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TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public
with Confidential - *ex parte*, Prosecution only annexes A, B and C
**Further Submissions of the Prosecution Regarding the OTP Representative's
Press Interview**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the*

Court to:

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Ms Paolina Massida

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. As requested by the Chamber, the Prosecution attaches a transcript of a confidential interview not to be used without prior approval, and it also separately furnishes a recording. The transcript was prepared by the Office of the Prosecutor (OTP); the recording was made by the reporter and furnished to the OTP. Additionally, the Prosecution attaches the draft that the reporter proposed to publish, which by prearrangement he submitted to the OTP for its review of quotes to be attributed to the Office; the attachment contains the OTP edits to that draft.
2. The Prosecution's answers in the draft attached are consistent with the Statute, the policy of the OTP, the in-court statements by the Deputy Prosecutor, and the Prosecution's prior filing. They are also consistent with the practice before other international courts and tribunals. The materials confirm that the Office of the Prosecutor did not demean the role of the judges, the character of the Accused, or the trial process. Nor did it misstate evidence or otherwise violate any norms of conduct in this Court.
3. The OTP agreed to answer questions from a reporter about the role of intermediaries. It followed intense media attention including by this particular reporter, that intermediaries corrupted evidence and the Prosecution committed abuse of process by relying on these allegedly dishonest intermediaries in gathering its evidence.
4. The Office of the Prosecutor considered that it was important to clarify its policy on the use of intermediaries. In all the situations currently before the Court, the Office of the Prosecutor conducts investigations in an insecure environment. Intermediaries are needed in many instances to protect the confidentiality of the investigations and the witnesses. Their use cannot in any way be properly regarded as affecting the integrity of the Office. The Office of

the Prosecutor's reputation is key to its ability to perform its function, to call witnesses and receive cooperation.

5. The Office of the Prosecutor has internal guidelines for its public statements to the media, embassies or other public offices, universities, NGO organizations, and the like, and can share them if the Chamber so decides. The Prosecution further submits that these entities have the right to information regarding the Court and the Prosecution's performance of its responsibilities under the Rome Statute. It serves the public interest for the Office of the Prosecutor to clarify its methods of investigation, including how it overcomes the difficulties presented by an insecure environment, and to confirm that its policy is to prosecute only persons it genuinely believes are guilty of the charged offenses, without commenting on issues such as the credibility of witnesses or evidence, the correctness of judicial decisions, or other matters under consideration by the Chamber.
6. With respect to the immediate controversy, the Prosecution submits that, through its complaints regarding the press interview, the Defence continues to include in the trial itself issues that are not the object of the trial, and to distract the judicial process from the matters that the trial is designed to resolve, namely, the criminal charges against Thomas Lubanga.
7. The Prosecution thus proposes that further discussions on this matter be undertaken in a Chambers conference with all parties present, which discussions could be transcribed and made publicly accessible if deemed appropriate by the Chamber. A Chambers conference might give all participants the opportunity to discuss the issue fully without detracting from the limited in-court time that has been allocated to the questioning of witnesses.

Statement of Facts

8. On 17 March 2010 the Chamber asked the Prosecution to respond to several questions concerning an interview given by the Office of the Prosecutor's representative. The Prosecution submitted its response on 19 March 2010.¹
9. Subsequently, the interview was the subject of additional in-court questions and exchanges.² On 23 March, after having represented that the OTP did not record the interview, upon request from the Chamber to that effect, Deputy Prosecutor Fatou Bensouda agreed to inquire into whether the reporter taped the interview.
10. As a result of those inquiries, the Prosecution now provides or confirms the following additional information:
 - a. As previously reported to the Court, the Prosecution normally records press interviews of Prosecution spokespersons. In this instance, however, the OTP equipment failed, so the OTP could not make a recording of the interview.
 - b. The reporter, however, successfully recorded the interview.
 - c. The reporter subsequently emailed the sound file of the interview to the Public Information Unit (PIU) in the OTP. The OTP outlook email could not accommodate a file of that size, so the file was emailed to another staff member's private email account.
 - d. The PIU staff member prepared a rough transcription of the interview which she forwarded without comment and without specifying on what it was based to the head of PIU.

¹ ICC-01/04-01/06-2363.

² ICC-01/04-01/06-T-266-CONF-ENG ET, pages 1-3 and 22-24.

- e. When the issue arose before this Court, the PIU staff member was out of the country, on leave to attend to a sensitive personal matter, and was inaccessible by telephone or email. She returned to the office on 24 March.
 - f. The head of the PIU thereafter listened to the recording and made substantial edits to the rough transcript previously prepared. The transcript is attached as Confidential– *ex parte* Prosecution only Annex A to this submission. The OTP also provides a copy of the recording, which is attached as Confidential– *ex parte* Prosecution only Annex B.
11. Additionally, the Prosecution informs the Chamber that the OTP also has within its files a copy of a draft of the article that the reporter sent to the Office before publication. Pursuant to standard practice the OTP reserves the right to review the quotes attributed to it. In this instance the OTP made minimal changes to the lines attributed to it. A copy of the original proposed version, with OTP comments and changes, is attached as Confidential– *ex parte* Prosecution only Annex C.

Submissions

12. As a review of the draft approved and the article published, and even the confidential transcript, will establish, the Office of the Prosecutor's representative never said anything that properly could be construed as disrespect for the Chamber or the judicial process. Nor did the Office of the Prosecutor's representative prejudge the case or otherwise intrude on judicial functions. The Office of the Prosecutor was asked by the reporter about the role of the intermediaries in corrupting evidence and to respond to allegations that the Prosecution unduly relied on the intermediaries in gathering evidence to the detriment of a fair trial. The Office of the Prosecutor answered.

13. The documents are provided at the request of the Chamber. The Prosecution submits that the Defence should not be allowed to request the Chamber to pass judgment on a private off-the-record conversation, no matter with whom the conversation is held. Off the record interviews, including the instant one, are confidential conversations. The express understanding in this and all OTP contacts with the media is that comments will not be publicly revealed without the approval of the participants. That which is published – after approval – will reflect the position of the OTP; that which is not published remains a confidential conversation.
14. The public has the right to receive information regarding the function and legitimacy of the Court and the Office of the Prosecutor. In the absence of other compelling public interest, such as security for the witnesses, it would be unacceptable to restrict the right of the public.
15. In accordance with the Rome Statute mandate, the Prosecution has a right – and an obligation – to independently pursue cases. Its ability to call witnesses and receive cooperation is based on its impartiality and integrity and the public appearance of its impartiality and integrity. Just as the rights of the public should not be restricted, it is equally unacceptable to hamper the Office of the Prosecutor's ability to affirm publicly its moral authority to perform its role, thereby creating the conditions in which it is able to carry out its mandate in accordance with the Statute. There are no legal reasons to require silence by the Prosecution in the face of public attacks against its reputation.³

³ For example, see Defense Case Opens, Lubanga Lawyers Claim Testimony Was Fabricated, Wairagala Wakabi, 27/01/2010 (“Thomas Lubanga’s defense opened today at the International Criminal Court (ICC), with his lawyers declaring that they would produce evidence to show that agents of the Office of The Prosecutor helped to fabricate the testimony of several witnesses who were called by the prosecution. Catherine Mabilie, Lubanga’s lead counsel, said they would produce 16 witnesses...”); Lubanga’s Defense Opening Statement – Witnesses Lied, Lubanga is Not Guilty, Wairagala Wakabi, 27/01/2010 (“The defense also intend to show that some of this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of The Prosecutor”); Lubanga’s Lawyers Will Ask Judges To Discontinue Case, Wairagala Wakabi, 29/01/ 2010 (“Catherine Mabilie, the lead defense counsel, said on Wednesday that they would ask judges to discontinue the case after producing 16 witnesses who will, among others, show that all the witnesses presented by the prosecution as former child soldiers were bogus. She said the witnesses, and in some cases their parents, deliberately lied to court, and that they were helped by agents of the Office of The Prosecutor to fabricate their testimony”); (Witness: I Was Falsely Paraded As A Child Soldier), Wairagala Wakabi, 09/02/2010 (“The two

Instead, when accusations publicly impugn its integrity and suggest that prosecutorial misconduct amounts to abuse of process, the Office of the Prosecutor is entitled to be able to address public accusations of abuse so long as it (a) fully respects the other participants and the process and (b) abstains from comment on the credibility of witnesses or evidence, the correctness of judicial decisions, or other matters under consideration by the Chamber. This approach is consistent with the practice in many national jurisdictions and other international criminal tribunals.

16. In this instance, the OTP did not overstep any reasonable limits that might be placed on its ability to act. It answered the questions of the reporter – it did not have the prerogative to direct the interview -- and properly included the recognition that it would be for the Chamber to make all and any final determinations.
17. The Office of the Prosecutor’s conduct thus fell within appropriate limits. Beyond that, the Prosecution will provide further information, including the parameters of its guidelines for its own conduct, if the Chamber so decides.
18. Such further discussion, however, should not continue to interfere with the progress of the case or distract attention from the core issue in this proceeding - the criminal liability of the Accused for war crimes. Even had the Office of the Prosecutor made statements that the Defence deemed to be overstepping, which is strongly denied, they could not form the basis for a claim that the Prosecution breached the Accused’s right to a fair trial or the public’s right to

defense witnesses who preceded Django recounted how intermediaries of the Office of The Prosecutor (OTP) bribed relatives of young boys to fabricate evidence that they were former child soldiers. One of those boys appeared as a prosecution witness at the Lubanga trial”; Lubanga Trial Adjourned Over Transcription Problems, Wairagala Wakabi, 16/02/2010 (“Two previous defense witnesses have been examined at length about their meetings with intermediaries of the OTP. These two witnesses accused the intermediaries of concocting evidence, including bribing or duping parents and guardians of young boys into joining alleged schemes in which the boys were falsely presented to OTP officials as having served as child soldiers”; Lubanga Defense Heads To Congo for ‘Critical Research’, Wairagala Wakabi, 18/02/2010 (“Since the defense case started on January 27, 2010, five witnesses have been called. The first three witnesses testified that intermediaries of the Office of The Prosecutor (ICC) bribed and duped some boys and their parents or guardians into joining the alleged scheme to fabricate evidence’’).

a fair proceeding. Nor can it be said that the interview created a situation in which it undermines the rule of law or reasonably offends justice and propriety to continue try the Accused in these circumstances. The Chamber, not the public, will adjudicate guilt or innocence based on the evidence in the case. Extrajudicial statements by the Prosecution, the Defence, or any participant that are made in accordance with the applicable standards and consistent with the Statute and related instruments cannot be said to influence that adjudication nor reflect adversely on the integrity of the judicial process.⁴

19. The Prosecution offers its full cooperation to the Court to resolve this matter in a manner that is fair, expeditious and consistent with the Statute and related instruments. Having regard to the imperatives of completing the trial in a timely manner and allowing full time to question upcoming witnesses, the Prosecution respectfully requests that if the Chamber deems that further discussion on this issue might be appropriate, the discussions could be held in chambers, in the presence of all parties but without using valuable in-court time and resources. The discussions could be transcribed and appropriate portions made publicly available. The purpose of the in Chambers discussion is not to hide the issue from public attention, but to prevent it from further delaying the progress of the trial itself.

⁴ The remedy for purported serious misconduct would be, instead, removal from office. Article 46. Article 47 provides that lesser misconduct shall be subject to disciplinary measures under the Rules of Procedure and Evidence. See, e.g., Rules 170 and 171.

Request for Confidentiality

20. To protect the prerogative of the reporter, and also to protect the right of the Prosecution to engage in confidential conversations, the Office of the Prosecution files Annexes A, B and C as Confidential– *ex parte* Prosecution only.



Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of April 2010
At The Hague, The Netherlands