



ICCBA LEGAL ADVISORY COMMITTEE

LEGAL ANALYSIS: ICC INFORMATION PROTECTION POLICY FRAMEWORK

The present Legal Analysis is submitted by the ICCBA Legal Advisory Committee (“LAC”). It is one of the deliverables prepared in accordance with the LAC work plan approved by the Executive Council (“EC”) for year 2017-2018, and is submitted to the EC for its review, endorsement, and publication on the ICCBA website. It should be read in conjunction with the LAC’s “Index of ICC Administrative Issuances of Relevance for Counsel and Support Staff”, which was submitted to the EC in November 2017.

The goal of the present legal analysis is to enhance the knowledge and understanding of Counsel and Support Staff in relation to the **ICC legal framework governing information protection**, which is directly relevant to the performance of their functions before the Court and their compliance with the duty of confidentiality imposed by Article 8 of the [Code of Professional Conduct for Counsel](#) (“CPCC”). The present legal analysis is also a contribution of the LAC to the fulfilment of the ICCBA’s mandate, pursuant to Article 2(5) of its [Constitution](#), to seek to “enhance the quality of justice at the ICC as required under the provisions of the Rome Statute and other recognized texts”.

1 / Main Provisions Governing the ICC Information Protection Policy Framework

The framework principles governing the protection of information within the ICC are provided in a three-page **Presidential Directive of 2005** entitled “[Information Security Policy](#)”. This Presidential Directive requires that all “users” of information produced, transmitted and stored for and by the Court “must comply with the security provisions and restrictions placed on them by the Court” (section 2.3), and further underlines that the policy is binding both on the Court and “all those who seek access to its information” (section 2.4). The Presidential Directive also mandates that the Court implement the Information Security Policy through promulgation of administrative issuances addressing the Court’s regulation of information security matters including information classification, handling and encryption, and mobile computing (section 3.5).

Further to this dictate, the main instrument governing in a detailed manner the classification and protection of information within ICC is **Administrative Instruction ICC/AI/2001/001 of 2007** entitled “[ICC Information Protection Policy](#)”. This policy applies to all ICC records, in any medium or form, judicial and non-judicial alike (section 1.17). It defines the protection levels applicable to information within the ICC, the criteria applicable to the classification of information, provides rules governing the classification, handling, dissemination and disclosure of classified information and the actions to be taken in cases of suspected compromise of information security, including potential disciplinary action.

Applicability: As noted above, the [Information Security Policy](#) (Presidential Directive ICC/PRES/D/G/2005/001) applies to all “users” of information produced, transmitted and stored for and by the Court as well as all those who “seek access to” such information. Independent Counsel and Support Staff do not seem to fall under the category of “users” or “those who seek access to [the Court’s] information under this Presidential Directive. These categories are not defined. These categories appear to be limited to those staff members and officials of the Court having access to classified information in the performance of their official duties. This interpretation is supported by the subsequent Administrative Instruction of 2007 implementing the Presidential Directive of 2005 (see below), which excludes Counsel and Support Staff from the list of persons to whom the policy applies. If no obligation is “placed on them” by the Administrative Instruction of 2007 implementing the Presidential Directive of 2005, the logical inference is that the Presidential Directive does not apply to Counsel and Support Staff. Several obligations under the Directive are limited to staff members and officials only, such as the duty to report suspected security incidents under section 3.8 of the Presidential Directive of 2005, or to “the Court” under sections 3.3, 3.5, 3.6, 3.7 and 3.9. These specific obligations clearly do not apply to independent Counsel and Support Staff. Accordingly, subject to further clarification, it would appear that [Presidential Directive ICC/PRES/D/G/2005/001](#) effectively does not apply to independent Counsel and Support Staff.

The ICC Information Protection Policy, which was promulgated further to the Information Security Policy, applies specifically to current and former “Staff” (section 2.2). [Section 1.28 of Administrative Instruction ICC/AI/2007/001](#) defines “Staff” for the purpose of this Administrative Instruction as including “all Elected Officials, staff and individuals affiliated with or having a contractual relationship with the Court, such as independent contractors, gratis personnel, interns, consultants, volunteers, interpreters and other contractual personnel who are entrusted with authorised access to ICC Information in the course of performing their official duties” (emphasis added). Notably, independent Counsel and Support Staff are excluded from the definition of “staff” under the ICC Information Protection Policy. While independent Counsel and Support Staff are issued letters of appointment by the Registry of the Court, they cannot be considered “contractual personnel” in the absence of a contractual relationship akin to the contracts signed by contractors, interns, consultants and the like. The level of detail provided in [Section 1.28 of Administrative Instruction ICC/AI/2007/001](#) leads to the conclusion that the exclusion of Counsel and Support Staff from the list of persons to whom the ICC Information Protection Policy applies was not a mere omission, but a deliberate exclusion. The consequence of this exclusion is that the [ICC Information Protection Policy](#) – as it is – is not binding on independent Counsel and Support Staff. Their obligations in respect of information protection are governed by Article 8 of the [CPCC](#) only.

The ICC Information Protection Policy does apply to the personnel of the Office of the Prosecutor (“OTP”), as specified in Regulation 21 of the [Regulations of the Office of the Prosecutor](#) and given that OTP personnel fall under the category of “staff” for purposes of the Information Protection Policy.

Scope of application: The ICC Information Protection Policy applies to all ICC documents and records, as defined under [sections 1.11 and 1.14 of Administrative Instruction ICC/AI/2007/001](#): “Books, papers, photographs, machine readable materials, maps, or other documentary materials, regardless of physical form or characteristics, which are in possession of the Court and have documentary or evidential value”, including “portable computing devices (for example, laptops and PDAs) with resident memory”. It thus

applies to all ICC documents and records, be they of a judicial nature – filings, transcripts, evidence, statements – or not, whatever their physical or electronic form.

Classification Levels: The ICC Information Protection Policy first defines the applicable protection levels of the Court ([sect. 3](#)). There are four levels under this Policy: (a) UNCLASSIFIED, which is equivalent to “public”; (b) “[ICC] RESTRICTED”, which is the default classification level for documents that are not marked with a classification ([sect. 5.14](#)); (c) “[ICC] CONFIDENTIAL”; and (d) “[ICC] SECRET” for information that it has been determined should be restricted to and not revealed beyond a select number of individuals and which automatically applies to “UNDER SEAL” judicial documents ([sect. 5.13](#)). It is worth noting that the classification levels under the ICC Information Protection Policy are different from the classification levels defined by [regulation 14 of the Regulations of the Registry \(“RoR”\)](#). This discrepancy is further addressed below (see **2 / Strengthening and Enhancing Compliance with ICC Information Protection Policy Framework**). Caveats and endorsements are used to specify authorised recipients of Information (like “*Ex Parte* Defence only” or “*Ex Parte* Victims only”) ([sect. 6.1, 6.4](#)). All documents registered before the Court need to be shared with the Registry, as the keeper of ICC Records, pursuant to [rule 15\(2\) of the Rules of Procedure and Evidence](#). Any *Ex Parte* caveat thus necessarily includes the Registry, without the need to specify this. Also, caveats specific to one Registry section only (like “*Ex Parte* VWU only”) do not prevent the dissemination of the documents to other relevant sections of the Registry, like the Court Management Section for the purpose of registration, the Language Service Section for the purpose of translation and the Immediate Office of the Registrar, the Legal Office and the Office of the Director - Division of Judicial Service for the purpose of coordinating Registry activities. These sections / offices are included within the Registry – which is a single entity – and do not need to be specified.

Authority to Classify Documents: The responsibility of classifying documents ([sect. 8.3](#)) is entrusted to the “Organisational Unit”, as defined as “an Organ, Division, Office, Section, Team or Unit” ([sect. 1.23](#)), which creates the information or receives it from a third party provider. Each Organisational Unit shall designate a Classification Officer, in charge of the classification of the information it generates. Because the ICC Information Protection Policy does not apply to independent Counsel and Support Staff, it falls within the Lead Counsel’s ambit under articles 7(4), 24(1) and 32 of the [CPC](#) to determine how best to cope with the confidentiality obligations bearing on her/his team pursuant to Article 8 of the CPC. Though not binding, the ICC Information Protection Policy may provide guidance in meeting this responsibility. In the current practice, the classification of documents submitted by Defence and Victims’ teams to the Court outside of the judicial context has usually been determined by the Registry, taking into account the teams’ views on the confidentiality / sensitivity of the information. The legal basis for the authority of the Registry to determine the final classification of information provided by Defence and Victims’ teams needs to be clarified. This is another area with regard to which the ICCBA calls for a clarification of the ICC Information Protection Policy, in order to further define the role and duties of Counsel and Support Staff thereunder and the working relationship between the Court and Defence and Victims’ teams in this context.

Marking: Generally, ICC produced information must be marked with the applicable level of classification. When not marked, information is deemed [ICC] RESTRICTED by default ([sect. 5.14](#)). Markings shall be applied to all copies of classified information ([sect. 7.2](#)), with the exception of information intended for

public release which does not need to be marked UNCLASSIFIED when its format clearly identifies its public nature ([sect. 7.4](#)). [Sections 22-23](#) provide further details governing the marking of documents.

Handling: [Sections 14 to 37 of the ICC Information Protection Policy](#) govern various aspects of the handling of classified documents, like vetting of persons who are given access to classified documents (sect. 15), their dissemination (sect. 16), disclosure (sect. 17) and electronic transmission (sect. 28), the use of ICT systems (sect. 19, 27, 34), their printing, copying and faxing (sect. 25, 29), shredding (sect. 26), transportation (sect. 30-31), packaging (sect. 32), storing (sect. 35-37) and destruction (sect. 33-34). Specific, more stringent, provisions apply to [ICC] CONFIDENTIAL and [ICC] SECRET documents.

“Need-to-know” Dissemination Principle: Even information classified as the most sensitive needs to be disseminated in order for the Court to make use of it. This dissemination is done on a “need-to-know” basis, according to which “an individual’s specific function or tasks shall be the principal determinant of that individual’s need to know and of the consequent scope of access to information” ([sect. 16.1\(b\)](#)). This is for instance the reason why certain staff members within the Registry have access to information at all levels of classification because they need to access these materials to perform their functions. This includes, for example, the Court Management Section for the purpose of registration, the Language Service Section for the purpose of translation and the Immediate Office of the Registrar, the Legal Office and the Office of the Director - Division of Judicial Service for the purpose of coordinating Registry activities.

Reporting of Compromise: [Section 1.7 of the ICC Information Protection Policy](#) defines “Compromise” as “the loss, improper access or use, and unauthorised disclosure, alteration and destruction of information”. Suspected compromise of the security of classified information must be reported to the Registry’s Information Security Officer in a timely fashion ([sect. 38.2](#)). The Information Security Officer now forms part of the Information Management Services Section (“IMSS”), within the Division of Judicial Services of the Registry. Non-reporting of a suspected compromise may incur “disciplinary action in accordance with applicable Staff Regulations, Staff Rules or any other administrative issuance” ([sect. 40.3](#)). It should be noted that the Staff Regulations and Staff Rules, as well as the internal disciplinary mechanisms of the Court, do not apply to counsel and support staff. The obligation to report compromise is limited to staff members and ICC Officials under section 3.8 of [Presidential Directive ICC/PRES/D/G/2005/001](#) and does not apply to independent Counsel and Support Staff. However, sections 1.1(a) and 1.3(a) of the [ICC Whistleblowing and Whistle-Blower Protection Policy](#) make Counsel – and arguably Support Staff – responsible for reporting suspected ICC-related misconduct, past or present. Whether this obligation to report misconduct under the Whistleblowing policy applies to “compromise” as defined under section 1.7 of the ICC Information Protection Policy would require further clarification.

2 / Strengthening and Enhancing Compliance with ICC Information Protection Policy Framework

Ensuring Consistency between the ICC Information Protection Policy and the Regulations of the Registry: [Regulation 14 of the RoR](#) defines four levels of confidentiality for judicial records, which are different from those provided by the ICC Information Protection Policy. The four levels of classification under Regulation 14 of the RoR are : (a) “Public”, which is similar to “UNCLASSIFIED” under [section 5.4 of](#)

[the ICC Information Protection Policy](#); (b) “Confidential”, which is similar to “[ICC] CONFIDENTIAL” under [section 5.10 of the ICC Information Protection Policy](#); (c) “Under Seal”, which is similar to “[ICC] SECRET” under [section 5.13 of the ICC Information Protection Policy](#); and (d) “Secret”, which has no equivalent under the ICC Information Protection Policy. The classification “[ICC] RESTRICTED” provided under [sections 3.3\(b\) and 5.5-5.7 of the ICC Information Protection Policy](#) also has no equivalent under [Regulation 14 of the RoR](#), whereas it is defined as the default classification for unmarked documents under [section 5.14 of the ICC Information Protection Policy](#). The “Judicial Records” to which the classification levels provided under [Regulation 14 of the RoR](#) are nowhere defined. Although it is clear that documents filed in the records of the judicial proceedings before the Court fall into that category, the situation is less clear for other categories of documents, for example witnesses’ statements, victims’ applications for participation or reparations or other evidence which have not (yet) been filed in the record of a case or situation. These other categories of documents in any case fall under the ICC Information Protection Policy. The discrepancy between the [ICC Information Protection Policy](#) and [Regulation 14 of the RoR](#) has several consequences, such as:

- (i) Unmarked judicial records shall be considered by default [ICC] RESTRICTED, but this administrative classification has no judicial equivalent in judicial proceedings before the Court. The question as to whether a compromise of information or a document classified as [ICC] RESTRICTED amounts to a breach of confidentiality remains open, since the information is not classified as “confidential” under the [ICC Information Protection Policy](#), or [Regulation 14 of the RoR](#). The fact that the ICC Information Protection Policy does not apply to Counsel and that [ICC] RESTRICTED information or documents are not considered confidential leads to the conclusion that the disclosure – or other forms of compromise – of [ICC] RESTRICTED or otherwise unmarked information and documents does not constitute a breach of confidentiality for the purpose of the liability of Counsel and Support Staff under Article 8 of the [CPC](#);
- (ii) Because [Regulation 14 of the RoR](#) defines classification levels without governing the handling of documents – which is left for the [ICC Information Protection Policy](#), the handling of Secret documents under [Regulation 14\(d\) of the RoR](#) is not governed, beyond what is provided for in that regulation;
- (iii) There is a high risk of confusion between the level of classification [ICC] SECRET under the [ICC Information Protection Policy](#) which corresponds to the classification “under seal” under [Regulation 14\(c\) of the RoR](#) - and the “Secret” classification under [Regulation 14\(d\) of the RoR](#). In the absence of guidance as to how information classified as “Secret” under [Regulation 14\(d\) of the RoR](#) shall be handled, Counsel and Support Staff should apply at least the same measures as they apply for information classified as “Under Seal”, in addition to the specific measures specified in [Regulation 14\(d\) of the RoR](#). However, the difference between “Under Seal” and “Secret” classifications would still need to be clarified.

The ICCBA hereby invites the ICC management to address the abovementioned inconsistencies and ensure the consistency of its administrative Information Protection Policy with the levels of classification of judicial documents under [Regulation 14 of the RoR](#). The protection of information is key to preserving the integrity of the judicial proceedings before the Court, the guarantees of a fair trial and the security of victims, witnesses and other persons at risk on account of the activities of the Court. The ICCBA stands

ready to contribute to the consultations on the appropriate amendments to the existing policies, which affect the daily work of Counsel and Support Staff before the Court, in accordance with [rule 20\(3\) of the Rules of Procedure and Evidence](#) and other provisions governing the promulgation of administrative issuances before the Court.

Enhancing Compliance of the Court with its own Information Protection Policy: It appears that the OTP does not, as standard practice, mark judicial documents – in particular witness statements – which are not (yet) filed in the record of a case or situation with a classification level, or simply marks them as [ICC] RESTRICTED. Accordingly, these witness statements shall be deemed to be classified as [ICC] RESTRICTED pursuant to the [ICC Information Protection Policy](#) and are thus not confidential – and therefore public – under [Regulation 14 of the RoR](#), and as far as independent Counsel and Support Staff are concerned under article 8 of the [CPC](#). This situation creates a risk of incidental or purposeful dissemination of highly sensitive information that could compromise the protection of victims, witnesses and other persons at risk on account of such dissemination. *Bona fide* recipients of such sensitive information may not know that this information is classified as confidential, because it is not marked so, and may disseminate it further, thus increasing the risk. The sensitivity of this information should normally require, by its nature, classification as Confidential. This issue was raised before the Court in the *Gbagbo and Blé Goudé* Case (submissions available in French only [here](#) (par. 18-19) and [here](#) (par. 7-14)). Trial Chamber I confirmed that witness statements – though not marked – were classified confidential ([Transcript 15 February 2017, p. 3, lines 6-11](#)) and instructed the OTP to reassess, as appropriate, the degree of compliance of its practice with the relevant administrative instructions of the Court ([Transcript 22 February 2017, p. 48, lines 23-25 to p. 49, lines 1-5](#)). As far as the ICCBA is aware, this issue has not yet been addressed at a systemic level.

The OTP, in accordance with the E-Court Protocol usually applicable in each case before the Court, generally indicates in the metadata accompanying each electronic version of an item disclosed to the Defence or the Legal Representatives of Victims and / or in the disclosure letter or note accompanying a disclosure package the level of classification of the item (“public” or “confidential”). However, the absence of an appropriate physical classification marking on each disclosed document does not comply with the applicable Information Protection Policy and puts an undue burden on Counsel and Support Staff who will be receiving and reviewing an OTP case file consisting of many thousands of items, with respect to correctly recalling and applying at all times the appropriate level of classification of a particular document, especially in the dynamic context in which investigations take place. This situation is further compounded by the fact that documents may be reclassified as public in the course of a case, with the OTP likely providing only updated metadata that indicates the change of classification of an item. The absence of marking of these documents as “Confidential” may be considered as a “compromise” - i.e. improper use – of classified information pursuant to [Section 1.7 of the ICC Information Protection Policy](#). This would shift at least part of the liability for improper disclosure on the OTP and may incur disciplinary action against OTP staff members and/or officials under section 40.3 of the [ICC Information Protection Policy](#), section 5.3(l) of the [ICC Code of Conduct for Staff Members \(ICC/AI/2011/002\)](#) and section 28 of the [IOM Mandate](#) (see [ICCBA-LAC’s Legal Analysis: ICC Internal Accountability Mechanisms and Policies](#)). As such, Counsel and Support Staff may have a duty to report the absence of such marking pursuant to sections 1.1(a) and 1.3(a) of the [ICC Whistleblowing and Whistle-Blower Protection Policy](#). The absence of

appropriate marking is also placing victims, witnesses and other persons at risk on account of unmarked information, in circumstances where their protection is considered a shared responsibility of “all the organs of the Court and those involved with the trial”, including Counsel ([see ICC-01/04-01/06-1140, par. 36](#)).

The ICCBA hereby invites the ICC management, in particular the OTP, to proceed urgently to review its practice in compliance with the relevant administrative instructions of the Court as instructed by the Trial Chamber in the *Gbagbo and Blé Goudé* Case and stands ready to contribute to any consultations necessary to achieve the goal of proper and systematic protection of classified information.

CONCLUSION: The LAC draws the attention of Counsel and Support Staff to the abovementioned provisions governing the protection of information within ICC, as they are key to the daily performance of their functions before the Court and the fulfilment of their obligations of confidentiality under the Rules, which come in addition to the specific disciplinary regime provided under Article 8 of the [CPCC](#). The LAC also invites the ICC management as a matter of priority to undertake the steps identified in the present analysis in order to clarify its Information Protection Policy to ensure consistency of the provisions governing the protection of information and to strengthen compliance with these policies. The ICCBA looks forward to participating in the required consultations on these aspects which are relevant to the daily work of Counsel and Support Staff, in accordance with [rule 20\(3\) of the Rules of Procedure and Evidence](#) and other provisions governing the promulgation of administrative issuances before the Court.