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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

Defence Brief on Matters the Defence Raised During the Confirmation Hearing

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No. ICC-01/04-01/06

7 December 2006

II – General observations on the evidence tendered

A) REDACTED

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4) Witness WWW-0012⁴¹

19. The Defence has demonstrated that there were deficiencies and contradictions with respect to dates,⁴² people⁴³ and their functions⁴⁴ as well as in the knowledge of facts at the time covered by the charging document.⁴⁵ The version of facts presented by this witness did not convince the Defence, neither would it convince the Chamber. Consequently, the Defence submits that the evidence is of no probative value as a result of the victim's bias,⁴⁶ and the redactions made in the victim's statements by the Office of the Prosecutor.⁴⁷ Moreover, the witness was actually not testifying as an eye witness and the witness's hearsay evidence does not meet the requisite standard of reliability.

B – General criticism of the method of proof used by the Prosecutor

20. Without wishing to be repetitive,⁴⁸ the Defence would like to briefly return to the issue of the form of the documents in general.

⁴¹ EVD-OTP-00002.

⁴² Transcript of 23 November 2003, p. 109, lines 6-11; and Witness Statement of www-0012 [available in French only], p. 11, paras. 56-58.

⁴³ Witness Statement of www-0012 [available in French only], p. 19, paras. 82-83-87, p. 17, para. 89, and transcript, p. 109, lines 24-25 and p. 110, lines 1-15.

⁴⁴ Idem, p. 16, para. 82, which states that Lotsove had APC troops at her disposal, and transcript of 23 November 2006, p. 109, lines 13-22.

⁴⁵ Idem, p. 43, para. 225 (Luanda Agreement), transcript of 23 November 2006, p. 111, lines 19-25 and, p. 112, lines 1-7.

⁴⁶ The Defence emphasised both her inconsistency on a political level and her bias on account of her allegiance to PUSIC – transcript of the hearing of 28 November 2006, p. 109, lines 8-25 and, p. 110, lines 12-25. See also the passages of the witness statement which confirm that the witness worked for several political parties or movements at the same time.

⁴⁷ Witness Statement [available in French only], p. 66, paras. 355-356, 357.

⁴⁸ See the transcript of the hearing of 22 November 2006 with regard to the Defence objection to the various types of evidence on the Prosecution's amended list of evidence.

1) Evidence in general

21. The Defence made several objections which apply to all the statements.⁴⁹ Before *ad hoc* tribunals, following the procedure under rule 92 *bis*, written statements are admissible only if they were made under oath before a member of the Registry⁵⁰ and are in a language which the makers understand.⁵¹ The provisions of rule 92 *bis* are strict.⁵² In this case, the Defence notes, on the contrary, that almost all of the evidence of the witnesses in the form of written statements relates to this point. Accordingly,⁵³ the Prosecutor cannot rely on written statements with regard to the responsibility of Thomas Lubanga Dyilo.

2) Redacted statements⁵⁴

22. The Defence recalls that the criticisms voiced apply to many documents⁵⁵ and that the authorised redactions substantially diminish their probative value, since the summaries are not the words of the witnesses.

⁴⁹ Of the anonymous witnesses to the six witnesses/children whose statements have not been redacted, the witnesses did not undergo any cross-examination. See transcript of 22 November 2006, p. 19, lines 11-25, the statements were not made under oath. See transcript of 22 November 2006, p. 20, line 14 to p. 22, line 6. The interview with the witness was conducted in a language other than the language spoken or understood by the witness. See transcript of 22 November 2006, p. 22, line 7, to p. 24, line 10.

⁵⁰ See Rule 92 *bis* B: "A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and (i) the declaration is witnessed by: (a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or (b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose".

⁵¹ Nevertheless, although statements have been admitted under that rule, the Chamber often ordered the witness to appear so that he or she could be cross-examined. See the Milosevic case, 21 March 2002, "Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92*bis*". The Chamber admitted the statements because "the evidence proposed to be given is subject of an important issue in this case". <http://www.un.org/icty/milosevic/trialc/decision-/20321AE517364.htm>

⁵² The written statement cannot relate to "a matter other than the acts and conduct of the accused as charged in the indictment".

⁵³ Although the Prosecutor may use the written statements to prove the facts alleged in the document containing the charges.

⁵⁴ In this regard, the Defence also refers to its submissions at the confirmation hearing. See transcript of 22 November 2006, p. 16, line 22 to p. 19, line 11.

⁵⁵ See the following statements: DRC-OTP-0127-0074 and DRC-OTP-0155-0070 by witness WWW-0015; DRC-OTP-0087-0188 and DRC-OTP-0087-0146 by witness WWW-0002; DRC-OTP-0066-0002 by witness WWW-0014; DRC-OTP-0113-0002 by witness WWW-0045, and DRC-OTP-0164-0356 by witness WWW-0046.

3) Anonymous witnesses and summaries⁵⁶

23. Although summaries are provided for in the Statute and the Rules of Procedure and Evidence, nothing is said about their probative value. Accordingly, the Defence maintains its criticisms about the probative value of the statements of persons whose identity is unknown to either the Chamber or the Defence, and extends the criticisms to several summaries⁵⁷ and statements.⁵⁸

4) Kristine Peduto

24. The Defence challenges the entire testimony of Kristine Peduto because it does not meet credibility and reliability requirements. While the Prosecution presents the witness as a credible and reliable expert, a review of Kristine Peduto's written statement, examination-in-chief and cross-examination reveals serious contradictions, chronic uncertainty, severe memory lapses, serious mistakes, as well as an alarming lack of knowledge of her working environment and the general background in Ituri. Despite these very serious weaknesses, the witness ventures to make serious, at times even contradictory charges, concerning the suspect. The Defence maintains that the witness is totally lacking in credibility.

a) Serious contradictions vitiating all of the witness's statements

25. Without being exhaustive, the Defence would like to note certain aspects which it finds to be the most disturbing.

26. When the witness was asked where Mr Lubanga was in August 2002, she answered that she imagined that the suspect was in Bunia.⁵⁹ However, when asked

⁵⁶ See transcript of 22 November 2006, p. 24, line 19 to, p. 32, line 22.

⁵⁷ See DRC-OTP-0164-0275; DRC-OTP-0164-0258; DRC-OTP-0164-0272; DRC-OTP-0164-0284; DRC-OTP-0164-0262; DRC-OTP-0164-0249; DRC-OTP-0164-0250; DRC-OTP-0164-0313; DRC-OTP-0164-0243; DRC-OTP-0164-0291; DRC-OTP-0164-0301.

⁵⁸ DRC-OTP-0108-0142; DRC-OTP-0126-0086; DRC-OTP-0104-0015; DRC-OTP-0160-0489; DRC-OTP-0104-0026; DRC-OTP-0160-0479; DRC-OTP-0104-0107.

⁵⁹ Transcript of 20 November 2006, p. 44, line 25.

whether she knew that he was in detention in Kinshasa until the end of August 2002, she was forced to admit her lie.⁶⁰

27. In her written statement, the witness referred to an appeal directed by the suspect to Hema families in March-April 2003.⁶¹ The contradiction became apparent under cross-examination, when the witness categorically dated the incident in September, at a time when the FPLC did not exist.⁶²

28. On direct examination, the witness stated that, in September 2002, the FNI was mostly made up of Lendus and Ngitis;⁶³ under cross-examination, she admitted, after all, that she did not know that as a fact.⁶⁴ Moreover, the FNI did not exist in September 2002, a fact which the witness ended up conceding.

29. During her examination before the Court, the witness referred to the large number of children in uniform, although in her written statement she stated, in regard to the same situation, that she did not see a large group, and also referred to a “ghost town”.

30. The witness stated that she had no knowledge of a mutiny within the APC,⁶⁵ but a few minutes later, she admitted that the FPLC had also served under the APC⁶⁶ and also that she was aware of the split between the UPC and the APC.⁶⁷

31. In her written statement, the witness stated that the MILOBs had notified Thomas Lubanga, the then RCD-ML Defence Minister, that they would be prepared to provide information about child demobilisation,⁶⁸ but is unable to say exactly when and how such notification was communicated to him. Furthermore, she

⁶⁰ Transcript of 20 November 2006, p. 45, line 11.

⁶¹ Witness Statement, May 2006, para. 95.

⁶² Transcript of 21 November 2006 p. 83, line 24.

⁶³ Transcript of 15 November 2006, p. 26, lines 10-11.

⁶⁴ Transcript of 20 November 2006, p. 81, line 3.

⁶⁵ Transcript of 20 November 2006, p. 68, line 22.

⁶⁶ Transcript of 20 November 2006, p. 77, line 13.

⁶⁷ Transcript of 20 November 2006, p. 123, line 23.

⁶⁸ Witness Statement, May 2006, para. 56.

admitted under cross-examination that Mr Lubanga was no longer Defence Minister in September 2002, the period she was referring to.⁶⁹

32. In her written statement, the witness referred to children who allegedly received military training in the UPC camp in Rwampara in July 2002.⁷⁰ She stated that she received this information from displaced persons in Uganda and categorically denied having seen these children.⁷¹ A little further, the witness stated that calls for recruitment for Hema militia members were also part of the APC.⁷² However, under cross-examination, the witness admitted that she did not know to what military group Rwampara belonged.⁷³ Finally, in view of these contradictions, she was forced to retract her allegations and admit the mistake she made in pointing the finger at the UPC.⁷⁴

33. The witness contradicted herself because on several occasions she said that in the spring of 2003, the funding of aid programmes was problematic,⁷⁵ although she admitted that the CTO existed at the time. She admitted this when she confirmed that she knew the Defence witness who was working for the CTO after June 2003⁷⁶ and that she attended weekly meetings.⁷⁷

34. When asked whether she would have entrusted child soldiers found in Rwampara in March 2003 to an NGO, she answered that NGOs did not have the means to take care of these children.⁷⁸ She later returned to this issue and stated that aid programmes had been in place for many months – years, to receive demobilised children.⁷⁹

⁶⁹ Transcript of 20 November 2006, p. 87.

⁷⁰ Witness Statement, May 2006, para. 63.

⁷¹ Transcript of 20 November 2006, p. 121, line 10.

⁷² Transcript of 20 November 2006, p. 125. [French version]

⁷³ Transcript of 20 November 2006, p. 131, line 22.

⁷⁴ Transcript of 20 November 2006, p. 134, line 11.

⁷⁵ Transcript of 20 November 2006, p. 71, line 7 and p. 82, line 9.

⁷⁶ Transcript of 21 November 2006, closed session, pp. 11-12.

⁷⁷ Transcript of 21 November 2006, closed session, p. 12, line 6.

⁷⁸ Transcript of 21 November 2006, p. 78, line 15.

⁷⁹ Transcript of 21 November 2006, pp. 114-115.

35. Regarding the age of the children she met at Paidha, in Uganda, the witness stated under direct examination that two were aged less than 15 years.⁸⁰ However, under cross-examination, she answered that two were fifteen years old and the others were older.⁸¹

36. Under direct examination, the witness recalled that the children at Mont Awa were under the orders of Commander Jérôme Kakwavu and that they had sung to the glory of Papa Thomas or Papa Jérôme.⁸² But under cross-examination and in her written statement, she stated that the children had sung to the glory of Papa Lubanga.⁸³ She withdrew this allegation immediately, confirming that she had meant “Papa Thomas”.

37. The witness stated that the displaced persons in Uganda testified about the public threats made against the Alur by Ms Lotsove and Commander Jérôme in October 2002. In her written statement, the witness stated that Commander Kisémbó had accompanied Ms Lotsove to Mahagi,⁸⁴ but in her examination-in-chief, she could not remember whether Kisémbó was present.⁸⁵

⁸⁰ Unedited transcript of 15 November 2006, p. 44, line 17.

⁸¹ Transcript of 20 November 2006, p. 146, line 20.

⁸² Transcript of 15 November 2006 p. 45. It is the same Papa “Thomas” who was referred to by Ms. Bapita on 28 November 2006 whereas the leader of the FPDC is also named Thomas.

⁸³ Transcript of 20 November 2006 p. 151, line 15; Witness Statement, May 2006, para. 69.

⁸⁴ Witness Statement, May 2006, para. 62.

⁸⁵ Transcript of 15 November 2006 p. 42, lines 12-13.

b) Testimony based on inaccurate recollection

38. It is shocking for the Defence to note that in her oral testimony, the witness was unable to remember her own written statements made five months previously,⁸⁶ and that she relied on what she herself called a poor memory.⁸⁷

39. The Prosecution wrongly attempted to ascribe this poor memory to the fact that these gaps related mainly to events that occurred outside the witness's area of expertise, which is child protection. The Defence refers to portions concerning the exact dates of the witness's movements in Ituri in September 2002,⁸⁸ or to reports drafted earlier by her colleagues on their work in Ituri before 2002.⁸⁹ In light of the many unanswered questions, the Court can only wonder what knowledge should actually be possessed by a witness portrayed by the Prosecution as an expert in child soldier issues in Ituri during the period covered by the charges.

c) Alarming ignorance of her working environment and the overall context in Ituri

40. The witness displayed an alarming ignorance of her area of expertise and facts concerning the conflict in Ituri.⁹⁰ Under cross-examination, she provided the court with the criteria that she herself would use in defining the area of expertise of an expert on the problem of child soldiers, emphasising that such an expert should in particular have a fairly clear picture of the armed forces involved and who they really are.⁹¹ The Prosecution also acknowledges that this knowledge is essential.

⁸⁶ Transcript of 20 November 2006, p. 119, line 17. The Defence can only be very critical about the credibility of this testimony, the content of which, as related by the witness, goes back several years.

⁸⁷For so many important events, although, based on this same memory, she is able to remember exact dates or minute details. For example, the witness recalls the following: the exact date of her visit to Mr Lubanga on 30 May 2003 (Transcript of 21 November 2006, p. 97); the date on which Commander Jérôme split away from the UPC (Transcript of 20 November 2006, p. 150); the exact names of lecturers at the ISP (Transcript of 20 November 2006, p. 129).

⁸⁸ Transcript of 20 November 2006, p. 37, line 22.

⁸⁹ Transcript of 20 November 2006, p. 40, line 23.

⁹⁰ Even the Prosecution portrayed her as an expert on the problem of child soldiers in Ituri from September 2002 to the end of 2003.

⁹¹ Transcript of 20 November 2006, p. 79, line 23.

Thus, in response to a question put to her by the Prosecution, the witness confirmed that she had a broad range of information on the military situation.⁹²

41. In fact, the witness herself admitted on many occasions that she could not answer questions about the armed forces involved,⁹³ and that she did not receive extensive information on all events throughout the whole territory.⁹⁴ In so doing, the witness admitted that she did not have the required knowledge to handle such matters.⁹⁵ In the view of the Defence, these significant discrepancies are extremely alarming because they have of necessity vitiated the witness's reading of the events and caused her to make unfounded charges against the suspect, largely on the basis of errors due to ignorance of the situation.

42. In her written statement, the witness thus levelled serious charges against the suspect for acts allegedly committed in September 2002. The witness stated that on her trip to Bunia in September 2002 she "was observing the war and that Mr Lubanga was one of its players".⁹⁶ At the same time, the witness admitted that she was not aware of the political situation or the conflict in Ituri before she left the town in 2002,⁹⁷ and that as a result, she was unable to answer questions about military forces in Ituri in the summer of 2002.⁹⁸ Ms Peduto merely stated that she had received allegations indicating that the UPC was responsible.⁹⁹ She stated that she did not remember what the acronym FPLC stood for.¹⁰⁰ In light of the serious charges she has levelled against the UPC and its militia regarding child soldiers, it can hardly be said that this information is out of her line of work. Furthermore, Ms Peduto ultimately admitted that she was unaware that Mr Lubanga had been imprisoned in Kinshasa during that period. But, under cross-examination, she began to accuse Mr Lubanga of

⁹² Transcript of 15 November 2006, p. 19, line 17.

⁹³ Transcript of 20 November 2006, p. 67, line 21 and p. 79, line 7.

⁹⁴ Transcript of 21 November 2006, p. 84, lines 11, 15 and 19.

⁹⁵ But she took the liberty under oath to testify about events and facts about which she knew nothing.

⁹⁶ Witness Statement, May 2006, para. 47.

⁹⁷ Transcript of 20 November 2006, p. 59.

⁹⁸ Transcript of 20 November 2006, p. 64, line 6.

⁹⁹ Transcript of 20 November 2006, p. 61, line 25.

¹⁰⁰ Transcript of 20 November 2006, p. 50, line 16.

being responsible for the massacres that she situated in August and September 2002,¹⁰¹ although Lubanga only returned to Bunia on 29 August 2002. Before the Court, the witness was forced, due to the flimsiness of her charges, to change her allegation against the suspect and correct it by admitting that she was referring to the “movement for which he was responsible”.¹⁰² With such gaps, which the witness obviously did not fill in retrospect, how can she claim to make such specific allegations against the suspect?

d) Factual errors

43. Here are some factual errors, amongst others:

- The witness maintained that the demobilisation decree issued by Mr Lubanga on 1 June 2003 was allegedly limited to seventy children, but when document EVD-OTP-0051, which she claimed to have read before,¹⁰³ was shown to her, she was forced to withdraw that statement because, in fact, the decree had no restrictions.
- The witness claimed that the FNI¹⁰⁴ was responsible for the massacres of August 2002¹⁰⁵ although the FNI was not created until December 2002. She was therefore forced to admit that her allegation was an error.¹⁰⁶
- The witness could not confirm the dates of her trips to Bunia, although she had kept notes of the trips and their duration.¹⁰⁷ She could not say whether there had been previous missions in Ituri.¹⁰⁸

¹⁰¹ Transcript of 20 November 2006, p. 43, line 6.

¹⁰² Transcript of 20 November 2006, p. 49, line 5.

¹⁰³ Transcript of 21 November 2006, p. 105, line 18.

¹⁰⁴ Transcript of 21 November 2006, p. 107, line 25.

¹⁰⁵ Transcript of 15 November 2006, p. 26.

¹⁰⁶ Transcript of 20 November 2006, p. 80, line 17.

¹⁰⁷ Transcript of 20 November 2006, p. 37, lines 15 and 24.

¹⁰⁸ Transcript of 20 November 2006, p. 40, line 20.

- The witness stated that she was in Bunia around 2 and 10 September.¹⁰⁹ She stated that the UPC government was already in place when she arrived.¹¹⁰ However, the government was not yet in place at the time.¹¹¹ Similarly, she stated that Adèle Lotsove had been appointed minister in the UPC government in August 2002,¹¹² whereas the government had not yet been formed.
- The witness stated that there is no language difference between the Northern Hema and the Southern Hema; however, she admitted that she did not know what languages they spoke.¹¹³ In fact, there is a significant difference. The Southern Hema speak Kihema while the Northern Hema speak Kilendu.

e) **Incompetence of the witness with regard to her research into the plight of child soldiers in Ituri – serious defects**

44. Not only did the witness demonstrate large gaps in her knowledge of her working environment, her allegations were based essentially on hearsay or evidence the reliability of which is dubious to the extreme. Hence, the entirety of her factual statements are rendered questionable by her blatant incompetence with regard to the methodology of her research into the plight of child soldiers in Ituri,¹¹⁴ with particular regard to the two most important aspects in the identification of child soldiers, that is, the age of the child and the militia to which the child belongs.

i) **Estimating the age of child soldiers**

45. Before addressing the defects of the testimony in detail, the Defence wishes to make a general observation to the effect that, contrary to the Prosecution's claim, Ms Peduto is not in the least qualified to testify on the key point in the Prosecution's

¹⁰⁹ Transcript of 20 November 2006, p. 37, lines 15 and 24.

¹¹⁰ Transcript of 20 November 2006, p. 76, line 6; p. 100, line 18.

¹¹¹ EVD-OTP-0026.

¹¹² Transcript of 15 November 2006, p. 40 [French version].

¹¹³ Transcript of 20 November 2006, p. 123.

¹¹⁴ During the time she spent in the region.

case: that there were persons under the age of fifteen in the armed forces. This is because, as she stated repeatedly, the test used to identify child soldiers was to distinguish persons under the age of 18.¹¹⁵ Accordingly, when the witness speaks in general terms of ‘children’, this must be understood as a reference to persons under the age of 18.

46. The witness admitted under direct examination, and confirmed under cross-examination, that she did not use scientific criteria to estimate the age of the children and therefore that she could not be certain that the children were under the age of fifteen.¹¹⁶ Yet, this is one of the constituent elements of the crime. As for Peduto’s estimation of the age of the children, it should be noted, firstly, that she did not see extracts of records of birth or identity papers.¹¹⁷ When she saw an attestation, she did not photocopy it.¹¹⁸ Moreover, she relied solely on what the children at Rwampara said¹¹⁹ and on her own judgement;¹²⁰ as she did for the child who said he had been recruited directly by TLD in his car¹²¹, or the children taken to Mandro.¹²² She also admitted that she had no means of verifying their identity or age.¹²³ Lastly, she believed the children were telling her the truth, because they would have had no reason to lie to her.¹²⁴ With regard to the children the witness claims to have seen outside Mr Lubanga’s residence during her visit, the witness first claimed to have seen several children under the age of fifteen as guards, all armed and wearing uniforms.¹²⁵ However, under cross-examination, she recanted, saying she only saw one child who appeared to her to be under the age of fifteen and that she was unable

¹¹⁵ Transcript of 20 November 2006, p. 109; transcript of 21 November 2006, p. 58, line 20.

¹¹⁶ Transcript of 21 November 2006, p. 104, line 9.

¹¹⁷ Transcript of 21 November 2006, p. 39, lines 12-13.

¹¹⁸ Transcript of 20 November 2006, p. 108, line 16.

¹¹⁹ Transcript of 21 November 2006, p. 39, lines 19-21.

¹²⁰ Transcript of 21 November 2006, p. 40, line 2.

¹²¹ Transcript of 21 November 2006, p. 75, line 24.

¹²² Transcript of 21 November 2006, p. 77, line 16.

¹²³ Transcript of 21 November 2006, p. 39, lines 24-25.

¹²⁴ Transcript of 21 November 2006, p. 40, line 6.

¹²⁵ Transcript of 15 November 2006, p. 42, para. 125.

to offer an opinion concerning the other guards; later, she added that it had been dark and that she did not speak to the child.¹²⁶

47. Where the witness claimed to know the age of a child, she obtained such information simply by asking the child and without taking appropriate measures to ensure that the child was telling the truth.¹²⁷ For the most part, the witness referred to the ages of the youths in very vague terms. For example, under direct examination, the witness spoke of tiny children whose kalachnikovs rose above their heads.¹²⁸ However, under cross-examination, she admitted that this was an image used by informants to describe child soldiers.¹²⁹

ii) Identification of the militias

48. As for her knowledge of the forces to which the children belonged, the witness admitted that she proceeded by deduction. For the most part, she distinguished between the PUSIC, the FNI, the FDPC and the FAPC according to their location: the only reason she proceeded thusly was because she thought the UPC were the only forces in the town of Bunia on that date.¹³⁰ However, the witness herself admitted that the same groups fought over certain areas, taking control over territory from one another,¹³¹ and that their uniforms bore no distinctive signs and are bound to have changed.¹³²

¹²⁶ Transcript of 21 November 2006, p. 98 to 100.

¹²⁷ Transcript of 20 November 2006, p. 90.

¹²⁸ Transcript of 15 November 2006, p. 29.

¹²⁹ Transcript of 20 November 2006, p. 83, line 18.

¹³⁰ Transcript of 20 November 2006, p. 91, line 12.

¹³¹ Transcript of 21 November 2006, p. 32, line 25.

¹³² Transcript of 21 November 2006, p. 92, line 9.

f) Witness's reliance on hearsay

49. Many of the witness's allegations are based on hearsay, often 'second-hand' hearsay.¹³³

- In her written statement, the witness says that Thomas Lubanga had a "bad reputation with MONUC staff".¹³⁴
- Under direct examination, the witness referred to the presence of children guarding UPC premises.¹³⁵ However, under cross-examination, she admitted that there were no indications on the buildings to support her allegation that they belonged to the UPC.¹³⁶
- In her written statement, the witness said that Hema militias were involved in the murder of ICRC workers in 2001.¹³⁷ However, under cross-examination, she admitted that this allegation was based on "rumours".¹³⁸
- The witness alleged that Ms Lotsove issued death threats, an allegation she based on reports from third parties present at this meeting.¹³⁹

¹³³ See *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, 1 December 2000, Decision On Prosecutor's Submissions Concerning "Zagreb Exhibits" And Presidential Transcripts. "39. The Trial Chamber has examined the documents sought to be admitted. The Trial Chamber finds that many documents are to be excluded for one or more of the following reasons: [...] (e) the material is based on anonymous sources or hearsay statements that are incapable of now being tested by cross-examination. 40. In this latter case, the probative value of the evidence is so reduced that it is "substantially outweighed by the need to ensure a fair trial", i.e., to admit it at this stage of the proceedings would violate the accused's right to a fair trial." <http://www.un.org/icty/kordic/trialc/decision-e/01201AE514292.htm>. According to the witness, the humanitarian community denounced the significant number of very young children among Lubanga's troops in evidence in Bunia. See Witness Statement, May 2006, para. 53.

¹³⁴ See Witness Statement, May 2006, para. 47. However, under cross-examination, she stated that she did not receive a report on political affairs prepared by MONUC. She also stated that she did not obtain this information from her – unnamed – colleagues at MONUC, but from various unnamed informers.

¹³⁵ Transcript of 20 November 2006, p. 23 [French version].

¹³⁶ This idea was founded solely on indications from unnamed military observers. Transcript of 20 November 2006, p. 88, line 25.

¹³⁷ Transcript of 20 November 2006, para. 47.

¹³⁸ Transcript of 20 November 2006, p. 76, line 18.

¹³⁹ Transcript of 20 November 2006, p. 113.

- In her written statement, the witness referred to children who allegedly received military training in the UPC camp in Rwampara in July 2002.¹⁴⁰ She stated that she got this information from displaced persons in Uganda and categorically denied having seen the children.¹⁴¹ Later, she stated that calls for the recruitment of Hema militia members were also part of the APC.
- The witness accused Professor Pilo of making an appeal for recruitment among the Hema community, but admitted not having personally heard him do so. Rather, these were statements reported by various informers. The witness did not think the informers heard these statements themselves.¹⁴²

g) – Unreliability of reports underpinning Peduto's testimony¹⁴³

i) Languages

50. Ms Peduto's testimony and the reports she wrote were often based on her discussions with the population, notably with children. The reliability of the information obtained through these discussions depends on the ability of the people with whom the witness was dealing to understand the subject of the discussions and vice versa. In the Ituri area, where many languages are spoken, there is a translation problem which makes such work even more difficult. The Defence maintains that the witness did not take sufficient steps to ensure proper translation during the discussions.

51. Firstly, the witness does not take into account the variations between regional languages. Under cross-examination, it was noted that the witness knew nothing of the languages spoken in the Ituri region: she claimed not to know of Kingwana¹⁴⁴ and stated that there was no difference in the languages spoken by the Southern

¹⁴⁰ Witness Statement, May 2006, para. 63.

¹⁴¹ Transcript of 20 November 2006, p. 121, line 11.

¹⁴² Transcript of 20 November 2006, p. 130.

¹⁴³ The Prosecution refers to the reports.

¹⁴⁴ Transcript of 20 November 2006, p. 105, line 8.

Hema and the Northern Hema; at the same time, she admitted not knowing what language they speak.¹⁴⁵

52. Nor did the witness take reliable measures to ascertain the languages spoken by the interviewees, especially since she determined the languages in question according to which region the interviewee came from,¹⁴⁶ which is surprising given that she admitted not knowing all the languages spoken. The witness was thus obliged to agree that it was possible that the language spoken by children in Rwampara may have been different and could not confirm that the people she had spoken to had understood their interviewers one hundred percent.¹⁴⁷ She knows there are differences between the Swahili of Kenya and that of Ituri, and yet she used a Kenyan interpreter to interview children in Ituri.¹⁴⁸

53. It is because of a translation problem that the interviews with children in Paidha, Uganda, are called into question. According to the witness, the children spoke Alur and the interviews were held with an alleged English-Alur translator.¹⁴⁹ This use of a translator is strange, for two reasons. Firstly, if the children were Congolese, and especially if they were educated Congolese as stated by the witness,¹⁵⁰ the witness could have spoken to them in French.¹⁵¹ Moreover, the witness did not explain how she could be sure the children were Congolese, not Ugandan, and that they spoke Alur. The use of English suggests the children were Ugandan.

54. It can be concluded from this that the witness did not insist on a high level of accuracy; she was satisfied if they claimed to understand each other.¹⁵² However, it is

¹⁴⁵ Transcript of 20 November 2006, p. 123.

¹⁴⁶ Transcript of 20 November 2006, p. 103.

¹⁴⁷ Transcript of 21 November 2006, p. 75, line 17.

¹⁴⁸ Transcript of 20 November 2006, p. 104.

¹⁴⁹ Transcript of 20 November 2006, p. 142. She explained under cross-examination that the Alur community was present in the Congo and Uganda and that it is a relatively homogenous community.

¹⁵⁰ Transcript of 15 November 2006, p. 44, line 25.

¹⁵¹ Transcript of 20 November 2006, p. 117. The fact that English was spoken would tend to indicate that the children were of Ugandan origin. If the children really did not speak French, the translator would also have spoken French if she was indeed Congolese.

¹⁵² Transcript of 20 November 2006, p. 104, line 42.

one thing to understand what is being said generally, it is another to understand subtleties, as these can change the meaning of a sentence altogether. What's more, the witness did not always use MONUC's official interpreters¹⁵³ and did not even request a translator's certificate.¹⁵⁴

h) Conclusion

55. There are such gaping holes in the credibility of the witness that the Prosecution is obliged to acknowledge as much in its submissions, alleging that these holes demonstrated that the witness had answered the questions in all honesty and that she did not keep a diary. However, it is hardly necessary to remind the Court that honesty and impartiality are the minimum prerequisites of a sworn witness, and that a witness also needs to be more consistent, accurate, and certain in order to establish the credibility of his or her testimony. In light of the above observations, one can only but note that the witness has none of these prerequisites.

56. The Defence submits that the issue is no longer to what extent such and such part of the evidence can seriously be admitted by the Court; rather, it is simply a matter of finding that from one statement to the next, the witness herself demonstrated that her statements were not reliable and lacked credibility. It follows that the Court cannot seriously rely on the said statements.

¹⁵³ The interviews in Rwampara were conducted in Swahili with people who are not professional translators and who were not MONUC staff, Transcript of 21 November 2006, p. 44, line 13. The interviews with displaced people in Uganda were conducted in Alur with people who are not professional translators and who were not MONUC staff, Transcript of 20 November 2006, p. 105, line 24.

¹⁵⁴ Transcript of 20 November 2006, p. 117.

5) Documents

a) NGO reports

57. The Defence has already stated its reservations regarding the various reports which refer to witness interviews and maintains that these reports cannot be used as evidence in a criminal case.^{155, 156.}

58. Furthermore, similar NGO reports were also rejected by the International Court of Justice in the Case of Armed Activities on the Territory of the Congo.¹⁵⁷ “The Court has for such reasons set aside the ICG report of 17 November, the HRW report of March 2001, passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and *Jeune Afrique*; and the statement of a deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings.”¹⁵⁸ Yet, an HRW report¹⁵⁹ and another ICG report¹⁶⁰ appear on the Prosecutor’s list of evidence.

59. In conclusion, the criticism in this section applies both to all NGO and MONUC reports and to the Security Council resolutions and report which feature on the Prosecution’s amended list of evidence.

¹⁵⁵ The Decision of the Pre-Trial Chamber of 17 November and the Decision of the International Court of Justice show that these reports are of minimal probative value. NGOs are often highly biased and their point of view is far from being independent because it stems from the need to sensationalise a given situation in order to attract interest from governments or international organisations. It has also become clear that Security Council resolutions and reports are often based on NGO reports. Therefore, an error which creeps into the first report is then repeated.

¹⁵⁶ These reports do not allow the person who was interviewed to check whether what was taken down by the investigator or the NGO actually reflects the truth in terms of what was said. See Transcript of 22 November 2006, p. 32, lines 21-24: “NGO reports, allegedly based on interviews, do not allow the person who was being interviewed to check whether what was being written down by the investigator, or the NGO, genuinely reflected what they had stated”.

¹⁵⁷ Democratic Republic of the Congo v. Uganda, 19 December 2005, <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>. The Court “has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan.”

¹⁵⁸ Para. 159.

¹⁵⁹ Human Rights Watch Report, March 2001, EVD-OTP-00205.

¹⁶⁰ See ICG Report, Military Intervention in Ituri, 13 June 2003, EVD-OTP-00003.

b) Press articles,¹⁶¹ e-mails¹⁶² and video evidence¹⁶³

60. The Defence wishes to draw to the attention of the Chamber the fact that the videos tendered by the Prosecutor contain statements uttered at a certain point by Mr Thomas Lubanga, thus infringing his basic right to remain silent under article 67(1)(g) of the Statute.

c) Documents not commented upon by witnesses

61. The Prosecution submits that it has shown, and will continue to show [...] the interlink between the various pieces of its evidence which corroborate each other and thus add to the evidentiary value of the pieces of evidence considered individually.”¹⁶⁴ This violates the principle which requires that each piece of evidence be considered individually.¹⁶⁵

62. As a result, the Defence is of the opinion that the Pre-Trial Chamber should follow the distinction made by the Chamber in the Oric case before the ICTY¹⁶⁶ between documents put to a witness and an exhibit which was not.

C – Evidence presented by the Defence

63. The context presented by the Prosecutor only shows part of the picture.

64. Upon a review of the ‘Save the Children’ report of February 2003,¹⁶⁷ the Defence notes that it does not mention the FPLC. Accordingly, the Defence infers

¹⁶¹ The Defence’s arguments include all the press articles on the Prosecutor’s list. See Transcript, 22 November 2006, p. 34, line 1 to p. 36, line 18.

¹⁶² See Transcript, 22 November 2006, p. 36, line 19 to p. 37, line 18 [French version]. The criticism applies to the two e-mails used by the Prosecutor, EVD-OTP-00091 and EVD-OTP-00141.

¹⁶³ See Transcript of 22 November 2006, p. 40, line 22 to p. 42, line 20 [French version].

¹⁶⁴ See Transcript of 28 November 2006, p. 10, lines 10-14

¹⁶⁵ None of these documents were shown to witnesses to confirm their authenticity or the truth of their contents. See Transcript of 22 November 2006, p. 38, lines 10-13. The Defence notes that in reality the Prosecutor always told the Chamber how it ought to understand the document he was using and that he would never have been able to rely on witness statements to prove the authenticity and probative value of documents not shown to witnesses.

¹⁶⁶ *Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, para. 29.

from this that the FPLC was not responsible for the recruitment of child soldiers, whose demobilisation is the focus of the study and, in the alternative,¹⁶⁸ it should be noted that the report also explains the highly complex process of demobilisation,¹⁶⁹ as confirmed by witness Peduto.¹⁷⁰

65. Regarding the e-mails from Mr J.P. Molondo Lopondo.¹⁷¹ The Prosecutor never disclosed this report before the hearing of 27/11/06 and, as a result, he failed in his disclosure obligation under article 67(2) and has infringed the Statute, specifically the principle of the presumption of innocence by imposing on the accused a burden of proof which does not lie on him. In addition, his case is “tailor-made”.

66. The Prosecutor has not denied that these e-mails¹⁷² were actually sent. Moreover, in his request to the French police, the Prosecutor himself mentioned the plan to exterminate the Hema.¹⁷³ His allegation that these e-mails are “bogus” is unsupported (*reus excipiendo fit actor*), despite the in-depth investigation carried out at his behest. That the e-mail account had a Rwandan address is no surprise, because

¹⁶⁷ EVD-D01-00001. This report concerns projects undertaken in the Kivus at the time, but also includes a comparative mission in Bunia. The report was written towards the end of the period of the UPC government in Bunia. On p. 6, there is a list of the active armed groups. Although the document mentions the RCD-K/ML, which was active in the south of Ituri, it does not mention the FPLC. It may therefore be inferred that the FPLC was not responsible for the recruitment of child soldiers, whose demobilisation is the focus of the study.

¹⁶⁸ Insofar as the charges might involve armed children other than those who were officially part of the armed forces as a result of having enrolled.

¹⁶⁹ Before this can take place, intensive preparation must be completed and ‘networks’ established, and it also mentions the risk of children falsely claiming to be child soldiers in order to benefit from the skills training programme. See p. 18, para. 2 of the report. This is confirmed by witness Peduto. See Transcript of 21 November 2006, pp. 109 and 111.

¹⁷⁰ When she confirms that it was not possible to take in the children that would be demobilised in Ituri, again in May 2003, due to a lack of funds and active NGOs in this field at that time in Ituri. See Transcript of 21 November 2006, pp. 78 and 69.

¹⁷¹ EVD-OTP-00002, EVD-OTP-00003, EVD-OTP-00004, EVD-OTP-00005, EVD-OTP-00006. The e-mail account from which these e-mails were sent was the focus of an investigation by the French Police at the request of the Prosecutor, which began on 23/12/04. However, the Prosecutor did not disclose the e-mails received by and sent from this account either, and it was only by chance that the Defence was able to find a very limited number of the e-mails sent.

¹⁷² EVD-OTP-00004. The e-mails prove the genocide that was being planned against the Hemas and explain the subsequent mutiny within the APC which had already been mentioned in the e-mail of 21 July 2002. The e-mail of 19 July 2002¹⁷² proves that the government in Kinshasa supported this plan.

¹⁷³ DRC-00073-008, para. 3.

Mr Lopondo was in Goma, RCD-Goma, which was backed by Rwanda, before he came to Bunia, where this type of service was not available at the time.

67. The Defence presented documents from the UPC and its government.¹⁷⁴ These documents prove the desire for ethnic reconciliation, pacification and the ban on recruiting anyone under the age of 18 in the FPLC, the peace and reconciliation achieved and the resumption of the massacres after 6 March 2003.

68. J. Tinanzabo's letter to Radio Okapi,¹⁷⁵ the contents of which were never challenged, shows MONUC's bias against the UPC and the FPLC. This is confirmed by the MONUC letter of 7 February 2005,¹⁷⁶ which contradicts the allegation itself at a time when the FPLC had been integrated into the Congolese army for more than six months.

69. The Security Council repeated the same false charges against Mr T. Lubanga.¹⁷⁷ The notes from the *Auditorat Général Militaire Congolais*¹⁷⁸ echo these charges.¹⁷⁹

70. Mr Thomas Lubanga's letter of 7 February 2004 to the Government proves that his detention in Kinshasa, which began on 13 August 2003, continued beyond the end of the *période discriminatoire* (sic) and that he was away from Ituri.

71. Evidence presented by the Defence,¹⁸⁰ which is of vital importance, and the credibility of which has not been challenged by the Prosecutor, points to those who

¹⁷⁴ EVD-D01-00010; EVD-D01-00008. The Prosecutor has not proved that these official documents were not used. He has limited himself to allegations on the matter. The multi-ethnic composition of the UPC government was recognised by witness Peduto (Transcript of 21/11/06, p. 86, lines 8-10).

¹⁷⁵ EVD-D01-00011.

¹⁷⁶ EVD-D01-00013 which ascribes acts of violence to the UPC whose armed elements appear to have vanished from the entire area.

¹⁷⁷ EVD-D01-00014.

¹⁷⁸ EVD-D01-00016 and EVD-D01-00017.

¹⁷⁹ And prove that even on 25 February 2005, the date on which the blue helmets were murdered, at a time when the suspect had been in prison in Kinshasa for a long time, his responsibility in these events was used as a pretext in order to begin a judicial enquiry against him. It was only in passing that reference was made to other investigations into other crimes, even though Mr T. Lubanga had been in arbitrary detention for two years.

are really responsible for the violence and massacres in Ituri. The Prosecutor does not refer to this and therefore provides a distorted version of the facts. This exhibit was subsequently authenticated by a date and the signature of the person concerned.

72. Exhibit EVD-D01-00015, recorded by the Defence, was provided by a person who was in Ituri at the time of the events and whose credibility was not called into question by witness Peduto, who knew the person and even worked with them.¹⁸¹

73. This evidence confirms the time spent in detention by Mr T. Lubanga in Kinshasa at the beginning and end of the period covered by the charging document.¹⁸² Amongst others, this witness completely demolishes the credibility of witness Peduto when she describes Mr T. Lubanga's demobilisation efforts pursuant to the decree of 1 June 2003 as a "masquerade" because he speaks of the CTO, a project that Ms Peduto was forced to acknowledge at the end of her cross-examination¹⁸³. As a result, she was also forced to admit that the decree in question was not limited to 70 children, as she had previously alleged.¹⁸⁴

¹⁸⁰ EVD-D01-00018 This witness, who was at the heart of the conspiracy, is not talking about his or her former enemy, the FPLC or the UPC but of the EMOI, which included the FNI, RCD-K/ML, APC, FRPI, the Mai-Mai, and the Nalu. The EMOI was an autonomous military structure which was answerable to the *maison militaire* [team of military advisors] of President J. Kabila, which funded and organised the massacres.

¹⁸¹ See Transcript of 21 November 2006, pp. 7 and 9 [French version].

¹⁸² Consequently, he would not have been in a position to commit the offences of which he is accused. It confirms that no children under the age of 15 were recruited into the FPLC. It confirms the reason for the defection of Chief Kahwa and the creation of PUSIC, back in 2002: the fact that T. Lubanga rejected plans for systematic attacks advocated by Chief Kahwa. It therefore confirms both the political philosophy of the UPC government and the total lack of control by Mr Lubanga over the former APC rebels who made up the FPLC. It confirms the peace agreement secured by the UPC government and signed by all the communities apart from the Northern Lendu, at the French Protestant church in February 2003. This vital fact was deliberately omitted by the Prosecutor and he has refused to disclose the signed Memorandum of Understanding which was in the offices of the Minister for Pacification at the time of the illegal seizure by the Prosecutor's investigators. It confirms the climate of peace which prevailed during the period of the UPC government and confirms the use of child soldiers by Uganda from 6 March 2003 in Ituri and the emergence of this issue at the time.

¹⁸³ See Transcript of 21 November 2006, p. 8 [French version]. She was even forced to acknowledge that she attended weekly meetings in person with, among others, the CTO, UNICEF and Save the Children about the demobilisation which was underway.

¹⁸⁴ See Transcript of 21 November 2006, p. 107.

[signed]_____
Jean Flamme, Counsel for the Defence

Dated this 6th day of December 2006

At The Hague