

PUBLIC

**Annex 3 to the
Defence Reply to Registry's Submission #1352**

Administrative Instruction

ICC/AI/2020/XXX

Date: dd/mm/2020

ICC AMENDED INFORMATION PROTECTION POLICY

The Registrar, with the consent of the President and the Prosecutor, pursuant to sections 3.2 and 3.3 of Presidential Directive ICC/PRESG/G/3002/001 (*“Procedures for the Promulgation of Administrative Issuances”*) and for the purpose of reviewing and updating the existing ICC Information Protection Policy of 19 June 2007 (ICC/AI/2007/001) pursuant to rule 101.4(b) of the ICC Staff Rules and section 3.5 of Presidential Directive ICC/PRESG/G/2005/001 (*“Information Security Policy”*), promulgates the following:

Section 1 – Use of Terms

For the purpose of the present Administration Instruction, the following terms are defined as follows:

- 1.1. “Counsel” – Counsel as defined under Article 1 of the Code of Professional Conduct for Counsel;
- 1.2. “ICC Information” and “ICC Records” - All ICC information and records in any medium, form or shape, including books, papers, photographs, machine readable materials, maps or other documentary materials, including audio- and video- records, regardless of physical form or characteristics, which are received or created by the Court, including their non-finalised drafts and other working materials. The content of portable computing devices (for example, laptops or PDAs) with resident memory are regarded as ICC Records within the context of the present Administrative Instruction. ICC Records include but are not limited to born-digital records and those that have been digitised from another medium or format. ICC Records include Judicial Records;

- 1.3. “Judicial Records” – All documents filed in the records of situation and case proceedings before the Court. Judicial Records are a sub-category of ICC Records;
- 1.4. “Organisational Units” – An organ, a division, an office, a section, a team or an unit, including legal teams working under the authority of a Counsel;
- 1.5. “Users” - All current and former Elected Officials, staff members and individuals affiliated with or having a contractual relationship with the Court, such as Counsel and their assistants and other staff as defined under Articles 1, 2(2) and 32 of Code of Professional Conduct for Counsel, independent contractors, gratis personnel, interns, visiting professionals, consultants, volunteers, interpreters, and other contractual personnel who are or have been entrusted with authorised access to ICC records as a result of the performance of their official duties or have otherwise become in possession of such records.

Section 2 – Purpose

- 2.1. The present Administrative Instruction is promulgated for the purpose of amending and replacing Administrative Instruction ICC/AI/2007/001 of 19 June 2007 (“*ICC Information Protection Policy*”). On 14 November 2007, the Judges amended the Regulations of the Court by inserting new Regulation 23*bis*, governing the filing of documents marked *ex parte*, under seal or confidential. This amendment entered into force on 18 December 2007. On 4 December 2013, the ICC Registrar amended Regulation 14 of the Regulations of the Registry, governing the levels of confidentiality within ICC. This amendment entered into force on 5 December 2013. The primary purpose of the present Administrative Instruction is to adapt the ICC Information Protection Policy to Regulation 23*bis* of the Regulations of the Court and Regulation 14 of the Regulations of the Registry.
- 2.2. The present Administrative Instruction sets out the minimum standards for protecting confidentiality of Information within the operations of the Court, for classifying information and the consequent appropriate handling and dissemination of classified information.

Section 3 - Scope

- 3.1. The present Administrative Instruction applies all ICC Information and Records, as defined in section 1.2 above.
- 3.2. Unless specified otherwise, the present Administrative Issuance applies to judicial records, subject to the rulings of the relevant Chambers.
- 3.3. The present Administrative Instruction applies to all Users, as defined under section 1.5 above.

Section 4 – Classification Levels

- 4.1. The classification levels applicable to judicial records and materials under regulation 14 of the Regulations of the Registry apply to all ICC records. These include the following levels:
 - (a) Public: available to the public;
 - (b) Confidential: not to be disclosed to the public;
 - (c) Under seal: confidential; accessible and known only to a limited number of persons. Each recipient Organisational Unit shall compile and maintain a list of its staff members who have or have had access to ICC records and materials so classified; and
 - (d) Secret: accessible and known to a very limited number of persons. Each recipient Organisational Unit shall compile and maintain a list of its staff members who have or have had access to ICC records and materials so classified. Under this classification, circulation is restricted, including as regards downloading and printing.
- 4.2. The classification levels “Confidential”, “Under Seal” or “Secret” may be used in combination with a specific caveat restricting the dissemination of the relevant Records to specific authorised recipients. Pursuant to Regulation 23*bis* of the Regulations of the Court, caveats on judicial records are expressed by using the mention “*ex parte*” followed by a description of the authorised recipients. Caveats are limited to ICC

records classified as “Confidential”, “Under Seal” or “Secret”. When the exact classification of an “*ex parte*” or otherwise caveated record is not specified, the record shall be considered “Confidential” by default. Except for “Secret” records, caveats may refer to the specific Organisational Units to which the intended recipients belong, without identifying them individually;

4.3. As a transitional measure, records, information and documents classified under the following classification levels and caveats under sections 3.3 and 6.4 of Administrative Instruction ICC/AI/2007/001 are reclassified under the present Administrative Instruction as follows:

- (a) “[ICC] UNCLASSIFIED” records under section 3.3(a) of Administrative Instruction ICC/AI/2007/001 are reclassified as “Public” under the present Administrative Instruction;
- (b) “[ICC] RESTRICTED” and “[ICC] CONFIDENTIAL” records under sections 3.3(b) and (c) of Administrative Instruction ICC/AI/2007/001 are reclassified as “confidential” under the present Administrative Instruction;
- (c) “[ICC] SECRET” records under section 3.3(d) of Administrative Instruction ICC/AI/2007/001 are reclassified as “Secret” under the present Administrative Instruction;
- (d) “[ICC] CONFIDENTIAL” or “[ICC] SECRET” records to which the caveat “*ex parte*” applies under section 6.4 of Administrative Instruction ICC/AI/2007/001 are respectfully reclassified as “Confidential *ex parte*” or “Secret *ex parte*” followed by the same list of authorised recipients, under the present Administrative Instruction; and
- (e) Non classified records to which the caveat “*ex parte*” applies under section 6.4 of Administrative Instruction ICC/AI/2007/001 are reclassified as “Confidential *ex parte*” followed by the same list of authorised recipients, under the present Administrative Instruction.

Section 5 – Classification Criteria

- 5.1. The classification of judicial records filed in the records of situations and cases before the Court is governed by the Regulations of the Court and the relevant Chambers' rulings. The present section does not apply thereto.
- 5.2. ICC Records shall be classified based on their content, its sensitivity and the risks associated with their dissemination. Each individual Record shall be classified to its appropriate level, which is not necessarily the classification level of the information it is based on or responding or referring to. For efficiency purposes, the chosen classification of each record shall be as low as possible and as high as necessary to achieve its purpose of protecting the interests of the Court.
- 5.3. Records shall be classified according to the following criteria:
 - (a) Records received from public sources and/or aimed for public dissemination and consumption shall be classified public. These include without limitation ICC publications, including its website and documents and information posted thereon, the Official Journal of the Court, speeches, public reports, the public redacted version of classified records, if any, and public information and outreach materials created under Regulation 5*bis* of the Regulations of the Registry. Only the final version of public documents created by the Court is public. Non-final drafts are considered confidential and cannot be disseminated without the prior authorisation of the Court;
 - (b) Records received through a non-public channel – including non-public letters or e-mails – and/or specifically marked as confidential by their source and those which are not specifically meant for public dissemination shall be classified confidential. These include without limitation all ICC records generated internally for the daily functioning of its administration and operations, communications exchanged between persons to whom the present Administrative Instruction applies under section 3.3 above, confidential reports, working materials and notes. In the absence of other specific classification, all ICC records except those received from public sources, shall be considered “Confidential” by default;
 - (c) Records received through a non-public channel and specifically marked as “confidential” or “under seal” by their source and which uncontrolled dissemination to non-authorised or non-intended recipients may cause harm to the interests of the Court

shall be classified under seal. These include without limitation ICC Records containing sensitive information, like the identity of victims, witnesses and other persons at risk on account of the activities of the Court, information about administrative and disciplinary proceedings, including the internal investigation of disciplinary cases, and non-public information in relation to preliminary examinations and investigations by the Office of the Prosecutor. The authorised recipients of under seal records shall be identified by a specific caveat. When no such caveat is specified, no dissemination action shall be taken until the applicable caveat is clarified, by a person having authority to classify the specific record under section 6 of the present Administrative Instruction;

(d) Records received through a non-public channel and specifically marked as “secret”, “top secret” or any comparable mention by their source or which dissemination outside a limited number of specifically authorised individual recipients is expected to cause serious harm to the core interests of the Court, including the integrity of its proceedings, shall be classified secret. The secret level of classification shall be resorted to in exceptional cases and for most sensitive individual records only. Records shall normally remain secret for a limited duration necessary for the Court’s appropriate action and be reclassified at a lower level as soon as possible thereafter, unless specific reasons forbid so. No dissemination action shall be taken without the prior authorisation by a person having authority to classify the specific record under section 6 of the present Administrative Instruction. The person authorising the dissemination of a secret record is responsible for maintaining a register with the list of individual recipients authorised, the exact date of the dissemination, its purpose and, where applicable, specific conditions and instructions regarding its handling and conservation. After the reclassification of the relevant secret record at a lower level, this register is no longer maintained, but the person in charge of the register shall keep it available.

Section 6 – Classification and Reclassification of ICC Records

- 6.1. The authority to classify and reclassify Judicial Records is governed by the Regulations of the Court and the relevant Chambers’ rulings. The present section does not apply thereto.

- 6.2. The Head of each Organisational Unit receiving or creating a new ICC Record has authority to classify it. This authority can be delegated to the Heads of specific Organisational Sub-Units in charge of creating or handling the relevant Record.
- 6.3. ICC Records which have not been classified pursuant to section 6.2 above, except those received or collected from public sources, shall be considered “Confidential” by default. This default classification applies until the relevant ICC Record is classified pursuant to section 6.2.
- 6.4. The classification and caveat applied to a specific ICC Record under the present Administrative Instruction shall be respected by all Users and Organisational Units receiving it. They have no authority to vary them.
- 6.5. The authority to vary the classification and/or caveat of an ICC Record under the present Administrative Instruction is limited to the Head of the Organisational Unit which classified it last or her/his supervisor. The classification or caveat of an ICC Record can be varied *proprio motu* or upon request. If the classification and/or caveat of an ICC Record received from an external source were determined in accordance with the source’s instructions or at its request, the Court shall seek the external source’s prior agreement prior to varying these.
- 6.6. In case of doubt as to the appropriate classification or caveat of an ICC Record, the classifying authority may seek guidance from the Chair of the Information Management Governance Board under section 3.1.3 of Administrative Instruction ICC/AI/2017/001 (*“Establishment of the Information Management Governance Board, its Composition and Terms of Reference”*). As appropriate, the Chair of the Information Management Governance Board may consult the Information Security Officer for technical advice pursuant to section 4.1.6 of Administrative Instruction ICC/AI/2017/001.
- 6.7. Authorised recipients listed under the applicable caveats shall receive prompt notification of the variation in the classification or caveats applicable to an ICC Record.
- 6.8. Users shall be informed of the classification and caveat history of ICC Records. This information can take the form of appropriate markings printed or stamped on the relevant ICC Records and/or be conveyed together with their notification.

Section 7 – Dissemination of ICC Records

- 7.1. Public ICC Records can be disseminated without restriction.
- 7.2. Confidential ICC Records with no specific caveat shall be disseminated to Users on a need-to-know basis, as defined under section 7.6 below.
- 7.3. Confidential ICC Records with a specific caveat limiting their dissemination to specific Organisational Units shall be disseminated to Users working within the relevant Organisational Units on a need-to-know basis, as defined under section 7.6 below. The dissemination of such ICC Records beyond the Organisational Units authorised by the caveat requires the prior variation of the caveat.
- 7.4. Under seal ICC Records shall be disseminated to Users working within the relevant Organisational Units authorised by the caveat on a need-to-know basis, as defined under section 7.6 below. Pursuant to regulation 14(c) of the Regulations of the Registry and section 4.1(c) above, each Organisational Unit shall compile and maintain a list of its staff members who have or have had access to ICC records and materials so classified. The dissemination of such ICC Records beyond the Organisational Units authorised by the caveat requires the prior variation of the caveat.
- 7.5. Secret ICC Records shall be disseminated to the individual Users authorised by their caveat. Pursuant to regulation 14(d) of the Regulations of the Registry and sections 4.1(d) and 5.3(d) above, the person with authority to classify the specific ICC Record shall maintain a register with the list of individual recipients authorised, the exact date of the dissemination, its purpose and, where applicable, specific conditions and instructions regarding its handling, conservation, return and/or destruction.
- 7.6. The dissemination of ICC Records on a need-to-know basis pursuant to sections 7.2 to 7.4 above shall be limited to those Users who need to access them for a specific and legitimate purpose. Such legitimate purpose includes, without limitation, the performance of the User's official functions for the Court, the execution of a contract, the participation in judicial proceedings or other litigations and the conduct of authorised preliminary examinations, investigations, fact-finding missions or audits. No need-to-know consideration can justify the dissemination of ICC Records beyond the limits of the Organisational Units specified in their caveat.

7.7. The Court may release classified ICC Records to external parties not falling in the category of Users under section 1.5 above, such as States representatives or authorities, other international organisations or non-governmental organisations under the following conditions:

- (a) the release serves a specific legitimate purpose, equivalent to those listed in section 7.6 above, such as the conduct of the Court's diplomatic relations or operations within the territory of Situation and other countries;
- (b) the released ICC Records is not used for purposes other than the legitimate purpose for which it was released under (a) above;
- (c) the released ICC Records keeps its level of classification and caveats and the recipient third party agrees to abide by it and not to disseminate it further. The recipient third party shall protect and safeguard the released ICC records according to its own security regulations applicable to information holding an equivalent protection level;
- (d) the ICC expressly reserves its right to take any appropriate action against the recipient third party in case of breach of the conditions set forth under (a) to (c) above; and
- (e) no ICC Records containing information affecting the privacy of Elected Officials or staff members may be disclosed to third parties without their prior express consent.

7.8. The rules governing the dissemination of ICC Records shall be applied restrictively. The dissemination of ICC Records beyond what is specifically authorised in sections 7.2 to 7.7 above may be considered a violation of the present Administrative Instruction and expose its author to appropriate action in accordance with section 8.3 below.

Section 8 – Compliance

8.1. Heads of Organisational Units are responsible for ensuring awareness and full compliance of the Users placed under their authority with the present Administrative Instruction. They shall follow the recommendations of the Information Management Governance Board and issue instructions and provide guidance on good practices in view of protecting the security of classified ICC Records and avoid their dissemination

to unauthorised recipients. Where necessary, technical advice may be sought from the Information Security Officer pursuant to section 4.1.6 of Administrative Instruction ICC/AI/2017/001.

- 8.2. Perceived violations of the present Administrative Instructions or perceived unauthorised dissemination of classified ICC Records shall be reported without delay to the Court's Information Security Officer for immediate containment action. The duty to report suspect ICC-related misconduct under section 1.3(a) of Presidential Directive ICC/PRESG/2014/003 (*"ICC Whistleblowing and Whistle-blower Protection Policy"*) also applies to perceived violations of the present Administrative Instruction or perceived unauthorised dissemination of classified ICC Records.
- 8.3. Any violation of the present Administrative Instructions may be considered, as applicable and subject to their specific definition, as an offence against the administration of justice under Article 70(1) of the Rome Statute, misconduct under Rules 24 or 25 of the Rules of Procedure and Evidence or Article 31 of the Code of Professional Conduct for Counsel, failure to observe the standards of confidentiality set out in regulation 1.2(j) of the Staff Regulations amounting to serious misconduct under rule 110.7(b) of the ICC Staff Rules, unsatisfactory conduct pursuant to section 5.3(l) of Administrative Instruction ICC/AI/2011/002 (*"Code of Conduct for Staff Members"*) or a cause of termination of contract under the ICC General Terms and Conditions of Contracts for Goods and Services. It may expose the offender to appropriate legal action.
- 8.4. The staff members' compliance with the present Administrative Instruction is considered in the yearly appraisal of their performance.

Section 9 – Final Provisions

- 9.1. The present Administrative Instruction replaces and abolishes Administrative Instruction ICC/AI/2007/001. All provisions of Administrative Instruction ICC/AI/2007/001 not contained in the present Administrative Instruction are also abolished.

- 9.2. References made to Administrative Instruction ICC/AI/2007/001 in the provisions of other administrative issuances, like section 5.3(l) of Administrative Instruction ICC/AI/2011/002, shall be read as referring to the present Administrative Instruction.
- 9.3. The present Administrative Instruction enters into force on dd/mm/2020.

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