

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 26 November 2007

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Under Seal, Ex parte

**Prosecution's Response to 'Directions of the Appeals Chamber'
relating to unsealing of documents**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Fabricio Guariglia, Senior Appeals Counsel

Mr Eric MacDonald, Trial Lawyer

Introduction

1. The Prosecution submits that the documents identified by the Appeals Chamber can be made public, subject only to the redactions which have already been authorized by the Single Judge in Pre-Trial Chamber II¹ to the Application for Leave to Appeal, which was the object of these proceedings and which was annexed to the initiating application.

Request that This Submission be Filed Under Seal and *Ex parte*

2. The Office of the Prosecutor respectfully requests that this filing be received under seal and on an *ex parte* basis because it refers to filings and proceedings before the Appeals Chamber which are, for the time being, classified as “under seal, *ex parte*.”

Background

3. On 15 March 2006, the Office of the Prosecutor sought from Pre-Trial Chamber II leave to appeal² a decision rendered on 10 March 2006 and entitled “Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission filed by the Registry on 5 December 2005”.³ Both the Application for Leave to Appeal and the Impugned Decision were, at the time, classified as “under seal, *ex parte* Prosecution only.”

¹ Hereinafter “the Single Judge”.

² ICC-02/04-01/05-79-US-Exp (hereinafter “Application for Leave to Appeal”).

³ ICC-02/04-01/05-77-US-Exp (hereinafter “Impugned Decision”). The Impugned Decision was dated 9 March 2006 but registered on 10 March 2006.

4. On 2 May 2006, in response to an order of the Pre-Trial Chamber,⁴ the Prosecution filed a request to unseal, *inter alia*, the documents relating to these proceedings and the relevant transcript, in some cases with limited redactions.⁵
5. On 11 May 2006, the Prosecution filed parallel applications for suspension or stay of consideration of the Application for Leave to Appeal before the Pre-Trial Chamber,⁶ and for suspensive effect before the Appeals Chamber,⁷ in light of the fact that the Prosecution's Application for Extraordinary Review was pending before the Appeals Chamber. Annexed to the Application for Suspensive Effect was a copy of the Prosecution's Application for Leave to Appeal. In the Application for Suspensive Effect, the Prosecution noted that it had "requested that the filing in the Pre-Trial Chamber be re-classified and made public with minor redactions, and that request is under consideration."⁸
6. On 10 July 2006, the Pre Trial Chamber denied the Prosecution's Application for Leave to Appeal and application to suspend or stay consideration.⁹ On 13 July 2006, the Appeals Chamber denied the Application for Suspensive Effect.¹⁰
7. On 21 July 2006, the Prosecution filed a further request before the Pre-Trial Chamber to unseal the Impugned Decision, Application for Leave to Appeal, and other related material.¹¹

⁴ ICC-02/04-01/05-82.

⁵ ICC-02/04-01/05-83 and under seal annexes.

⁶ ICC-02/04-01/05-85-US-Exp.

⁷ ICC-02/04-01/05-84-US-Exp (hereinafter "Application for Suspensive Effect").

⁸ Application for Suspensive Effect, footnote 1.

⁹ ICC-02/04-01/05-90-US-Exp.

¹⁰ ICC-02/04-01/05-92-US-Exp.

¹¹ ICC-02/04-01/05-93-US-Exp.

8. On 2 February 2007, the Single Judge ordered the unsealing of the Decision Denying Leave to Appeal and of a redacted version of the Impugned Decision, and ordered the Prosecution to file in the record of the case a redacted version of the Application for Leave to Appeal.¹²
9. On 13 March 2007, the Prosecution filed as public a series of redacted versions of under seal documents, including a redacted version of the Application for Leave to Appeal.¹³
10. In response to a further order from the Single Judge on 12 July 2007,¹⁴ on 2 August 2007 the Prosecution provided additional views on the further unsealing of documents in the case.¹⁵

Request to Unseal

11. In the Prosecution's most recent filing relating to unsealing of documents before the Single Judge, the Prosecution noted that some under seal documents in the case which it considered could be unsealed related to proceedings before the Appeals Chamber; that the Appeals Chamber might be the competent Chamber to vary the classification of those documents; and that the Prosecution had "no objection to the unsealing of any of the documents related to that appeal", subject to the minor qualifications set out.¹⁶ The Prosecution recognizes that it has not yet made a parallel request for the unsealing of those documents before the Appeals Chamber.

¹² ICC-02/04-01/05-135, pp. 10 (s), 12 (n) and 13 (f).

¹³ ICC-02/04-01/05-221; see Annex 1, pp. 236-258.

¹⁴ ICC-02/04-01/05-249.

¹⁵ ICC-02/04-01/05-250.

¹⁶ *Ibid*, para. 3

12. The filings referred to in the Appeals Chamber's order were made under seal because they related to proceedings before the Pre-Trial Chamber which were under seal at the time, but which have now been classified as public, in some cases with certain redactions.¹⁷ There was nothing inherent to the substance of the filings before the Appeals Chamber themselves which required that they be maintained under seal. Therefore with the sole exception of the annex to the Prosecution's Application for Suspensive Effect, the Prosecution submits that there is no reason to maintain the classification of the documents and transcript listed in the Appeals Chamber's order as "under seal", and does not object to the Appeals Chamber reclassifying those documents as public.
13. In relation to the Application for Leave to Appeal before the Pre-Trial Chamber, which was annexed to the Prosecution's Application for Suspensive Effect, the Prosecution submits that this may be reclassified as public subject to the same redactions as were made to the original Application for Leave to Appeal under the authority of Pre-Trial Chamber II.¹⁸ The Prosecution hereby annexes a copy of the redactions proposed to and authorized by the Single Judge (Annex I), and a copy of the redacted version as publicly filed (Annex II).
14. The Prosecution submits that, given that the annex in question is a copy of a document filed before another Chamber of this Court and that the competent Chamber has now ruled on the reclassification and form of that document, then the underlying rationale of Regulation 42(3) and the

¹⁷ ICC-02/04-01/05-135.

¹⁸ The redactions requested by the Prosecution and authorised by the Single Judge were to paragraph 24 and footnote 5 of the Application for Leave to Appeal, and contained one reference to the identity of the source of the letter which was the subject of the proceedings, and one reference to the nature of information which was protected under Article 54(3)(e).

interests of maintaining consistency in the public judicial database of the Court support the making of the same redactions to an unsealed version of ICC-02/04-01/05-84-US-Exp-Anx1.

Conclusion

15. For the foregoing reasons, the Office of the Prosecutor respectfully requests the Appeals Chamber to reclassify and make public documents ICC-02/04-01/05-84-US-Exp (excluding the annex), ICC-02/04-01/05-86-US-Exp, ICC-02/04-01/05-91-US-Exp and ICC-02/04-01/05-92-US-Exp, along with the transcript ICC-02/04-01/05-T-1-Conf-Exp; and to unseal and make public a redacted version of ICC-02/04-01/05-84-US-Exp-Anx1 subject to the same redactions as were authorized by the Single Judge of Pre-Trial Chamber II.



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of November 2007
At The Hague, The Netherlands