Cour
Pénale
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International
Criminal
Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **1 May 2006**

THE APPEALS CHAMBER

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

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Prosecution Response to Thomas Lubanga Dyilo's Brief in Support of the Appeal

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
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Counsel for the Defence
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Procedural history

1. On 17 March 2006, Thomas Lubanga Dyilo ("the Appellant") was surrendered and transferred to the Court pursuant to a "Warrant of Arrest"[1] and a "Request for Arrest Addressed to the Authorities of the Democratic Republic of the Congo"[2] issued by Pre-Trial Chamber I. Thomas Lubanga Dyilo made his first appearance before the Court, pursuant to Article 60 (1), on 20 March 2006.[3]

2. On 20 March 2006, counsel for the Appellant indicated that he wished to appeal against the admissibility of the case and the jurisdiction of the Court, filing before Pre-Trial Chamber I an "Application by Duty Counsel for Extension of the Time-Limit to Appeal and for Disclosure of the Office of the Prosecutor's Case File" in which he requested an extension by 30 days of the time-limit to appeal, and further requested "that the Court ... provide the accused and his counsel with access to the Prosecutor's entire case file against the accused".[4]

3. On 22 March 2006, the Pre-Trial Chamber ruled that it was not competent to entertain the application for extension of time, as appeals against jurisdiction and admissibility are made directly to the Appeals Chamber.[5] The Pre-Trial Chamber further outlined its prior decisions on the content of the record of the case and the situation available to the Appellant, and sought the Prosecution's observations on the request by the Appellant for further access.[6]

4. The Prosecution responded on 24 March 2006, submitting that the "Statute and the Rules of Procedure and Evidence do not provide for a person subject to a warrant of arrest ... to have access to the Prosecution's *entire* case-file",[7] and that the Appellant

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[1] "Decision on the Prosecutor's Application for a warrant of arrest, article 58", ICC-01/04-01/06-8-US-Corr Annex I, 10 February 2006 (hereinafter the "Decision", issuing "Warrant of Arrest", ICC-01/04-01/06-2-tEN).
[2] ICC-01/04-01/06-9-US, 27 February 2006.
[3] See "Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-38, 17 March 2006.
[4] ICC-01/04-01/06-45-tEN, 20 March 2006, at p. 3. Counsel went on to specify a series of documents that he requested access to "in particular".
[5] "Decision on the Application by the Duty Counsel for the Defence dated 20 March 2006", ICC-01/04-01/06-50, 22 March 2006, at pp. 4-5 (hereinafter, the "22 March 2006 Decision").
[6] *Ibid*, at pp. 2-3, 5.
[7] "Prosecution's Response to Requête du conseil de permanence de prorogation du délai d'appel et de

already had access to all relevant information, which was "formatted and/or redacted ... by the Pre-Trial Chamber and the Prosecution" pursuant to the Statute.[8]

5. On 24 March 2006, the Appellant filed an appeal pursuant to Rule 154, asking that the Appeals Chamber declare that the case is inadmissible and the warrant of arrest was improperly issued against Thomas Lubanga Dyilo.[9]

6. On 10 April 2006, the Appellant filed his "Brief filed under regulation 64 in support of the appeal of 27 March 2006".[10] The Prosecution now files its response to the Appellant's Brief, pursuant to Regulation 64 (4).

Preliminary considerations

7. The Prosecution firstly submits that it is questionable whether this appeal should have been brought at all before the Appeals Chamber at this stage. In particular, the Prosecution notes that the Appellant was not faced with a choice between lodging this appeal or foregoing his right to raise matters related to admissibility or jurisdiction. On the contrary, as the determinations of jurisdiction and admissibility reached by the Pre-Trial Chamber in its Decision were necessarily provisional in nature and made solely to establish the legal basis for issuing an arrest warrant under Article 58, the Appellant was entitled to challenge both jurisdiction and admissibility under Article 19 in due course. The Prosecution made this position clear to the Appellant in its response to his first application for an extension of time.[11]

8. The Prosecution further notes that under the Appellant's account of events, he was apparently *notified* of the Decision on 19 March 2006.[12] This may have misled the Appellant into believing that his only available opportunity to raise issues pertaining to

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communication du dossier du Bureau du Procureur", ICC-01/04-01/06-55, 24 March 2006, at para. 4 (hereinafter, the "Prosecution's Response").

[8] *Ibid*, at paras. 5-6.

[9] "Appeal by Duty Counsel for the Defence against Pre-Trial Chamber I's Decision of 10 February 2006 on the Prosecutor's Application for a Warrant of Arrest, Article 58", ICC-01/04-01/06-57-Corr-tEN, 24 March 2006 (hereinafter the "24 March 2006 Appeal").

[10] ICC-01/04-01/06-75-tEN (hereinafter the "Appellant's Brief"). The Appeal was originally filed on 24 March 2006. The Brief refers to a corrected version filed on 27 March 2006, but also dated 24 March 2006.

[11] Prosecution's Response, at footnote 6. Indeed, the Appellant referred to the procedural vehicle of Article 19 in his 24 March 2006 Appeal, at p. 2.

[12] Appellant's Brief, at p. 2.

admissibility and/or jurisdiction was to file an appeal within the time-limit prescribed by Rule 154, which was arguably triggered by the notification.[13] The Pre-Trial Chamber, however, had only ordered Registry to notify by way of personal service to the accused *the warrant of arrest* and the relevant legal provisions from the Court's basic documents, a decision consistent with Rule 117 and Regulation 31 (3).[14]

9. The Prosecution submits that as a general principle a distinction must be drawn between *notification*, within the terms of Regulation 31, and *access to the record* by counsel. The former denotes the operation of transmission of judicial decisions or filings to all those who are participating in the relevant situation or case *at the time of the filing of the document or of the issuance of the decision*; the latter refers to a different operation, namely access by someone who has just become a participant, within the meaning of the Regulations of the Court, to the record of the proceedings conducted *prior* to him or her becoming one (and therefore acquiring access rights).

10. Only the process of notification, as described above, triggers the relevant time-limits prescribed by the Rules of Procedure and Evidence and the Regulations of the Court to file responses, appeals, replies or applications. This is apparent, since only those who are participating in the situation or case at the time of the relevant filing or decision enjoy procedural rights before the Court and are therefore entitled to react to such filing or decision by filing their own document, as defined by Regulation 22. Conversely, a person that becomes a participant at a later stage does not acquire, by virtue of his or her subsequent access to the record, a right to retroactively participate in procedures that are already closed: for instance, a participant who, while examining the record, becomes aware of the existence of a decision entered 12 months prior to his or her accessing the record and which he or she deems prejudicial to his or her interests, may not seek appellate review of that decision.[15] To conclude otherwise would turn the Court's criminal process into a highly unstable set of procedural steps which, instead of moving forward in a sequential manner, may be revisited or "turned back" at any point in time by the simple inclusion of a new participant.

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[13] Rule 154(1) provides that an appeal may be filed, *inter alia*, pursuant to Article 82(1)(a) "not later than five days from the date upon which the party filing the appeal is notified of the decision."

[14] "Demande d'arrestation et de remise de M. Thomas Lubanga Dyilo adressée à la République Démocratique du Congo", ICC-01/04-01/06-9-US, 24 February 2006, at p. 5.

[15] This does not mean that such participant may no seek a different remedy, in the form of an application or motion, in order to have the matter revisited by the relevant Chamber, where appropriate.

The request for an extension of time

11. At paragraph 2.2 of his Brief, the Appellant submits that having "not received the disclosure materials to which he is entitled, [he] is unable to provide grounds for [his] appeal", since he allegedly "does not have the materials on which Pre-Trial Chamber I based its decision."[16] This assertion is inaccurate. As the Appellant himself explains, he has had access to a number of documents, listed in the in the annex to the Appellant's Brief.[17] These documents include all of the documents relevant to the Appellant's case that were provided to the Pre-Trial Chamber for the purposes of supporting the Prosecution's application for warrants of arrest under Article 58, i.e. the very "materials on which Pre-Trial Chamber I based its decision", to use the Appellant's own words. In those instances where the documents have been formatted and/or redacted, this has been done by the Pre-Trial Chamber and the Prosecution under the Statute and the Rules of Procedure and Evidence, in particular for the purposes of protection of victims and witnesses pursuant to Articles 57 (3) (c) and 68 (1) of the Rome Statute. However, these redactions and/or formatting of the documents have been performed only to the extent necessary to prevent access to identifying features of protected victims and witnesses or to information related to further investigative efforts not covering the present case; the substance of the information contained in the documents is not affected by them.[18] All these explanations have been already provided to the Appellant.[19]

12. Thus, the Appellant had in his possession at the time of the filing of his Brief all the material necessary for the purposes of bringing an appeal against the Pre-Trial Chamber's Decision, and should have fully developed his arguments in the document in support of the appeal, as required by the law of this Court. Further, the Prosecution notes that an appeal is a *corrective* process: the burden on the Appellant is to demonstrate an error made by the Chamber, considering the relevant legal principles

[16] Appellant's Brief, at p. 4.
[17] *Ibid.*
[18] The Appellant obviously has not had access to other confidential materials in the situation record which do not form part of the Appellant's case. See further "Prosecution's Observations on Disclosure", ICC-01/04-01/06-67-AnxA, 6 April 2006, at para. 10; "Prosecution's Response to, *inter alia*, the Request of the Defence for Unrestricted Access to the Entire Record of the Situation in the Democratic Republic of the Congo", ICC-01/04-01/06-86, 26 April 2006, at para. 10-11.
[19] See Prosecution's Response, in particular paras. 5 and 6. See also the Decision, at p. 4.

and the materials at the Chamber's disposal at the time of the decision. Materials in possession of a participant that were not filed before the Chamber, and consequently were not considered in the Chamber's decision-making process, are accordingly not relevant at this stage.[20]

13. The Prosecution therefore submits that the Appellant has failed to establish "good cause" for an extension of time, within the meaning of Regulation 35, and consequently his request should be rejected. The Appellant has access to all of the documents required to file a document in support of appeal. The further access that the Appellant seeks, to the entire situation file and to unredacted versions of every document submitted to the Pre-Trial Chamber, is not material to the present proceeding and as such does not constitute good cause.[21] Where an appellant has access to the information required to file his appeal, "it is not in the interests of justice to delay the filing of the Appellant's Briefs merely because of the possibility that such additional arguments or grounds of appeal may be discovered in that [potential further] material."[22]

The reservations on disclosure

14. In his Brief, the Appellant also raises certain "reservations" about disclosure.[23] These reservations are expressed in general terms, referring to the obligation on the Prosecutor to "disclose his or her evidence" under Rules 76 and 77, and to Article 61 (3) (b). The Appellant asserts that "in order to verify the legality of his arrest and the

[20] If the Appellant wishes to argue on the basis of other material that the case is inadmissible, rather than arguing that the Chamber erred in its determination based on the information before it, then the proper procedural vehicle is a challenge to admissibility under Article 19 rather than an appeal – see para 7 above.

[21] The Prosecution does not dispute that a delay in receiving materials which are material or essential to the preparation of an appeal may justify an extension of time in some circumstances – see e.g. *Prosecutor v Kvocka et al.*, IT-98-30/1-A, Decision on Request for Extension of Time to Appeal, 19 September 2002. Further, the Appeals Chamber should be particularly cautious about granting the extension requested in this case given its open-ended nature – see, *a contrario*, *Bagosora et al. v The Prosecutor*, ICTR-98-41-AR72(C), Decision on Motion for Extension of Time to File an Appeal, 19 September 2003, referring to both "materials essential to the preparation of the appeal" and "the short duration of the extension requested".

[22] *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, at para. 22. If in due course the Appellant is able to demonstrate that access to the information sought is required for a legitimate forensic purpose, and having considered such additional material considers that there are additional arguments or grounds of appeal, then he may apply to add them – *ibid*, at paras. 21-22. See also *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Decision on Second Motions to Extend Time for Filing Appellant's Briefs, 2 July 2001, at paras. 12-14.

[23] Appellant's Brief, at pp. 3-4.The Prosecution notes that the 24 March 2006 Appeal makes no reference to disclosure or access to the record.

admissibility of the case [he] must have this material at his disposal from the moment of his arrest".[24]

15. Issues relating to the regime for disclosure are presently before the Pre-Trial Chamber. The Pre-Trial Chamber has established an interim system of disclosure,[25] and the Prosecution and the Appellant have both provided observations on this system.[26] The Pre-Trial Chamber has given the parties until 2 May 2006 to submit their final observations on the system of disclosure. The matters raised by the Appellant, and in particular the scope of his entitlement to material either in the situation record or in the Prosecution's possession or control, are thus squarely before the Pre-Trial Chamber.

16. While these issues are pending before the Pre-Trial Chamber, the Prosecution has taken a liberal interpretation of the disclosure to which the Appellant is entitled at this stage of proceedings. The Prosecution, despite its clear reservations about the interim system of disclosure imposed by the Pre-Trial Chamber,[27] has already disclosed material to the Appellant under both Articles 61 (3) (b) and 67 (2), and this disclosure is ongoing.[28] However the Prosecution has not been in a position to provide inspection pursuant to Rule 77, as it fundamentally objects to an obligation on parties

[24] Appellant's Brief, section 2.1. The precise scope of "this material" is not entirely clear. It may refer to all of the Prosecutor's evidence (as implied by section 2.1); or to the subsequent assertion that "the defence has not received the disclosure materials to which it is entitled ... it does not have the material on which Pre-Trial Chamber I based its decision." (section 2.2); or to "full and unredacted disclosure of both the record of the proceedings and the Prosecutor's record in the present case." (section 2.2)

[25] See "Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure", ICC-01/04-01/06-54, 24 March 2006; and "Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure", ICC-01/04-01/06-58, 27 March 2006.

[26] "Filing of Incriminating Evidence and Potentially Exculpatory Evidence", ICC-01/04-01/06-64, 5 April 2006; "Prosecution's Observations on Disclosure", ICC-01/04-01/06-67-AnxA, 6 April 2006; "Observations de la défense concernant le système de divulgation, requis par les décisions du 23 et 27 mars 2006", ICC-01/04-01/06-68, 6 April 2006. The Prosecution and the Appellant provided further observations at a hearing pursuant to the "Decision Convening a Hearing on the System of Disclosure for the Purposes of the Confirmation Hearing", ICC-01/04-01/06-74, 10 April 2006.

[27] In particular, the Prosecution has strong reservations about the interim system of disclosure purporting to require disclosure through the Registry, rather than directly to the defence. The Prosecution believes that disclosure under the Statute is to take place directly between the parties. The Prosecution has therefore been disclosing material directly to the Appellant, but has also communicated the material to the Pre-Trial Chamber shortly thereafter (while reserving its right to take a different approach in future cases – see "Prosecution's Observations on Disclosure", ICC-01/04-01/06-67-AnxA, 6 April 2006, at para. 8 and footnote 14).

[28] To date, the Prosecution has disclosed two packages of potentially exculpatory materials and one package of material pursuant to Article 61(3)(b), totalling 30 items. The Prosecution envisage further disclosure, including further Article 61(3)(b) materials in near future, and ongoing disclosure of potentially exculpatory materials at intervals of approximately two weeks.

to file with the Registrar material which is subject to inspection, as required by the interim system of disclosure.[29]

17. Crucially, and as explained above, the Appellant already has access to all of the documents and material that he requires for the purpose of the present appeal, namely all of the material put before the Pre-Trial Chamber by the Prosecution for the purposes of issuing the warrant of arrest, albeit in a formatted or redacted form.[30] The Prosecution submits that the Appellant's insistence on obtaining unredacted versions of these documents is unjustified.[31] As explained above, the redactions have been made by the Prosecution and by the Pre-Trial Chamber pursuant to the Statute and the Rules, and in order to protect legitimate interests such as the protection of victims and witnesses.[32]

The admissibility issues raised by the Appellant

18. The Appellant claims that the Pre-Trial Chamber erred in its Decision as to the admissibility of the case against Thomas Lubanga Dyilo. In particular, the Appellant appears to consider that one of the pillars of the Chamber's finding of admissibility – the different bases for the ICC and DRC arrests proceedings – was flawed, as no arrest warrant was ever served on his client by the DRC authorities, a fact that in addition casts doubts as to the legality of his arrest. On this basis alone, the Appellant seeks a reversal of the Pre-Trial Chamber's findings on admissibility.

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[29] The Prosecution has made this position clear to both the Appellant and to the Pre-Trial Chamber (see "Filing of Incriminating Evidence and Potentially Exculpatory Evidence", ICC-01/04-01/06-64, 5 April 2006, at para. 6; "Prosecution's Observations on Disclosure", ICC-01/04-01/06-67-AnxA, 6 April 2006, at para. 9). The Prosecution has, however, provided to the Appellant a first list of documents falling within the parameters of Rule 77 (see "Filing of Incriminating Evidence and Potentially Exculpatory Evidence", ICC-01/04-01/06-64, 5 April 2006, at para. 6), in order to facilitate inspection once this matter is resolved.

[30] See "Decision on the Application by the Duty Counsel for the Defence dated 20 March 2006", ICC-01/04-01/06-50, 22 March 2006, at pp. 2-3 stating that "the following documents ... are currently accessible to duty counsel for the defence ... a formatted and/or redacted version of the filings of the Prosecution during the application process for a warrant of arrest against Mr Thomas Lubanga Dyilo".

[31] The Prosecution has firmly maintained this position from the beginning – see Prosecution's Response, at paras. 5-6.

[32] The redacted versions of the documents and material to which the Appellant has access are in a coherent and comprehensible form, and contain all of the relevant information to which the Appellant is entitled. i.e. not necessarily names, places and dates. On the ongoing necessity of restrictions on disclosure and redaction of statements, see "Prosecution's Observations on Disclosure", ICC-01/04-01/06-67-AnxA, 6 April 2006, at para. 10.

19. The Prosecution in particular submits that the Appellant has misconstrued (a) the nature of the decision taken by the Pre-Trial Chamber, and (b) the distinction between domestic and ICC custodial proceedings.

(a) Nature of the decision taken by the Pre-Trial Chamber

20. The Appellant cites a finding made by the Chamber related to the admissibility of the case against Thomas Lubanga Dyilo, concluding that the Prosecution's general statement pertaining to the DRC's authorities inability in the sense of Article 17 of the Statute did not "wholly correspond to the reality any longer".[33] The Prosecution, in its Application, submitted that the case against Thomas Lubanga Dyilo would be admissible because of the absence of any State taking action in relation to the crime alleged. In support, the Prosecution offered the letter of referral from the DRC authorities which, as the Chamber concurred, indicated that the DRC was "unable to undertake the investigation and prosecution of crimes falling within the jurisdiction of the Court".[34] The Chamber went on to note, nonetheless, that recent changes in the DRC national judicial system suggested that a blanket statement on the inability of the DRC judicial system may no longer be warranted. In particular, it noted the existence of several domestically issued arrests against persons in the DRC for crimes that could possibly fall within the jurisdiction of the Court.[35] However, as the Chamber further held, the mere existence of domestic activity would be insufficient to avert admissibility: for a case to be found inadmissible "national proceedings must encompass both the person and the conduct which is the subject of the case before the Court".[36]

21. The finding cited by the Appellant thus had a very confined scope: the Chamber did not decide on matters such as the existence of a domestic arrest warrant, or the contents of such warrant, as the Appellant appears to imply.[37] Rather, in accordance with the requirements of an admissibility assessment, the Chamber was confirming the non-existence of *any* domestic proceedings against the person in question for the

[33] Appellant's Brief, citing Decision at para. 36.
[34] Decision, at para. 35.
[35] Decision, at para. 36.
[36] Decision, at para. 37.
[37] Appellant's Brief, at p. 5.

crimes alleged by the Prosecution, a finding firmly supported by the information provided to the Pre-Trial Chamber[38] and that the Appellant himself does not appear to dispute. The Prosecution emphasizes that, as shown, no domestic proceedings initiated against the Appellant cover the recruitment, conscription and use of child soldiers, i.e. the substance of the present case. Those domestic proceedings, therefore, cannot, under any circumstances, render the case against the Appellant inadmissible.

(b) Distinction between domestic and ICC custodial proceedings

22. The Appellant appears to suggest that alleged irregularities in detention of his client prior to his transfer to the ICC can be heard before the Court. The Prosecution firstly submits that the Appellant is neither bringing any evidence pertaining to this alleged illegality, nor providing any specific details as to its form or scope. Rather, the Appellant appears to be arguing, with no clearly identifiable basis, that there is a "possibility" that his arrest by the DRC authorities – prior to any ICC intervention – was illegal, presumably under DRC law.[39] The Prosecution respectfully submits that the Appeals Chamber should not be asked to decide on "possibilities" or speculative arguments of any kind. Moreover, the Prosecution stresses that any participant bringing an appeal before this Chamber has a burden to clearly spell out the legal and factual basis for the grounds of appeal he or she is raising, as well as to indicate the relevant sources of information substantiating the factual allegations contained therein, as required by Regulation 64 (2).

23. In addition, the Prosecution notes that (a) an alleged illegality tainting arrest procedures would arguably be relevant vis-à-vis the exercise of jurisdiction over the relevant person by the Court, and not admissibility; and (b) as the pertinent case law illustrates, the prior detention of an accused person may be attributable to an international tribunal, and thus subject to a challenge before it, only if it can be shown that the person had been held in the custody of the tribunal – i.e. at its request or

[38] The Prosecution made it clear during the 2 February 2006 hearing that the charges contained in the domestic DRC warrants of arrest were distinct from the charges against the Appellant in this case ("Redacted Version of the Transcripts of the Hearing Held on 2 February 2006 and Certain Materials Presented During that Hearing", ICC-01/04-01/06-48, 22 March 2006 at pp. 9-10; pp. 5-6 of transcript). The Prosecution further confirmed that to the best of its knowledge no other country was investigating the Appellant for the crimes in this case (*ibid*, at p. 13; p. 9 of transcript).

[39] Appellant's Brief, at p. 5.

direction.[40] Moreover, on assessing relevant remedies, the fact of an irregularity in the surrender process would not of itself be sufficient to exclude jurisdiction, but would need to be balanced against a series of relevant factors.[41]

24. In the present case, neither the Prosecution nor the Pre-Trial Chamber was at any stage involved in domestic proceedings relating to the arrest and detention of Thomas Lubanga Dyilo prior to the issuance of the arrest warrant by the Chamber and the transmission to the DRC authorities by the Registrar of the Court of the request for the arrest and surrender of the Appellant. The basis and/or legality of his arrest and detention in the DRC prior to this date, therefore, are not matters that can be properly heard before this Court.

25. The Prosecution further notes that the Appellant has at his disposal, as part of the record accessible to him, a detailed and documented account of the arrest and surrender procedures followed pursuant to the arrest warrant by the Pre-Trial Chamber and the request for arrest and surrender transmitted to the DRC authorities.[42] That record provides no support whatsoever for any allegation of unlawfulness pertaining to the specific procedure of arrest and surrender to the Court of the Appellant, and none has been raised by the Appellant.

Conclusion

26. The Prosecution respectfully submits that, for the reasons explained above, the appeal brought by the Appellant under Article 82 (1) (a) must necessarily fail. As noted at the beginning of this response, the Prosecution is of the view that this appeal was a premature step, and that instead of rushing to file a document containing vague and unsubstantiated allegations before the Appeals Chamber, the Appellant should have examined the Decision and the record and decided whether to make a challenge to the admissibility of the case under Article 19, as he was entitled to.

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[40] See *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999.
[41] *Prosecutor v Nikolic*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002; and *Prosecutor v Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning the Legality of Arrest, 5 June 2003.
[42] These documents do not form part of the public record, and accordingly cannot be described in a public filing.

27. In this sense, the Appeals Chamber may wish to consider re-directing the Appellant to the Pre-Trial Chamber and to the available remedies which the Appellant may resort to if he considers, having looked at the Decision and the related materials available to the Appellant, that the case against him is inadmissible. Whereas the Prosecution's position ordinarily would be that by choosing to bring an appeal under Article 82 (1) (a) an accused person is making use of his or her opportunity to challenge admissibility, as prescribed by Article 19 (4), and that any subsequent attempt to do so would require special leave and a showing of exceptional circumstances,[43] the Prosecution submits that in the particular circumstances of this case the fairest position is the one described at the beginning of this paragraph. The Court is a novel institution, its procedures are being used for the first time in this case and a number of provisions in its basic documents require further clarification by means of judicial interpretation. In this particular context, the Appellant should not be deprived of an opportunity to fully and meaningfully litigate the admissibility of the case against him, if he considers that such litigation is warranted, merely because he initially chose the wrong avenue.[44]

28. The Prosecution accordingly requests the Appeals Chamber to:

(a) Reject the Appellant's request for an extension of time; and

(b) Reject the Appellant's alternative request to overturn the Pre-Trial Chamber's Decision and to declare the case against Thomas Lubanga Dyilo inadmissible.

Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of May 2006

At The Hague, The Netherlands

[43] Article 19 (4), third sentence.
[44] The Appeals Chamber may wish to provide guidance on these matters in its decision.

LIST OF AUTHORITIES

ICTY

Prosecutor v Kordić and Čerkez, IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001
http://www.un.org/icty/kordic/appeal/decision-e/10511EX315605.htm

Prosecutor v Kordić and Čerkez, IT-95-14/2-A, Decision on Second Motions to Extend Time for Filing Appellant's Briefs, 2 July 2001
http://www.un.org/icty/kordic/appeal/decision-e/10702EX316060.htm

Prosecutor v Kvocka et al., IT-98-30/1-A, Decision on Request for Extension of Time to Appeal, 19 September 2002
http://www.un.org/icty/kvocka/appeal/decision-e/19094716.htm

Prosecutor v Nikolic, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002
http://www.un.org/icty/nikolic/trialc/decision-e/10131553.htm

Prosecutor v Nikolic, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning the Legality of Arrest, 5 June 2003
http://www.un.org/icty/nikolic/appeal/decision-e/030605.pdf

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Barayagwiza v Prosecutor, ICTR-97-19-AR72, Decision, 3 November 1999

Prosecutor v Bagosora et al., ICTR-98-41-AR72(C), Decision on Motion for Extension of Time to File an Appeal, 19 September 2003
http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/190903.htm