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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
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 Redacted Version

**Prosecution's Response to the "Seconde Requête de la Défense aux fins de
dépôt de documents" of 16 June 2010**

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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Introduction

1. On 16 June 2010, almost nine months after the Prosecution rested its case, the Defence requested the admission of four one-sided documents, duplicates of election cards for four individuals:¹ (i) two Prosecution trial witnesses, DRC-OTP-WWWW-0010 (W-0010) and DRC-OTP-WWWW-0294 (W-0294), who testified in March 2009, and (ii) two other persons, DRC-OTP-WWWW-0006 (W-0006) and DRC-OTP-WWWW-0009 (W-0009), who provided statements to the Prosecution pre-trial but did not testify in the present proceeding.
2. While not contesting that the cards are what they purport to be, the Prosecution nonetheless strenuously objects to the admission of these four exhibits. Offered to challenge the credibility of witnesses, they were not put to the witnesses concerned. Thus, the witnesses have not been given an opportunity to comment on these cards; to explain the circumstances in which these cards were requested; and to provide any additional information related to the cards.
3. Despite the fact that these documents appear to be copies of official government records, nothing explains how the documents came to include the birth dates: the proffer, for example, does not indicate that the DRC authorities consulted official registers, sought extrinsic proof of the witness's age, or accurately recorded the date of birth as given to them by the witnesses or other sources.
4. Moreover, even if the information on the cards was provided by the witnesses, other witnesses in this case and in the case *The Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO* (Katanga case) have testified

¹ Seconde requête de la Défense aux fins de dépôt de documents, ICC-01/04-01/06-2484-Conf ('Defence Request').

that they had compelling reasons to apply for election cards even though they were not legally of age to do so and it meant giving false data (including birth dates) on their election cards. It thus would be manifestly unfair to admit these documents without having given the witnesses the opportunity to comment upon them.

5. Finally, in the Prosecution's submission, there is no basis for admitting the cards related to W-0006 and W-0009, who did not give evidence before this Court. Their statements are not evidence and their credibility is not an issue.

Preliminary remark

6. The Prosecution verified whether the original elections cards are registered in the central database, and received a positive answer from the Congolese authorities on 22 June 2010. It seems that the election cards would have been requested in 2005. [REDACTED].² At the time of submission of the present filing, this investigation was not yet concluded. The Prosecution therefore makes a request to file further submissions, should it be necessary, once it has obtained the results of its investigation.

² According to Congolese Law, duplicates can only be obtained by the holder of the election cards: The law of 24 December 2004 (Loi N° 04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo) provides in its article 27 that - to obtain a copy of his/her card, the card-holder him/herself ("le titulaire") has to go to the liaison office (since we are after the initial official registration phase) and demonstrate, inter alia, that he/she has signaled the loss of his/her card at the registration centre, and that, through comparison with the card stored in the system, he/she is the person owning the card:

Article 27: *La carte d'électeur est valable pour tous les scrutins de la transition. Elle doit être conservée avec soin. En cas de perte de la carte d'électeur, au cours de la période d'identification et d'enrôlement, le titulaire s'adresse au Centre d'Inscription pour formuler une demande de duplicata.*

Après cette période, il s'adresse au Bureau de Liaison. Un duplicata lui sera délivré aux conditions suivantes:

- a) que la perte ait été dûment signalée au Centre d'Inscription du ressort ;*
- b) que le nom du détenteur figure sur la liste électorale du Centre d'Inscription et que son identification soit confirmée par la photo ainsi que l'empreinte digitale ;*
- c) que la perte soit intervenue au moins deux semaines avant la date fixée pour le vote.*

La nouvelle carte doit porter la mention "Duplicata". Aucune attestation ou photocopie de la carte d'électeur ne peut être acceptée.

Submissions

7. The documents are offered too late in the process. The Defence had ample opportunity to cross-examine W-0010 and W-0294 on all matters related to their credibility, and it did so. For reasons yet to be provided, the Defence failed to fully investigate, notwithstanding that they had information regarding these witnesses for years before their testimony, and did not put the alleged election cards to them. As a result, neither W-0010 nor W-0294 have to date been granted an opportunity (i) to comment on the circumstances in which these cards were established, (ii) to explain whether they provided the information contained therein and, if they did, (iii) why they did so.

8. To now seek to impeach the credibility of trial witnesses through the admission of these documents would be manifestly unfair. If the Defence wants this information to be considered by the Trial Chamber, then it is only proper that it apply to re-call the witnesses concerned to provide an explanation. It would not be in the interests of justice or procedural fairness to admit these documents without allowing the witnesses this opportunity.³ This Chamber, as well as other International Tribunals, has recognized the fundamental right of witnesses to be confronted with challenges to their credibility, to be afforded reasonable and fair opportunity to respond to such challenges, and to bring finality to credibility challenges on collateral issues.⁴

³ *Prosecutor v Bagilishema*, Appeals Chamber Judgement, 3 July 2002 at para. 67: “The tender of the further material as a defence exhibit without having given the witnesses the opportunity to deal with it in cross-examination was a serious breach of the duty of fairness of the trial, and it led to the right of the Prosecution to have the three witnesses recalled to explain their previous inconsistent statements”.

⁴ In respect of witness 298, this chamber held: ‘Mr Desalliers, forgive me interrupting, and I do so for this reason. Arguably, there are two different categories here in terms of the material that can be covered: on the one hand, material that has gained in relevance, or has become relevant, since the witness gave evidence, and we bear in mind how early he was called in this trial; on the other hand, there is material on which he was properly examined during the course of his evidence and in relation to which arguably there should be

Election cards can be unreliable and contain inaccurate information

finality, because otherwise you could have a witness giving evidence and you could endlessly go back to him and her and try to improve on the questions which you put and then the answers which you receive during the course of the evidence. And there may be objections to that happening, because otherwise trials would never come to an end. Could you please set out in writing - and you can do this by way of email - the subjects that you wish to raise with 298, together with a short explanation as to why it has become necessary now to seek to go back to him for a further interview': ICC-01/04-01/06-T-274-CONF-ENG, page 6, lines 9-25 and page 7, lines 1-2.

In respect of Defence witness DRC-D01-WWWW-0035, this Chamber held: 'If you're -- if, as I - I'm not sure whether correctly - but if, as I divine it, you are in fact seeking, through these questions, to establish [REDACTED], whilst he had the documents in his possession, somehow tampered with them, either altering what was on the originals or substituting wholly new documents or adding new documents [REDACTED] you must explore that directly with the witness. It shouldn't be left hanging in the air for a comment to be made later without the witness having been given the opportunity to deal with it. Now, if you're not going to be suggesting that later, then you needn't deal with it. But if you may be, you're under an obligation to deal with it now directly. ICC-01/04-01/06-T-283-CONF-ENG, page 46, lines 16-25 and page 47, lines 1-3.

Furthermore, and in respect of the same witness, this Chamber reiterated: 'Now, as with suggestions of fraudulent activity with the documents, if that possibility is later to be canvassed before us during the course of submissions, it should have been explored with the witness whilst he is here so he has an opportunity of dealing with the suggestion. So, please, reflect over the weekend on that. If we hear no more about it, we will not expect to hear a submission that the witness may have given false evidence because he is in a prejudiced position on account of some kind of loyalty which he feels to the Hema movement and the UPC as reflected in [REDACTED]. I'm sorry that's taken a minute or two to say, but I think it is important, Mr Sachdeva, that with issues such as these which are alluded to, but then do not lead to a firm suggestion, there is no room for mistake later because they haven't been properly explored with the witness at the relevant time. I'm sure you'll reflect on that': ICC-01/04-01/06-T-283-CONF-ENG, page 69, lines 16-25 and page 70, lines 1-6.

Also in respect of Prosecution Witness DRC-OTP-WWWW-0299, this Chamber recalled this principle: 'Good. Mr. Desalliers, so as to make sure there's no misunderstanding hereafter, although at the commencement of this witness's testimony there were a number of observations made as to his identity and that of his son, no questions have been put to him on the basis that he is not telling the truth when he says that [REDACTED]. Now, we are making the assumption that that matter has not been raised by you because there is no challenge to that fact, which of course is something which one would expect to be within your client's own personal knowledge [REDACTED]. I just want to ensure that it has been a deliberate and considered step on your part not to challenge that evidence.' ICC-01/04-01/06-T-122-CONF-ENG, page 42, lines 16-25 and page 43, lines 1-3.

See also *Kajelijeli v Prosecutor*, ICTR 098-44A-A (Judgment), 23 May 2005, para 26. "In the view of the Appeals Chamber, when weighing the Appellant's allegations going to the credibility of the Prosecution witnesses, the Trial Chamber was entitled to take into account the fact that the Appellant did not put such allegations to the witnesses for their reactions. Indeed, without the benefit of observing the witnesses' reactions to such allegations, the Trial Chamber was not in a position to determine whether there was merit in the Appellant's charges. Contrary to the Appellant's claim, there is no indication that the Trial Chamber based its position on this matter on the version of Rule 90(G) which came into effect after the Appellant's trial. Accordingly, this subground of appeal is dismissed".

In further support of this view, common law jurisdictions explicitly prohibit the impeachment of a witness through extrinsic documentary evidence: "The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment. See generally *McCormick on Evidence*, *supra*, § 40, at 89; Hale, *Bias as Affecting Credibility*, 1 Hastings L.J. 1 (1949)." *United States v. Abel*, 469 U.S. 45, 52, (U.S. (Supreme Court) 1984).

9. Several witnesses in the Katanga case and in the present case have testified that the information on their election card was inaccurate and/or obtained in violation of the Congolese legislation, which requires the person who requests the card to provide specific documentary evidence or to present five witnesses to confirm their identity.⁵
10. For example, in the Katanga case, witness DRC-OTP-WWWW-0279 (W-0279), born in 1990,⁶ explained that he obtained an election card containing incorrect information (namely that he was born in 1984⁷) by simply providing a document drafted by his brother. No further verification was conducted.⁸

⁵ Loi N° 04/028 du 24 décembre 2004 portant identification et enrôlement des électeurs en République Démocratique du Congo : **Article 10** :

Pour justifier l'identité et l'âge de l'électeur, sera prise en considération l'une des pièces ci-après :

- le certificat de nationalité ou l'attestation tenant lieu de certificat de nationalité ;
- la carte d'identité pour citoyen ;
- le passeport national ;
- le permis de conduire national sécurisé ;
- le livret de pension congolais délivré par l'Institut National de Sécurité Sociale ou par toute autre institution congolaise légalement reconnue en tenant lieu ;
- la carte d'élève ou d'étudiant ;
- la carte de service.

A défaut de l'une ou l'autre de ces pièces, sera pris en considération le témoignage fait devant le bureau du Centre d'Inscription par cinq témoins déjà inscrits sur la liste des électeurs du même Centre d'Inscription et résidant depuis 5 ans au moins dans le ressort du centre d'inscription.

⁶ ICC-01/04-01/07-T-151-CONF-ENG, page 23, line 11.

⁷ ICC-01/04-01/07-T-151-CONF-ENG, page 20, line 10.

⁸ ICC-01/04-01/07-T-151-CONF-ENG, page 25, lines 14 to 21: 'Now, when you went along to the Electoral Commission to get a card that clearly was regarded as very important by everybody, what document did you produce to show that you were born on the year that appears on that card? A. I didn't have any other documents. What I showed them there -- well, it was my big brother who had written something on a bit of paper, it was written by my older brother, and that is what I presented where you had to register'.

ICC-01/04-01/07-T-151-CONF-ENG, page 26, lines 21 to 25; page 27, lines 1 to 25 and page 28, lines 1 to 10: Q. If you take the date that you've given this Court as your birthday and we look at the date the card was issued, you were 14. So I'm not asking you to do the maths; I've done it for you. So you turn up and you say, "I'm 20 years old," when in fact you were 14, and they give you a card. Is that what you're saying? I didn't say anything. I gave them the piece of paper that I had. That is when they made this card for me. I didn't say anything to them. The 14 years of age that you are referring to, I did not talk about that. I didn't say anything about 14 or 15 years of age. Q. What was the piece of paper that you provided them? What was that? A. It was the piece of paper on which you see what is written on the card. Q. What was the document you gave them as proof of who you were and how old you were? What was it? A. I have just told you, the document I gave them, it was information written on the piece of paper. That is the information that they wrote on the card. Q. You see, I have a copy here of the relevant law in the Congo, dated December 2004, and

11. Also in the Katanga case, witness DRC-OTP-WWWW-0132 (W-0132) testified that she obtained one election card in a false name. She explained that she simply mentioned this false name, and obtained the card without having to provide supporting documentation.⁹ She explained that later on, she requested a second election card, under a different name, which she again obtained without providing any supporting documentation.¹⁰
12. In the present case, witness DRC-D01-WWWW-0015 (DW-0015) testified that she does not know her birthday, but that the date of [REDACTED] was indicated on the election card. She explained that the date on the election card was provided by her grandparents, and she does not believe that she turned 47 years old in 2010 as the date of birth on the card indicates.¹¹

I'm looking at Article 10. Just one moment. This was provided, I think, by the Prosecution. It hasn't yet been given an EVD number. In due course, we'll submit it. So let me just paraphrase, loosely translated, what Article 10 says. And what it says is: "To prove the identity and age of an elector," someone who wants to be put on that list of electors, "consideration will be taken of one of the documents below ..." and then it lists documents, and they're the kind of documents you would expect. It starts with certificate of nationality, citizen's card, national passport, driving licence, pension document, "carte de l'eleve," "carte de service." And it says: "In the absence of one or other of these documents, consideration will be given of evidence placed in front of the bureau of the centre of inscription by five witnesses already on the list of electors and resident for five years in the place of the centre of inscription." From what you say, Mr. Witness, you didn't have any of those documents with you, did you? A. That is correct, and I was not the only one. I did not have those documents. There are other people who arrived with bits of paper that they would present, and they were registered and they were given cards. And I proceeded in the same manner.

9 ICC-01/04-01/07-T-141-CONF-ENG, page 71, lines 17 to 25 and page 72, lines 1 to 5: 'Q: How did you manage to get a card in a false name? Didn't you have to produce some documents to support who you were, or are you saying you just went into an office, perhaps, and said, "I am so-and-so. Give me an electoral card"? How did it come about? A. I received it. I received that card. That is what I said, and it happened as I said. The names that I gave were taken down, so I received that card on the basis of the identity that I provided. Q. Did you produce any documents to support the name that you provided? Did you produce any documents to -- to prove to the authorities that that was your name or your date of birth or your place of birth? And don't mention names again, but just generally, did you have to produce any documents to support that? A. No. I gave them only what they asked me. I did not give any further explanations'.

¹⁰ ICC-01/04-01/07-T-141-CONF-ENG, page 73, lines 6 to 15: 'Now, looking at this card, it's the same in every detail except 7 for, of course, the names on it. It has what appears to be your finger-print again on it. It has the same signature of the president who signed the card in the electoral office. It has the same number, your national number. Now, how did you get this second card? A. The second card -- what can I tell you? The second card, I got it when we wanted to come. My mother went there, and I changed that name. My husband went so that we could change the name. But it is the same card'.

11 ICC-01/04-01/06-T-278-CONF-ENG page 21, lines 5 to 25 and page 22 lines 1 to 19: Q. Witness, what is your date of birth? A. I'm sorry, I'm not exactly sure what year I was born in. I'm very sorry but, you see, I have not studied. Q. Did you tell the Defence at any point in time that your date of birth was

13. Also in the present case, witness DRC-OTP-WWWW-0299 (W-0299) testified that – because his wife did not know her birth date - the Election Committee ‘invented’ a date for her, and indicated that date on her election card.¹²

[REDACTED]? A. That -- they saw that on my enrolment card. Q. Can you explain to me what is a carte d'enrôlement? THE WITNESS: I don't know exactly how to put it, but it's an official card with a photograph of the owner. MS ZAGO: Q. Thank you. And who -- do you know which entity issued this carte d'enrôlement? A. It was before the voting was held in the country. People were asked to enrol, so we went and enrolled or registered ourselves, so to speak, and that was at the mission. Q. Did you declare yourself to the, I assume, officers that issued this card that your date of birth was [REDACTED]? (...) Q. Witness, when you went to get this carte d'enrôlement, did you declare yourself to the officers who were supposed to issue this card that your date of birth was [REDACTED]? A. I didn't see that myself because my parents were already dead then, but the grandparents, they were the ones who helped me provide my birth date. Q. When did you get this carte d'enrôlement what year? A. Since I've got it, well, it's been five or six years, and that card I had, I still have it with me here. Q. You've forgotten since that date that your date of birth was [REDACTED]? A. Yes, indeed, I had forgotten that. Q. Are you 47 years old today? A. I believe -- well, I'm not exactly 47 years of age. Q. How old do you think you are? A. I wonder -- I think the people who had me were 35 or 36, so I wonder how I could be older than those who gave birth to me.

¹² ICC-01/04-01/06-T-119-CONF-ENG, page 36, lines 16-25, page 37 lines 1-25 and page 38, lines 1-19: WITNESS (interpretation): The date on this card is just an invention because she didn't study, so when she went to register they invented a date. She didn't even go to the first year of primary school. The CI agents imagined up a date and put that date down. They asked her information concerning the date. She didn't know, and that's why they put that date, but it's not the correct date. Q. Who are these CI agents you're mentioning? A. The CI is the Commission Independante Electorale, independent electoral commission, the commission that registered people to vote in the Congo. Q. So you believe that these CI agents invented the date on the card we have in front of us for [REDACTED]. A. Yes. Actually she didn't even attend the first year of primary school. So if somebody asks her for her date of birth, she can't give it. And when she went to enlist, how could she have given that date to register if she didn't know it? How can I write something if I don't know how to write? And I know that if you ask me to write something I know how to write, it's not the same as asking something of somebody who doesn't know how to either read or write. She doesn't know any of those. Q. Your answers are given in Swahili, and I think I understood from the French translation -- just a moment, please. (Defence counsel confer) MR. DESALLIERS (interpretation): Q. I think I understood the word "enlistment" in French. Is that the word you used? WITNESS (interpretation): Yes. Q. What do you mean by "enlist," "enlisting"? A. As far as I'm aware, people were enlisted. That is, people were counted for the election, and after that they were given an electoral card that served as an identity card. Q. So if the date of birth isn't correct, what is the date of birth, the real one? A. The real date of birth, well, one could ask her father or mother, somebody who knew. I married her. I couldn't tell you. Q. So how can you state that the date of birth on the card is wrong if you don't know [REDACTED] date of birth? A. If you look at the number of the Registration office, you'll see it's a different number. She went to a different one to the one I went to. If you look at the date on which she registered, you'll see that not only the date but also the office is different. How is it possible that a date was written down for somebody -- on that card, for somebody who doesn't know how to read or write, because she doesn't know how to either read or write. It is hard for me to understand because she is someone I live with; she can neither read nor write. Q. She doesn't know how to read or write, but does she know her date of birth? A. Well, the card, you see, isn't from me. I didn't go to register her. She went to register herself. But she's somebody who doesn't know how to read or write, so she won't be able to give any details about the dates. I can't say anything, because she was the one who went to

14. Several organizations, including the United Nations, have reported on the difficulties related to the June 2006 elections¹³ especially in the Ituri region. Watchlist on Children and Armed Conflict reported: *'Registration has been challenging, especially in the rural areas of the troubled eastern provinces, where insecurity threatens to jeopardize the elections process, and in areas where refugee returns continue. For example, in Ituri District, Orientale Province, due to insecurity, only 129 out of 514 voter registration centers were operational*'. (emphasis added)¹⁴
15. By way of example, and as a result of the lack of requesting identification documents, many Rwandans acquired Congolese identifications cards during the 2006 elections.¹⁵

Motivation to request an election card

16. The election cards were issued in 2005 in view of the elections held on 30 June 2006. However, the election cards were not only used to vote in the 2006 elections, but were recognized by the Congolese government as identification cards. Since no identification cards existed in the DRC at that

register herself. I wasn't the one who went there for her. If you look at the office, you'll see the -- both offices are different. The registration took place in different places. However, all of that happened in Bunia.

¹³ In May 2007, Special Representative of the Secretary General William Swing Stated: *'The Congo is one of the most recent countries to hold democratic elections. It did so against all odds. The Congolese elections are the largest elections that the UN has supported: The largest country (the size of Western Europe); the largest electorate (25 million); and the largest challenge (no roads; no I.D. cards; no recent census; no multi-party elections in 40 years). In fact, the United Nations has never undertaken anything quite on the scale of the Congolese elections'*. (emphasis added): W. Swing: "War, Peace and Beyond": SRSG William Swing - 08 may. 07: <http://www.un.int/drcongo/un-news.htm>.

The International Foundation for Electoral Systems reported on the 2006 elections: *'IEC officials had a daunting challenge. They had to recruit, train and deploy tens of thousands of registration agents, compile more than 25 million registrants into a voter list, eliminate duplicates and verify them in an effort to prevent fraud. Then they had to transport the delicate kits over 1.4 million square miles of rough territory to registration centers that often needed to be supplied with electricity and adequate security; and they had to do all of this in active conflict zones, in many cases:* <http://www.ifes.org/Content/Publications/Feature-Stories/2006/Jul/Voter-Registration-Field-Notebook-DRC.aspx?p=1>

¹⁴ http://watchlist.org/reports/files/dr_congo.report.20060426.php?p=6

¹⁵ Africa Faith and Justice Network: Rwandan Policy in DRC: <http://afjn.org/focus-campaigns/promote-peace-d-r-congo/30-commentary/794-rwandan-policy-in-drc.html>

time, this motivated many to request the cards.¹⁶ Inevitably, and since only persons legally of age could request the card, people had to declare that they were born in 1987 or before in order to obtain the cards.

17. W-0279, called as a child soldier in the Katanga case, explained why he provided an inaccurate birth date to obtain the card, and why he needed this election card as a protective measure. He explained that FARDC soldiers would stop people at check-points and ask them for their election cards. Those who could not present an election card were arrested.¹⁷

¹⁶ The United Nations reported on this issue: 'Another immediate benefit of the registration drive was the distribution to eligible voters of national identity cards, an important tool for safeguarding citizens' rights and access to public services': UN helps Democratic Republic of Congo with elections: <http://content.undp.org/go/newsroom/2006/july/drc-elections-20060721.en?categoryID=349424&lang=en>.

¹⁷ ICC-01/04-01/07-T-151-CONF-ENG, page 23, lines 22 -24 : 'That card, I did everything to get it because of my safety and because the year that is there -- I decided to increase the number of years so that I could get that card; page 24: lines 3-8: ' No. It was when they came to do the enlisting. The reason I was asking for this for my own safety was because they were saying that when enlisting, if somebody didn't have this card, well, when they started to check, then the person who didn't have that card, then he would have problems. He would be arrested or put into prison, and that is why I got that card made. That is a reason I had that card made'; page 24: lines 17-19: 'It helped with my safety in that wherever I wanted to go, I could go easily. It was that card that helped me. That is how that card could help me'. Page 24: line 24-25 and page 25: lines 1-2: 'I've just told you. It is when I moved about, it was then that that card helped me. It was when I moved about, when I met with soldiers, if they asked me for my card, then I was able to show them that card. It was that card that helped me with my safety'.

ICC-01/04-01/07-T-154-CONF-ENG, page 46, lines 8 to 25; page 47, lines to 23: 'So, Witness, Counsel Hooper asked you -- the following question: "How is it that this card helped to guarantee your security?" You didn't answer that question. Counsel Hooper thereafter continued. He asked you the following question: "Do you have an answer? To what extent did that ensure your security, the fact that you had such a card with all the mentions of points thereon?" This was a question that he asked you. And you answered thereto: "I have just told you. It was when I was moving around, this card was of help to me. When I was moving from place to place, when I came across soldiers, if they asked for my card, I would present it to them. It was this card that helped me with my security." And that -- that's what you answered Counsel Hooper. I have certain questions to ask you with regards to this part of your testimony. You made reference to the fact that when you were moving around you could come across soldiers. Where it concerns these soldiers, were they FRDC, or were they, rather -- FARDC, or were they, rather, militia? A. They were FARDC soldiers. Q. And, Witness, so that we can all understand how this occurred, these soldiers, where were they? Where could you come across them? A. There were even FARDC troops where we were living. They were also at the roundabout where you have the road going to Bogoro and Zombe. They were also in Lengabo, in Yambi, and around that area. Q. And so we can also understand, when you met or came across these soldiers, did they have control points? A. Yes. THE INTERPRETER: "Check-points," corrects the interpreter. MR. GARCIA: (Interpretation) Q. Normally when you meet these soldiers at check-points, when you meet them in the places that you've mentioned, what happens then? A. Could you repeat your question? Q. So, Witness, when you came across these soldiers at check-points, what did they say to you? What was asked of you? A. They asked

18. The ICG report on the 2006 elections confirms this practice: *'To encourage participation, especially in the face of a UDPS call to boycott the process, the government declared the voter card a valid form of identification. For a population often harassed by security forces – the lack of an identity card was a frequent reason for arrest and fines – this was a strong motivation'*. (emphasis added)¹⁸
19. Médecins sans Frontières mentions similar scenarios in the Katanga region: *'While access by MSF to areas of military operation has been refused on the grounds of security, we have no idea how many people have been willing to take the risk of travelling to those zones controlled by the Government. Threatened and attacked by the Mai-Mai, they also fear arrest and violence by the military – particularly if they do not have an electoral registration card. Many may remain trapped in the bush still subject to violence and abuse'*. (emphasis added)¹⁹
20. Other reasons also prompted Congolese citizens to request election cards. For example, Watchlist on Children and Armed Conflict reported that people believed they would lose their citizenship if they failed to register to vote: *'The United Nations High Commissioner for Refugees (UNHCR) also reported that Congolese refugees residing in neighboring countries have prematurely begun to repatriate, despite high insecurity. Apparently, they are responding to false rumors that they may lose their Congolese citizenship if they do*

us to present our card. That's what they did basically. Q. Did they ask other things other than asking for your cards? A. Nothing else. Q. What happened, Witness, if the person did not have his card? A. If the person did not have a card, that person was stopped. He remained there, but I don't know what happened afterwards.

¹⁸ International Crisis Group: "CONGO'S ELECTIONS: MAKING OR BREAKING THE PEACE"

Africa Report N°108 – 27 April 2006, page 3: <http://www.crisisgroup.org/~media/Files/africa/central-africa/drcongo/Congos%20Elections%20Making%20or%20Breaking%20the%20Peace.ashx>

¹⁹ Médecins Sans Frontières: 'Still trapped in the bush', 09 February 2006 http://www.msf.org/msfinternational/invoke.cfm?objectId=51376269-9452-7C0C-72B82F36C9F99FA9&component=toolkit.article&method=full_html

*not register to vote, because the voter registration card is intended to replace older national identity cards’.*²⁰

21. In sum, even if the witnesses had in fact requested election cards, it cannot be concluded that they are necessarily incredible witnesses, either because they lied about their age at trial or lied to the electoral commission. However, admitting these cards without giving the witnesses an opportunity (i) to comment on these cards; (ii) to explain the circumstances in which these cards were requested; and (iii) to provide any additional information related to the cards.
22. Finally, there is no basis for admitting the cards related to W-0006 and W-0009, who did not give evidence before this Court. Their statements are not evidence and their credibility is not an issue.

Weight to be afforded to the alleged election cards

23. Alternatively, and should the Chamber admit these documents without offering the witness an opportunity to comment upon them, the Prosecution submits that the weight afforded to them should be very low.

Conclusion

24. Based on the foregoing:
 - the Prosecution requests permission to file further submissions, should it be necessary, once it has obtained the results of its investigation;
 - the Prosecution requests the Trial Chamber to reject the Defence’s request for the admission of these four documents related to trial and non-trial witnesses; and

²⁰ http://watchlist.org/reports/files/dr_congo.report.20060426.php?p=6

- In the alternative, if the Chamber decides to admit the election cards, the Prosecution requests that the witnesses concerned be called/re-called or that the documents concerned be afforded very little weight.



Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of July 2010
At The Hague, The Netherlands