

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/05 OA

Date: 4 February 2008

THE APPEALS CHAMBER

Before: Judge Georghios M. Pikis, Presiding
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO,
DOMINIC ONGWEN**

Public

Decision of the Appeals Chamber on the Unsealing of Documents

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Mr Fabricio Guariglia

The Appeals Chamber of the International Criminal Court (hereinafter the “Court”),

In the application of the Prosecutor of 11 May 2006 entitled “Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review” (ICC-02/04-01/05-84-US-Exp) and Annex thereto, filed in the instant case and classified as “under seal”,

Having before it the “Prosecution’s Response to ‘Directions of the Appeals Chamber’ relating to the unsealing of documents” of 26 November 2007 (ICC-01/04-01/05-262-US-Exp),

Renders unanimously the following

DECISION

1. The documents with the document number:

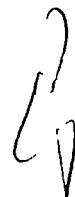
- a. ICC-02/04-01/05-84-US-Exp and Annex A (ICC-02/04-01/05-84-US-Exp-Anx A) thereto in the redacted form directed by Pre-Trial Chamber II on 2 February 2007 (ICC-02/04-01/05-135) and filed by the Prosecutor on 13 March 2007 (ICC-02/04-01/05-221-AnxA),
- b. ICC-02/04-01/05-262-US-Exp and Annex II (ICC-02/04-01/05-262-US-Exp-Anx2) and,

2. The transcript of the hearing of 13 July 2006 (T-02/04-01/05-T-1-Conf-Exp)

shall be made public.

3. The decisions with the document number:

- a. ICC-02/04-01/05-86-US-Exp,
- b. ICC-02/04-01/05-91-US-Exp,
- c. ICC-02/04-01/05-92-US-Exp and



d. ICC-02/04-01/05-260-US-Exp

and translations thereof shall be made public.

The reasons of the majority, namely Judges Kirsch, Pillay, Song and Kourula follow hereafter and are signed by Judge Pillay. The reasons of Judge Pikis are given in a separate opinion.

I. RELEVANT PROCEDURAL HISTORY

1. On 13 July 2006, the Appeals Chamber dismissed¹ the Prosecutor's application for the suspension of proceedings initiated by him before Pre-Trial Chamber II for leave to appeal² pending determination of his application³ to the Appeals Chamber for extraordinary review of a decision of Pre-Trial Chamber I of 31 March 2006 denying him leave to appeal. The application of the Prosecutor was filed *ex parte* and "under seal". The decision of Pre-Trial Chamber II and proceedings before it were classified by Pre-Trial Chamber II as under seal. The Prosecutor requested that the application be received "under seal" and in accordance with this request the Appeals Chamber conducted the proceedings and issued its decision "under seal".

2. On 21 November 2007, the Appeals Chamber rendered the "Directions of the Appeals Chamber"⁴ requesting the Prosecutor to provide reasons warranting the continued classification of the aforementioned appeal proceedings and decisions "under seal".

¹ *Prosecutor v. Kony a.o.* "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'" 13 July 2006 (ICC-02/04-01/05-92-US-Exp).

² *Prosecutor v. Kony a.o.* "Prosecutor's Application for Leave to Appeal Pre-Trial Chamber II's Decision on Prosecutor's Application That The Pre-Trial Chamber Disregard As Irrelevant The Submission Filed By The Registry on 5 December 2005" 15 March 2006 (ICC-02/04-01/05-221-AnxA).

³ *Situation in the Democratic Republic of the Congo* "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 24 April 2006 (ICC-01/04-141).

⁴ *Prosecutor v. Kony a.o.* "Directions of the Appeals Chamber" 21 November 2007 (ICC-02/04-01/05-260-US-Exp).



3. On 26 November 2007, the Prosecutor filed his response entitled “Prosecution’s Response to ‘Directions of the Appeals Chamber’ relating to the unsealing of documents”⁵. The Prosecutor acknowledged that the reasons for withholding publication of the appeal proceedings and decisions no longer exist save for the application of the Prosecutor requesting leave to appeal which was annexed to the application of the Prosecutor before the Appeals Chamber⁶ and has since been made public in a redacted form⁷. The Prosecutor further applied in his response, for the decisions, relevant documents and the transcript to be made public as well as the abovementioned annex⁸ to be published in a redacted form.

II REASONS

4. Rule 137 (2) of the Rules of Procedure and Evidence provides that a Trial Chamber “may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.” Pursuant to rule 149 of the Rules, this provision applies *mutatis mutandis* to proceedings in the Appeals Chamber. Regulation 20 (3) of the Regulations of the Court provides: “[a] Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.” The existence of a factual and legal basis for the continuation of the “under seal” classification must be shown. Where the basis for the classification no longer exists the Chamber may order a reclassification of the record.

5. In light of the submissions of the Prosecutor, as summarised in paragraph 3, above, the Appeals Chamber finds that the basis for the “under seal” classification no longer exists. Accordingly, the Appeals Chamber orders the unsealing and publication of the decisions of the Appeals Chamber, the documents filed before the Appeals Chamber

⁵ *Prosecutor v. Kony a o* “Prosecution’s Response to ‘Directions of the Appeals Chamber’ relating to unsealing of documents” 26 November 2007 (ICC-02/04-01/05-262-US-Exp).

⁶ See (ICC-02/04-01/05-84-US-Exp-Anx A).

⁷ See (ICC-02/04-01/05-221-AnxA).

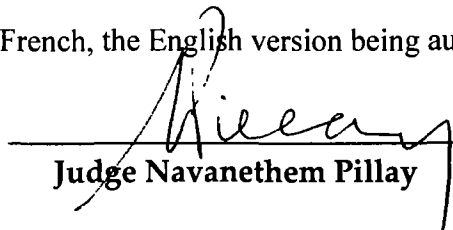
⁸ See (ICC-02/04-01/05-84-US-Exp-Anx A).

and the transcript of the hearing, except for the annex to the application of the Prosecutor.⁹

6. This decision shall also apply to the Directions of the Appeals Chamber of 21 November 2007 to the Prosecutor as well as his response¹⁰ and Annex II¹¹ thereto, excluding Annex I¹².

7. The decision of the Appeals Chamber is rendered unanimously with Judge Pikis attaching a separate opinion.

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



Judge Navanethem Pillay

Dated this 4th day of February 2008

At The Hague, The Netherlands

⁹ See (ICC-02/04-01/05-84-US-Exp-Anx A)

¹⁰ *Prosecutor v. Kony a.o.* "Prosecution's Response to 'Directions of the Appeals Chamber' relating to unsealing of documents" 26 November 2007 (ICC-02/04-01/05-262-US-Exp).

¹¹ ICC-02/04-01/05-262-US-Exp-Anx2.

¹² ICC-02/04-01/05-262-US-Exp-Anx1.

Separate opinion of Judge Georgios M. Pikis

1. On 13 July 2006, the Appeals Chamber dismissed¹ an application of the Prosecutor seeking the suspension of proceedings initiated by him before Pre-Trial Chamber II for leave to appeal² pending determination of his application³ to the Appeals Chamber for the extraordinary review of a decision of Pre-Trial Chamber I of 31 March 2006 denying him leave to appeal. The application of the Prosecutor was filed ex parte and “under seal”. The decision of Pre-Trial Chamber II and proceedings before it were classified by the same Chamber as under seal. The Prosecutor petitioned that the seal should cover the process before the Appeals Chamber too.⁴ The seal was retained both with regard to appeal proceedings and their resolution (decision). In the decision of the Appeals Chamber, the issue of under seal proceedings is not touched upon.

2. A public hearing assuring the openness of the judicial process is envisaged by the Rome Statute (hereinafter “Statute”) at every stage of the proceedings involving adjudication bearing on the confirmation of the charges, the trial of the accused and proceedings on appeal. Transparency of the process is established by a series of provisions of the Rome Statute and the Rules of Procedure and Evidence (hereinafter “the Rules”), in particular by articles 64 (7), 67 (1) of the Statute and rule 121 (1) of the Rules. Article 68 (1) and (2) of the Statute confers power upon the Court to screen proceedings from publicity, if such a measure is judged necessary for the protection of the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁵ The rule enshrined in article 64 (7) of the Statute is subject to an additional caveat permitting non-disclosure of the proceedings for the protection of confidential and

¹ *Prosecutor v. Kony a.o.* “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’” 13 July 2006 (ICC-02/04-01/05-92-US-Exp).

² *Prosecutor v. Kony a.o.* “Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber II’s Decision on Prosecutor’s Application That The Pre-Trial Chamber Disregard As Irrelevant The Submission Filed By The Registry on 5 December 2005” 15 March 2006 (ICC-02/04-01/05-221-AnxA).

³ *Situation in the Democratic Republic of the Congo* “Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 24 April 2006 (ICC-01/04-141).

⁴ *Prosecutor v. Kony a.o.* “Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review” 11 May 2006 (ICC-02/04-01/05-84-US-Exp), para. 1.

⁵ See *inter alia* in this context rules 87 and 88 of the Rules and Procedure and Evidence



sensitive information⁶. A similar proviso is set out in the section introducing subparagraphs a) to i) of article 67 (1) of the Statute. Article 72 of the Statute on the other hand allows in a proper case the non-disclosure of information prejudicial to national security.

3. Corresponding to the duty to hold a public hearing is the duty cast by rule 15 (1) of the Rules on the Registrar to maintain a database of the proceedings, open to the public, “subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data”. In the decision of the Appeals Chamber of 23 February in *Prosecutor v. Lubanga* (OA8), it is underlined that the “[m]ere labelling of a given proceeding as ‘confidential’ without substantiation is not in itself conclusive”⁷. Reasons justifying non-publication must be advanced by the party asking for such a measure, such as to justify the course sought for.

4. Rule 137 (2) of the Rules provides that a Trial Chamber “may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.” Analogous power is acknowledged to the Appeals Chamber by virtue of the provisions of rule 149 of the Rules. Rule 137 (2) of the Rules gives procedural expression to the duty of a Chamber to ensure the openness of the judicial process. The duty arises when the reasons for non-disclosure disappear. The word “may” does no more than reproduce the power of a Chamber to see that the judicial process is opened to the public. “May” in this context does not import discretion but gives expression to the obligation to do what is required by law.⁸ Asking the question whether in the absence of reasons justifying the continued withholding of the publication of proceedings the court has discretion to leave the seal intact, brings to the fore the mandatory nature of the power to make the proceedings public. Not to act would be a derogation from the duty to administer justice openly. The non-disclosure of oral and

⁶ See articles 54 (3) (e) and 93 (8) (a) and (b) of the Statute.

⁷ “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007” 23 February 2007 (ICC-01/04-01/06-838) and reasons given on 9 March 2007 (ICC-01/04-01/06-844), para. 17

⁸ As to the meaning the word “may” may bear, see: “Halsbury’s Laws of England” Volume 44 (1) (4th Edition, Reissue, Butterworths, London 1995), para. 1337; *Greenberg, D.* “Stroud’s Judicial Dictionary of Words and Phrases” Volume 2: F-O (7th Edition, London, Sweet & Maxwell 2006), page 1644.

documentary evidence adduced before a Chamber would hide from view the judicial process in the absence of any reasons that could validate such a course. In those circumstances the departure from the norm of a public hearing can find no justification. The duty to make public what transpires in the course of the judicial process does not abate at the end of the judicial proceedings but subsists thereafter, binding the court to keep track of the scene and remove the ban on publicity whenever and wherever the reasons for non-disclosure eclipse. Regulation 20 (3) of the Regulations of the Court heeds the obligation of a Chamber to see that the mantle of secrecy is kept no longer than necessary. It provides: "A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist."; a provision coincidental with rule 137 (2) of the Rules. The duty to uphold the principle of a public hearing does not lapse with the determination of the under seal proceedings but continues thereafter for as long as the proceedings are sealed off. Ensuring publication of the judicial process is a lasting obligation that binds the court to survey the scene throughout.

5. The Statute confers no power to withhold publication of judgments/decisions of the Appeals Chamber. On the contrary, a positive duty is cast upon the Appeals Chamber by the Statute to deliver its judgments in open court. This is mandated by the provisions of article 83 (4) of the Statute with regard to appeals raised under article 81 (1) and (2) and by rules 158 (2), 153 (2) and 161 (3) of the Rules respecting appeals under articles 81 (3) (c), 82 (1) and (2) and article 82 (4) and proceedings under article 84 of the Statute. They cover the whole spectrum of judgment/decision-rendering of the appellate process.

6. Furthermore, rule 144 of the Rules specifically ordains that decisions of the Trial Chamber on a) the admissibility of the case, b) the jurisdiction of the Court to take cognizance of a case, c) the criminal responsibility of the accused, d) sentence and e) reparations should be pronounced in public. Article 74 (5) of the Statute likewise provides that the decisions of the Trial Chamber on the guilt or innocence of the accused should be pronounced in public whereas article 76 (4) imposes a similar duty with regard to sentencing decisions. The aforesaid articles and rule form part of Part 6 of the Statute



and the rules governing proceedings before the Trial Chamber respectively, made applicable *mutatis mutandis* to appeal proceedings by rule 149 of the Rules.

7. The relevant provisions of the Statute and the Rules imposing a duty upon the Court to make judicial decisions public reflect internationally recognized human rights principles made applicable by article 21 (3) of the Statute binding the Court to follow them in the application as well as the interpretation⁹ of the law applicable under the Statute. Holding proceedings in public is postulated as an attribute of a fair trial.

8. Article 14 (1) of the *International Covenant on Civil and Political Rights*¹⁰ assures the publicity of judicial proceedings subject to exceptions for reasons of morals, public order, national security in a democratic society, in the interests of the private lives of the parties, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. No like constraint is provided for in the case of the judgment/decision of a court save in cases affecting juveniles, matrimonial disputes or guardianship of children.

9. Article 6 (1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹¹ likewise envisions a public hearing as an inseverable element of a fair trial subject to exceptions similar to those for which provision is made in the aforementioned international covenant. But no exception is made insofar as the duty to pronounce judgment publicly is concerned; article 6 (1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* states: "Judgments shall be pronounced publicly [...]". Explanatory of the reasons warranting the publicity of judgments/decisions of a court of law is the following passage from the judgment of the European Court of Human Rights in the *Case of Pretto a.o. v. Italy*: "In the opinion of the Court, the object [...] is to ensure scrutiny of the judiciary by the public with the view to

⁹ See also *Situation in the Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006 (ICC-01/04-168), paras 33 to 40.

¹⁰ General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171.

¹¹ 4 November 1950 as amended by Protocol 11, 213 United Nations Treaty Series 221 et seq., registration no. 2889.



safeguarding the right to a fair trial.”¹² To that one should add the significance of judgments and decisions as a source of law, a fact expressly acknowledged by article 21 (2) of the Statute, wherein it is provided: “The Court may apply principles and rules of law as interpreted in its previous decisions.” Judicial decisions identify the law applicable, determine its meaning, and delineate the range of its application as may be gathered from the object and purposes of the law revelatory of the spirit of a legislative enactment. Making the case law known is a condition of its applicability. Withholding publication of judgments/decisions is tantamount to secreting their existence, making the principles deriving therefrom inaccessible to the public. The requirement to pronounce judgments in public, as the European Court of Human Rights noted in the above case, is satisfied if the judgment of the court is made public, available to everyone.¹³ The manner of making it known to the public is not of the essence; what matters is making it known to the public.

10. As earlier indicated, the sealing of documents produced before the Court and the record of judicial proceedings generally is, by definition, a temporary measure. And it cannot be otherwise with regard to a judgment/decision retained under seal, a reality reflected in the Appeals Chamber’s Directions of 21 November 2007¹⁴ asking the Prosecutor to identify reasons, if any, why the decisions should be kept under seal.

11. In response¹⁵ to the directions of the Appeals Chamber, the Prosecutor informed the Chamber that the seal on the process has to a large extent been lifted by an order of Pre-Trial Chamber II save for the application of the Prosecutor requesting leave to appeal that has been made public in a redacted form after deletion therefrom of reference to

¹² Judgment of 8 December 1983, Application no. 7984/77, para. 27.

¹³ See also in this context *Case of Axen v. Germany*, Judgment of 8 December 1983, Application no. 8273/78, paras 29 to 32; *Case of Sutter v. Switzerland*, Judgment of 22 February 1984, Application no. 8209/78), paras 31 to 34; In *B. and P v The United Kingdom* (Judgment of 24 April 2001, Application nos. 36337/97 and 35974/97, paras 42 to 49) the European Court of Human Rights took the view that the publication of the judgment of a trial court may be withheld in cases involving sensitive issues affecting children, provided this is envisaged by domestic legislation. Nevertheless, the exception can find no application, as noted therein, in respect of judgments of the appeal court that may *inter alia* surface in the English law reports.

¹⁴ *Prosecutor v. Kony a.o.* “Directions of the Appeals Chamber” 21 November 2007 (ICC-02/04-01/05-260-US-Exp).

¹⁵ *Prosecutor v. Kony a.o.* “Prosecution’s Response to ‘Directions of the Appeals Chamber’ relating to unsealing of documents” 26 November 2007 (ICC-02/04-01/05-262-US-Exp).



protective measures and confidential information. This application was annexed¹⁶ to the application of the Prosecutor before the Appeals Chamber in order to shed light on its background. The order¹⁷ to omit or discolour parts of the application was never made the subject of review by the Appeals Chamber nor is it before the Appeals Chamber for consideration in these proceedings.

12. Insofar as the decision¹⁸ of the Appeals Chamber of 13 July 2007 and the decisions antecedent thereto (ICC-02/04-01/05-86-US-Exp and ICC-02/04-01/05-91-US-Exp) are concerned, not only the Prosecutor acknowledges the absence of reasons for withholding their publication but moved the Appeals Chamber by his response that the decisions be made public as well as the relevant documents and the transcript¹⁹ of delivery of the decision.

13. There are no reasons that could justify the withholding of publication of the documents filed before the Appeals Chamber or the transcript except for the annex to the application of the Prosecutor. No reasons are identified that could conceivably justify keeping the decision of 13 July 2006 or the directions establishing the framework of the proceedings under seal. Hence, the decision to make them public.

14. It goes without saying that the Directions of the Appeals Chamber of 21 November 2007 inviting the response of the Prosecutor to the issue specified therein will also be unsealed as well as his response²⁰ and Annex II²¹ thereto except for Annex I²² that

¹⁶ Annex A (ICC-02/04-01/05-84-US-Exp-AnxA) to *Prosecutor v. Kony a.o.* "Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review" 11 May 2006 (ICC-02/04-01/05-84-US-Exp).

¹⁷ *Prosecutor v. Kony a.o.* "Décision relative à la levée des scellés et à la reclassification de certains documents dans les dossiers de la situation et de l'affaire et annexes" 2 February 2007 (ICC-02/04-01/05-135).

¹⁸ *Prosecutor v. Kony a.o.* "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'" 13 July 2006 (ICC-02/04-01/05-92-US-Exp).

¹⁹ Transcript of 13 July 2006 (ICC-02/04-01/05-T-1-Conf-Exp).

²⁰ *Prosecutor v. Kony a.o.* "Prosecution's Response to 'Directions of the Appeals Chamber' relating to unsealing of documents" 26 November 2007 (ICC-02/04-01/05-262-US-Exp).

²¹ ICC-02/04-01/05-262-US-Exp-Anx2.

²² ICC-02/04-01/05-262-US-Exp-Anx1.



contains a document of which a redacted version has been filed by order²³ of Pre-Trial Chamber II.

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



Judge Georghios M. Pikis
(Presiding Judge)

Dated this 4th day of February 2008

At The Hague, The Netherlands

²³ *Prosecutor v Kony a.o.* “Décision relative à la levée des scellés et à la reclassification de certains documents dans les dossiers de la situation et de l’affaire et annexes” 2 February 2007 (ICC-02/04-01/05-135).