

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

No.: ICC-01/04 OA

Original : English

Date: 22 September 2008

**THE APPEALS CHAMBER**

**Before:** Judge Georghios M. Pikis, Presiding  
Judge Philippe Kirsch  
Judge Sang-Hyun Song  
Judge Erkki Kourula  
Judge Daniel David Ntanda Nsereko

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**Public**  
*Ex parte, Prosecutor only*

**Decision on the Unsealing of the Judgment of the Appeals Chamber issued on 13 July  
2006**



**Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

**REGISTRY**

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**Registrar**

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

Recalling the appeal of the Prosecutor of 14 February 2006, entitled “Prosecutor’s Appeal against Pre-Trial Chamber I’s 10 February 2006 ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’” (ICC-01/04-125-US-Exp),

Recalling its judgment of 13 July 2006 in the aforesaid appeal, entitled “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’” (ICC-01/04-169-US-Exp) (hereinafter: the “Judgment of 13 July 2006”) which has not been made public,

*Renders* the following

## DECISION

1. The Judgment of 13 July 2006 entitled “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’” (ICC-01/04-169-US-Exp),
2. the “Directions of the Appeals Chamber” of 15 April 2008 (ICC-01/04-495-US-Exp) and
3. the “Prosecutor’s Response to Directions of the Appeals Chamber regarding Continued Classification of Appeal as Under Seal” of 23 April 2008 (ICC-01/04-496-US-Exp)

are made public.

## REASONS

1. At the request of the Prosecutor the application before Pre-Trial Chamber I for the issuance of a warrant of arrest for Mr Bosco Ntaganda was kept under seal. The application was rejected. The Prosecutor appealed the decision leading to the reversal of the impugned decision and the remission of the case back to Pre-Trial Chamber I “for completion of the review limited to the requirements stipulated in article 58 (1) of the Statute.”



2. Guided by the Judgment of 13 July 2006, Pre-Trial Chamber I addressed anew the application for the issuance of a warrant for the arrest of Mr Bosco Ntaganda and sanctioned it. Proceedings before both the Pre-Trial and the Appeals Chamber were kept under seal by corresponding decisions of the two Chambers.

3. On 15 April 2008 the Appeals Chamber directed the Prosecutor to provide reasons if any: “[w]arranting the continued classification of the aforesaid document (ICC-01/04-125-US-Exp) ‘under seal’, and [...] Why the aforesaid Judgment and Decisions of the Appeals Chamber should not be publicised”<sup>1</sup>. In so directing the Appeals Chamber had regard to rule 137 (2) of the Rules which reads:

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.

4. In accordance with the “Decision of the Appeals Chamber on the Unsealing of Documents” of 4 February 2008<sup>2</sup>, rule 137 (2) of the Rules applies equally to appeal proceedings by virtue of rule 149 of the Rules.<sup>3</sup> Regulation 20 (3) of the Regulations of the Court is to the same effect as rule 137 (2) of the Rules.<sup>4</sup>

5. In the aforesaid Directions, the Appeals Chamber acting on its own motion, invoking regulation 28 (1) of the Regulations of the Court in this regard, sought the views of the Prosecutor, the only party to the proceedings under seal, as to the existence of reasons, if any, justifying the sustenance of the seal over the proceedings. Regulation 23 *bis* (3) of the Regulations of the Court<sup>5</sup> gives procedural effect to the above decision, formalising the exercise of the power by a Chamber to act on its own motion with regard to the unsealing of a document in the proceedings.

6. One other decision of the Appeals Chamber that illuminates the ground relevant to the attachment of a seal over judicial proceedings is that of 9 March 2007<sup>6</sup>. In that case it was underlined that the mere classification of a document as confidential or under seal by the filing party does not bind the Chamber to treat it as such. As stated in paragraph 17, the

<sup>1</sup> *Situation in the Democratic Republic of the Congo* “Directions of the Appeals Chamber” (ICC-01/04-495-US-Exp) (hereinafter: “Directions of 15 April 2008”).

<sup>2</sup> *Prosecutor v Kony et al* “Decision of the Appeals Chamber on the Unsealing of Documents” 4 February 2008 (ICC-02/04-01/05-266) (Judge Pikis appended a separate opinion).

<sup>3</sup> *Ibid* at paragraph 4.

<sup>4</sup> Regulation 20 (3) of the Regulations of the Court reads: “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.”

<sup>5</sup> Regulation 23 *bis* of the Regulations of the Court was adopted on 14 November 2007 and entered into force on 18 December 2007.

<sup>6</sup> *Prosecutor v Lubanga* “Reasons for ‘Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la designation d’un nouveau Conseil de la Défense’ filed on 20 February 2007’ issued on 23 February 2007” 9 March 2007 (ICC-01/04-01/06-844).

“[m]ere labeling of a given proceedings as confidential without substantiation is not in itself conclusive”.

7. In response to the Directions of the Appeals Chamber of 15 April 2008, the Prosecutor informed<sup>7</sup> the Appeals Chamber that on 29 February 2008 he applied to the Pre-Trial Chamber to lift the seal over the warrant for the arrest of Mr Bosco Ntaganda. The application was originally confined to the unsealing of the warrant of arrest itself; subsequently extended to the decision of the Pre-Trial Chamber.<sup>8</sup>

8. The application of the Prosecutor for the unsealing of the warrant of arrest was upheld on 28 April 2008<sup>9</sup> and in relation to the impugned decision on 17 July 2008<sup>10</sup>, subject to the redaction of the names of certain witnesses to which reference was made in the decision of the court. Evidently, the reason for imposing a seal on the proceedings and maintaining it thereafter was to shield from public knowledge the application for the issuance of the warrant of arrest. Holding back publication was regarded as essential for its execution. The Prosecutor, the person who sought the seal on the proceedings, not only consents to the unsealing of the warrant of arrest but at his request the seal was removed from both the warrant of arrest and the decision of the Pre-Trial Chamber. Any reasons for keeping under seal the Judgment of the Appeals Chamber of 13 July 2006 have vanished. In the decision of the Appeals Chamber no reference is made to persons named as witnesses and for that reason no need arises for the redaction of any part of it.

9. No reason exists for withholding publication of the Judgment of the Appeals Chamber, consequential for the definition of the parameters of its jurisdiction and the admissibility of a case before the International Criminal Court. Therefore, the Appeals Chamber directs the unsealing of the Judgment of 13 July 2006, the Directions of 15 April 2008 and the Prosecutor’s Response of 23 April 2008.

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

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<sup>7</sup> *Situation in the Democratic Republic of the Congo* “Prosecution’s Response to Directions of the Appeals Chamber regarding Continued Classification of Appeal as Under Seal” 23 April 2008 (ICC-01/04-496-US-Exp), paragraph 9.

<sup>8</sup> *Ibid* paragraph 14.

<sup>9</sup> *Prosecutor v. Ntaganda* “Decision to unseal the warrant of arrest against Bosco Ntaganda” (ICC-01/04-02/06-18)

<sup>10</sup> *Situation in the Democratic Republic of the Congo* “Decision unsealing and reclassifying Pre-Trial Chamber I’s Decision of 10 February 2006” (ICC-01/04-520).



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**Judge Georghios M. Pikis**  
**Presiding Judge**

Dated this 22<sup>nd</sup> day of September 2008

At The Hague, The Netherlands