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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

Skeleton Submission on Hearsay Evidence of Witness P-267

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The issue concerns the proposed introduction into evidence of general references made by witness P-267 in his evidence as to the alleged participation of Germain Katanga in attacks such as Bogoro, based on unspecified statements made by unidentified third parties one year and a half after the events to which they relate.
2. The Chamber has requested the parties to remain within the confines of its previous ruling. In this respect, in response to a request for clarification from the Prosecution, the Chamber stated that this should not be concerned with personal conversations with child soldiers so as not to go back on this ruling. The ruling being referred to, as the Defence understands it, is that contained at 165, p73, line 10:

This personal knowledge that the witness seems to have acquired of one of the two accused justifies a number of questions being put to the Prosecutor as to the personal impression that he might have acquired of the accused and of the exchanges, discussions they might have had. I don't think that we are talking about hearsay. We're talking about bilateral relations that were established at a given moment in time between the witness and the accused.

So provided that the Prosecutor remains within those limits, the Bench sees no reason why he shouldn't put perfectly precise questions because he, the Prosecutor, has understood that if there is a faux pas on his part, there will perfectly legitimately be a reaction on your part.

Definition of hearsay

3. Hearsay evidence constitutes an out of court statement adduced for the truth of its contents: "the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says" (See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16

February 1999, para 14). Thus, X told me that.... X told me that Y told him that would be tertiary hearsay.

General Principles on the admission of evidence

4. The general principal on the admission of evidence according to Article 69(4) of the Statute, is that the Chamber possesses a broad discretion in relation to the admission of evidence. Evidence is admitted having regard to its relevance and considerations of any prejudice and the fair evaluation of the evidence. This is a more refined provision than that of Rule 89 (C) of the Statutes Rules of Procedure and Evidence of the *ad hoc* tribunals, which simply states that evidence is admissible if it has probative value.
5. The Appeals Chamber of the ICTR set out in the judgment on the first case before the ICTR, the general parameters of admission of evidence in terms of Rule 89 (C). In this respect, it held that evidence would be admitted if it had probative value. It held that the question of the reliability of evidence went not just to weight, but also, to its admissibility. In other words, the admission of evidence was not unlimited. The Trial Chamber has a broad – though not unlimited – discretion in the matter. Evidence could be so lacking in indicia of reliability as to be devoid of probative value (*See Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4, 1 June 2001, paras 286-287). The specific context of that case was that there had been no timely objections to evidence which was already on the record and there was the opportunity to cross-examine. So, from this time, a distinction is drawn between dealing with the exclusion of evidence on the record and objection to the eliciting of evidence before it was on the record.
6. Subsequent decisions have developed upon these principles, by overlaying the principles that the Trial Chamber must apply principles for the fair determination of the issues, and that the prejudicial effect of evidence may outweigh its probative value (*see Prosecutor v. Nahimana et al.* the Separate Opinion of Judge Shahabudeen). In *Prosecutor v Kordic & Cerkez*, the Appeals Chamber stated that the broad discretion given by Rule 89(C), is nevertheless limited by the requirement in Rule 89(B) that the rules of evidence applied by a Chamber must be those which best favour a fair

determination of the matter before the Chamber, and which are consonant with the spirit of the Tribunal's Statute and the general principles of law.

General approach to hearsay evidence

7. The general approach to hearsay evidence in the *ad hoc* tribunals has been that it is admissible, but of reduced weight (*see, for example, Prosecutor v. Limaj*, Case No., Oral Ruling of 18 November 2004, pp. 447-449 "whether any weight, and if so, what weight will attach to [hearsay opinion] will depend to what extent the question of hearsay is clarified by other evidence and it is shown to be reliable [. . .] Let it be clear that we, in receiving this evidence, will treat it as merely, in a sense, an introductory summary and it will be of no weight in our view unless later witnesses substantiate the basis for it").
8. This has also been the position in *Lubanga* (*see* ICC-01/04-01/06-T-125-ENG WT (12/02/09), pp 66-67 : "[...] information that the witness would have become aware of at the time that these events were unfolding [...] is a material consideration. It is likely that the evidence is of greater value in those circumstances than if this was something that he happened to hear many years later when talking to somebody who was unconnected with the events.")
9. However, in line with the general principles as stated above, the Chamber has discretion in the matter which can be exercised on a case-by-case basis.

Considerations for the exclusion of hearsay evidence in appropriate cases

10. Hearsay is a category of evidence which carries with it particular dangers in terms of its reliability. In *Kordic and Cerkez*, the Appeals Chamber held that the reliability of a hearsay statement is relevant to its admissibility, and not just to its weight (*see Prosecutor v. Kordic and Cerkez*, Case No. IT-05-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000). The question of the inadmissibility of hearsay evidence in specific circumstances has been addressed in the *Milosević* case. In this case Judge May held contrary to the prosecution

submission, that the opportunity to cross-examine those who had summarized the statements of others did not overcome the absence of an opportunity to cross-examine the persons who made them. He recognized that in other cases, it was possible that the statements may contain their own indicia of reliability which does overcome the absence of that opportunity (*see Prosecution v. Milosević*, Case No. IT-02-54, Transcript pp 11471-11472, dated 10 October 2002).

11. Also, in the *Milosević* case, it was held that while hearsay statements made almost contemporaneously with the period of the charge were admissible, statements of a hearsay nature made in conversations some three years later would not be admitted for lack of reliability. Judge May said:

I'm sorry, Rule 89 permits the Chamber to admit any relevant evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
... statements of another person three years after the event, about which there is or could be other evidence, is not sufficiently probative to be admissible in the particular circumstances of this case.

Particular difficulty with evidence resting upon the correctness of an identification of the accused

12. When the hearsay nature of a statement is combined with its reliability depending upon a correct identification of the accused, particular difficulties arise. As stated by the ICTR Trial Chamber and approved by the ICTR Appeals Chamber in the case of *Niyitegeka*:

The Chamber accepts that identification evidence has inherent difficulties due to the vagaries of human perception and recollection. Therefore, the Chamber has carefully assessed and weighed the identification evidence adduced, taking into account the following factors: prior knowledge of the Accused, reliability of witness testimonies, conditions of observation of the Accused, discrepancies in the evidence or the identification, the possible influence of third parties, the existence of stressful conditions at the time the events took place, the passage of time between the events and the witness's testimony, and the general credibility of the witness

In the case of evidence of a hearsay nature it is usually impossible to test properly the reliability of the statements in these respects.

The particular circumstances of this case

13. In the particular circumstances of this case, it is submitted that it would be inappropriate and prejudicial to the fairness of the trial to admit into evidence statements made to 267 about Germain Katanga's participation in the attack on Bogoro in so far as such statements are being admitted for the truth of their contents.
14. In this case the best evidence of the personal position of Mr Katanga at the Bogoro attack is available. Witnesses have appeared giving direct evidence of this.
15. 267's evidence before the Chamber concerns his position as the head of an NGO facilitating the demobilization of child soldiers in 2004-2005. He has no personal knowledge of that attack based upon his personal perceptions of the attack. He was not there and he was not in the militia or a victim of that attack. Whatever information he has received is entirely of a hearsay nature. On the basis of the information in the hands of the defence in his statement the information is either from the Ngiti community or his agents. In the case of the former, he plainly would have to have an interpreter present. The quality or qualifications of the interpreters is unknown. Even in instances where he has spoken to children in the demobilization process, it is unclear whether any such children participated directly in the attack on Bogoro or what would be the basis of their assertions about Katanga – personal perception or in itself hearsay evidence. The reliability of such statements cannot be properly tested.
16. The prosecution should not be permitted to adduce evidence of 267's knowledge of the personal experiences of children specifically at the Bogoro attack because this is a matter which the Defence would have required notice given its sensitive nature to the case. No such notice exists in relation to this.
17. On the facts here, cross-examination of this witness cannot cure the lack of reliability of statements which he may have heard. Whatever the credibility of this witness might be we are essentially dealing with loosely expressed hearsay identification evidence

with respect to the original maker of the statements. In such circumstances, it is impossible to cure the unreliability of such statements in the absence of cross-examination of the original maker of the statement. Also, since this witness was speaking to people with the objective of the demobilization of children, it is unlikely that he was looking for or focusing on details of the identification of Katanga at Bogoro or what he specifically did there. 267's cross-examination cannot be a remedy.

18. In the evidence thus far there are considerable discrepancies as to whether Katanga was at Bogoro, was there at the beginning, the middle or the end or after a few hours of the attack, one day, or three days. So any hearsay evidence cannot be specifically related to presence at the attack itself.
19. The conversations of 267 would have taken place between June 2004 and mid 2005, so one and a half to two and a half years after the attack. In line with the decision in *Milosevic*, statements made long after the
20. events by third persons could not be sufficiently probative to be admissible, but would simply create an air of suspicion around the accused. Their prejudicial effect far outweighs any probative value.
21. Finally, and this interrelates with the point in paragraph 17 above one must take into account the dangers of identification evidence. Even if "first hand" hearsay (i.e. a statement made by a person present at Bogoro to witness 267), statements about the actions of Germain Katanga at the Bogoro attack would be dependent on a correct identification by the maker of the statement. There is no way to test in cross-examination the distance of view, prior knowledge of the accused, conditions of view etc of the original maker of the statements.
22. This evidence concerns hearsay made at least one and a half years after the event that might be first, second, third, or sixth hand hearsay and concerns identification of the accused, and is unnecessary in the context of a trial where the Prosecution are calling direct evidence of those present at the attack.
23. It is therefore submitted that that admission for the truth of their contents of statements about the accused's presence at the Bogoro attack or other attacks and what he did,

from this witness, would be inconsistent with the fairness of the proceedings. Accordingly, questions to elicit this information for the truth of its contents should not be allowed.

Respectfully submitted,



David HOOPER Q.C.

Dated this 9 July 2010

At The Hague