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No.: **ICC-01/04-01/06**

Date: **15 April 2010**

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

Prosecution's Submission Regarding Witness 157

Source: Office of the Prosecutor

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

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Submission

1. On 31 March 2010, the Defence orally complained that the Prosecution in the case against Germain Katanga and Mathieu Ngudjolo Chui (the *Katanga* case) has indicated by way of two filings that it does not intend to offer evidence specifically to establish that Witness 157 was a child soldier,¹ whereas the Prosecution in the present case did call such evidence.² At the Trial Chamber's request, the Prosecution responds to this oral submission.³
2. The Prosecution has discretion to devise its trial strategy to meet the needs of the case at hand. In so doing, it is entitled to take into account its experiences in other cases. As this Chamber is aware, the Defence cross-examined Witness 157 regarding his age at recruitment. The Prosecution in the *Katanga* case is reasonably entitled to consider this fact, particularly since other witnesses are available to prove the single charge in *Katanga* of using child soldiers.
3. At the same time, the Prosecution disagrees with the Defence's mischaracterization that the "OTP in the other case is adopting a position *stating that this witness is not a child soldier*" (emphasis added).⁴ Nowhere in these filings has the Prosecution in the *Katanga* case stated that Witness 157 was not a child soldier. If that were the Prosecution's view of Witness 157, it would withdraw the contrary evidence of the witness in this case. But that is not its position. In response to a court request that the Prosecution identify the general areas about which each of its witnesses would testify, the Prosecution stated that Witness 157 may testify as an insider soldier about the attack on Bogoro.⁵ It did not, however, abandon the position in *Lubanga* that Witness 157 was under the age of 15 at the time of his recruitment.

¹ The Defence made reference to filings ICC-01/04-01/07-1378-Conf-Exp-AnxB, 14 August 2009, paragraph 4 and ICC-01/04-01/07-1480-Conf-Exp, 19 September 2009 at paragraph 30.

² ICC-01/04-01/06-T-274-ENG-ET, 31 March 2010, pages 8-9.

³ ICC-01/04-01/06-T-274-ENG-ET, 31 March 2010, page 10, lines 7-19.

⁴ ICC-01/04-01/06-T-274-ENG-ET, 31 March 2010, page 9, lines 15-16.

⁵ Prosecution filings ICC-01/04-01/07-1378-Conf-Exp-AnxB, 14 August 2009, paragraph 4 and ICC-01/04-01/07-1480-Conf-Exp, 19 September 2009 at paragraph 30. Please see also the public French

4. The positions in the two cases are not mutually inconsistent. Each case prosecuted by the Office of the Prosecutor is distinct; the crimes stem from different incidents and are committed by different perpetrators. The Prosecution in each of the cases before the Court has the discretion to determine which evidence it intends to rely upon to discharge its burden of proof. In this regard, the Prosecution evaluates and selects the evidence that best, and in the most efficient and streamlined way, establishes that the Accused persons in that case are criminally responsible for the crimes charged. The Prosecution is not obliged to call the same witnesses in the *Lubanga* and *Katanga* trials nor, if it chooses to use common witnesses, is it forbidden from relying on those witnesses to establish different facts in the two distinct cases. The Prosecution must be free to choose and present its best and most relevant evidence as to all essential elements in each case, and cannot be compelled to use the same evidence when different Accused persons are separately charged and separately tried.

5. In the *Katanga* case, the Accused are charged with 10 war crimes and/or crimes against humanity stemming from an attack against the civilian population in Bogoro in February 2003. The charge of using children to participate actively in hostilities as a war crime is but one of these 10 charges. Out of the 26 witnesses it intends to call, the Prosecution in the *Katanga* case is calling three other alleged former FNI-FPRI child soldiers and a number of crime base and insider witnesses to establish the crime of using children under the age of 15 to participate actively in hostilities. Because the recruitment of children is not the sole focus of the *Katanga* case, and because Trial Chamber II has set limits on the amount of time the Prosecution may take to put on its case, the Prosecution must limit the number of witnesses specifically designed to prove that single charge. Its decision regarding

transcript ICC-01/04-01/07-T-92-CONF-FRA, 28 January 2010, page 5, line 21 (the French transcript is quoted because the English translation does not fully capture the original French submission).

witness 157 is not a concession that the challenges to his credibility were well-founded or that the witness was untruthful.



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of April 2010
At The Hague, The Netherlands