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**International
Criminal
Court**

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No.: **ICC-00/26**
Date: **25 September 2026**

THE APPEALS CHAMBER

Before:

Judge Tomoko Akane, Presiding
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 Appeal Brief against “Decision closing the situation record”

Source: Office of the Prosecutor

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INTRODUCTION

1. On 7 August 2026, under the administration of then President Gustavo Petro, the Colombian authorities transmitted a communication to the Prosecutor (“Communication”).¹ This was presented as a referral of a situation in the meaning of article 14 of the Statute. The Communication referred to past and ongoing crimes under the Statute committed on the territory of Colombia. It further expressed concern that a “significant change in circumstances” would in the future affect the willingness and/or ability of the Colombian authorities genuinely to investigate and/or prosecute those crimes.
2. Following consultations between the Prosecution and representatives of the present Colombian authorities under President Abelardo de la Espriella, the Acting Prosecutor duly notified the Presidency of the Communication in accordance with regulation 45 of the Regulations of the Court.² This was based on the Prosecutor’s view that the Communication is a valid referral. The Prosecutor further considered notification appropriate since: (i) there is no open investigation at the Court already encompassing the subject matter of the referral, and; (ii) no Pre-Trial Chamber was previously assigned to the *Situation in Colombia* notwithstanding the prior preliminary examination carried out by the Prosecutor *proprio motu* pursuant to article 15, which was closed in 2021.
3. On 24 August 2026, the Presidency assigned the *Situation in Colombia* to Pre-Trial Chamber II. It also ordered that all information as to the existence of the situation was to be classified as ‘secret’³—in which regard the Prosecution requested the Presidency to reconsider its order in part.⁴
4. On 3 September 2026 Pre-Trial Chamber II summarily decided to close the situation record, based on its view that the Communication was not a valid referral.⁵ In particular, the Chamber considered that the Communication did not sufficiently specify the subject matter of the referral. The Decision was issued without notice, and without opportunity for the Prosecution to provide formal submissions in writing to the Chamber.
5. The Prosecution now appeals the Chamber’s decision because it erroneously terminates the Court’s exercise of jurisdiction pursuant to the referral. The Prosecution emphasises that

¹ See ICC-00/26-1-SECRET-Exp-AnxI (“Regulation 45 Notification”), Annex (Communication).

² See Regulation 45 Notification.

³ See ICC-00/26-1-SECRET-Exp (“Presidency Order”).

⁴ See ICC-00/26-2-SECRET-Exp (“Request for Reconsideration”).

⁵ See ICC-00/26-3-SECRET (“Decision”).

this Appeal is thus *unrelated* to the distinct question on the merits whether, *after and on the basis of* the Prosecutor's assessment under article 53(1), an investigation shall be initiated in this situation. In this respect, as the Prosecution has previously stated, it has "held positive consultations with relevant Colombian authorities in which they have reiterated that they will maintain their constructive engagement with the [Prosecution] in line with the Cooperation Agreement. This could form the basis to resolve the preliminary examination expeditiously, returning to the state of affairs preceding the referral."⁶

6. Notwithstanding these future questions on the merits of the Communication, the Prosecution respectfully requests the Appeals Chamber to affirm that the Pre-Trial Chamber may not terminate the Court's exercise of jurisdiction by reviewing the validity of a referral accepted by the Prosecutor. This precludes the ability of the Prosecutor to conduct the analysis legally required under article 53(1) of the Statute, and exceeds the scope of the judicial review power provided in article 53(3). The Chamber's peremptory assertion of the powers in the Decision—and, in particular, without notice or opportunity for the Prosecution to make written submissions—thus raises serious constitutional implications for the functioning of the Court. The errors of reasoning in the Decision, materially affecting the assessment of the Communication itself, further illustrate why the broad powers assumed by the Chamber should be regarded with concern.

CONFIDENTIALITY

7. This brief is filed as 'Secret' and *ex parte*, Prosecution only, pursuant to regulation 23bis(2), consistent with the classification of the notice of appeal. More generally, and as previously stated, the Prosecution nevertheless defers to the Appeals Chamber's view of the appropriate posture for these appeal proceedings.⁷

SUBMISSIONS

8. The Prosecution respectfully submits that the Decision not only errs in its conclusions concerning the validity of the referral, but should not have been issued in the first place. As explained in the following paragraphs, the Prosecution submits that the Chamber erred in two significant respects. First, on the merits, the Chamber erred in determining that the Communication was not valid as an article 14 referral, thereby closing the situation record and

⁶ Regulation 45 Notification, para. 7.

⁷ See ICC-00/26-4-SECRET-Exp OA ("Notice of Appeal"), paras. 6-8. More recently, see also ICC-00/26-5-SECRET-Exp ("Prosecution submissions on reclassification").

terminating the Court's exercise of jurisdiction pursuant to that referral. Second, 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. The latter error is inextricably linked to the first error because, without the Chamber's assumption that it was competent to issue the Decision, it could not have done so.

9. As a consequence of these errors, the Chamber erroneously terminated the Court's exercise of jurisdiction pursuant to the referral. The proper course of action would have been for the Chamber to await the Prosecutor's determination under article 53(1)—through conduct of a preliminary examination—as to whether there was a reasonable basis to proceed to open an investigation. Following the Prosecutor's determination, the Chamber would be competent to exercise those powers of judicial review set out in article 53(3) according to the conditions therein. Thereafter, *if* there remains no reasonable basis to proceed with an investigation, the Court's exercise of jurisdiction pursuant to the referral would be duly terminated. This is the approach required by the Statute, consistently applied in situations such as *Comoros*, *Gabon*, *Bolivia*, and *Venezuela II*.

I. THE CHAMBER ERRED IN DETERMINING THAT THE COMMUNICATION WAS NOT AN ARTICLE 14 REFERRAL, THEREBY CLOSING THE SITUATION RECORD AND TERMINATING THE COURT'S EXERCISE OF JURISDICTION (FIRST GROUND)

10. In the Decision, on the merits, the Chamber considered (correctly) that "it is clear from the wording" of article 14 of the Statute that a valid referral "must identify a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed". This means that "the alleged criminal conduct must have already occurred and/or be ongoing, rather than being merely prospective or hypothetical."⁸ The Chamber further noted that article 14(2) "provides that the State Party submitting a referral shall, '[a]s far as possible', specify the relevant circumstances and attach such supporting documentation as is available."⁹

11. In the present circumstances, the Chamber found that "the Communication does not fulfil the requirements set forth in article 14" because it does not identify "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed and other 'relevant circumstances' are not identified."¹⁰ Rather, in the view of the Chamber:

⁸ Decision, para. 7.

⁹ Decision, para. 7.

¹⁰ Decision, para. 8. *See also* para. 9 (finding, "[i]n light of the above," that "the Communication does not constitute a referral within the meaning of article 14 of the Statute").

[T]he Communication primarily consists of several references to concerns, speculative risks and hypothetical scenarios that may or may not materialise in the future. By way of example, the Chamber notes paragraph 8 of the Communication where Colombia mentions a 'serious an[d] imminent risk' 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'.¹¹

12. As a consequence of this finding, the Chamber concluded that "the application of regulation 45(1)" was "inapposite" and therefore decided "to close the situation record 00/26".¹² In the view of the Chamber:

This is without prejudice to the Prosecution further considering the matter in the exercise of its functions under the statutory framework. The Chamber notes in this regard the Prosecution's reference to its ongoing complementarity assessment under article 53(1)(b) of the Statute.¹³

13. In the Prosecution's respectful submission, and as explained in the following paragraphs, these findings were erroneous. Specifically, the Chamber misinterpreted the Communication, which identified a situation in which one or more article 5 crimes appear to have been committed. These crimes had previously already been the object of the Prosecutor's (now closed) preliminary examination pursuant to article 15 of the Statute.¹⁴ Furthermore, the Chamber misdirected itself as to the jurisdictional nature of the Decision, insofar as it apparently considered that the Prosecution could still conduct a complementarity assessment under article 53(1)(b).¹⁵ Consequently, due to these errors, the Chamber erroneously terminated the Court's exercise of jurisdiction pursuant to the referral.¹⁶

I.A. The Chamber erred by misinterpreting the Communication

14. The Chamber erred in fact by misinterpreting the Communication. To support its conclusion that the Communication did not identify a situation in which one or more article 5 crimes appear to have been committed, the Chamber found that the Communication "primarily" consisted of "speculative" and "hypothetical" risks. This was a conclusion that no reasonable

¹¹ Decision, para. 8. In a footnote, the Decision further cited paragraphs 5, 10, 13, and 14 of the Communication, without comment: see fn. 5.

¹² Decision, para. 10.

¹³ Decision, para. 11.

¹⁴ See below paras. 14-24.

¹⁵ See below paras. 25-32.

¹⁶ See below paras. 33-34.

finder of fact could have reached, materially affecting the Decision. First, it overlooked the plain reference in the Communication to “past” crimes in Colombia. Second, it confused information relevant to a complementarity assessment—which would be carried out by the Prosecution in the conduct of a preliminary examination—with the subject matter of the referral.

I.A.1. In seeking to identify the subject matter of the referral, the Chamber overlooked the plain reference in the Communication to “past” crimes in Colombia

15. The Acting Prosecutor considered that the Communication was a valid referral, and consequently submitted the Regulation 45 Notification to the Presidency. In that notification, the Prosecution expressly drew attention to the Colombian authorities’ indication that the subject matter of the referral encompassed ““past, and ongoing[,] crimes [...] committed on the territory of Colombia or by its nationals”. Specifically, it noted that the Communication referred 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’)”. It also referred to “ongoing ‘violence affecting former FARC-EP combatants, social leaders and human rights defenders’”.¹⁷

16. For the purpose of this appeal, the Prosecution further sets out the relevant passages of the Communication. In particular:

- Paragraph 1 requests, “should the statutory threshold be met”, the opening of “an investigation into *past, and ongoing[,] crimes*”.¹⁸
- Paragraph 2 explains that the “referral is made in view of a significant change of circumstances affecting the capacity of the Colombian State” to “genuinely investigate, prosecute and sanction” persons responsible for the conduct of crimes falling within the scope of the Cooperation Agreement signed by the Prosecution and Colombia.¹⁹ The Cooperation Agreement pertains directly to the crimes previously under preliminary examination by the Prosecution pursuant to article 15 of the Statute. This paragraph therefore links the subject matter of the referral in the Communication to the subject matter of the previous (and now closed) preliminary examination.

¹⁷ See Regulation 45 Notification, para. 2 (emphasis added).

¹⁸ Regulation 45 Notification, Annex (Communication), para. 1 (emphasis added).

¹⁹ Regulation 45 Notification, Annex (Communication), para. 2.

- Paragraph 3 recalls the finding of the Prosecution's previous preliminary examination, in which it found that "there was a reasonable basis to believe that crimes against humanity and war crimes within the jurisdiction of the Court *had been committed* in Colombia".²⁰
- Paragraph 8 refers to certain lines of inquiry concerning alleged crimes identified in the previous preliminary examination and which, in the view of the Communication, may no longer be genuinely investigated or prosecuted by the Colombian authorities. Specifically, it refers to "*investigations concerning forced displacement, sexual and gender-based crimes, and so-called 'false positives', which the [Prosecution] consistently identified throughout the preliminary examination* as priority areas requiring particular attention".²¹ The term "false positives" is not a legal term of art, but again refers to a particular set of historical allegations of article 5 crimes in Colombia which were considered in the previous preliminary examination.²²
- Paragraph 11 reiterates that the Communication "is grounded on the factual and institutional premises" which led to the Prosecution closing the previous preliminary examination, thus reinforcing the link with the subject matter of the referral.²³
- Paragraph 12 repeats again the Prosecution's previous determination that, in Colombia, "there is a reasonable basis to believe that crimes against humanity [...] and war crimes [...] were committed [...] including *murder, forcible transfer, imprisonment or other severe deprivation of physical liberty, torture, rape and other forms of sexual violence, attacks against civilians, hostage-taking and the conscription, enlistment and use of children under fifteen in hostilities*". It refers in particular to "accountability gaps" regarding "forced displacement, sexual and gender-based crimes, and extra judicial killings (so-called false positive cases)."²⁴
- Paragraphs 15 to 17, and 19, conclude by again illustrating that the subject matter of the referral encompasses the subject matter of the previous preliminary examination, which the Communication seeks to re-open in light of their view of the change of circumstances concerning the prospects of domestic accountability.²⁵

²⁰ Regulation 45 Notification, Annex (Communication), para. 3 (emphasis added).

²¹ Regulation 45 Notification, Annex (Communication), para. 8 (emphasis added).

²² See e.g. ICC OTP, Report on the Situation in Colombia, 30 November 2023 ("Closure Report"), para. 5 ("killings of civilians staged to look like combat kills, commonly known as 'false positive' killings").

²³ Regulation 45 Notification, Annex (Communication), para. 11.

²⁴ Regulation 45 Notification, Annex (Communication), para. 12 (emphasis added).

²⁵ Regulation 45 Notification, Annex (Communication), paras. 15-17, 19.

17. For the purpose of article 14(2), the Communication further appended, relevantly, both the Cooperation Agreement concluded between Colombia and the Prosecution, and the Prosecution's own report explaining its findings in the previous preliminary examination under article 15 of the Statute.²⁶ This further cemented the link between the subject matter of the referral and the subject matter (and findings) of the previous preliminary examination.

18. Notwithstanding the lengthy exposition in the Communication itself, and the brief summary provided by the Prosecution in the Regulation 45 Notification, the Decision neither acknowledged nor addressed any of this information. No reasonable Chamber could have failed to do so. Of the six paragraphs of the Communication cited in the Decision (in three sentences of reasoning), just one—paragraph 8—was among the relevant paragraphs described above.²⁷ No explanation is provided for the failure to address the other relevant paragraphs, despite their obvious relevance.

19. Moreover, even within its discussion of paragraph 8 of the Communication, the Chamber again omitted to acknowledge or to address the express reference in this paragraph to the crimes identified in the previous preliminary examination carried out by the Prosecution. Instead, the Chamber focused on just two phrases (“serious and imminent risk” and “announced intentions”), considered in isolation. These phrases were contained in the first two sentences of this paragraph. The Chamber made no reference to the existence or contents of the further four sentences in that paragraph, which related the Colombian authorities' concerns to the relevant subject matter. Again, no explanation for the omission was provided.

20. In conclusion, no reasonable Chamber could have interpreted the Communication in the manner of the Decision. Not only was its reasoning minimal, but it failed to acknowledge or to address the majority of paragraphs which were critical to establishing the subject matter of the referral. In the one relevant paragraph that was addressed, the Chamber failed to identify the relevant passages of that paragraph. Instead, as addressed in the following paragraphs, it addressed passages in the Communication which were irrelevant to the subject matter of the referral.

²⁶ See Regulation 45 Notification, Annex (Communication), para. 24. This is in addition to the Communication's further reference to circumstances which it considered relevant under article 14(2), for the purpose of the complementarity assessment carried out in the course of any preliminary examination resulting from the referral: para. 16.

²⁷ See Decision, para. 8 (citing Regulation 45 Notification, Annex (Communication), paras. 5, 8-10, 13-14).

I.A.2. The Chamber confused information relevant to a possible complementarity assessment with the subject matter of the referral

21. Rather than considering the relevant information in the Communication specifying the subject matter of the referral, the Chamber unreasonably took account of irrelevant information in the Communication.²⁸ This irrelevant information concerned the Colombian authorities' view of the potential risk to their future ability and willingness genuinely to investigate and prosecute article 5 crimes.²⁹ While this information was potentially relevant to the *future admissibility assessment* to be conducted by the Prosecutor through a preliminary examination, concerning complementarity, it had no bearing on the subject matter of the referral.³⁰

22. By confusing information potentially relevant to an admissibility assessment with the subject matter of the referral, the Chamber misinterpreted the Communication. To establish that a case or potential case is *admissible* (on the basis of complementarity), there is no requirement to prove that the circumstances relevant to the article 17 assessment amount to criminal conduct. Nor does a finding of admissibility necessarily imply any criminal responsibility on the part of the authorities who are not able or willing genuinely to investigate or prosecute. Rather, questions concerning the subject matter of a referral and the assessment of admissibility are wholly separate. As such, no reasonable Chamber could have understood the Communication's reference to concerns potentially relevant to admissibility (on the basis of complementarity) as pertaining to the subject matter of the referral.

23. It is accepted that assessing the validity of a referral may require determining whether a situation is identified in which one or more article 5 crimes appear to have been committed.³¹ However, this does not encompass any assessment (even on a threshold *prima facie* basis) whether any potential case resulting from such crimes would be admissible. This forms part of the substantive assessment to be carried out by the Prosecutor under article 53(1) (through conduct of a preliminary examination). Plainly, it would put the cart before the horse if this were *also* to form part of the threshold determination of the validity of a referral.

²⁸ See Decision, para. 8.

²⁹ See Regulation 45 Notification, Annex (Communication), paras. 5, 8-10, 13-14.

³⁰ But see further Regulation 45 Notification, para. 6 (recalling that preliminary examinations are carried out "objectively, on the basis of the available factual information"). As such, the Prosecution's admissibility (complementarity) assessment under article 53(1)(b) of the Statute is underpinned by concrete information and not mere hypothetical possibilities.

³¹ See *above* para. 10 (quoting Decision, para. 7). In the respectful submission view of the Prosecution, any such assessment is to be carried out by the Prosecutor, however: see *further below* paras. 43-48.

24. As such, no reasonable fact-finder could properly have taken account of information pertaining to admissibility (on the basis of complementarity) when considering the validity of a referral—much less confused such information for information identifying the subject matter of the referral. Nor could a reasonable fact-finder properly treat admissibility-related information as negating or detracting from information identifying the subject matter of the referral. To the contrary, reference to admissibility-related information was simply irrelevant for the espoused purpose of the Decision. No reliance should have been placed upon it.³²

I.B. The Chamber further erred in taking account of the Prosecution's "ongoing complementarity assessment under article 53(1)(b)"

25. Having determined that the Communication did not constitute a valid referral, the Chamber held that the Regulation 45 Notification was inapposite and the situation record must be closed.³³ This terminated the Court's exercise of jurisdiction pursuant to the referral.

26. Yet the Chamber nevertheless then stated, incorrectly, that its decision was "without prejudice to the Prosecution further considering the matter in the exercise of its functions under the statutory framework".³⁴ Consequently, the Chamber erred in law and/or fact by considering that: (i) the Prosecution could carry out a "complementarity assessment under article 53(1)(b)" *pursuant to the Communication*, if it was not a valid referral, and/or; (ii) the Prosecution could carry out a complementarity assessment under article 53(1)(b) *proprio motu* in circumstances where there was no open preliminary examination.

27. To any extent that the Chamber's observation formed part of the reasoning in the Decision,³⁵ it was thus erroneous. Plainly, if the referral was invalid, it precluded the conduct of any preliminary examination under article 53(1). Furthermore, while the Prosecutor always retains discretion under article 15(6) to reopen a (closed) preliminary examination,³⁶ the Prosecution has not announced such a step at the present time. In this context, it is obviously

³² See also [ICC-02/17-138 OA4](#) ("Afghanistan Article 15(4) Appeal Judgment"), paras. 40-41 (stating further, albeit in the more general context of article 15(4), that "the value of a *judicial* assessment of admissibility" at the preliminary examination stage is in any event "limited").

³³ [Decision](#), para. 9.

³⁴ [Decision](#), para. 10.

³⁵ For example, if the Chamber were to have been of the view that its decision did not in fact prejudice the Prosecution's complementarity assessment, or that this the Decision was not in fact jurisdictional in its nature or effect.

³⁶ See [Statute](#), art. 15(6) ("This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence"). This is no more than the corollary of the Prosecutor's inherent discretion to open a (new) preliminary examination *proprio motu* under article 15(1)-(2), and merely affirms that the decision to close a preliminary examination without opening an investigation creates no kind of estoppel.

untenable for a mere *hypothetical* possibility of future action to alter the legal nature or effect of the Decision. Likewise, a Chamber may not rely on a hypothetical possibility as justification for a decision terminating the exercise of jurisdiction pursuant to a right expressly granted in the Statute.³⁷

I.B.1. The Chamber wrongly considered that article 53(1)(b) activities can occur outside the context of preliminary examination

28. The Statute and the Rules provide for two circumstances in which the Prosecution can make an assessment under article 53(1)(b) of the Statute. These are, either: pursuant to a valid referral, as part of the Prosecutor's assessment "whether to initiate an investigation" under article 53(1) (through conduct of a preliminary examination),³⁸ or; pursuant to a preliminary examination initiated by the Prosecutor *proprio motu* under article 15(1) to (2) and rule 48.³⁹ There are no other circumstances when article 53(1)(b) is engaged *stricto sensu*.

29. As the Appeals Chamber recently affirmed in *Duterte*, the "preliminary examination phase" is a distinct procedural stage with a clear basis in the Court's legal texts.⁴⁰ This applies equally to the regimes under both articles 15 and 53(1), even though they are triggered in different circumstances. In both respects, conduct of a preliminary examination is not merely a passive exercise,⁴¹ and may entail particular legal obligations for the Prosecutor.⁴² In particular, in the course of his assessment, the Prosecutor will typically seek information from appropriate external sources.⁴³ (Among other reasons, this is why preliminary examinations cannot be conducted wholly in secret.⁴⁴) While the Prosecution does of course continuously monitor relevant current events in order to inform the Prosecutor's determination whether to exercise his *proprio motu* powers under article 15, by definition this is not—and cannot be—the same as the conduct of a preliminary examination. To conclude otherwise would be to defeat the distinct procedural status of a preliminary examination.⁴⁵

³⁷ Notably, articles 13, 14, and 53(1) of the Statute provide referring entities (i.e., States Parties and the UN Security Council) with a "right" to trigger the exercise of the Court's jurisdiction, in the form of requiring the Prosecutor to conduct a preliminary examination: *see e.g. Afghanistan Article 15(4) Appeal Judgment*, para. 31 (referring to "the right vested in all States Parties and in the Security Council"). *See further* paras. 28-29.

³⁸ *See Statute*, art. 53(1).

³⁹ *See Statute*, art. 15(1)-(2); *ICC RPE*, rule 48.

⁴⁰ *See e.g. ICC-01/21-01/25-415 OA3* ("*Duterte Jurisdiction Appeal Judgment*"), para. 128.

⁴¹ *See e.g. Duterte Jurisdiction Appeal Judgment*, para. 126.

⁴² *See e.g. Duterte Jurisdiction Appeal Judgment*, para. 127.

⁴³ *See Statute*, art. 15(2); *ICC RPE*, rule 104(2).

⁴⁴ *See further Request for Reconsideration*, paras. 3, 7, 11-13.

⁴⁵ *See also Duterte Jurisdiction Appeal Judgment*, paras. 124-125, 130-133 (rejecting Defence arguments concerning the nature of a preliminary examination).

30. Accordingly, for the Chamber to be correct in its assertion that the Prosecution was or would in the future be conducting an “ongoing complementarity assessment *under article 53(1)(b)*”, this can only have implied its view either that: (i) this was possible outside the context of a preliminary examination, or; (ii) that a preliminary examination would occur notwithstanding the Decision. For the reasons stated above, if the Chamber had reached the former view, it was manifestly wrong in law. Likewise, for the reasons now explained, if the Chamber had reached the latter view—that there is an ongoing preliminary examination absent the referral—it was factually erroneous.

I.B.2. If the referral is invalid, there is no open preliminary examination

31. In the Regulation 45 Notification, the Prosecution had expressly quoted the request in the Communication to “urgently reconsider the assessment of complementarity that underpinned *the closure of the preliminary examination in October 2021* and proceed, should the statutory threshold be met, to open an investigation”.⁴⁶ Furthermore, the closure of that (previous) preliminary examination in October 2021 was not only announced in a press release,⁴⁷ but also subsequently litigated before the Pre-Trial Chamber,⁴⁸ and extensively discussed in the 22-page report which was appended to the Communication (and which, in turn, was annexed to the Regulation 45 Notification).⁴⁹

32. In these circumstances, no reasonable chamber could have relied on the existence of an open and ongoing preliminary examination in which the Prosecution could be conducting an “ongoing complementarity assessment under article 53(1)(b)”.⁵⁰ Likewise, no reasonable chamber could have considered that the routine monitoring activities carried out by the Prosecution for the purpose of article 6 of the Cooperation Agreement amounted to such an assessment.⁵¹ To the contrary, if this were the case, this would defeat the purpose of the closure of the preliminary examination which terminated such activities.

⁴⁶ Regulation 45 Notification, para. 3 (emphasis added).

⁴⁷ See e.g. [ICC OTP, ‘ICC Prosecutor, Mr Karim A.A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice,’ 28 October 2021](#).

⁴⁸ See e.g. [ICC-RoC46\(3\)-01/22-6](#) (“Colombia Closure Decision”).

⁴⁹ See [Closure Report](#), paras.

⁵⁰ *Contra* Decision, para. 10.

⁵¹ See e.g. [Cooperation Agreement](#), art. 6 (“In line with the Rome Statute, the Office of the Prosecutor may reconsider its assessment of complementarity in light of any significant change in circumstances [...] In this context, and to ensure information flows about these and other related matters, lines of communication between the Office of the Prosecutor and the Government of Colombia and judicial actors, including with the Special Jurisdiction for Peace, will be maintained and reinforced”). See further [Statute](#), art. 15(6). See also [Regulation 45 Notification](#), para. 6 (“Within the framework of the Cooperation Agreement, to date, the Office has taken the view

I.C. As a consequence of its errors, the Chamber terminated the Court's exercise of jurisdiction pursuant to the referral

33. It is beyond doubt that the above errors, if established, materially affected the Decision. But for these errors, the Decision would not have determined that the Communication was not a valid referral for the purpose of article 14 of the Statute. As a consequence, it would not have closed the situation record and thereby terminated the Court's exercise of jurisdiction pursuant to that referral.

34. To the contrary, but for the above errors and in accordance with its obligation under article 53(1) of the Statute, the Prosecution would in principle be undertaking the necessary assessment to determine whether there is a reasonable basis to proceed to open an investigation (through conduct of a preliminary examination).⁵² In particular, for this purpose and as stated in the Regulation 45 Notification, this assessment would "be focused on the requirements of article 53(1)(b) of the Statute".⁵³

II. 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 (SECOND GROUND)

35. As an essential precondition to its reasoning on the merits, the Chamber also determined that it was competent to render the Decision. It reached this conclusion in a single brief passage, without further reasoning or legal citation. The Chamber asserted that:

[T]he Chamber [...] notes that the Prosecution refers to the Communication as 'a State Party referral'. Having been seised of the Situation in Colombia and noting the content of the Communication, 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.⁵⁴

36. In the Prosecution's respectful submission, and as explained in the following paragraphs, these findings were erroneous. In rendering the Decision—which was issued without notice,

that Colombia is taking concrete and progressive steps genuinely to investigate and prosecuted alleged crimes falling within the jurisdiction of the Court").

⁵² The Prosecution notes, however, that it will not actually be in a position to conduct a preliminary examination until the blanket 'secret' classification of the situation is lifted: see Request for Reconsideration, paras. 3, 7, 11-13. See also above para. 29.

⁵³ See Regulation 45 Notification, para. 6.

⁵⁴ Decision, para. 5 (emphasis added).

and without formal opportunity for the Prosecution to make written submissions⁵⁵—the Chamber acted beyond its powers (*ultra vires*) and usurped the statutory competence reserved to the Prosecutor at this stage of proceedings. In this way, the Chamber erred in law and/or procedure and/or abused the exercise of any relevant discretion with which it was vested.

37. Specifically, the Statute *expressly* allocates competence between the Prosecutor and the Pre-Trial Chamber for the conduct of preliminary examinations. Within this allocation, the Pre-Trial Chamber is afforded *express* powers of judicial review, but these were not applicable in the circumstances of the Decision.⁵⁶ Beyond this, the Pre-Trial Chamber is not vested with any *general and unrestricted* power of judicial supervision (or “judicial scrutiny”), either by implication or inherently, which would make redundant the carefully calibrated statutory scheme.⁵⁷ Consequently, because of these errors, the Chamber erred in determining that it was competent to render the Decision, and thereby terminating the Court’s exercise of jurisdiction pursuant to the referral.⁵⁸

II.A. The Statute expressly allocates competence between the Prosecutor and the Pre-Trial Chamber for the conduct of preliminary examinations

38. In *Afghanistan*, the Appeals Chamber explained the general “statutory scheme regulating the respective functions and powers” of the Prosecutor and the Pre-Trial Chamber “with respect to investigations”⁵⁹—that is, before the prosecution of a concrete case is initiated under article 58(1) of the Statute. Initiating a prosecution is the natural point when the judicial chambers of the Court assume more direct control over the conduct of proceedings, given the greater impact upon the individual(s) affected by those proceedings. Until then, however, “article 42(1) [of the Statute] recognises the independence of the Prosecutor and her responsibility for the conduct of investigations, while articles 56 and 57 identify *specific functions* that may be exercised by the pre-trial chamber”.⁶⁰

39. These same principles necessarily apply, *mutatis mutandis*, to the conduct of a preliminary examination, which is the essential precondition to the opening of an

⁵⁵ See also Decision, para. 13 (further stating that, forthwith, “only submissions filed by the Prosecution and Colombia in relation to the possible reclassification of filings will be entertained by the Chamber”).

⁵⁶ See below paras. 38-48.

⁵⁷ See below paras. 49-53.

⁵⁸ See below para. 54.

⁵⁹ Afghanistan Article 15(4) Appeal Judgment, para. 63.

⁶⁰ Afghanistan Article 15(4) Appeal Judgment, para. 63 (emphasis added).

investigation.⁶¹ As the Appeals Chamber recently affirmed in *Duterte*, the “preliminary examination phase” of proceedings entails the Prosecutor’s “*autonomous*[]” determination whether there is a reasonable basis to proceed with an investigation.⁶² Consequently, the Prosecution respectfully submits that the Prosecutor has primary competence under articles 13, 14(1), 42(1) and 53(1) for the initiation and conduct of preliminary examinations of referred situations, while article 53(3) identifies specific functions that may be exercised by the Pre-Trial Chamber.⁶³ Associated with the Prosecutor’s primary competence to conduct preliminary examinations is the Prosecutor’s primary competence to determine the validity of a referral, consistent with articles 14(1) and 42(1) and regulation 45.

II.A.1. The Prosecutor has primary competence to conduct the preliminary examination of referred situations, subject to judicial review in accordance with article 53(3)

40. The Statute provides expressly in article 53(1) that it is “[t]he Prosecutor” who is charged with “deciding whether to initiate an investigation” of situations referred to him or her by a State Party or the UN Security Council. This is accomplished by the Prosecutor determining whether there is a “reasonable basis to proceed under the Statute”, having regard to the criteria in article 53(1)(a) to (c). The Prosecutor does this by means of a preliminary examination. Rules 104 and 105 further emphasise the primary competence of the Prosecutor in this regard, since they not only refer extensively to the powers and obligations of “the Prosecutor” but even stress this competence in their titles.⁶⁴

41. Furthermore, the drafters of the Statute carefully considered the appropriate degree of judicial control at this stage of proceedings, and provided for it expressly. Thus, in article 53(3) they specified the judicial review functions to be carried out by the Pre-Trial Chamber for this purpose. Specifically, as the Appeals Chamber stated in *Afghanistan*, 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.”⁶⁵ No other form

⁶¹ In the context of article 15 preliminary examinations, but applicable *mutatis mutandis* also to article 53(1) preliminary examinations of referred situations, see also [Duterte Jurisdiction Appeal Judgment](#), para. 125 (referring to “the preliminary examination to be carried out by the Prosecutor as a precursor to his or her decision as to whether to submit a request [...] to open an investigation”).

⁶² [Duterte Jurisdiction Appeal Judgment](#), paras. 128-129.

⁶³ The same principle applies to preliminary examinations initiated *proprio motu* except insofar as article 15(1)-(3) and (5)-(6) illustrate the primary competence of the Prosecutor, while article 15(4) identifies specific functions that may be exercised by the Pre-Trial Chamber. See e.g. [Afghanistan Article 15\(4\) Appeal Judgment](#), paras. 30-32 (distinguishing the discretion afforded to the Prosecutor under article 15 from the specific functions allocated to the Pre-Trial Chamber); [Colombia Closure Decision](#), paras. 6-7.

⁶⁴ See [ICC RPE](#), rules 104 (“Evaluation of information by the Prosecutor”, emphasis added), 105 (“Notification of a decision by the Prosecutor not to initiate an investigation”, emphasis added).

⁶⁵ [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 29 (emphasis added).

of judicial review is provided. In particular, there is no judicial review of the Prosecutor's determination that an investigation *shall* be opened pursuant to a referral, based on his or her assessment under article 53(1)(a) to (c).

42. In the Decision, the Chamber neither referred to nor addressed any of these statutory provisions. Manifestly, it could not avail itself of article 53(3). In the absence of any other relevant statutory power of judicial review, the Decision thus lacked legal authority for the remedy that it ordered.⁶⁶ Accordingly, in principle, and on the face of the Statute, the Chamber acted beyond its powers (*ultra vires*). This state of affairs was not altered by the Chamber's implicit assertion of a power of judicial review over the Prosecutor's acceptance of the validity of a communication from a State Party as a referral for the purpose of article 14.

II.A.2. The Prosecutor has primary competence to determine the validity of a referral

43. Articles 13 and 14 provide that an authorised entity—that is, a State Party or the UN Security Council—seeking to trigger the Court's exercise of jurisdiction as of right “may refer *to the Prosecutor* a situation” in which one or more article 5 crimes “appear to have been committed requesting *the Prosecutor* to investigate the situation”.⁶⁷ Article 42(1) likewise states that “[t]he Office of the Prosecutor [...] shall be responsible for receiving referrals” and “*for examining them* and for conducting investigations and prosecutions”.⁶⁸ Critically, regulation 45(1) likewise states materially that:

*The Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, sub-paragraph (b); and shall provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber [...]*⁶⁹

44. It follows from these provisions that the Prosecutor clearly has the primary competence to determine whether a communication received from a State Party constitutes a valid referral

⁶⁶ In this regard, the Prosecution also notes the Chamber's assertion in a footnote that regulation 66ter did not apply to the Decision “in the absence of a referral pursuant to article 14”: Decision, para. 10 (fn. 6). The Chamber does not explain the basis for this view, especially given that regulation 66ter(2)(a) expressly appears to cover circumstances “[w]hen the Prosecutor [has] provided information in accordance with regulation 45, sub-regulation 1”, as in this case. See Regulations of the Court, reg. 66ter(2)(a). The Prosecution notes that the effect of the Chamber's view in this regard is to dispense with the requirement which would otherwise apply under this provision for the Prosecutor to providing information “in writing” to the Chamber before it may close the situation record.

⁶⁷ Statute, art. 14(1). See also art. 13(a) (“referred to the Prosecutor by a State Party”), 13(b) (“referred to the Prosecutor by the Security Council”). See further ICC RPE, rule 45 (“[a] referral *to the Prosecutor* shall be in writing”, emphasis added).

⁶⁸ Statute, art. 42(1) (emphasis added).

⁶⁹ Regulations of the Court, reg. 45(1) (emphasis added).

in the meaning of article 14. This is the necessary implication of the express provisions in the Court's legal texts, especially article 42(1) of the Statute, and is confirmed by the broader principles described above.⁷⁰ In particular, the Prosecutor is the statutory addressee and recipient of a referral, with responsibility for "examining" it. The Prosecutor is then vested with the duty to notify the Presidency when required by regulation 45(1), as correctly interpreted. Self-evidently, if the Prosecutor makes a regulation 45(1) notification, the Prosecutor affirms his or her view of the validity of a referral.⁷¹

45. Even if the Decision accepts that the Prosecutor exercises the primary competence to determine the validity of a referral, and that submitting a regulation 45(1) notification reflects his or her affirmation of its validity (as it may seem to do),⁷² this does not mean that the Statute allows any judicial review of the Prosecutor's decision at the present stage of proceedings. While the Decision assumes that the Chamber is vested with such a power of review, this is incorrect for at least two reasons.⁷³

46. First, consistent with the statutory scheme previously affirmed by the Appeals Chamber (identifying *specific* and *expressly identified* functions for the Pre-Trial Chamber),⁷⁴ silence in the Statute means that a function does *not* exist. Any other approach would alter the delicate balance struck by the drafters in negotiating the Statute. This view is also consistent with the fact that, at later stages of proceedings once a prosecution has been initiated, when the judicial chambers of the Court assume a much greater degree of control, the Statute contains much broader enabling provisions.⁷⁵ No such provision is made for the Pre-Trial Chamber.⁷⁶

47. Second, the absence of any power to review the Prosecutor's *affirmation* of the validity of a referral is entirely consistent with the statutory "expectation" in article 53(1) that "the Prosecutor *will* proceed to investigate referred situations".⁷⁷ It is likewise consistent with the absence of any power under article 53(3) to review the Prosecutor's determination to *initiate*

⁷⁰ See above paras. 40-42.

⁷¹ Conversely, where the Prosecutor considers that a communication does *not* amount to a valid referral, the Prosecutor may *not* notify the Presidency.

⁷² See e.g. [Decision](#), para. 5 (noting "that the Prosecution refers to the Communication as 'a State Party referral'").

⁷³ *Contra Decision*, para. 5. Furthermore, even if there were a relevant power of judicial review, the Decision does not state the basis for its assumption that this power is vested in the Pre-Trial Chamber rather than the Presidency, which duly received and relied upon the Regulation 45 Notification in this situation notwithstanding the Chamber's subsequent view that this was "inapposite".

⁷⁴ See above paras. 38-42.

⁷⁵ See e.g. [Statute](#), art. 64(6).

⁷⁶ See also below paras. 49-53

⁷⁷ [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 29 (emphasis added).

an investigation of a situation pursuant to a referral.⁷⁸ It would be contradictory for the Statute to allow judicial review of the validity of a referral, but to prevent judicial review of the resulting (and more consequential) decision to open an investigation. Consequently, the well established limits on the scope of judicial review under article 53(3) strongly imply the absence of any power to review the validity of a referral once affirmed by the Prosecutor, at this stage of proceedings and in the context of a situation as a whole.⁷⁹

48. The Decision addressed none of these considerations. It identified no concrete or specific legal basis for the exercise of competence to review the Prosecutor's affirmation of the validity of the Communication as a referral for the purpose of article 14 of the Statute. Consequently, it exceeded the Chamber's powers, and should not have been issued.

II.B. The Pre-Trial Chamber is not afforded any general power of judicial supervision in this context, either expressly or by implication of the Statute or inherently

49. Finally, in the interest of completeness and consistent with the principles described above, the Prosecution respectfully submits that the Pre-Trial Chamber is not afforded with any more general power of judicial supervision or "judicial scrutiny" which could otherwise have justified the Decision. This is not provided in the Statute, either expressly or by implication, nor is there any lacuna in the Court's legal texts justifying resort to inherent powers.

II.B.1. The Pre-Trial Chamber has no statutory power of judicial supervision

50. As the Appeals Chamber has previously emphasised, the Statute does not afford the Pre-Trial Chamber with any general power of judicial supervision, but rather assigns specific powers and functions.⁸⁰ These specific powers and functions are both necessary and adequate for the Pre-Trial Chamber to serve its mandate, and are set out chiefly in provisions such as articles 56, 57, 58, 60, 61, and 72 of the Statute.

⁷⁸ See e.g. [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 29 (referring to judicial control under article 53(3) only over the decision "not to investigate", emphasis added).

⁷⁹ The Prosecution notes that this is without prejudice to the power of the Pre-Trial Chamber (or as necessary the Trial Chamber) to satisfy itself that the Court is properly exercising its jurisdiction over a *concrete case*, once a prosecution has been initiated under article 58: see *above* para. 38. While such a scenario is unlikely to arise, a chamber would be competent in principle to address the purported invalidity of a referral—and consequently the Court's exercise of jurisdiction over a suspect—at that stage, in accordance with article 19(1) and (2): see [Statute](#), art. 19(1)-(2). Equally, if necessary, the Prosecutor retains discretion to seek a jurisdictional ruling under article 19(3) of the Statute (read as necessary with regulation 46(3)), and by that means a chamber may also come to assess the validity of a referral: see [Statute](#), art. 19(3). Yet this unique discretion conferred on the Prosecutor does not, however, allow any other organ, party, or participant to compel triggering of this procedure.

⁸⁰ See *above* e.g. paras. 38-39.

51. Consistent with the careful allocation of powers and responsibilities between the Prosecutor and the Pre-Trial Chamber in the conduct of proceedings prior to the initiation of a prosecution (*i.e.*, preliminary examination and investigation), the drafters deliberately refrained from affording the Pre-Trial Chamber the same general competence afforded to the Trial Chamber to rule on all matters relevant to the case before it.⁸¹ Furthermore, in the Decision, the Chamber neither identified nor relied upon any such power.

II.B.2. The Pre-Trial Chamber has no inherent power of judicial supervision

52. The Appeals Chamber has previously addressed the concept of ‘inherent powers’ and authoritatively determined the extent to which they apply under the Statute. In principle, as it stated in *Bemba et al.*, such powers should be “invoked in a *very restrictive manner*”.⁸² As previously explained at first instance in *Banda*, and cited with approval, this is essential because proceedings at the Court “are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail”.⁸³ The *Bemba et al.* Appeals Chamber further emphasised:

[W]hen a matter is regulated in the primary sources of the law of the Court, there is also no room for chambers to rely on purported ‘inherent powers’ to fill in non-existent gaps [...] not every ‘silence’ in the legal framework of the Court constitutes a lacuna”⁸⁴

53. Applying these principles to the circumstances of the Decision, there is no lacuna justifying or permitting any resort to any inherent power establishing the competence purportedly exercised by the Chamber. To the contrary, if the Appeals Chamber affirms the above submissions concerning the correct interpretation of articles 13, 14, 42(1), and 53 of the Statute, which are consistent with its previous reasoning in *Afghanistan* concerning the general statutory scheme at this stage of proceedings, it is clear that the nature and scope of the power of judicial review is regulated in the primary sources of the law of the Court. Consequently, since no provision is made for the power of judicial review purportedly applied in the Decision, it must be erroneous.

⁸¹ See above para. 46 (citing by comparison, *e.g.*, [Statute](#), art. 64(6)).

⁸² [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#) (“*Bemba et al.* Sentencing Appeal Judgment”), para. 75 (emphasis added, citing [ICC-02/05-03/09-410](#) (“*Banda* Stay of Proceedings Decision”), para. 78).

⁸³ [Banda Stay of Proceedings Decision](#), para. 78.

⁸⁴ [Bemba et al. Sentencing Appeal Judgment](#), para. 76.

II.C. As a consequence of its errors, the Chamber terminated the Court's exercise of jurisdiction pursuant to the referral

54. The Chamber's errors of law and/or procedure and/or its abuse of the exercise of any relevant discretion with which it was vested, which manifested in it acting beyond its powers (*ultra vires*), materially affected the Decision. But for these errors, the Decision would not have been issued at all. In this way, these errors are inextricably linked to the errors on the merits of the Decision, addressed above, and resulted in the Chamber erroneously terminating the Court's exercise of jurisdiction pursuant to the referral.⁸⁵

CONCLUSION

55. For all the reasons above, the Appeals Chamber should confirm the applicable law, grant the Appeal, and reverse the Decision in its entirety. If necessary, this will include directing the re-opening of the situation record. The Appeals Chamber should further direct Pre-Trial Chamber II 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 or her conduct of a preliminary examination).



Mame Mandiaye Niang
Acting Prosecutor

Dated this 25th day of September 2026
At The Hague, the Netherlands

⁸⁵ See above paras. 10-34.