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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 THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

Prosecution's Submissions on Admissibility of Hearsay Evidence

Source: Office of the Prosecutor

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Introduction

Pursuant to the Order made by Trial Chamber II (“Chamber”) during the hearing held on 8 July 2010 the Prosecution hereby submits its response to the objections raised by the defence for Germain Katanga pertaining to the admissibility of hearsay evidence elicited from witness P-267 during his examination in chief, in particular as it relates to the acts or conduct of the accused. Such evidence relies on information collected by staff employed in P-267’s NGO in the course of their duty. The present submission is based on Article 69(4).

In accordance with Article 69(4), the Court may rule on admissibility of any evidence taking into account, *inter alia*, its probative value and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness. The admissibility of hearsay evidence is governed by the same criteria as admissibility of all evidence before the Court. This Court has consistently ruled that hearsay evidence, regardless of its degree, is admissible before this Court. Likewise, other international tribunals have found such evidence to be admissible. The fact that hearsay is once or twice removed may bear on its probative value but is not a bar to its admissibility. Furthermore, there is no basis in the founding texts of the Court or its jurisprudence to exclude hearsay evidence relating to the acts and conduct of the accused.

The in-court testimony of P-267 is sufficiently reliable to warrant its admission into evidence to further assist the Court in its determination of the truth. Because the reliability of such evidence is verified, an assertion for its exclusion, at this stage of the proceedings based on the prejudicial effect that it may cause cannot be supported.

Background

1. This submission is made while P-267's testimony is on-going. The witness began testifying before this Chamber, as a Prosecution witness, on 30 June 2010 and continued on 2, 5, 6 and 8 July 2010. The issue at hand arose during his direct examination; the Prosecution started questioning the witness on the responsibility of Germain Katanga for the Bogoro attack, which led to objections by the defence for Germain Katanga.¹ The Defence based their objections on authorities provided in court.² The Chamber ordered the parties and participants to file their observations on the issue of admissibility of hearsay evidence before Friday, 9 July 2010, at 3 p.m. The Prosecution hereby complies with this order.

2. The evidence, the admissibility of which is contested by the defence, can be characterized, as acknowledged by all parties and participants, as hearsay evidence, once or more removed, and relates to Germain Katanga's responsibility in the Bogoro attack.³ The Defence argues that the prejudicial effect of its admission outweighs its probative value. The Defence also argued that they had only received prior notice of the fact that this information emanated from the Ngiti community. The Defence asserts that they received

¹ ICC-01/04-01/07-T-165-CONF-ENG, 8 July 2010, p. 48, l. 11 and onwards.

² ICC-01/04-01/07-T-166-CONF-ENG, 8 July 2010, p. 42, l. 20- p. 43, l. 6.

³ ICC-01/04-01/07-T-166-CONF-ENG, 8 July 2010, p. 42, l. 1-19, Counsel O'Shea: "I've listened to the arguments of the Prosecution. I've listened to the argument of the Legal Representatives and to you, Mr. President, outlining your -- your views on your prior decision, but we -- we -- I'd like it to be understood that the nature of what we have a difficulty with, because I think it's been slightly misunderstood here or there, we don't simply have a difficulty with hearsay evidence coming from sources other than child soldiers. We also have a problem with hearsay evidence coming from child soldiers. Your Honour has quite rightly set out that it's legitimate for this witness to speak about his interactions, his direct interactions, with child soldiers. He is, after all, here to speak about child soldiers and the process of demobilisation, and your Honour has referred to your Honour's prior ruling in that respect. **But what we're complaining about here is a specific piece of evidence which my learned friend Mr. MacDonald is seeking to adduce before this Chamber, a specific piece of evidence relating to the responsibility of Mr. Katanga, and in that specific context we have the right to question the reliability of -- of evidence of this nature, even if it comes from child soldiers, which this witness has come here to talk about.**"[emphasis added].

no notice that this type of evidence may have come from child soldiers interviewed by P-267 or his agents.⁴

Prosecution's Submissions

Hearsay evidence is admissible

3. The issue of admissibility of evidence has already been extensively litigated before this Chamber. Therefore, the Prosecution incorporates by reference its arguments on the principles of admissibility of evidence developed in full its prior submission dated 17 November 2010.⁵ Here, the Prosecution reiterates the principle of free assessment of evidence under Article 69 and Rule 63(2). Article 69(2), in addition to the main principle of orality of evidence, envisages the admission of evidence other than by the testimony of a witness at trial. Article 69(3) also provides that parties may submit relevant evidence. Since neither the Statute nor any Rule bars or limits the admission of hearsay evidence in the situation presented here, the Chamber has the discretionary power to admit, in its search for the truth, the evidence pursuant to the general admissibility principles found in Article 69(2), (3) and (4) and Rule 63(2).
4. The criteria of admissibility as developed by Trial Chamber I, can be divided into three stages: determining *prima facie* relevance, *prima facie* probative value (including, among others, assessment of indicia of reliability) and weighting of the prejudicial effect against the probative value.⁶ The criteria do not categorically exclude hearsay evidence or determine that evidence that has a potential for prejudice must be excluded, regardless of its relevance,

⁴ ICC-01/04-01/07-T-166-CONF-ENG, 8 July 2010, p. 34, l. 14 – p. 35, l. 9.

⁵ ICC-01/04-01/07-1643, 17 November 2009, paras. 8-9, 12-13, 15-17.

⁶ ICC-01/04-01/06-1399, 13 June 2008, para. 27.

reliability, and probative value. So, to the extent that the Defence demands automatic exclusion because the evidence is unfairly prejudicial, such a complaint would seem to be foreclosed by the Chamber's balancing test.

5. Thus, the Prosecution asserts that hearsay evidence is not *per se* inadmissible and that Chambers have, in principle, the discretion to admit such evidence into the record. In doing so, they may, as for any other form of evidence, examine its indicia of reliability and its relevance or probative value.
6. The Prosecution acknowledges that if evidence cannot satisfy minimal indicia of reliability it should not be admissible. Neither party should be prejudiced by the admission of unreliable evidence against it.⁷ But hearsay evidence is not *per se* unreliable. Whether it is reliable and consequently to be given probative value will depend on a number of factors that must be assessed on a case-by-case basis, taking into account the specific facts of the proffered evidence.
7. For example, Pre-Trial Chamber I expressed a particular limitation with respect to anonymous hearsay evidence, generally allowing it probative value "only to corroborate other evidence."⁸ Pre-Trial Chamber I, in its Decision on the Confirmation of charges in the Katanga case, articulated its discretion under Article 69(4) to determine relevance and/or admissibility of evidence and that it would look at the intrinsic coherence of any item of evidence and declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be

⁷ Trial Chamber I has considered that this may indeed be the effect of demonstrable lack of reliability of evidence, but has still left open the door to include even such evidence: see ICC-01/04-01/06-1399, para. 30.

⁸ PTC I, ICC-01/04-01/06-803tEng, Decision on the Confirmation of Charges, 29 January 2007, paras. 101, 106.

made in light of the whole body of evidence introduced at the confirmation hearing” (underline added).⁹

8. The rules apply regardless whether the hearsay evidence concerns the acts or conduct of the accused. There is no principled basis for a distinction in value between hearsay evidence offered to establish the Accused’s acts and evidence offered to establish any other essential elements of a charged offense. Thus, the Prosecution disagrees with the Katanga Defence theory that it is particularly objectionable to admit hearsay that attributes responsibility to Germain Katanga for the Bogoro attack.¹⁰

9. The ICTY jurisprudence¹¹ refuses to impose a categorical limitation on the use of hearsay evidence to prove the acts and conduct of the accused. In the *Kordić and Cerkez* case, the Appeals Chamber rejected a claim that uncorroborated hearsay evidence could not be considered as proof of the individual criminal responsibility of the accused. The Appeal Judgment made clear that there is no distinction. “The Trial Chamber weighed the probative value of portions of that evidence and concluded that it was reliable for the purpose of proving the truth of its contents, in the sense of being voluntary, truthful and trustworthy.”¹² It also explained: “The Trial Chamber considered the probative value of Witness AT’s evidence and – together with other evidence – arrived at its conclusions in a fully-reasoned and methodical manner. The Appeals Chamber has considered the arguments alleging Witness AT’s

⁹ PTC I, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 1 October 2008, para. 77.

¹⁰ That is, regardless whether P-267 obtained this evidence from child soldiers who might have had direct knowledge of Katanga’s responsibility, or from his agents who conversed with child soldiers). See *supra* note 3.

¹¹ The Rules of Procedure and Evidence (RPE) governing the ICTY (and the ICTR), like the rules in this Court, do not contain provisions dealing specifically with hearsay statements. Nevertheless, this type of evidence can be admissible under Rule 89(C), which states: “A Chamber may admit any relevant evidence which it deems to have probative value.” In fact, some ICTY decisions consider that Rule 92 bis of the ICTY Rules of Procedure and Evidence, which governs admissibility of written statements of witness who are unavailable to testify, encompasses a very special type of hearsay evidence: See for example *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002 (cited by the Defence in their submissions) and *Prosecutor v. Galic*, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), Case No. IT-98-29-AR73.2, App. Ch., 7 June 2002.

¹² *Prosecutor v. Kordić and Cerkez*, Appeal Judgement, IT-95-14/2-A, 17 December 2004, paras. 283-284.

evidence to be uncorroborated hearsay evidence deficient in credibility and finds that the Accused have failed to demonstrate that the Trial Chamber erred in its assessment of the evidence. The Trial Judgement reflects the prudence exercised by the Trial Chamber in accurately analysing the factual matrix surrounding the events in the Lašva Valley in mid-April 1993, and Witness AT's place within it. The arguments against the Trial Chamber's reliance upon the testimony of Witness AT are dismissed".¹³

10. Similarly, in the *Milutinović et al.* case, the Court refused to exclude a priori the use of hearsay evidence in order to prove the individual criminal responsibility of an accused, though the trial chamber in that case indicated it would likely give low weight to the evidence.¹⁴ Recently in the *Haraqija and Morina* case for contempt of court, the Appeals Chamber stated that "as a matter of law, it is permissible to base a conviction on hearsay or circumstantial evidence, but caution is warranted in such circumstances".¹⁵
11. There is also no categorical bar against the admission of hearsay in the second degree. "Double hearsay" evidence, though perhaps less relied upon, is admissible before the ICTY. In the *Kordić and Cerkez* case, the judges routinely admitted double hearsay, but specified that its weight would have to be determined afterwards in the context of the evidence presented as a whole.¹⁶ Similarly, in the *Stakić* case, ruling on the admission of an expert report into

¹³ *Ibid.*, para. 294.

¹⁴ "The Trial Chamber has found this [the admission into evidence of hearsay evidence concerning the accused Sainović] an extremely difficult matter to resolve, and we will ultimately decide that this evidence is admissible. But the weight to be given to evidence of this nature, touching as it does on an important element, which could contribute to the evidence of individual criminal responsibility of this accused, is quite another matter". *Prosecutor v. Milutinović et al.*, Transcript, IT-05-87, 13 November 2006, p. 6347, lines 10-16. *See also Prosecutor v. Kordić and Cerkez*, Transcript, IT-95-14/2, 08 June 1999, p. 3596, lines 20-25 and p. 3597, lines 1-14, where the Chamber deliberated that "it makes no difference that the [hearsay] evidence is about a crime. What does make the difference is as to whether it is potentially reliable or not".

¹⁵ *Prosecutor v. Haraqija and Morina*, Appeal Judgment, IT-04-84-R77.4-A, 23 July 2009, para. 62.

¹⁶ *See Prosecutor v. Kordić and Cerkez*, Transcript, IT-95-14/2, 14 October 1999, p. 8489, lines 13-25 and p. 8490, lines 1-2; *Prosecutor v. Kordić and Cerkez*, Transcript, IT-95-14/2, 04 November 1999, p. 9465, lines 14-25 and p. 9466, lines 1-7; and *Prosecutor v. Kordić and Cerkez*, Transcript, IT-95-14/2, 18 February 2000, p. 14616, lines 1-19.

evidence, the judges admitted the report but specified that they would not rely on it alone to convict the accused.¹⁷

12. Contrary to the Defence's assertions,¹⁸ the ICTY and the ICTR judges recognize less, not more discretion than the ICC to admit evidence. Although Rule 89 C of the Tribunals' RPE was more general than the relevant ICC provisions, the Tribunals' jurisprudence effectively states that it applies the "balancing test" of probative value vs. prejudicial effect.

This evidence is reliable and relevant and should be admitted; the Chamber then may accord it appropriate weight in its discretion

13. In the present case, the disputed evidence was collected during the course of professional activities conducted by P-267's organization.¹⁹ The organization, moreover, employed a systematic and consistent methodology in obtaining and recording information from children.²⁰ The forms and registration were effected contemporaneously, on the ground, and for purposes completely apart from, indeed without even conceivable contemplation of, their use in litigation. The use of forms and their registration once data is collected²¹ further attest of the reliability of this information as conveyed to the Chamber by P-267.

14. The professional training and background of the teachers employed by, and acting as agents of, this organization further militate for the reliability of the

¹⁷ "The hearsay rule does not apply, but the issue of how much weight is given to this evidence is very much a matter for the Tribunal. And, in that connection, we shall, of course, bear in mind that it is hearsay. And, as I said earlier, sometimes hearsay upon hearsay. With those considerations in mind, we shall admit this report. But, I should make it quite plain, there is no question of this defendant be convicted on the basis of this evidence. And we shall require other evidence before we consider taking such course". *Prosecutor v. Stakić*, Transcript, IT-97-24, 6 July 1998, p. 75 lines 23-24.

¹⁸ ICC-01/04-01/07-164-CONF-ENG, 5 July 2010, p. 43, l. 24 – p. 44 l. 5.

¹⁹ ICC-01/04-01/07-163-CONF, 30 June 2010, p. 36, l. 5 – p. 44, l. 2. p. 21, l. 4 – p. 37, l. 5, p. 38, l. 24 – p. 55, l. 18.

²⁰ ICC-01/04-01/07-165-CONF, 6 July 2010, p. 21, l. 4 – p. 37, l. 5, p. 38, l. 24 – p. 55, l. 18

²¹ ICC-01/04-01/07-165-CONF, 6 July 2010, p. 23, l. 15 – p. 31, l. 22.

information collected and its communication by P-267.²² Indeed, this staff has received specialized training on demobilization from International NGOs.²³ The professional relationship between the witness, a trained professional with ample experience in the field,²⁴ and his staff indicates that the collection of information was conducted under his close supervision.²⁵

15. This sort of evidence would be deemed admissible even in common law jurisdictions that bar the admission of hearsay evidence. One such jurisdiction, the United States, allows for specific exceptions to the rule against hearsay evidence when the evidence proffered consists of records maintained in the ordinary course of business. “Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status.²⁶ This is particularly so when the document has been prepared for non-testimonial purposes, and without contemplation of its use as proof in subsequent litigation. Thus, in *Melendez-Diaz*, the United States Supreme Court recognized the exception to the hearsay rule while particularly excluding laboratory reports offered without the live testimony of the laboratory analyst, based specifically on the fact that the reports were prepared for the purpose of providing evidence against the accused at trial. But other business records prepared and kept in the ordinary course of business are non-testimonial statements and thus are admissible notwithstanding that they may be hearsay.²⁷

16. The Prosecution asserts that admitting this evidence into the record does not prejudice the Defence since the Defence will have the opportunity to challenge the witness, the methods employed by him and his organization, and the

²² ICC-01/04-01/07-165-CONF, 6 July 2010, p. 20, l. 9-25.

²³ ICC-01/04-01/07-165-CONF, 6 July 2010, p. 13, l. 18 – 22.

²⁴ ICC-01/04-01/07-165-CONF, 6 July 2010, p. 36, l. 5 – p. 44, l. 2.

²⁵ ICC-01/04-01/07-165-CONF, 6 July 2010, p. 35, l. 11-20.

²⁶ See Fed. Rule Evid. 803(6).” *Melendez-Diaz v. Massachusetts* 129 S.Ct. 2527, 2538 (U.S. Mass. 2009).

²⁷ See *United States v. Mashek*, 606 F.3d 922, 930 (United States, 8th Cir. 2010).

process for collecting the information through cross-examination. Once the evidence is admitted, and after having heard and observed the direct and cross-examination, and with the benefit of the entire body of evidence, at the end of the trial the Bench will be properly positioned to assign the appropriate weight to this – indeed to all – of the evidence in the case. It is a matter to be determined at the end of trial, not at the admissibility stage, and taking into account the totality of evidence.

17. Thus, the Prosecution submits that the evidence should be admitted here. The Prosecution further notes that jurisprudence provided by the Defence does not apply to the current issue before this Chamber. In the Milosevic 30 September 2002 decision on admissibility of prosecution investigator's evidence before the ICTY, the issue was whether a summary of various witness statements, made by the prosecution investigator, prepared for the purpose of trial proceedings, could be admissible. Differently from this cited case, the disputed evidence, in the current situation, was not collected for the purpose of the trial.²⁸

18. The Akayesu judgment relied upon by the Katanga Defence likewise merely reasserted the general principles of admissibility of evidence. While the separate opinion of Judge Shahabudeen in the *Nahimana* case dealt with exclusion of evidence when its prejudicial effect outweighs probative value, this issue arose in relation to temporal jurisdiction of the tribunal.

19. Consequently, the authority relied upon by the Defence does not require exclusion of the proffered evidence in this case.

²⁸ It is also to be noted that in the ICTY, the witness statements prepared for the purpose of trial could only be admissible if they satisfy the conditions of Rule 92 *bis*, *ter* or *quater* of the ICTY RPE – which was not the case of the summary prepared by the investigator. The statements summarized were not collected according to the Rule 92 *bis*. The summary also contained the investigator's conclusions.

Conclusion

20. For the foregoing reasons, the Prosecution requests that the Chamber reject the objections of the Katanga defence and admit the evidence of P-267 regarding the responsibility of Katanga.



Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of July 2010

At The Hague, The Netherlands