



Original: **English**

No.: **ICC-00/26**
Date: **26 August 2026**

THE PRESIDENCY

Before:

Judge Tomoko Akane, President
Judge Rosario Salvatore Aitala, First Vice-President
Judge Reine Alapini-Gansou, Second Vice-President

SITUATION IN THE REPUBLIC OF COLOMBIA

Secret, *ex parte*, only available to the Prosecution

Prosecution request for reconsideration

Source:

Office of the Prosecutor

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INTRODUCTION

1. In response to the Prosecution's notification of 21 August 2026 of a referral from the Government of the Republic of Colombia,¹ pursuant to regulation 45 of the Regulations of the Court, the Presidency issued an order on 24 August 2026 which: (i) assigned the situation to Pre-Trial Chamber II, and; (ii) classified "the present decision concerning the assignment of the situation to Pre-Trial Chamber II as 'secret', in accordance with regulation 14(d) of the Regulations of the Registry, until and unless Pre-Trial Chamber II determines that information *as to the existence of the situation* may be classified otherwise."²

CONFIDENTIALITY

2. This request is filed with 'secret' classification and *ex parte*, available to the Prosecution only, consistent with the classification of the Order and in accordance with regulation 23bis(2).

SUBMISSIONS

3. The Prosecution respectfully requests reconsideration of the Order in part—specifically, reconsideration of the Presidency's decision to classify as 'secret' *all* "information as to the existence of the situation", thus encompassing all ensuing proceedings such as the preliminary examination.³ Since this unprecedented course of action was imposed without the opportunity for the Prosecution to make written submissions, the arguments briefly outlined in this request should be considered as "new" and ripe for adjudication. The Prosecution submits that reconsideration is justified, exceptionally, because:

- The Order contains a clear error of reasoning, as there is no statutory basis for the Presidency (or a Pre-Trial Chamber) to classify a situation as 'secret';
- Reconsideration is necessary to prevent an injustice because: 'secret' classification prevents the Prosecution from discharging its statutory functions in carrying out the preliminary examination in this situation, and; 'secret' classification does not apparently serve any forensic purpose in the present circumstances.

¹ [ICC-00/26-1-SECRET-Exp-AnxI](#) ("Regulation 45 Notification").

² [ICC-00/26-1-SECRET-Exp](#) ("Order") (emphasis added).

³ See [ICC-01/12-01/18-734](#) ("Al Hassan Reconsideration Decision"), para. 11; [ICC-02/04-01/15-468](#) ("Ongwen Reconsideration Decision"), para. 4; [ICC-01/05-01/13-1282](#) ("Bemba et al. Reconsideration Decision"), para. 8; [ICC-01/04-02/06-519](#) ("Ntaganda Reconsideration Decision"), para. 12; [ICC-01/09-01/11-1813](#) ("Ruto and Sang Reconsideration Decision"), para. 19. See also [ICC-02/05-01/20-517](#) ("Abd-Al-Rahman Reconsideration Decision"), para. 10; [ICC-01/04-01/06-2705](#) ("Lubanga Reconsideration Decision"), para. 18; [ICC-01/14-01/22-43](#) ("Mokom Reconsideration Decision"), para. 19.

A. There is no statutory basis for the Presidency (or a Pre-Trial Chamber) to classify a situation as ‘secret’

4. The Order relies solely upon regulation 14(d) of the Regulations of the Registry as the basis for classifying the situation as ‘secret’. However, regulation 14(d) is a procedural provision, which defines *how* “[j]udicial records and materials shall be classified”—it does not state *what* should (or should not) be classified, or in what circumstances, or by whom. Accordingly, regulation 14(d) of the Regulations of the Registry provides no basis for the classification of the Order by the Presidency, and is inapposite.

5. Review of the Court’s applicable legal texts—to which the Regulations of the Registry are, in any event, subordinate⁴—shows no other basis for the judicial classification of a situation (and thus the very fact of all ensuing proceedings, such as the preliminary examination) as ‘secret’. Specifically:

- there is an express statutory requirement to notify, *inter alia*, all States Parties that an investigation in a situation has been initiated;⁵
- before the initiation of an investigation, where a situation is referred to the Court (as in this situation), the existence of a preliminary examination is by definition also always known to at least some persons or entities outside the Court,⁶ who are not under judicial control, which is inconsistent with a ‘secret’ classification;⁷
- the Prosecutor has sole responsibility under the Statute for the proper conduct of a preliminary examination of a referred situation, unless and until the referring entity seeks judicial review of a decision *not* to open an investigation, and this is inconsistent with a blanket classification of the situation as ‘secret’,⁸ and;

⁴ See e.g. [Regulations of the Registry](#), reg. 1(1). See further [Statute](#), arts. 21(1)(a), 51(4)-(5); [Regulations of the Court](#), reg. 1(1).

⁵ See e.g. [Statute](#), art. 18.

⁶ See e.g. [Statute](#), arts. 13-14. See also [ICC RPE](#), rule 105. While a State Party may or may not choose to publicise its referral, this does not mean that it can attach any unilateral condition of confidentiality or secrecy upon a referral. At the very least, the referring State Party will itself be aware that the Court’s proceedings will necessarily ensue from its referral. Furthermore, a UN Security Council referral will always be done publicly.

⁷ Compare [Regulations of the Registry](#), reg. 14(d) (defining materials classified as “secret” as “accessible and known to a very limited number of persons”). See also below para. 12.

⁸ See e.g. [Statute](#), art. 53; [ICC RPE](#), rules 104(2), 107-110. As also noted below, in particular, the Prosecutor’s broad discretion under rule 104(2) to solicit or collect information from such entities or persons as considered appropriate is inconsistent with any power to impose a condition of secrecy upon the Prosecutor: see further below paras. 11-13. Likewise, in this context, there is no lacuna in the Statute permitting reference to the doctrine of “inherent powers” which, as the Appeals Chamber has emphasised, may only be “invoked in a very restrictive manner”: see [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#) (“*Bemba et al.* Sentencing Appeal Judgment”), paras. 75-76; [ICC-02/05-03/09-410](#) (“*Banda Stay of Proceedings Decision*”), para. 78.

- while the Presidency and judicial Chambers of the Court are empowered to determine the classification of a “document” filed before the Court,⁹ this necessarily remains subject to compliance with the legal framework governing the Court’s proceedings more broadly.¹⁰

6. The consistent past practice of the Court and of the Prosecution supports these principles. Notably, for example, every preliminary examination to date has been announced publicly,¹¹ notwithstanding the Prosecution undertaking to respect the confidentiality of individual article 15(1) communications.¹² Furthermore, every decision to date assigning a referred situation to a Pre-Trial Chamber has been issued publicly,¹³ but for the present Order.¹⁴ For many years,

⁹ See e.g. [Regulations of the Court](#), reg. 23bis.

¹⁰ For example, notwithstanding regulation 23bis, the Trial Chamber does not have discretion to issue a judgment or sentencing decision entirely in secret: see [Statute](#), arts. 74(5), 76(4).

¹¹ See e.g. [ICC OTP, Policy on Preliminary Examinations \(2013\)](#), para. 95 (“The Office will make the commencement of preliminary examinations public”). While this policy is currently under review by the Prosecution, this is an accurate statement of the Prosecution’s practice. This now applies to 29 situations in total, including both referrals and preliminary examinations which were opened *proprio motu*. While not all of the Prosecution’s public statements are still available on the Court’s website, see e.g. (chronologically): [Press Statement of 19 April 2004 \(“Democratic Republic of Congo”\)](#); [Press Statement of 7 January 2005 \(“Central African Republic”\)](#); [Press Statement of 1 April 2005 \(“Darfur, Sudan”\)](#); [Press Statement of 11 February 2009 \(“Kenya”\)](#) (referring to previous statement of 5 February 2008); [Press Statement of 14 October 2009 \(“Guinea”\)](#); [Press Statement of 25 June 2010 \(“Georgia”\)](#) (referring to previous announcement of 14 August 2008); [Press Statement of 6 December 2010 \(“Republic of Korea”\)](#); [Press Statement of 6 April 2011 \(“Côte d’Ivoire”\)](#) (referring to previous announcement); [Press Statement of 18 July 2012 \(“Mali”\)](#); [Press Statement of 14 May 2013 \(“Union of the Comoros”\)](#); [Press Statement of 7 February 2014 \(“Central African Republic II”\)](#); [Press Statement of 25 April 2014 \(“Ukraine”\)](#); [Press Statement of 13 May 2014 \(“Iraq/United Kingdom”: Reopening\)](#); [Press Statement of 16 January 2015 \(“State of Palestine”\)](#); [Press Statement of 25 April 2016 \(“Burundi”\)](#); [Press Statement of 29 September 2016 \(“Gabon”\)](#); [Press Statement of 8 February 2018 \(“Philippines” and “Venezuela I”\)](#); [Press Statement of 18 September 2018 \(“Bangladesh/Myanmar”\)](#); [Press Statement of 17 February 2020 \(“Venezuela II”\)](#); [Press Statement of 9 September 2020 \(“Bolivia”\)](#); [Press Statement of 15 June 2023 \(“Democratic Republic of Congo II”\)](#); [Press Statement of 30 September 2024 \(“Lithuania/Belarus”\)](#).

¹² See e.g. [Regulations of the Office of the Prosecutor](#), reg. 28(1). See also e.g. [ICC OTP, Policy on Preliminary Examinations \(2013\)](#), paras. 87-88. While this policy is currently under review by the Prosecution, this is an accurate statement of the Prosecution’s practice concerning article 15(1) communications. The Prosecution further notes that, while regulation 28(2) is framed as applying to “the *preliminary examination* of information on crimes under article 15, paragraph 1 and 2”, this refers in fact to the *initial* review of article 15(1) communications as described in regulation 27. It is on the basis of this review that the Prosecutor decides whether to open a preliminary examination, which is publicly announced.

¹³ In 15 situations, the preliminary examination was at least *initially* triggered by a referral by a State Party or the UN Security Council, or a referral was made before the preliminary examination was completed: see (chronologically) [ICC-01/04-1](#) (“DRC I Assignment Decision”); [ICC-02/04-1](#) (“Uganda Assignment Decision”); [ICC-01/05-1](#) (“CAR I Assignment Decision”); [ICC-02/05-1](#) (“Darfur Assignment Decision”); [ICC-01/11-1](#) (“Libya Assignment Decision”); [ICC-01/12-1](#) (“Mali Assignment Decision”); [ICC-01/13-1](#) (“Comoros Assignment Decision”); [ICC-01/14-1](#) (“CAR II Assignment Decision”); [ICC-01/16-1](#) (“Gabon Assignment Decision”); [ICC-01/18-1](#) (“State of Palestine Assignment Decision”); [ICC-02/18-1](#) (“Venezuela I Assignment Decision”); [ICC-01/20-1](#) (“Venezuela II Assignment Decision”); [ICC-02/20-1](#) (“Bolivia Assignment Decision”); [ICC-01/23-1](#) (“DRC II Assignment Decision”); [ICC-01/24-1](#) (“Lithuania/Belarus Assignment Decision”).

¹⁴ Similar principles concerning the publicity of preliminary examinations (and resulting investigations) apply in decisions assigning situations to a Pre-Trial Chamber to receive an article 15(3) application—even though a small number of these decisions were initially and temporarily issued under seal or with ‘secret’ classification, for concrete reasons to preserve the integrity of an ensuing investigation, if authorised. In 14 situations, the preliminary examination was triggered *proprio motu* and *no referral* was made before the preliminary examination

the Prosecution also publicly reported on its preliminary examination activities,¹⁵ and such matters continue to be reported (in a different form) within the context of the Court's budgetary process.¹⁶ Nothing in this practice suggests that either the Presidency or a judicial Chamber or the Prosecution considered it tenable for a preliminary examination to be conducted entirely in secret.

7. Furthermore, in the firm view of the Prosecution, applying a 'secret' classification to the very existence of a preliminary examination would undermine an important interest facilitating the effective delivery of the Court's mandate. As such, it would be inconsistent with the object and purpose of the Statute. While the Prosecution fully recognises and endorses the necessity of maintaining the confidentiality of certain proceedings (for example, the issue of a warrant of arrest) in order to preserve their effectiveness, this logic does not apply to the fact of the existence of a preliminary examination. For example:

- Preliminary examinations necessarily require seeking the voluntary external cooperation of States, civil society, and/or individuals. This would be impossible if the fact of the preliminary examination is not known.
- Preliminary examinations offer an opportunity to build a framework for complementarity activities with relevant States, which depends *inter alia* on a transparent exchange of relevant information.
- The due conduct of a preliminary examination, with appropriate transparency, promotes the legitimacy of any ensuing decision either to open an investigation, or *not* to open an investigation, both with civil society and the international community more broadly.

was completed, such that the situation was assigned to a Pre-Trial Chamber *only* if the Prosecution indicated that it intended imminently to file an article 15(3) application for authorisation to open an investigation. Thus, for 6 of those 14 situations (*Colombia, Guinea, Nigeria, Honduras, Republic of Korea, Iraq/UK*), no assignment decision was made because it was not requested by the Prosecution. Of the remaining 8 situations, the assignment decision was public in all but two cases: see (chronologically) [ICC-01/09-1](#) ("Kenya Assignment Decision"); [ICC-02/11-1](#) ("Côte d'Ivoire Assignment Decision"); [ICC-01/15-1](#) ("Georgia Assignment Decision"); [ICC-02/17-1](#) ("Afghanistan Assignment Decision"); [ICC-01/19-1](#) ("Bangladesh/Myanmar Assignment Decision"); [ICC-01/22-1](#) ("Ukraine Assignment Decision"). The two exceptions are: [ICC-01/17-1](#) ("Burundi Assignment Decision"); [ICC-01/21-1](#) ("Philippines Assignment Decision"). While these were initially issued under seal, in both cases the fact of the preliminary examination was already publicly known: see e.g. [Press Statement of 25 April 2016 \("Burundi"\)](#); [Press Statement of 8 February 2018 \("Philippines" and "Venezuela I"\)](#). The assignment decisions were issued under seal, exceptionally, for prudential reasons to avoid publicising the *timing* of the imminent article 15(3) request—but this must be considered in the context that both the preceding preliminary examination and the subsequent authorised investigations were publicly avowed. See also below para. 9.

¹⁵ See e.g. [2011 PE Report](#); [2012 PE Report](#); [2013 PE Report](#); [2014 PE Report](#); [2015 PE Report](#); [2016 PE Report](#); [2017 PE Report](#); [2018 PE Report](#); [2019 PE Report](#); [2020 PE Report](#).

¹⁶ See e.g. [ICC ASP, Report on activities and programme performance of the International Criminal Court for the year 2024, 23 April 2025, ICC-ASP/24/3](#), paras. 59-64.

- States have, in their past interactions with the Prosecution, ascribed considerable importance to the ‘no surprise’ principle with regard to major new initiatives which may lead to the opening of an investigation.

8. A similar balance of interests is reflected in article 18(1) of the Statute, which requires the Prosecutor (on opening an investigation) to “notify *all* States Parties *and* those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” (emphasis added). Notification may be made on a “confidential basis” and subject to certain limitations in “the scope of the information provided”, where justified.¹⁷ However, it remains inescapable that the Statute expressly requires the *fact* of an open investigation of article 5 crimes to be widely disseminated, thus precluding in practice any possibility of a ‘secret’ investigation. While article 18(1) notification may in “exceptional and limited” circumstances be temporarily (and briefly) delayed with the authorisation of the Pre-Trial Chamber, it remains mandatory—and any delay is only permissible to the extent it “does not in any way diminish the rights accorded to States under article 18(1) and (2)”.¹⁸

9. The Court affirmed similar principles in the context of requests for authorisation of an investigation under article 15(3) and (4). In *Burundi*, where the fact of the preliminary examination was *already publicly known*,¹⁹ the Pre-Trial Chamber affirmed that it was permissible for an article 15(3) request—and the resulting article 15(4) decision—to be issued under seal and *ex parte*, in circumstances where “there is a danger to the life or well-being of victims and potential witnesses” and “the integrity of the Prosecutor’s investigation [...], if authorized, may be compromised”.²⁰ Nevertheless, a public redacted version of the article 15(4) decision was made available within a matter of weeks.²¹ Again, this practice reflects the general principle that while some limited measure of confidentiality may be workable and appropriate to ensure the effective discharge of the Court’s mandate concerning the opening of an investigation, there is a significant and overriding interest in transparency on this important step.

10. In circumstances where the Order addresses none of these considerations, and identifies no statutory basis for the ‘secret’ classification imposed, the Prosecution respectfully submits

¹⁷ See [Statute](#), art. 18(1) (“where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons”).

¹⁸ See [ICC-01/17-9-Red](#) (“*Burundi* Article 15(4) Decision”), para. 19.

¹⁹ See e.g. [Press Statement of 25 April 2016 \(“Burundi”\)](#).

²⁰ See [Burundi Article 15\(4\) Decision](#), paras. 11, 14, 18-19.

²¹ See [Burundi Article 15\(4\) Decision](#), para. 195. The *Burundi* Article 15(4) Decision was issued under seal on 25 October 2017. A public redacted version of the decision was issued on 9 November 2017.

that the Order reflects a clear error of reasoning. Without citing any statutory basis, the Order not only assumes power over the conduct of preliminary examinations of referred situations which is reserved to the Prosecutor under article 53(1) and rule 104, but also imposes a blanket classification which is inconsistent with the effective conduct of a preliminary examination and the object and purpose of the Statute.

B. The Prosecution cannot carry out the preliminary examination in accordance with the Statute if its existence is ‘secret’

11. In any event, the obligation of secrecy imposed by the Order causes an injustice because it prevents the Prosecution in practice from carrying out the preliminary examination which is statutorily required as a consequence of the referral.

12. Notably, regulation 14(d) requires that knowledge of the Order—and the existence of the preliminary examination itself—is restricted “to a very limited number of persons”. Yet the proper conduct of the preliminary examination will potentially require the Prosecution to engage with a number of external persons and organisations, with due transparency. Furthermore, rule 104(2) provides broad discretion to determine the number and identity of “reliable sources that [the Prosecutor] deems appropriate” for this purpose. In principle, the Prosecution does not see how compliance with the obligation of secrecy can practically be reconciled with the measures necessary to carry out a preliminary examination.

13. This is not altered by the facts of this particular situation. While the Prosecution recalls its preliminary observation that the Colombian authorities’ ongoing “constructive engagement with the Office in line with the Cooperation Agreement [...] could form the basis to resolve the preliminary examination expeditiously”,²² it cannot be assumed at this stage that this means the Prosecution can conduct the preliminary examination without any kind of transparent engagement with relevant external actors. To the contrary, expeditious resolution of the preliminary examination and a return to the state of affairs preceding the referral may in fact require the Prosecution to engage with such actors, to the mutual benefit of all concerned including the Colombian authorities.

C. Classifying the preliminary examination as ‘secret’ does not apparently serve any forensic purpose

14. Finally, the Prosecution notes that the Order does not contain any reasoning as to *why* the preliminary examination requires classification as ‘secret’. Nor can the Prosecution discern for itself any forensic purpose which would be served by this level of classification. In the

²² See Regulation 45 Notification, para. 7.

apparent absence of any forensic purpose, therefore, maintaining the classification is inconsistent with the principle of publicity and may itself occasion an injustice.²³ Furthermore, the Prosecution considers that classifying the preliminary examination as ‘secret’ is likely to result in consequences which may be *detrimental* to the mandate of the Court.

15. First, the Prosecution recalls that the fact of the referral—and the imminent regulation 45 notification—is already known at least to the present authorities of the Republic of Colombia.²⁴ Likewise, the fact of the referral is known to the former authorities of the Republic of Colombia,²⁵ including persons who may no longer be in office or subject to any relevant obligation to conduct themselves according to the policy of the present authorities. As such, neither the Presidency nor the Prosecution is in a position to exercise full control over the potential disclosure of information by external actors which may (at least) trigger active inquiries as to the current procedural posture at the Court.

16. Second, to the extent that there may be any prospect in this situation for resolving the preliminary examination expeditiously, the Prosecution submits that this will be significantly undermined by any external perception that it will be (or has been) treated differently from any other. The perception that the Court sought to carry out the preliminary examination in secret—or otherwise without the appropriate degree of transparency that the Prosecution has typically sought to provide—will likely be detrimental. Furthermore, this is likely to increase in proportion to the amount of time that secrecy is maintained.

17. Third, the Prosecution notes with grave concern the likely impact upon the Court’s mandate of any perceived breach of the principle that ‘the ICC does not conduct secret investigations’. This extends beyond the details of this particular situation. In the Prosecution’s view, potential unauthorised disclosure of the existence of a ‘secret’, *unspecified* situation—and the public speculation that would inevitably ensue—may in fact prove more damaging to the Court than public awareness of this situation.

²³ On the principle of publicity, see e.g. [Statute](#), arts. 21(3), 64(7), 67(1), 68(2), 74(5), 76(4). The Prosecution stresses that it is not its position that confidential proceedings are necessarily unlawful, but merely that confidentiality must always serve a forensic purpose: see *also above* para. 7. Absent such a purpose, however, in principle, the proceedings of the Court should be public.

²⁴ See e.g. [Regulation 45 Notification](#), para. 7 (referring to “positive consultations with relevant Colombian authorities” conducted “[s]ince the inauguration of President Abelardo de la Espriella”).

²⁵ See e.g. [Regulation 45 Notification](#), para. 1 (recalling that the referral was signed by the former President of Colombia).

CONCLUSION

18. For all these reasons, the Prosecution respectfully requests reconsideration of the Order, in part, as soon as possible. Should the Presidency consider it necessary, the Deputy Prosecutor remains available for direct consultations.

A handwritten signature in black ink, appearing to read 'Mame Mandiaye Niang', written over a horizontal line.

**Mame Mandiaye Niang,
Deputy Prosecutor**

Dated this 26th day of August 2026

At The Hague, the Netherlands