

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-01/04
Date: 21 April 2006

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Decision Reclassifying Certain Documents in the Record of the Situation in the
Democratic Republic of the Congo**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Ad Hoc Counsels for the Defence

Mr Tjarda van der Spoel
Mr Joseph Tshimanga

**Legal Representative of Participants VPRS 1
to VPRS 6**

Mr Emmanuel Daoud

I, Judge Sylvia Steiner, judge at the International Criminal Court (the "Court");

NOTING the "Decision Convening an *In Camera* Meeting",¹ issued by Judge Sylvia Steiner acting as single judge of Pre-Trial Chamber I on 16 March 2006, which convened an *in camera* meeting with the Prosecutor and the Registrar or their respective representatives, for Friday 17 March 2006 to deal, *inter alia*, with issues relating to the current classification of certain non-public documents in the record of the situation in the Democratic Republic of the Congo (the "DRC");²

NOTING the *in camera* meeting held before Judge Sylvia Steiner on 17 March 2006 with the Prosecution and the Registrar pursuant to the above decision, in which the Prosecution shared the concerns of the single judge about the current classification of certain non-public documents in the record of the situation in the DRC;³

NOTING the "Decision Concerning the Reclassification of Non-Public Documents in the Record of the Situation in the Democratic Republic of the Congo"⁴ (the "Decision"), issued by Judge Sylvia Steiner acting as single judge of Pre-Trial Chamber I on 20 March 2006, in which the Prosecution was given ten days to "provide the Chamber with a list of non-public documents filed by the prosecution and which in the Prosecution's view should be reclassified with a different level of confidentiality";⁵

NOTING the "Prosecution's Observations concerning the Reclassification of Non-public Documents in the Record of the Situation in the Democratic Republic of the

¹ ICC-01/04-01/06-36.

² *Idem*, p. 3.

³ ICC-01/04-01/06-T-2-US-EXP-EN, p. 44, lines 18 to 25.

⁴ ICC-01/04-130.

⁵ *Idem*, p. 3.

Congo - Annex 1" (the "Prosecution's Observations"),⁶ filed by the Prosecution on 30 March 2006, where, in addition to submitting the list requested in the Decision and referring to the levels of confidentiality provided for in the Regulations of the Registry,⁷ the Prosecution defined the various levels of confidentiality of its filings as follows:

- (i) "Under Seal *ex parte* Prosecution only: access to the Pre-Trial Chamber and the Prosecution only.
- (ii) Under Seal: access to the Pre-Trial Chamber, Prosecution and Defence only. In addition, "Under Seal" filings are subject to specific handling codes, such as restricted distribution, to ensure a greater degree of confidentiality.
- (iii) Confidential: access to the Pre-Trial Chamber, Prosecution, Defence and other possible participants only.
- (iv) Public: access to the Pre-Trial Chamber, Prosecution, Defence other possible participants and the public";⁸

NOTING the decision of Pre-Trial Chamber I of 5 April 2006 designating Judge Sylvia Steiner as single judge of the situation in the DRC;⁹

NOTING articles 57 (3) (c), 67 (1) and 68 (1) of the Rome Statute (the "Statute"), rules 87 and 88 of the Rules of Procedure and Evidence (the "Rules"), and regulations 14 and 24 (4) of the Regulations of the Registry (the "Regulations");

CONSIDERING the multiplicity of persons and entities entitled to participate in some of the proceedings concerning the investigation into the situation in the DRC;

⁶ ICC-01/04-134-US-Exp.

⁷ Idem, p.3, footnote 4.

⁸ Idem, p. 3

⁹ ICC-01/04-138.

CONSIDERING that the level of confidentiality of many of the documents currently in the record of the situation in the DRC was determined solely by taking into consideration the persons and/or entities participating in the specific proceedings at which the relevant document was produced;

CONSIDERING that this approach only guarantees the confidentiality of the documents if a separate sub-folder for each set of related proceedings is created within the record of the situation in the DRC; and that, according to the Registrar, it is not feasible to create separate sub-folders within the record of the situation in the DRC;¹⁰

CONSIDERING, that, in determining the level of confidentiality of any document in the record of the situation in the DRC, it is necessary to take into account the multiplicity of persons and entities entitled to participate in some of the proceedings concerning the investigation of the situation in the DRC;

CONSIDERING, therefore, that it is necessary to reclassify a number of documents in the record of the situation in the DRC;

CONSIDERING furthermore that, according to regulation 14 of the Regulations, "[d]ocuments, material, orders and decisions may be classified as follows:

- (a) Public: available to the public;
- (b) Confidential: not to be disclosed to the public; or
- (c) Under seal: confidential; accessible and known only to a limited number of persons. Each organ and/or participant shall compile and maintain a list of

¹⁰ ICC-01/04-01/06-T-2-US-EXP-EN, p. 42, lines 1 to 25 and p. 45, lines 2 to 4.

persons who have had access to each document, material, order or decision under seal.”

CONSIDERING that, according to regulation 24 (4) of the Regulations, “[w]here proceedings are held without notification of one or more of the participants, or where they do not have an opportunity to voice their arguments, documents, material and orders shall be filed *ex parte*. The words ‘EX PARTE’ shall be inserted on the cover page in capital letters and the recipients other than the Chamber shall be specified after the phrase ‘only available to’.”

CONSIDERING, therefore, that, although the Prosecution refers to the levels of confidentiality provided for in the Regulations, it defines the various levels of confidentiality of its filings in a way which differs from regulations 14 and 24 (4) of the Regulations.

CONSIDERING that, unless Pre-Trial Chamber I expressly orders, as it did in its decision of 17 January 2006, the classification of a document as either “under seal” or “confidential” does not deny access to any person or entity entitled to participate in any of the proceedings concerning the investigation of the situation in the DRC; and that the difference between classifying a document as “under seal” or “confidential” relates only to the use of different handling codes;

CONSIDERING that in order to prevent one or more persons or entities entitled to participate in any of the proceedings concerning the investigation of the situation in the DRC from accessing a document filed in the record of the situation in the DRC, it is necessary to insert the words “EX PARTE” on the cover page in capital letters and to specify the recipients other than the Chamber after the phrase “only available to”;

FOR THESE REASONS

DECIDE that the following documents¹¹ and transcripts, currently filed in the record of the situation in the DRC shall be reclassified as follows:

1. Documents relating to the *in camera* meeting held on 9 November 2004:
 - a. Documents 3, 4, 5, 6, 7 and 8 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.
 - b. The transcript of the *in camera* meeting held on 9 November 2004 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.
2. Documents relating to the status conference held on 15 March 2005:
 - a. Documents 9, 11, 12, 13, and 14 shall remain classified as public documents.
 - b. Document 15 shall be reclassified as a public document.
 - c. Document 10 shall remain classified as confidential and *EX PARTE*, only available to the Prosecution.
 - d. Document 16 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.
 - e. The transcript of the *in camera* meeting held with the Registrar on 2 March 2005 shall be reclassified as confidential and *EX PARTE*, only available to the Registry.

¹¹ Documents are referred to by the digit that follows the reference to ICC-01/04 in their reference number in the record of the situation in the DRC. For instance, document ICC-01/04-3-Conf is referred to as document “3”. Unless otherwise expressly provided for in this decision, translations and corrigendums are reclassified in the same manner as the original documents. Unless otherwise provided for in this decision, annexes are reclassified in the same manner as the documents which they are annexed to.

- f. The transcript of the status conference held on 15 March 2005 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.

3. Documents relating to the NFI/Article 56 Examination:

- a. Documents 19, 21, 35, 76, 83, 85, 90, 93, 96, 112, 122, 132, 137 shall remain classified as public documents.
- b. Documents 17, 18, 20, 32, 34, 54, 77, 82, 86, 87, 88, 89, 91, 92, 94, 95, 109, 113, 116 and 139 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution and Mr Tjarda van der Spoel, *ad hoc* Counsel for the Defence in relation to the NFI examination.
- c. Transcript of the hearing held on 21 April 2005 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution and to Mr Tjarda van der Spoel, *ad hoc* Counsel for the Defence in relation to the NFI examination.
- d. Transcript of the hearing held on 11 October 2005 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution and to Mr Tjarda van der Spoel, *ad hoc* Counsel for the Defence in relation to the NFI examination.

4. Documents relating to the application process of applicants VPRS 1 to VPRS 6:

- a. Documents 57, 62, 73, 101, 103, 105, 107, 110, 111, and 135 shall remain classified as public documents;
- b. Document 84 shall be reclassified as a public document;

- c. Document 22 shall be reclassified as confidential and *EX PARTE*, only available to the Registry;
 - d. Documents 23, 24, 72, 75 and 81 shall be reclassified as confidential and *EX PARTE*, only available to applicants VPRS 1 to VPRS 6, the Prosecution and Mr Joseph Tshimanga, *ad hoc* Counsel for the Defence in relation to the application process.
 - e. Documents 25, 26, 27, 28, 29, 30, 31, 74, 100 shall be reclassified as confidential and *EX PARTE*, only available to applicants VPRS 1 to VPRS 6 and the Prosecution.
 - f. Documents 33, 36, 46, 47, 48, 56, 59, 65, 66, 67, 68 and 70 shall be reclassified as confidential and *EX PARTE*, only available to applicants VPRS 1 to VPRS 6.
 - g. The English translation of document 101 shall be reclassified as confidential and *EX PARTE*, only available to applicants VPRS 1 to VPRS 6 and the Prosecution.
 - h. The corrigendum of the English translation of document 101 shall remain public.
 - i. Transcript of the hearing held on 12 July 2006 shall be reclassified as confidential and *EX PARTE*, only available to applicants VPRS 1 to VPRS 6.
5. Documents relating to the hearing on protection of victims and witnesses in the DRC under rule 103:
- a. Documents 55 and 79 shall remain classified as a public document.
 - b. Documents 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 50, 51, 52, 53, 58, 61, 63, 64, 69, 71, 78, and 80 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution, the NGO representatives

present at the proceedings under rule 103 and Mr Joseph Tshimanga, *ad hoc* Counsel for the Defence in the said proceedings.

- c. Transcript of the hearing held on 8 July 2005 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution, the NGO representatives present at the proceedings under rule 103 and Mr Joseph Tshimanga, *ad hoc* Counsel for the Defence in the said proceedings.

6. Documents relating to the first application process under article 58:

- a. Documents 98 and 99, 102, 104, 106, 108, 115, 118, and 119 shall remain under seal and *EX PARTE*, only available to the Prosecution.
- b. Document 114 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.
- c. Transcript of the hearing held on 2 February 2006 shall remain classified as under seal and only available to the Prosecution.

7. Other Documents:

- a. Documents 1, 2, 60, 97, 117, 123, 130, and 138 shall remain classified as public documents.
- b. Document 134 shall be reclassified as confidential and *EX PARTE*, only available to the Prosecution.

DECIDE that documents 120, 121, 124, 125, 126, 127, 128, 129, 131, 133 and 136 of the record of the situation in the DRC, currently classified as under seal and *EX PARTE* only available to the Prosecution, shall not be subject to the current decision on reclassification as they have been filed before the Appeals Chamber.

INSTRUCT the Prosecution and any other person or entity entitled to participate in any of the proceedings concerning the investigation of the the situation in the DRC to follow in any future filing the levels of confidentiality provided for in regulations 14 and 24 (4) of the Regulations of the Registry as interpreted in the present decision.

Done in English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Friday 21 April 2006

At The Hague

The Netherlands