



Original: **English**

No.: **ICC-00/26**
Date: **15 September 2026**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Sergio Gerardo Ugalde Godínez
Judge Haykel Ben Mahfoudh

SITUATION IN THE REPUBLIC OF COLOMBIA

Secret, <i>ex parte</i>, only available to the Prosecution Prosecution submissions on reclassification
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INTRODUCTION

1. On 24 August 2026, pursuant to regulation 45(1) of the Regulations of the Court, the Prosecution notified the Presidency of a communication from the authorities of the Republic of Colombia, which the Prosecution considered to be a valid referral according to article 14 of the Statute.¹ The Presidency assigned the situation to Pre-Trial Chamber II under designation ICC-00/26, and ordered that not only its own decision but all information as to the existence of this situation was to be classified as ‘Secret’.²
2. On 26 August 2026, the Prosecution sought reconsideration of the Presidency’s order with regard to classification,³ but to date has not received any final ruling on this matter from the Presidency.
3. On 3 September 2026, Pre-Trial Chamber II issued a decision closing the record of situation 00/26 on the basis of its view that the Colombian authorities’ communication was not a valid referral.⁴ The Chamber further ordered that it would not entertain any further submissions from the Prosecution, except concerning the future classification of filings in the record of the situation, if made by 15 September 2026.⁵
4. The Prosecution hereby complies with the Chamber’s order, notwithstanding its notice of appeal against the Closure Decision, filed on 9 September 2026.⁶

CONFIDENTIALITY

5. This request is filed with ‘secret’ classification, consistent with the classification of the Decision and in accordance with regulation 23bis(2). It is additionally filed *ex parte*, Prosecution only, since it refers to the existence and content of submissions which presently have the same status.

SUBMISSIONS

6. The Prosecution makes three principal submissions concerning the classification of the filings in the record of the situation.

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

² ICC-00/26-1-SECRET-Exp (“Presidency Order”).

³ ICC-00/26-2-SECRET-Exp (“Request for Reconsideration”).

⁴ ICC-00/26-3-SECRET-Exp (“Closure Decision”).

⁵ Closure Decision, paras. 12-13.

⁶ ICC-00/26-4-SECRET-Exp (“Notice of Appeal”).

7. First, the Prosecution maintains the position set out in its Request for Reconsideration to the Presidency. In principle, the Prosecution does not consider that there is a statutory basis to classify the very existence of a situation as ‘secret’.⁷ Nor is the Prosecution in a position to carry out the preliminary examination or investigation of a situation which is subject to an order classifying a situation as ‘secret’.⁸ In the Prosecution’s view, these principles are not only a matter of law and practice but also a cardinal foundation of the Court’s legitimacy with States.⁹ The Prosecution respectfully submits that the general importance of the ‘no secret situations’ principle exceeds the interests applicable in any particular situation, including the present one.

8. Second, the Prosecution underscores its previous submission to the Presidency that the Court is not in a position to control the potential release of information by external entities or actors which could at least imply the existence of this situation (thus not only making the ‘Secret’ classification otiose but positively counter-productive).¹⁰ In this regard, the Prosecution draws to the Chamber’s attention that former President of Colombia Gustavo Petro has now *already* made a brief public allusion to a communication from him transmitted to the Prosecutor.¹¹ In the Prosecution’s view, this underlines the likelihood that further disclosures may be made by persons who are not subject to the Court’s judicial control. As a consequence, it seems unlikely that it will be tenable for the Court to maintain the secrecy of all information concerning the existence of the situation. The Prosecution recalls its previous concern submitted to the Presidency that unplanned disclosure of an effort to maintain secrecy of this matter will likely be detrimental to the perception of the Court’s legitimacy in this situation,¹² in addition to the more general impact noted above with regard to States Parties and other States more widely.

9. Third, in the present context, if the Chamber accepts that *any* information concerning the existence of this situation should be made public, the Prosecution further submits that there is a clear interest in adequately publicising the general content of *all* filings presently in the situation record. In this regard, the Prosecution recalls its concern expressed in the Request for Reconsideration to the Presidency that a *partial* understanding (or misunderstanding) of the

⁷ See e.g. Request for Reconsideration, paras. 3-10.

⁸ See e.g. Request for Reconsideration, paras. 11-13.

⁹ See e.g. Request for Reconsideration, para. 17. See also paras. 7-9.

¹⁰ See e.g. Request for Reconsideration, para. 15.

¹¹ See e.g. https://www.cadena3.com/noticia/mundo/gustavo-petro-denuncia-a-su-sucesor-ante-la-corte-penal-internacional-por-persecucion-politica_589803 (reporting former President Petro’s announcement on the social media platform “X” that, before he had left office, he had filed a “complaint” (informal translation) before the Court).

¹² See e.g. Request for Reconsideration, para. 16.

litigation in this situation may be profoundly more damaging to the Court than a full understanding.¹³ Thus, assuming a decision to make public at least some relevant aspects of the Presidency's order and the Chamber's own decision, the Prosecution considers it essential also to make public:

- The content of the Prosecution's submissions in the Regulation 45 Notification in their entirety, with particular regard to: the circumstances in which the communication was transmitted to the Prosecution; the constructive engagement with the Colombian authorities in that regard, and; the Prosecution's view of the issues which might be relevant to the preliminary examination which would result from a valid referral in the present circumstances.¹⁴
- The content of the Prosecution's Request for Reconsideration in its entirety, which sets out the Prosecution's disagreement with the classification of the situation record, and its observation that it is not itself in a position to carry out a preliminary examination (or investigation) of a situation which is wholly secret.

10. With regard to the classification of the Prosecution's Notice of Appeal, and any subsequent filings on the situation record associated with those proceedings, the Prosecution notes that this will be determined by the Appeals Chamber. The Prosecution has already indicated its willingness to defer to the Appeals Chamber's assessment in this respect, having regard also to the content of the Request for Reconsideration to the Presidency and the present submissions to be made before this Chamber.¹⁵

11. In the interest of consistency, the Prosecution nevertheless considers it appropriate here to recall that the Notice of Appeal was brought in order to address the broader constitutional implications arising from the Closure Decision. While this appeal will, if upheld, naturally reinstate the Court's exercise of jurisdiction resulting from the Colombian authorities'

¹³ See e.g. Request for Reconsideration, para. 17.

¹⁴ See e.g. Regulation 45 Notification, paras. 5 ("since the Government of the Republic of Colombia has now submitted a valid referral [...]—and there is neither a relevant open investigation, nor any Pre-Trial Chamber already assigned—regulation 45 states materially that '[t]he Prosecutor *shall* inform the President'"), 6 ("in these circumstances, the Office must proceed to conduct a preliminary examination [...] this will be focused on the requirements of article 53(1)(b) of the Statute [...] objectively, on the basis of the available factual information. Within the framework of the Cooperation Agreement, to date, the Office has taken the view that Colombia is taking concrete and progressive steps genuinely to investigate and prosecute alleged crimes falling within the jurisdiction of the Court"), 7 ("Since the inauguration of President Abelardo de la Espriella, the Office has held positive consultations with relevant Colombian authorities in which they have reiterated that they will maintain their constructive engagement with the Office 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").

¹⁵ See e.g. Notice of Appeal, paras. 6-8.

communication, the Prosecution emphasised that this does not detract from its position set out in the Regulation 45 Notification (see first bullet point above) concerning the manner in which the preliminary examination may be resolved.¹⁶

CONCLUSION

12. For all these reasons, the Prosecution respectfully requests the Chamber to rule as soon as possible on the appropriate future classification of the filings in the situation record, taking into account the submissions above.



Mame Mandiaye Niang
Acting Prosecutor

Dated this 15th day of September 2026

At The Hague, the Netherlands

¹⁶ See e.g. Notice of Appeal, paras. 4-5 (“The Prosecution [...] brings this appeal to address the serious constitutional implications of the Decision [...] [which has] wide implications for the practice of the Court generally, beyond the circumstances of this situation. With specific regard to the present situation, the Prosecution recalls its Regulation 45 Notification to the Presidency [...] 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”).