be anticipated. Not only does this power go to the heart of prosecutorial independence, but in the Closure Decision the Chamber misinterpreted and/or purported to over-rule the expressly stated intention of the Acting Prosecutor to continue investigatory and potential prosecutorial activities in *Afghanistan I* (02/17).

18. Second, the Chamber erred in interpreting regulation 46(2), the "*proprio motu* authority" granted to it under regulation 66*ter*(2)(b),[25] and/or its purported "inherent judicial powers".[26] None of these provisions (nor any other provision in the Court's legal framework) provides any basis for the Chamber to close a situation record when the precondition in regulation 66*ter*(2)(a) is not met. Nor do they provide any basis for the Chamber in any other way to seek to terminate or limit an ongoing investigation without the assent of the Acting Prosecutor. To the extent that the Chamber considered that regulations 46(2) or 66*ter*(2) or its purported "inherent judicial powers"[27] empower it to intervene in order (in its view) to "prevent[]" a situation record or investigation "from remaining open indefinitely", or to make its own

[24] Closure Decision, para. 23. *See also* para. 15 (referring to regulation 46(2)).
[25] *Contra* Closure Decision, paras. 15, 23.
[26] *Contra* Closure Decision, para. 14.
[27] *Contra* Closure Decision, para. 14.

determination whether "the Prosecution is unable to pursue an investigation effectively or no longer has a prosecutorial interest in continuing it", this was erroneous.[28]

19. Third, consistent with its apparent view expressed in the preceding decisions giving rise to the First Appeal that it is empowered to oversee the conduct of the investigation,[29] the Chamber gave excessive weight in the Closure Decision to irrelevant, incorrect and/or unclear considerations.

20. Thus, while its reasoning was very sparse, the Chamber nevertheless emphasised matters such as:

(i) the passage of time since the investigation was opened,[30] and since "the alleged commission of the crimes";[31]

(ii) its view of the "significant limitations to the Prosecution's ability to conduct its investigations and secure evidence";[32]

(iii) its view of the "limited number" of arrest warrants sought in *Afghanistan I* (02/17);[33]

(iv) "the objectives of legal certainty, transparency and the proper administration of judicial proceedings";[34]

(v) its erroneous view that the Four Warrants "pertain to the Situation in Afghanistan II".[35]

21. These irrelevant, incorrect and/or vague and subjective considerations do not justify the Chamber's unilateral assumption of authority in the Closure Decision. Nor did the Chamber give sufficient weight to—or even acknowledge at all—other relevant considerations such as the independence of the Prosecutor as guaranteed in article 42 of the Statute, or the Prosecutor's express and exclusive competence for the conduct of investigations and the initiation of prosecutions as set out in articles 54 and 58 of the Statute.

[28] *Contra* Closure Decision, para. 18.
[29] *See also* First Appeal Brief, paras. 52-90.
[30] Closure Decision, para. 20 (recalling that the investigation "started more than six years ago after more than 10 years of preliminary examination"). The Prosecution notes, however, that the investigation was deferred for over two years until 30 October 2022 due to an admissibility challenge by Afghanistan: *see e.g.* ICC-02/17-196 ("Article 18 Decision"), paras. 2-5, and Disposition.
[31] *Contra* Closure Decision, para. 20 (fn. 18).
[32] Closure Decision, para. 20.
[33] *Contra* Closure Decision, para. 20.
[34] Closure Decision, para. 23.
[35] Closure Decision, para. 20.

Admissibility of the Appeal

22. The appeal is admissible under article 82(1)(a) because the Closure 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,[36] this "must be read with the corresponding reasoning that led to it",[37] and the impugned decision or impugned part of the decision assessed in its broader context.[38] 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.[39] 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".[40]

24. 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.[41] 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.

25. Applying these principles, the Closure Decision is jurisdictional in nature. First, by closing the situation record in *Afghanistan I* (02/17), the decision clearly seeks (whether correctly or not): (i) to terminate the investigative powers of the Acting Prosecutor for the purpose of *Afghanistan I* (02/17), and; (ii) to preclude the initiation by the Acting Prosecutor

[36] ICC-01/09-78 OA ("*Kenya* Admissibility Decision"), para. 15; ICC-01/18-423 OA ("*Palestine* Admissibility Decision"), para. 31.
[37] Article 18 Appeal Judgment, para. 53.
[38] *Palestine* Admissibility Decision, para. 31.
[39] *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.
[40] Article 18 Appeal Judgment, para. 53.
[41] ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), paras. 82-83; *see also* paras. 2-5, 88, 93, 113.

of any further prosecutions in *Afghanistan I* (02/17).[42] In this fashion, the Closure Decision plainly re-defines and limits the Court's exercise of jurisdiction in *Afghanistan I* (02/17).

26. Second, the Closure Decision disregards the Appeals Chamber's finding regarding the jurisdictional scope of the present situation in *Afghanistan I* (02/17) in several ways, including:

- The situation record could only be closed under regulation 66*ter*(2)(a), even *arguendo*, if the Four Warrants are transferred from the situation in *Afghanistan I* (02/17) to *Afghanistan II* (02/26)—where there is not yet an open investigation—as the Chamber purported to do in the Transfer Decision (which is the object of the Second Appeal). In this way, the Closure Decision depends on a re-definition of the scope of jurisdictional situation in *Afghanistan I* (02/17), which excludes the subject-matter of the Referral including the Four Warrants.[43]

- Furthermore, by (i) closing the situation in *Afghanistan I* (02/17) in which the Four Warrants were properly issued—and to which the exercise of jurisdiction in those cases is linked[44]; and (ii) disregarding that no investigation has yet been opened in *Afghanistan II* (02/26), the Closure Decision may affect the validity of the Court's exercise of jurisdiction in those four cases themselves.

- The Closure Decision instructs the Acting Prosecutor that, should he wish to initiate a prosecution "concerning crimes allegedly committed by the Islamic State of Khorasan Province ["IS-KP"] since 2016", he must (in the absence of a further referral) first request authorisation from the Chamber under article 15(3) to open a new investigation in a new situation (*i.e.*, a potential *Afghanistan III* situation).[45] Yet this ignores the express affirmation by the Appeals Chamber that such allegations already fall within the existing parameters of the situation in *Afghanistan I* (02/17).[46]

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[42] This is without prejudice to the Chamber's view that the Acting Prosecutor remained able to initiate further prosecutions in *Afghanistan II* (02/26), even though there is presently no open investigation in that situation, or that the Acting Prosecutor could seek to open a new investigation under article 15(3).
[43] *See e.g.* Closure Decision, para. 22 (considering that "lines of inquiry belong to the Situation in Afghanistan II"). *See further* Request for Clarification and/or Reconsideration, para. 35 (recalling that, as long as the Four Warrants remain "pending" in *Afghanistan I* (02/17), they "preclude any possibility that regulation 66*ter* might be triggered unless and until the prosecutions of these Cases are completed").
[44] *See e.g.* Request for Clarification and/or Reconsideration, para. 38 (recalling 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*", emphasis added, and citations therein).
[45] *See* Closure Decision, para. 24.
[46] *See* Article 18 Appeal Judgment, paras. 59-60 (finding that, as a consequence of its first error of law concerning "the scope of the Court's jurisdiction in Afghanistan, which had already been authoritatively determined by the Appeals Chamber", the Chamber further erred in fact by "qualifying the 'Islamic State-Khorasan Province' as a new party to the conflict falling outside the scope of the investigation").

27. Third, and in any event, the Closure 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.[47] Considered cumulatively, the Chamber's decisions appear to be a concerted effort to redefine the Court's exercise of jurisdiction unilaterally, without regard to the views or activities of the Prosecution or the authoritative guidance of the Appeals Chamber. From an external perspective, this may raise serious questions about the procedure adopted by the Court in this situation, which require timely and unequivocal resolution.

Request for Suspensive Effect

28. Article 82(3) provides that "[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request".[48] Such a request shall be made "[w]hen filing the appeal".[49] The decision whether to grant suspensive effect is discretionary, in light of the individual circumstances of the case.[50]

29. The Prosecution respectfully requests the Appeals Chamber to suspend the effect of the Closure Decision in its entirety because, by ordering the Registry immediately to "close the record" of the situation in *Afghanistan I* (02/17),[51] 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.[52]

30. First, suspensive effect is warranted because the Closure Decision disrupts the ongoing investigative activities of the Prosecution (which include, for example, several investigative missions scheduled for this month) in accordance with the three principal lines of inquiry referred to in the Closure Decision.[53] The Prosecution recalls, for example, that the cooperation

[47] *See above* para. 15 (as to the parameters of *Afghanistan I*); *see below* para. 31 (as to the confusion and uncertainty regarding the parameters).
[48] Statute, art. 82(3).
[49] ICC RPE, rule 156(5).
[50] *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.
[51] Closure Decision, Disposition.
[52] *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).
[53] *See* Closure Decision, para. 21.

obligations of States Parties under Part 9 of the Statute are contingent upon an open investigation. The Closure Decision incorrectly assumes that the Prosecution is empowered to conduct these activities on the basis of *Afghanistan II* (02/26),[54] and apparently confuses the opening of a new situation record with the opening of an investigation. Yet, to the contrary, and as required by the Statute, no investigation can be opened in *Afghanistan II* (02/26)—and therefore no investigative powers can be exercised in this context—unless and until the Acting Prosecutor makes the determination required by article 53(1), and then issues the notification to relevant States under article 18(1). At present, this has not occurred. It is not anticipated to occur at least until the First Appeal is resolved. In the meantime, unless the effect of the Closure Decision is suspended, the loss of potential investigative opportunities, while hard to quantify, is nonetheless irreversible.

31. Second, suspensive effect is warranted because of the now very significant potential for the Closure Decision (and the related subject-matter of the First Appeal and the Second Appeal) to be misunderstood by critical external stakeholders (including victims and affected communities)—unless and until the procedural and legal basis for any changes to the Court's jurisdictional posture is authoritatively confirmed by the Appeals Chamber. Until such time, the Closure Decision is highly likely to exacerbate the significant concern already expressed to the Prosecution by external partners. In turn, this is likely to affect cooperation with the Prosecution's ongoing investigation (as soon as this may be resumed). 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.

32. Third, suspensive effect is warranted because of the potential impact of the Closure Decision on the validity of the Four Warrants, pending the Appeals Chamber's resolution of this appeal and the related appeal proceedings. As the Prosecution has previously explained for the purpose of the Second Appeal, 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.[55] These risks are compounded by the Closure Decision, insofar as this may be taken to sever the jurisdictional link between the Four Warrants and *Afghanistan I* (02/17) such that the Court's exercise of jurisdiction in those case depends on the sufficiency of a link with *Afghanistan II* (02/26). There are cogent reasons not to depend upon such a link at the present time. Notably, the procedural basis for opening a separate investigation in *Afghanistan II* (02/26)—even in principle—awaits consideration by

[54] *Contra* Closure Decision, para. 25.
[55] *See* Second Notice of Appeal, paras. 28-30.

the Appeals Chamber in the First Appeal, and is contested by the Prosecution.[56] Yet moreover, as pointed out in the Second Appeal,[57] the Prosecution has not yet even opened an investigation in *Afghanistan II* (02/26), notwithstanding the Chamber's erroneous reference to "the Prosecution's ongoing investigation in the Situation in Afghanistan II."[58]

33. Finally, if the Registrar immediately takes the necessary steps to close the situation record in *Afghanistan I* (02/17) as required by the Closure Decision, the Prosecution also notes that the potential impact on the practical conduct of the ongoing appeal proceedings (in both the First and Second Appeals, as well as pursuant to the present Notice) may likewise be very hard to correct. For example, if the situation record in *Afghanistan I* (02/27) is closed, this may impede the filing not only of this Notice in that record but also of all subsequent filings. Nor is the existence of the new situation record in *Afghanistan II* (02/26) an appropriate alternative, since the effect of the Closure Decision (relating to the broad parameters of *Afghanistan I* (02/17)) pertains to allegations (for example, concerning IS-KP) which are clearly beyond the scope of any subject-matter *arguendo* in *Afghanistan II* (02/26).

34. For all these reasons, in considering whether to suspend the effect of the Closure Decision, the Prosecution respectfully requests the Appeals Chamber to consider the balance of relevant interests. On the one hand, the Closure Decision identifies no pressing need to close the record of the situation in *Afghanistan I* (02/17). To the contrary, no explanation has been provided for the Chamber's sudden impetus to reorganise the Court's exercise of jurisdiction concerning Afghanistan in the last four months. The Prosecution can discern no forensic reason for this. By contrast, if allowed to remain in effect, the Closure Decision disrupts the ongoing investigative activities of the Prosecution (as well as the immediate conduct of the various appeal proceedings on foot), threatens the confidence of external stakeholders (including victims and affected communities) in the Court's commitment to the existing investigation in the situation in *Afghanistan I* (02/17), and compounds the potential risks previously identified concerning the effect of the Transfer Decision upon the validity of the Four Warrants. Considered both cumulatively and separately, these consequences are difficult to correct and may be irreversible.

35. Given the immediate obstacles which the Closure Decision may pose to the ongoing investigative activities of the Prosecution (and the various appeal proceedings on foot), as well

[56] *See* First Notice of Appeal, paras. 9-18; First Appeal Brief, paras. 9-51.
[57] *See* Second Notice of Appeal, paras. 17, 19-20.
[58] *Contra* Closure Decision, para. 25.

as for the reasons stated in the Second Notice of Appeal, the Appeals Chamber may consider it appropriate to determine this matter on an expedited basis.

Relief requested

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

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

and, after considering the further submissions in the Prosecution's Appeal Brief to be filed under regulation 64(2) on 4 December 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 Closure Decision in its entirety under article 83(2) and rule 158(1).



Mame Mandiaye Niang
Acting Prosecutor

Dated this 13th day of November 2026
At The Hague, the Netherlands