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No.: **ICC-02/05-01/20**
Date: **20 February 2023**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v.
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)

PUBLIC

**Public redacted version of “Defence response to Prosecution’s second request to submit material from the bar table of 31 January 2023”,
13 February 2023, ICC-02/05-01/20-871-Conf**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s second request to submit material from the bar table (“Request”).¹ By email of 8 February 2023, the Trial Chamber granted the Defence request for an extension of the page limit of this response to 20 pages and of the time limit to 13 February 2023.

II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this response and its annexes are classified as confidential to reflect the fact the Request is also classified as confidential. A public redacted version will be filed shortly.

III. SUBMISSIONS

(a) Applicable law

3. The Defence acknowledges that the Directions on the conduct of proceedings² make provision for the tendering of documentary and other supporting evidence from the bar table. However, it is submitted that the tendering of such evidence through a witness must always be the preferred means of placing evidence on the record, because it gives the Chamber and the Parties an opportunity to satisfy themselves of the authenticity of the evidence, and better understand its context, relevance and reliability.³ The Defence summarises below the applicable standards and criteria of relevance in relation to admission of evidence from the bar table, as established by the developing case law of the Court.

4. In *Gbagbo & Blé Goudé*, the Trial Chamber stated that, “Parties are expected to fully litigate the relevance and admissibility of each item of evidence at the time it is submitted (cf. Rule 64(1) of the Rules). Unless the relevance of an item of evidence is readily

¹ ICC-02/05-01/20-860-Conf + Conf-Anx, 31 January 2023; public redacted version [ICC-02/05-01/20-860-Red](#)

² Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#) with Annex A, paras 55-56.

³ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 12.

apparent – on its face or from submissions that are already on the record of the case (such as the pre-trial brief) – the party submitting the evidence must make sufficiently detailed and precise submissions, so as to enable the other parties to make informed responses and the Chamber to resolve the matter, including ruling on admissibility if necessary.”⁴

5. An important factor for the Chamber to take into account when deciding on the admissibility of a document from the bar table must be whether a particular document could have been tendered through a witness, and the explanation provided by the moving party for failing to tender a particular document through a witness (or lack thereof).⁵ The fact that evidence is being tendered without proper authentication by a witness may be an important factor in the Chamber's assessment of its admissibility.⁶

6. Each item of evidence must be individually assessed for its relevance and probative value at the time it is tendered and before being admitted into evidence. If the tendering party is unable to demonstrate its relevance and probative value, including its authenticity, it cannot be admitted. It does not suffice to argue that its content may be corroborated by other evidence or that the Chamber may subsequently determine its proper evidentiary weight.⁷

7. The first factor which the Chamber must consider when determining probative value is the inherent reliability of an item of evidence.⁸ If an item of evidence does not display sufficient indicia of reliability, it may be excluded because it can hardly be considered to prove anything.⁹

⁴ *Gbagbo & Blé Goudé* (TC), Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, [ICC-02/11-01/15-773](#), para. 38 (*see also* para. 37).

⁵ *Ntaganda* (TC), Decision on Defence Request for Admission of Evidence from the Bar Table, [ICC-01/04-02/06-2201-Red](#), para. 6; Decision on Prosecution's Request for Admission of Documentary Evidence, [ICC-01/04-02/06-1838](#), para. 13.

⁶ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 12.

⁷ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 13.

⁸ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 21.

⁹ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 28.

8. When considering reliability, the Chamber must first decide whether the authenticity of a document has been established. In the absence of authentication, there can be no guarantee that a document is what the party tendering it purports it to be.¹⁰ In *Katanga*, the Trial Chamber held that, “*Under no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value.*”¹¹ The Chamber also found that, “*To admit unauthenticated evidence would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth.*”¹² It is for the tendering party to provide admissible evidence demonstrating the document’s authenticity. If no authenticating evidence is provided whatsoever, the documentary evidence should be found inadmissible; a mere general reference to the trial record is not enough since it is not for the Chamber to start its own investigations into material which may prove a document’s authenticity and reliability.¹³

9. Official documents that are not publicly available from official sources (for example, the website of an organisation or official publications) are not self-authenticating and should be certified by the relevant authority. However, when the author of a public document is an identified representative or agent of an official body or organisation, such as a member of the executive, public administration or the judiciary, that document may be presumed authentic if it has been signed by the identified official and the authenticity of that signature is not called into question.¹⁴

10. Private documents whose authenticity is dependent upon a connection with a third person or organisation should be authenticated by independent evidence. Such evidence should provide proof of authorship or adoption and integrity. If the date of the document cannot be inferred from the document itself, evidence of it should also

¹⁰ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 22.

¹¹ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 22.

¹² *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 22.

¹³ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 23.

¹⁴ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 24(b).

be provided. Any form of authentication by the alleged author of the document is preferable.¹⁵

11. Before video or audio material can be admitted, the Chamber will require evidence of “*originality and integrity*.”¹⁶ Once this has been established, this type of exhibit may often be admitted as evidence that speaks for itself and may be regarded, in this respect, as real evidence.¹⁷ Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard. It is submitted that the tendering party must nevertheless always establish relevance of such material.

12. After determining the question of authenticity, the Chamber must ascertain whether the evidence displays such qualities that, when considered alone, it could reasonably be believed.¹⁸ The *Katanga* Chamber stated that, whilst there is no finite list of possible criteria that are to be applied in determining reliability, certain key factors will normally be considered.¹⁹ These include:

- (a) Source: whether the source of the information has an allegiance towards one of the parties in the case or has a personal interest in the outcome of the case, or whether there are other indicators of bias;²⁰
- (b) Nature and characteristics of the item of evidence: for example, whether the evidence is an audio or video recording, automatically generated, or testimonial in nature. Other factors may include the public or private character of the information;²¹

¹⁵ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 24(c).

¹⁶ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 24(d).

¹⁷ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 24(d).

¹⁸ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 26.

¹⁹ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27.

²⁰ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27(a).

²¹ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27(b).

- (c) Contemporaneity: whether the information was obtained and recorded simultaneously or shortly after the events to which it pertains or whether the record was created at a later stage;²²
- (d) Purpose: whether the document was created for the specific purpose of these criminal proceedings or for some other reason;²³
- (e) Adequate means of evaluation: whether the information and the way in which it was gathered can be independently verified or tested. Although there is no prohibition on hearsay before the Court, there is an inherent risk in this type of evidence. The Chamber may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay.²⁴

13. Where a document has limited probative value in that (i) it contains no information about its specific sources, or how the evidence was collected, and (ii) contains findings about fundamental questions at issue and which therefore cannot be tested through cross-examination, it should not be admitted through the bar table.²⁵

14. It is well-established that evidence which is testimonial in nature should not be recognised for submission. In *Ruto & Sang*, it was held that, where evidence sought to be admitted is testimonial in nature, “a ‘bar table’ motion should not be used in manner which would be duplicative of the Rule 68 of the Rules procedure. Since the Prosecution is submitting the document for the truth of its content, the Chamber finds that it should have submitted the document under Rule 68 of the Rules.”²⁶

15. A document can be considered testimonial in nature if the person, when providing the statement, understands that they are providing information which

²² *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27(c).

²³ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27(d).

²⁴ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 27(e).

²⁵ See eg *Ruto & Sang*, (TC) Decision on the Prosecution's Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), para. 44.

²⁶ *Ruto & Sang*, (TC) Decision on the Prosecution's Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), para. 85. See also paras. 86-87.

may be relied upon in the context of legal proceedings, namely when they are questioned in the capacity of a witness in the context of or in anticipation of legal proceedings.²⁷ When materials can be “viewed as fitting within the definition of a prior recorded statement”, “[s]uch materials are indeed testimonial in nature and they cannot be recognised as submitted through the ‘bar table’”.²⁸

16. By way of example, in *Yekatom*, it was held that a compilation of statements, including phone numbers, taken for proceedings in national courts, were testimonial in nature and could not be admitted from the bar table.²⁹ Similarly, in *Gicheru*, a witness’s record of evidence taken before a domestic commission of inquiry was testimonial in nature and would be barred from being admitted from the bar table.³⁰

17. Special caution must be given to media reports. These often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In *Katanga*, the Chamber found that the newspaper accounts proffered by the Prosecution, were not accompanied by information about the background and qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. Under those circumstances, the Chamber was unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts.³¹ Similarly, the *Stanišić & Simatović* Trial Chamber of the IRMCT also expressed the need for caution when considering newspaper articles and media

²⁷ *Yekatom* (TC), Decision on First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), para. 16.

²⁸ *Yekatom* (TC), Decision on First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), para. 16.

²⁹ *Yekatom* (TC), Decision on Third Prosecution Submission Request (Call Data Records), [ICC-01/14-01/18-1499](#), paras. 33-34

³⁰ *Gicheru* (TC), Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness, [ICC-01/09-01/20-299](#), para. 16

³¹ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 31.

reports, finding that these are often not sufficiently reliable to serve as evidence unless they have been tendered through a witness.³²

18. Finally, the *Katanga* Chamber held that, in order to be admissible, evidence must, to some significant degree, “advance the Chamber’s inquiries”.³³ The Chamber should ask itself whether: (i) the item of evidence may significantly help the Chamber in reaching a conclusion about the existence or non-existence of a material fact; and (ii) the item of evidence may significantly help the Chamber in assessing the reliability of other evidence in the case.³⁴ If the potential impact the admission of a given item of evidence on the issues before the Chamber is “little to none”, then the Chamber should be slow to admit it since it will not advance its enquiry.³⁵

19. The Directions on the conduct proceedings make it clear that evidence may be added to the Prosecution’s List of Evidence after the deadline (originally, of 5 January 2022), “only with leave of the Chamber.” The Prosecution submitted its updated and operating List of Evidence on 9 May 2022 (“LoE”).³⁶ No application for additions to the LoE has been made since then.

20. In *Bemba et al.* the Trial Chamber refused the formal submission of exhibits that had not been included on the Prosecution’s list of evidence.³⁷

21. Based on the foregoing principles and criteria, the Defence provides detailed and specific arguments relating to each document to which submission is objected in the schedule annexed hereto (“Annexes A” for Categories A to G in the Bar Table

³² See eg. *Prosecutor v Stanišić & Simatović*, MICT-15-96-T, Decision on Prosecution Motion for Admission of Documents and Videos from the Bar Table, 11 February 2019, p. 3; *Prosecutor v Stanišić & Simatović*, MICT-15-96-T, Decision on Prosecution Motion for Admission of Documents from the Bar Table (Croatia), 11 February 2019, p. 2; *Prosecutor v Stanišić & Simatović*, MICT-15-96-T, Decision on Stanišić’s First Bar Table Motion (Personnel Files), 26 May 2020, p. 1.

³³ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 34.

³⁴ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 34.

³⁵ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 35.

³⁶ Prosecution’s submission of the updated List of Witnesses and List of Evidence (public with confidential annexes), [ICC-02/05-01/20-685](#), 9 May 2022.

³⁷ *Bemba et al.* (TC), Decision on ‘Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table’, [ICC-01/05-01/13-1524](#), para. 6.

Motion; “Annex B” for Category H (Maps)”). However, to assist the Chamber, certain objections are set out by category below.

(b) Documents that are not on the List of Evidence

22. Almost half of the documents sought to be submitted from the bar table (96 out of 205) are not on the OTP’s LoE. The OTP has not sought the leave of the Chamber to add any of these documents to the LoE in accordance with paragraph 8 of the Directions on the conduct of proceedings. No justification for seeking the late addition of this document has been provided. Since the Defence has had no previous notice of the Prosecution’s intention to rely on these documents, submission of these 96 documents should be rejected *in limine* “in order to protect the rights of the accused.”³⁸

(c) Documents that have already been formally recognised as submitted

23. The Chamber has already recognised eight documents as formally submitted.

(d) Documents that should have been submitted through witnesses

24. The OTP had foreseen the use of 37 of the documents sought to be submitted from the bar table with various prosecution witnesses. These 37 documents were included on the lists of materials provided by the OTP in advance of the witnesses’ testimony. Despite having the opportunity to use each of the 37 documents with identified prosecution witnesses, the OTP chose not to do so. The Defence therefore had no need to cross-examine these witnesses on these unused documents. At the conclusion of each witness’s evidence, the OTP, quite properly, did not seek to submit these documents into evidence. At this stage of the trial, it is improper and unfair for the OTP now to submit these documents via the bar table. This is because, as a result of the Prosecution’s choice not to adduce the evidence through its witnesses with whom these documents were associated, the Defence now has no opportunity to ask them any questions designed to test their reliability, authenticity

³⁸ *Bemba et al.* (TC), Decision on ‘Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table’, [ICC-01/05-01/13-1524](#), para. 6.

or relevance. The prejudicial effect of admitting these 37 documents in such circumstances would thus outweigh their probative value.

25. Other documents should have been tendered through witnesses to authenticate their contents, provide context, establish their authorship or generation, and be available for cross-examination. The fact that a large number of documents were not tendered through witnesses is a factor for the Trial Chamber to take into account when deciding on admissibility,³⁹ and indeed militates against recognition as formally submitted.

(e) Documents that have limited to no probative value

26. In reliance on the *Ruto & Sang* jurisprudence cited above,⁴⁰ it is submitted that the prejudice of admitting a large number of the tendered documents outweighs their probative value because: (i) they contain no or inadequate information about their specific sources, or how the evidence was collected; and/or (ii) contain findings about fundamental questions at issue. These documents cannot be tested through the cross-examination of the authors or producers of these documents. This causes sufficient prejudice to preclude submission through the bar table.

(f) Documents the relevance of which has not been explained

27. In reliance on the *Gbagbo & Blé Goudé* jurisprudence,⁴¹ submission of some documents is opposed on the grounds that the OTP has not met its burden because it has failed to fully litigate or otherwise explain their relevance and admissibility. Neither the Defence nor the Trial Chamber should be forced to second-guess why the OTP considers a given document to be relevant or admissible. Where this has not been explained, the consequence should be the refusal of formal submission.

³⁹ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 12.

⁴⁰ *Ruto & Sang*, (TC) Decision on the Prosecution's Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), para. 44.

⁴¹ *Gbagbo & Blé Goudé* (TC), Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, ICC-02/11-01/15-773, paras 37-38.

(g) Documents that are irrelevant in light of facts that have already been agreed between the Prosecution and Defence

28. A number of documents are relied on by the OTP because they are purportedly relevant to establish the contextual elements of war crimes or crimes against humanity. However, these contextual elements are already the subject of agreed facts. As noted in *Katanga*, in order to be admissible, evidence must, to some significant degree, “advance the Chamber’s inquiries”.⁴² If the potential impact the admission of a given item of evidence on the issues before the Chamber is “little to none”, then the Chamber should be slow to admit it since it will not advance its enquiry.⁴³ Documents that serve no purpose other than to underscore that which has already been agreed between the parties has little to no potential impact on the issues before the Chamber; consequently formal submission should not be recognised.

(h) Category A: Reports

29. The Prosecution has submitted a number of documents in a category entitled “Reports”. Many of these are ineligible to be formally recognised as submitted for the reasons of general application that are set out in paragraphs 22-28 above.

30. In addition, it was open to the Prosecution to call one or more witnesses to produce these reports. That may have required the Prosecution applying to add witnesses to their List of Witnesses. The OTP did not. One witness, however, who could and should have been called was P-0001 [REDACTED] of the UN Commission of Inquiry on Darfur (“UNCOI”).⁴⁴ He was expected to testify about the work of the UNCOI and the contents of the UNCOI report. He was not called.

⁴² *Katanga and Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 34.

⁴³ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 35.

⁴⁴ A summary of his anticipated testimony is found in Annex 2 to the Prosecution’s submission of the List of Witnesses and the List of Evidence, 5 January 2022.

31. The Defence also relies on the reasoning of the *Ruto & Sang* Chamber which refused the submission of a similar UN report investigating post-election violence in Kenya. The Chamber stated that *“the probative value of the document is limited by reason of the lack of clarity on how the information was collected, the hearsay nature of much of the content and the anonymity of the sources of information. In that regard, the Chamber notes that OHCHR reports, while compliant with methods suited to the purposes of human rights work, are generally not intended for use in a court of law. The Chamber additionally notes that, as is the case with Document 5 above, reliance on this report in respect of central questions at issue may not be appropriate and could amount to an abdication of the fact-finding functions of the Chamber”*.⁴⁵ Consequently, the Chamber did not admit the report.

32. Precisely the same reasoning can be applied to the other reports in this category.

33. Many of the reports are also testimonial in nature and should not be recognised as formally submitted. For example, the UNCOI report refers to the collection of information on attacks against 51 towns and villages, as well as eleven cases of single or multiple rapes, over six weeks in West Darfur. This was achieved through interviews of 116 eyewitnesses and a dozen circumstantial witnesses.⁴⁶ The evidence of other eyewitnesses and hearsay witnesses speak of *“Ali Kouchib”*.⁴⁷

34. Identical arguments can be made in respect of DAR-OTP-0209-0593, DAR-OTP-0216-0702, DAR-OTP-0063-0399 (and its English translation at DAR-OTP-0116-0549), DAR-OTP-0002-0201, DAR-OTP-0003-0099, DAR-OTP-0148-0002 (which contains direct quotes from some – anonymous – witnesses at for example at 0034-0035), DAR-OTP-0036-0348 (and its English translation at DAR-OTP-0116-0380), and DAR-OTP-0053-0068 (and its English translation at DAR-OTP-0153-0211).

⁴⁵ *Ruto & Sang*, (TC) Decision on the Prosecution's Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), para. 44.

⁴⁶ DAR-OTP-0013-0119 at 0124.

⁴⁷ DAR-OTP-0013-0119 at 0179-0180.

(i) Category B: Media Articles

35. The Prosecution has submitted a number of documents in a category entitled “Media Articles”. Many of these are ineligible to be formally recognised as submitted for the reasons of general application that are set out in paragraphs 22-28 above.

36. In addition, the Defence specifically relies on the approach taken by the *Katanga* Chamber and of the *Stanišić & Simatović* Trial Chamber of the IRMCT, discussed at paragraph 17 above. As in *Katanga*, the media articles for which the Prosecution seek formal submission have not been accompanied by information about the background and qualifications of the journalists or of their sources. The Chamber cannot be satisfied about their objectivity and professionalism and thus cannot attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts. Moreover, the Chamber is urged to exercise the same caution as was exercised by the *Stanišić & Simatović* Trial Chamber in finding that these are often not sufficiently reliable to serve as evidence unless they have been tendered through a witness.

37. Regarding the articles that purport to make mention of Mr Abd-Al-Rahman’s son, and the link to the “*Ali Kushayb*” nickname, the source or sources of this most contested of issues have not been provided. It is anonymous hearsay which the Defence cannot possibly test in any meaningful way. The strength of the purported linking evidence to the Accused’s nickname is so weak and of such low probative value that its formal recognition would be outweighed by its prejudicial effect.

(j) Category C: Legislation

38. Many of the documents in this category are not objected to. Full details are set out in Annex A.

(k) Category D: Government of Sudan Interview with the Accused

39. The Defence objects to the submission of all of the documents in this category. Some are ineligible to be formally recognised as submitted for the reasons of general

application that are set out in paragraphs 22-28 above. More specifically, the Defence vehemently contests that this interview ever took place. It is a fake. The Accused's purported signature on DAR-OTP-0218-0231 at 0239 is not his. His noted age is so erroneous that no police or judicial authority could have committed in the course of establishing the identity of an interviewee. The Defence does not seek to suggest that Mr Abd-Al-Rahman was coerced or unduly influenced in the interview; the interview simply never happened.

40. In addition, the different versions of the purported note of the interview with Mr Abd-Al-Rahman are of extremely low probative value. Their authenticity has not been established by the Prosecution [REDACTED].

41. The fact that DAR-OTP-0218-0231 does not contain a stamp from the Sudanese Ministry of Foreign Affairs to indicate that it could be shared and used in legal processes outside of Sudan, whereas it "*normally*" would is a further indication casting doubt on its authenticity. In short, there is no reliable information placed before the Trial Chamber about how this document, if genuine, was obtained, by whom, and in what circumstances. [REDACTED].

42. The Defence notes that [REDACTED]. Mr Abd-Al-Rahman's purported signature is not witnessed. [REDACTED]. The sheets of paper on which the notes are written are not headed, nor do they provide any contemporaneous indicia of reliability. The mere fact that some details set out in the note are consistent with certain agreed facts about Mr Abd-Al-Rahman is probative of nothing. Certain details were widely published following the warrant of arrest issued in 2007 by the Court and other public sources. As a former CRF officer, any such biographical details would in any event be readily available to anyone in a position of authority within the Government of Sudan. It would be dangerous to attach any weight whatsoever to this factor. Having said that, even Mr Abd-Al-Rahman's given age is inaccurate.

43. Looked at in the round, it is submitted that both the handwritten note and its typed-up copy are devoid of any clear indications of authenticity. It does not suffice to argue that its content may be corroborated by other evidence or that the Chamber

may subsequently determine its proper evidentiary weight.⁴⁸ If an item of evidence does not display sufficient indicia of reliability, it may be excluded because it can hardly be considered to prove anything.⁴⁹

(l) Category E: Material seized from the Accused

44. Many of the documents in this category are not objected to. Full details are set out in Annex A, including specific grounds for objecting to individual documents in this category.

45. Regarding the *“kind of poem dedicated to Ali Kushayb”*⁵⁰, the Defence notes that there is no evidence of: (i) when the audio recording was made; (ii) who made the recording; (iii) whose is the voice on the recording; (iv) how the recording came to be on Mr Abd-Al-Rahman’s telephone; (v) if sent to Mr Abd-Al-Rahman’s telephone, whether this was solicited or not; and (vi) whether it had ever been accessed or not. The Trial Chamber cannot rule out that the *“poem”* was sent, unsolicited, to Mr Abd-Al-Rahman by someone unknown to him who only believed that he was linked to the *“Ali Kushayb”* nickname by virtue of the ICC’s public warrant of arrest, or even by someone known to him shortly before his arrest in a light-hearted, ironic nod to the OTP’s (untrue) allegation. Even taken at its highest, this poem cannot support any alleged link between Mr Abd-Al-Rahman and the nickname *“Ali Kushayb”* and will not advance the Chamber’s enquiry⁵¹.

46. As argued in Annex A, the extremely low probative value of this *“poem”* is by far outweighed by its prejudicial effect. As such, the Trial Chamber should decline to recognise this exhibit as formally submitted.

(m) Category F: Photographs

⁴⁸ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 13.

⁴⁹ *Katanga & Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 28.

⁵⁰ DAR-OTP-0216-0792 (Transcript at DAR-OTP-0215-6816; Translation at DAR-OTP-0215-6831).

⁵¹ *Katanga and Ngudjolo* (TC), Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 35.

47. The Trial Chamber is referred to the specific grounds for objecting to the individual photographs in this category.

(n) Category G: Audio/Visual Material and Related Documents

48. The Trial Chamber is referred to the specific grounds for objecting to the individual audio/visual materials in this category.

49. [REDACTED].

(o) Category H: Map Book

50. The Trial Chamber is referred to the specific grounds for objecting to the individual maps in this category submitted in Annex B.

IV. RELIEF

51. The probative value of most of the documents submitted by the Prosecution is low. The prejudicial effect of admitting them, for the individual reasons set out in the Annexes, would outweigh whatever limited probative value they do carry. For many other documents, the documents do not take matters any further. The potential impact on the issues before the Chamber of their being recognised as formally submitted Chamber is “little to none”.

52. For this and all foregoing reasons provided in the present submission and its Annexes, the Trial Chamber is requested to deny recognition of all documents which are objected to by the Defence as formally submitted.

Respectfully submitted,



Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 20th day of February 2023 at The Hague, The Netherlands