

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-00/26**
Date: **9 September 2026**

THE APPEALS CHAMBER

Before:

**Judge Tomoko Akane
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin**

SITUATION IN THE REPUBLIC OF COLOMBIA

Secret and *ex parte*, Prosecution only

Prosecution notice of appeal of “Decision closing the situation record”

Source: Office of the Prosecutor

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Notice of Appeal

1. The Prosecution hereby respectfully gives notice of its appeal against the decision of Pre-Trial Chamber II in the *Situation in the Republic of Colombia* entitled “Decision closing the situation record”, filing number ICC-00/26-3-SECRET, rendered on 3 September 2026.¹
2. This appeal is brought under article 82(1)(a) of the Rome 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, in summarily determining at paragraphs 6-9 of the Decision that a document communicated to the Prosecutor by the Republic of Colombia (“the Communication”)² was “not a referral within the meaning of article 14”, despite its well-founded intention to that effect and the acceptance of its validity by the Prosecutor (demonstrated through the filing of a notification to the Presidency under regulation 45,³ and the assignment of the Chamber).⁴ The Chamber’s summary determination led it to decide at paragraph 10 and in the Disposition to “close the situation record”, thus improperly terminating the Court’s exercise of jurisdiction in the situation, and foreclosing the exercise of the Prosecutor’s express power and duty under article 53(1) to determine whether to initiate an investigation in the referred situation (through conduct of a preliminary examination), and;
 - (ii) the Chamber erred in law and/or fact and/or procedure, and/or abused any material discretion with which it is vested, in summarily determining at paragraph 5 of the Decision that it is vested with power under the Statute to “exercise [...] judicial scrutiny” over the validity of a referral under article 14, at the present stage of proceedings, thus leading to the error above.
3. Had the Chamber not erred in either of these respects, which are inextricably linked, it would not have issued the Decision. Accordingly, the Prosecution requests the Appeals Chamber to confirm the applicable law, to reverse the Decision in its entirety, and to direct the Chamber as to the proper scope of its statutory powers at this stage of proceedings consistent with article 53(1) and (3) of the Statute.

¹ See ICC-00/26-3-SECRET (“Decision”).

² See ICC-00/26-1-SECRET-Exp-AnxI (“Regulation 45 Notification”). The Communication is appended in full after the Prosecution’s own notification.

³ See Regulation 45 Notification, paras. 1-8.

⁴ See ICC-00/26-1-SECRET-Exp (“Presidency Decision”).

4. The Prosecution considers it appropriate to underscore that it brings this appeal to address the serious constitutional implications of the Decision. The Chamber terminated the Court's exercise of jurisdiction by summarily removing an express (and reserved) statutory competence from the Prosecutor (*i.e.*, deciding whether to initiate an investigation of a referred situation under article 53(1), including an assessment of a referral and the conduct of a preliminary examination), and purported to exercise that competence itself. The Chamber did so without prior notice, without giving an opportunity to the Prosecution to make written submissions, and with little or no reasoning. As such, the Decision is not only contrary to the statutory framework and its clear division of powers, but has wide implications for the practice of the Court generally, beyond the circumstances of this situation.

5. With specific regard to the present situation, the Prosecution recalls its Regulation 45 Notification to the Presidency, in which it noted that—due to the constructive engagement with the Colombian authorities, including in the framework of the Cooperation Agreement—its decision whether to initiate an investigation under article 53(1) (through conduct of a preliminary examination) might be resolved “expeditiously, returning to the state of affairs preceding the referral”.⁵ Accordingly, the fact of this appeal should not be taken as implying any particular outcome of the Prosecutor's determination under article 53(1) (through the conduct of a preliminary examination) if the Decision is reversed.

Confidentiality

6. This notice of appeal is filed as ‘Secret’, pursuant to regulation 23*bis*(2), since this is the classification of the Decision. The Prosecution draws to the Appeals Chamber's attention the express concerns that it had recently raised with the Presidency concerning the blanket application of this classification to a situation,⁶ which it appears the Presidency has decided not to address.⁷ Nevertheless, the Prosecution defers to the Appeals Chamber's view of the appropriate posture for these appeal proceedings.

7. Furthermore, the Prosecution notes that the Chamber ordered that the Decision should be notified to the Colombian authorities to hear submissions concerning the classification of two Prosecution documents filed in the situation.⁸ However, out of an abundance of caution the Prosecution has provisionally classified this notice of appeal as *ex parte*, Prosecution only,

⁵ See ICC-00/26-1-SECRET-Exp-AnxI (“Regulation 45 Notification”), paras. 5-7.

⁶ See ICC-00/26-2-SECRET-Exp (“Request for Reconsideration”).

⁷ See *e.g.* Decision, paras. 4, 12, and Disposition.

⁸ See Decision, paras. 10 (instructing the Registry “to promptly notify the present decision to the competent authorities of Colombia”), 12 (“referring to “the court filings contained in the record”, and Disposition (referring only to “ICC-00/26-SECRET-Exp-AnxI” (the Regulation 45 Notification) and “ICC-00/26-2-SECRET-Exp” (the Request for Reconsideration)).

since the Prosecution is the only party to any litigation concerning preliminary examinations of referred situations, unless and until article 53(3) of the Statute may be engaged.⁹

8. Accordingly, in the exceptional circumstances of this situation, the Prosecution defers to the assessment of the Appeals Chamber whether (notwithstanding the classification of the proceedings), they should be conducted *ex parte* or whether the Colombian authorities should be notified with a view to their potential participation together with any other organ of the Court which the Appeals Chamber may consider appropriate, such as the Office of Public Counsel for Victims.

Grounds of Appeal

9. The Prosecution has reviewed the Decision carefully with reference to the established standards of appellate review. On this basis, the Prosecution identified the following two grounds of appeal. While they are inextricably linked, error in respect of either ground of appeal would require reversal of the Decision in its entirety.

FIRST GROUND OF APPEAL: THE CHAMBER ERRED IN DETERMINING THAT THE COLOMBIAN AUTHORITIES' 'COMMUNICATION' WAS NOT AN ARTICLE 14 REFERRAL, THEREBY CLOSING THE SITUATION RECORD AND TERMINATING THE COURT'S EXERCISE OF JURISDICTION

10. The Chamber erred in summarily determining that the document communicated to the Prosecutor by the Colombian authorities “does not fulfil the requirements set forth in article 14 of the Statute”, and therefore “does not constitute a referral within the meaning of article 14”.¹⁰ As a consequence, the Chamber decided to “close the situation record”,¹¹ as soon as outstanding matters pertaining to the classification of filings are decided.¹²

11. The Chamber's decision improperly terminated the Court's exercise of jurisdiction in the situation, before the Prosecutor could validly exercise his express statutory power and duty under article 53(1) to determine whether to initiate an investigation in the referred situation (through conduct of a preliminary examination).¹³ This is manifest from the Chamber's

⁹ In the distinct procedural context of preliminary examinations initiated by the Prosecutor *proprio motu* under article 15, see also [ICC-02/17-137 OA2 OA3 OA4](#) (“Afghanistan Reasons for Oral Decision on Admissibility”).

¹⁰ [Decision](#), paras. 8-9.

¹¹ [Decision](#), para. 10. The Chamber's understanding that the Decision necessarily terminated the Court's exercise of jurisdiction is also implicit in its assertion that it would not entertain any further submissions except those pertaining to the classification of certain filings already on the record: see [Decision](#), para. 13.

¹² [Decision](#), para. 13.

¹³ See further below para. 25 (“The Decision is, by its nature, a jurisdictional ruling. By concluding that the Regulation 45 Notification was inapposite, and hence closing the situation record, the Chamber determined that there is no basis for the Court to exercise its jurisdiction pursuant to the ostensible referral by the Colombian

conclusion that the Prosecutor's Regulation 45 Notification to the Presidency was "inapposite".¹⁴

12. The Chamber's determinations were erroneous in several respects. Notably, for example, the Chamber considered that the Colombian authorities had failed to identify "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed",¹⁵ in the sense that "the alleged criminal conduct must have already occurred and/or be ongoing".¹⁶ In its view, the "Communication primarily consists of several references to concerns, speculative risks and hypothetical scenarios that may or may not materialise in the future."¹⁷

13. This is incorrect, as is clear from the express terms of the Communication itself. The Decision omits to address the passages noted by the Prosecution in its Regulation 45 Notification, in which the Colombian authorities made clear that the *subject matter* of the referral was "past, and ongoing[,] crimes [...] committed on the territory of Colombia or by its nationals", with express reference to the Prosecution's previous finding of a "reasonable basis to believe" that crimes against humanity and war crimes *had been committed* including in the context of 'forced displacement, sexual and gender-based crimes, and killings of civilians presented as combat casualties ('false positives')."¹⁸ The Chamber omitted reference to any of these passages, which it thus either ignored or misinterpreted.

14. Further, the Chamber misinterpreted those passages of the Communication which it did cite, where the Colombian authorities expressed some of the concerns underlying their view of the possibility of "a significant change in circumstances affecting the capacity of the Colombian State to genuinely investigate, prosecute and sanction those most responsible" for

authorities—and thus no basis for the Prosecutor to determine whether to initiate an investigation in the situation pursuant to article 53(1) (through conduct of a preliminary examination). Since a preliminary examination is the *sine qua non* for opening an investigation of a referred situation, the Decision necessarily determines that the Court may not exercise its jurisdiction at the Colombian authorities' initiative").

¹⁴ Decision, para. 9.

¹⁵ Decision, para. 8.

¹⁶ Decision, para. 7.

¹⁷ Decision, para. 8 (continuing: "By way of example, the Chamber notes paragraph 8 of the Communication where Colombia mentions a 'serious an imminent risk' [*sic*] and lists its principal concerns which consist of different 'announced intentions' of the new administration, and paragraph 9 where Colombia expresses a 'concern' about the 'public rhetoric and announced policy orientations'").

¹⁸ Regulation 45 Notification, para. 2 (emphasis added, further noting that the Colombian authorities also referred "to ongoing 'violence affecting former FARC-EP combatants, social leaders and human rights defenders'"). In the Communication, which is appended to the Regulation 45 Notification, express references to the alleged past or ongoing crimes constituting the subject matter of the referral are set out at paragraphs 1, 3, and 12.

the alleged crimes.¹⁹ In other words, the Decision confused information relevant to a possible complementarity assessment with the subject matter of the referral.²⁰

15. Accordingly, in these decisive aspects of the factual analysis in the Decision, the Chamber reached conclusions which no reasonable chamber could have reached, and/or failed to refer to all relevant information, and/or took into account irrelevant information and/or failed to provide adequate reasoning for its conclusion.

16. Likewise, the Chamber erred in law and/or fact when stating that the Decision is “without prejudice to the Prosecution further considering the matter in the exercise of its functions under the statutory framework” with reference to “its ongoing complementarity assessment under article 53(1)(b) of the Statute.”²¹ This impermissibly confused questions concerning the Court’s exercise of jurisdiction pursuant to a State Party referral—which has now concretely arisen—with the (hypothetical) exercise of jurisdiction pursuant to further *proprio motu* action by the Prosecutor. This was incorrect and/or unreasonable.

17. In particular, without a State Party (or Security Council) referral, the Prosecutor is not obliged to determine whether to initiate an investigation (through conduct of a preliminary examination)—and, indeed, *cannot* do so unless and until exercising his discretion *proprio motu* under article 15. As such, the Decision cannot detract from its actual termination of the Court’s exercise of jurisdiction pursuant to a State Party referral by referring to the Prosecutor’s ongoing discretion to open a preliminary examination *proprio motu*. To the contrary, as the Appeals Chamber has explained, the Prosecutor’s *proprio motu* power is a safeguard in the *absence* of a referral.²² The two procedures are clearly distinct, with material differences in their application and procedural consequences.²³ It cannot be said that a decision finding a State Party referral to be invalid nonetheless preserves the Court’s exercise of

¹⁹ See [Regulation 45 Notification](#), para. 3. In the appended Communication from the Colombian authorities, paragraph 2 explains why a referral was considered appropriate, notwithstanding the Cooperation Agreement between the Colombian authorities and the Prosecution which formed a relevant part of the context for the Prosecution’s prior determination to close its article 15 preliminary examination on the basis of complementarity. In paragraphs 8 and 9 of the Communication, the Colombian authorities explain the basis for their view of the “risk” that domestic “*proceedings* may be materially impaired” (emphasis added).

²⁰ While such information may be relevant in the Prosecutor’s determination whether to initiate an investigation under article 53(1) (through conduct of a preliminary examination), it is not germane to the validity of a State Party referral. Nor did the Chamber apparently suggest otherwise: see e.g. [Decision](#), para. 7.

²¹ [Decision](#), para. 11.

²² See [ICC-02/17-148 OA4](#) (“Afghanistan Article 15(4) Appeal Judgment”), paras. 30 (defining an article 15 preliminary examination as occurring “on [the Prosecutor’s] own motion when a situation has not been referred”, and stressing the “discretionary nature of this power”).

²³ See e.g. [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 33 (“the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation [...] in two distinct contexts”).

jurisdiction simply because (separately) there remains a hypothetical possibility that jurisdiction might (separately and hypothetically) be triggered by the Prosecutor *proprio motu*.

18. Furthermore, as both the Colombian authorities in the Communication and the Prosecution in its Regulation 45 Notification made clear, in the absence of a referral, the Prosecution is *not* currently conducting a complementarity assessment under article 53(1)(b) of the Statute (which is an integral part of the determination whether to open an investigation under article 53(1), through conduct of a preliminary examination).²⁴ To the contrary, the Prosecution's article 15 preliminary examination in relation to Colombia is closed.²⁵ While the Prosecution conducts residual monitoring under the terms of the Cooperation Agreement, this does not amount to an ongoing preliminary examination to which article 53(1)(b) applies.

19. If the Chamber had not erred by determining that the Colombian authorities' Communication was not a valid referral under article 14, it would not have closed the situation record and terminated the Court's exercise of jurisdiction pursuant to the referral.

SECOND GROUND OF APPEAL: THE CHAMBER ERRED IN DETERMINING THAT IT IS VESTED WITH STATUTORY POWER TO EXERCISE "JUDICIAL SCRUTINY" OVER THE VALIDITY OF A REFERRAL IN THE PRESENT CIRCUMSTANCES

20. As a necessary precondition to the above error, and inextricably linked to it, the Chamber also erred in determining that, "[h]aving been seised of the Situation in Colombia and noting the content of the Communication [from the Colombian authorities], the Chamber, *in the exercise of judicial scrutiny, finds it necessary* to assess whether said document constitutes a referral within the meaning of article 14 of the Statute."²⁶

21. These nine words—without citation to any statutory provision or supporting authority—are the *only* legal justification identified by the Chamber for undertaking the improper jurisdictional assessment described above or for ordering the remedies set out in the Decision.²⁷ The Chamber did not seek or receive submissions from the Prosecution on this matter, which

²⁴ See [ICC RPE](#), rule 48.

²⁵ See e.g. [ICC OTP, Report on the Situation in Colombia, 30 November 2023](#), para. 1 (referring to "the Prosecutor's determination in October 2021 to conclude the preliminary examination with a decision not to proceed with an investigation on the basis of the Office's admissibility assessment").

²⁶ [Decision](#), para. 5 (emphasis added).

²⁷ See also [Decision](#), para. 10 (fn. 6: noting that, "in the absence of a referral [...], regulation 66ter [...] does not apply"). The Prosecution notes that, under regulation 66ter, again, the Chamber's intervention would have been contingent upon the Prosecution's notification under regulation 66ter(2): see [Regulations of the Court](#), reg. 66ter(2)(a) ("When the Prosecutor, having provided information in accordance with regulation 45, sub-regulation 1, decides not to initiate an investigation [...] he or she shall inform in writing the Pre-Trial Chamber to which the situation has been assigned", emphasis added), (b) ("Having been so informed, the Pre-Trial Chamber may [...]").

was decided summarily and without notice.²⁸ The Chamber made no attempt to explain the unprecedented nature of the Decision—notwithstanding the Prosecution’s prior determination that a regulation 45 notification was warranted, and the Presidency’s determination accordingly to assign the Chamber to the situation.²⁹ Nor did it address the absence of any relevant power under the Statute for its intervention, or the contrary implication of provisions such as articles 13(a), 14 and 53(1) of the Statute, and rules 104 and 105. These provisions all expressly—and solely—refer to “the Prosecutor” as the recipient of State Party referrals and vested with responsibility to determine whether to initiate investigation into such situations (through the conduct of preliminary examinations).

22. Relevant to demonstrating the existence of the error in the Decision, the Prosecution further recalls the Appeals Chamber’s express guidance to the Pre-Trial Chamber that “article 42(1) [of the Statute] recognises *the independence of the Prosecutor and [their] responsibility* for the conduct of investigations, while articles 56 and 57 of the Statute identify *specific functions* that may be exercised by the pre-trial chamber”.³⁰ These same principles apply equally to decisions on the initiation of investigations (through the conduct of preliminary examinations), which in the case of referred situations are regulated by article 53(1) and (3) and rules 104 and 105. These provisions expressly demarcate the competences of the Prosecution and the Chamber. As the Appeals Chamber has found, article 53(3) “envisages judicial control” *only* “over the Prosecutor’s decision *not* to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations.”³¹

23. If the Chamber had not made this error concerning its own competence and powers, it would not have made the above error concerning the validity of the Communication as a referral to the Prosecutor under article 14 of the Statute, and would not have closed the situation record and thereby terminated the Court’s exercise of jurisdiction pursuant to the referral.

Admissibility under article 82(1)(a)

24. Appeals under article 82(1)(a) must pertain to a decision “with respect to jurisdiction”. While the operative part of the impugned decision must pertain to a question on the jurisdiction

²⁸ This violation of the *audi alteram partem* principle was compounded by the Chamber’s further instruction in the Decision that it would not entertain any further submission except on the matter of the possible reclassification of certain filings: Decision, para. 13. See further e.g. ICTY, Prosecutor v. Jelisić, IT-95-10-A, Judgment, 5 July 2001, para. 27; cf. ICC-01/14-01/18-678-Red OA (“*Yekatom & Ngaïssona* Admissibility Judgment”), para. 46.

²⁹ See Decision, para. 9 (concluding that the Chamber’s determination on the (in)validity of the referral “renders the application of regulation 45(1) [...] inapposite”). See further Regulation 45 Notification, paras. 1-8; Presidency Decision.

³⁰ Afghanistan Article 15(4) Appeal Judgment, para. 63 (emphasis added).

³¹ Afghanistan Article 15(4) Appeal Judgment, para. 29.

of the Court,³² this “must be read with the corresponding reasoning that led to it”,³³ and the impugned decision or impugned part of the decision assessed in its broader context.³⁴ Ultimately, it is the objective nature of a decision, rather than its ostensible designation, effect or implication, that determines whether it may be appealed under article 82(1)(a) of the Statute.³⁵ 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.³⁶ 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 according to the terms of the Statute.

25. The Decision is, by its nature, a jurisdictional ruling. By concluding that the Regulation 45 Notification was inapposite, and hence closing the situation record, the Chamber determined that there is no basis for the Court to exercise its jurisdiction pursuant to the ostensible referral by the Colombian authorities—and thus no basis for the Prosecutor to determine whether to initiate an investigation in the situation pursuant to article 53(1) (through conduct of a preliminary examination). Since a preliminary examination is the *sine qua non* for opening an investigation of a referred situation, the Decision necessarily determines that the Court may not exercise its jurisdiction at the Colombian authorities’ initiative.³⁷

26. The Decision notes that it is without prejudice to an alternative—and hypothetical—means of triggering the Court’s exercise of jurisdiction: the *proprio motu* action of the Prosecutor under article 15.³⁸ However, this discretionary and hypothetical action is irrelevant to the jurisdictional nature of the Decision. To conclude otherwise would be the same as saying that the Decision cannot be jurisdictional in nature simply because there remains the possibility that *another* State Party might make a referral and thereby trigger the Court’s exercise of jurisdiction. Hypothetical possibilities of this kind cannot be relevant to the nature of a decision for the purpose of article 82(1)(a).

³² See e.g. [ICC-01/09-78 OA](#) (“Kenya Admissibility Decision”), para. 15; [ICC-01/18-423 OA](#) (“Palestine Admissibility Decision”), para. 31.

³³ [Article 18 Appeal Judgment](#), para. 53.

³⁴ See e.g. [Palestine Admissibility Decision](#), para. 31.

³⁵ See e.g. [Kenya Admissibility Decision](#), para. 17.

³⁶ [ICC-01/21-01/25-415 OA3](#) (“Duterte Jurisdiction Appeal Judgment”), paras. 82-83. See also paras. 2-5, 88, 93, 113.

³⁷ See e.g. *above* para. 11.

³⁸ See *above* paras. 16-18.

Relief requested

27. For all the reasons above, and having considered the Prosecution brief which will be filed under regulation 64(2) on 25 September 2026, the Prosecution respectfully requests the Appeals Chamber:

- (a) to receive the appeal under article 82(1)(a);
- (b) considering the merits of the appeal, to confirm the applicable law with respect to the errors outlined in paragraphs 2 and 10 to 23 above, and on that basis reverse the Decision in its entirety under article 83(2) and rule 158(1); and
- (c) to direct the Chamber that its judicial competence with respect to decisions on whether to initiate the investigation of situations referred to the Prosecutor under articles 13(a) and 14 is confined to article 53(3) of the Statute, and does not encompass article 53(1) of the Statute (which is reserved to the Prosecutor, and carried out through his conduct of a preliminary examination).



Mame Mandiaye Niang
Acting Prosecutor

Dated this 9th day of September 2026

At The Hague, the Netherlands