

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **26 April 2021**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD**

Public

With Confidential Annex

**Defence Response to Prosecution's Second Request for the
Admission of Documentary Evidence from the Bar Table**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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 opposes the submission into evidence of the 63 items identified by the Office of the Prosecutor ('Prosecution') in its Second Request for the Admission of Documentary Evidence from the Bar Table ('Request').¹ Contrary to the Prosecution's assertions, these documents cannot be considered sufficiently relevant or probative to be submitted into evidence. Their submission will not assist the Trial Chamber in its determination of the truth, nor contribute to the expeditiousness of the proceedings.

II. Submissions

2. Relevance, probative value, and prejudicial effect are indeed the central issues to be considered by the Chamber in assessing whether documentary material may be submitted in this manner and at this stage of the proceedings. However, the Prosecution mischaracterises the applicable test to be applied by the Trial Chamber in determining whether to permit the submission of these documents from the bar table.² Rather than conducting a balancing exercise of relevance, probative value and potential prejudicial effect, the Chamber is to assess, first, whether the proffered item is relevant to a live issue in the case, and, if so, turn to determining whether it holds sufficient probative value. If and only if the item is found to be sufficiently probative, the Chamber will then need to examine whether the submission of the item would be unduly prejudicial to the non-calling party.
3. No burden can be shifted to the Defence. In the event that the Prosecution subsequently submits material that contributes to the establishment of the applicable criteria to the requisite standard, the Defence retains the right to 'raise issues of relevance or admissibility in light of all the information, either at the time of submission or subsequently within the confines of rule 64(1) of the Rules.'³ This rule thus dictates that the Defence must be afforded notice and an opportunity to respond to any evidence and arguments that might be relied upon by the Trial Chamber to establish the relevance and reliability of Prosecution evidence, before such evidence can be relied upon in the judgment.

¹ ICC-01/12-01/18-1412.

² ICC-01/12-01/18-1412, para. 8.

³ Gbagbo, [ICC-02/11-01/15-995](#), para. 56.

Relevance

4. It is incumbent upon the tendering party to demonstrate, with sufficient clarity and precision, and at the point of tendering, the relevance of each document to a material fact of the case and ‘how the item of evidence tendered makes this factual proposition more probable or less probable.’⁴ The Prosecution fails to do so.

Probative value

5. It is also incumbent upon the tendering party to demonstrate that each document holds sufficient probative value to be relied upon in the judgment. Indicia of authenticity include whether there is sufficient information to establish the authenticity of the document (for open source: verifiable information regarding source; for official records: letter-heads, signatures *et cetera* and documentation of chain of custody; for electronic data: evidence of originality and integrity of content).⁵ The Prosecution makes little effort to demonstrate these elements beyond stating basic indicia of authenticity, which is rudimentary and does not enhance probative value.⁶ Reliability must be demonstrated through information concerning the nature and characteristics of the evidence, the purpose of creation, contemporaneousness, and whether there is sufficient information to allow for a proper evaluation of sources, including whether the source was in a position to accurately and objectively record or recollect information concerning the facts and circumstances of the case, and the means used to compile the data or information in question.⁷
6. For hearsay to be accorded any probative value by a Trial Chamber, it ‘at the very least requires the Chamber to be provided with adequate information regarding the reliability and credibility of the original source.’⁸ It is well-established that no reasonable trier of fact can reach a conclusion to the requisite criminal standard solely on the basis of anonymous or insufficiently detailed hearsay.⁹ Assessment of the

⁴ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 16. See also: Katanga and Ngudjolo, [ICC-01/04-01/07-3184](#), para. 16; Ruto and Sang, [ICC-01/09-01/11-373](#), para. 66, and [ICC-01/09-01/11-1943-Red](#), para. 9; Ntaganda, [ICC-01/04-02/06-1838](#), para. 9.

⁵ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 24. Ntaganda, [ICC-01/04-02/06-1181](#), para. 11.

⁶ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 22.

⁷ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 27.

⁸ Gbagbo, [ICC-02/11-01/15-1263-AnxB-Red](#), para. 42.

⁹ Ntaganda, [ICC-01/04-02/06-2359](#), para. 453, fn. 1283, specifically: ‘Noting that the only mention of the use of mines comes from HRW report, DRC-OTP-0074-0797, at 0827, in which the source of this specific allegation is anonymous, and that no eyewitnesses confirmed their usage, the Chamber is unable to conclude beyond

probative value of anonymous hearsay requires an extremely cautious approach because the source of the information is, by definition, unknown and cannot be evaluated.¹⁰ While such material might not be automatically ruled out by this court, in its eventual assessment of the probative value, the Chamber will need to take ‘into account the context and conditions in which such evidence was obtained, with due consideration of the impossibility of questioning the information source in court.’¹¹ The Prosecution’s arguments in defence of anonymous hearsay are inapposite since they relate only to ‘hearsay’ not anonymous hearsay.¹² Further, the authorities relied on by the Prosecution refer to: the evidentiary weight given to intercepted communications in light of the evidentiary record as a whole, and therefore not to probative value;¹³ and hearsay evidence provided by witnesses providing *viva voce* testimony subject to examination by the parties (and which was accordingly afforded ‘only very low probative value’).¹⁴ This is not the nature of the items tendered.

7. Where insufficient or indeed *no* information is provided as to the circumstances in which the information is collected, including but not limited to where sources are not unidentifiable, the Prosecution places the Chamber in a position in which it is unable to assess the reliability and authenticity of the information, and thus ultimately unable to assess probative value such that it may determine whether to admit the material.¹⁵
8. Reliance on ‘corroboration’ or a deferred determination of evidentiary weight is also insufficient. Corroboration is proposition specific and requires each item to hold probative value in its own right.¹⁶ It is perfectly possible that two items independently

reasonable doubt that the UPC used land mines during this assault on Songolo.’ See also: ICTR, [Ndindabahizi Appeal Judgement](#), para. 115; [Kalimanzira Appeal Judgement](#), paras 77-80; [Muvunyi Appeal Judgement](#), paras 68-70; and, ECCC, [Case 002/01 Appeal Judgement](#), paras 434 and 442.

¹⁰ Gbagbo, [ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019, para. 43. See also, Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 29: ‘Insofar as [United Nations] reports emanate from independent observers who were direct observers of the facts being reported, the Chamber considers them to be *prima facie* reliable. However, if the author’s identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.’

¹¹ Bemba, [ICC-01/05-01/08-3343](#), para. 238.

¹² Request, para. 19.

¹³ Bemba et al., [ICC-01/05-01/13-2275-Red](#), paras 874-875.

¹⁴ Ngudjolo, [ICC-01/04-02/12-271-Corr](#), para. 226; and [ICC-01/04-02/12-3-tENG](#), paras 440 and 496.

¹⁵ ICTY, [Prlić](#), para. 26.

¹⁶ Gbagbo, [ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019, paras 48 and 49.

carrying little to no probative value say the same thing without being more useful in determining the truth. Worse, falsehoods can swiftly build on each other; such is the nature of rumour or promoted narratives. These do not properly assist the Chamber.

Prejudicial impact

9. While the Rome Statute allows for the submission of evidence ‘from the bar’, it is nonetheless necessary to exercise “caution when items are submitted without any corresponding witness to comment on them”.¹⁷ The prejudice caused through the inability of examine the source of information is particularly aggravated in the current instance as first, several items could and should have been submitted through a witness,¹⁸ and second, the majority of the tendered documents deny any assessment of the source/s of information.¹⁹ Without any means to verify even whether the hearsay is, for example, first-hand, third-hand, rumour circling in the civilian or military populations, a comment spreading on social media, or a government-promoted narrative fed to international agencies, the Court is unable to discharge its mandate and the Defence is unable to mount any challenge. In such circumstances the prejudice eclipses the probative value.
10. The Defence provides category-specific objections below, and document-specific objections in the annex to this filing.

Category 1: United Nations Secretary General

11. Expressions of concern²⁰ constitute opinion evidence, which is inadmissible as concerns the establishment of confirmed facts and circumstances.²¹ The Reports of the Secretary General concerning events in Libya or ‘the Sahel’ lack a sufficient nexus to the charged facts in this case,²² as do Reports concerning time periods falling outside

¹⁷ Ongwen, [ICC-02/04-01/15-615](#), para. 10.

¹⁸ For example, Documents 8, and 38-58 ought to have been tendered through P-0151 and P-0431. See: Ntaganda, [ICC-01/04-02/06-1838](#), para. 46; Ruto, [ICC-01/09-01/11-1353](#), para. 42.

¹⁹ MLI-OTP-0001-1359, MLI-OTP-0001-2113, MLI-OTP-0013-3433, MLI-OTP-0013-3441, MLI-OTP-0014-5183, MLI-OTP-0033-1978, MLI-OTP-0033-4394, MLI-OTP-0073-0008, MLI-OTP-0001-1468, MLI-OTP-0001-1924, MLI-OTP-0001-2001, MLI-OTP-0006-2732, MLI-OTP-0006-2740, MLI-OTP-0013-3422, MLI-OTP-0040-0320, MLI-OTP-0043-0508, MLI-OTP-0061-0886, MLI-OTP-0062-4367, MLI-OTP-0066-0391, MLI-OTP-0069-4120, MLI-OTP-0073-0031, MLI-OTP-0073-0070, MLI-OTP-0014-5202, MLI-OTP-0067-1395, MLI-OTP-0001-1904, MLI-OTP-0013-3500, MLI-OTP-0014-5201, MLI-OTP-0033-2301, MLI-OTP-0033-4336, MLI-OTP-0006-3280, MLI-OTP-0006-3286, MLI-OTP-0007-0203, MLI-OTP-0001-1459, MLI-OTP-0040-0287.

²⁰ MLI-OTP-0013-3433.

²¹ [ICC-01/04-01/07-2635](#), paras 31 and 32.

²² MLI-OTP-0001-1359.

the charges.²³ The reliability of reports concerning Mali is also fatally undermined by the lack of verifiable information concerning methodology and sources, and the concession that delegations lacked the means to access relevant and reliable information.²⁴ Thematic reports that rely on derivative information from country-specific missions and reports have no independent evidential value.²⁵

Category 2: United Nations Security Council and its subsidiary organs

12. The UNSC is a political body: its resolutions are triggered by political determinations rather than objective forensic analysis. Resolutions may be relied upon only for the purpose of establishing that there was a resolution, and not for the truth of their contents.²⁶ This is consistent with the practice of the UN to establish specific fact-finding missions, whenever factual determinations are required. The same considerations apply to records of Security Council meetings.²⁷ In line with the position of the ECJ,²⁸ given the absence of objective evidentiary standards and due process safeguards, UN sanctions listing can only be relied upon to establish that an individual was subject to sanctions, and not for the purpose of confirming the reasons for the listing. The Panel of Experts Reports concern activities that fall outside temporal scope of the charges.²⁹

Category 3: United Nations Human Rights Council

13. The Report of the Independent Expert fall outside the temporal scope of the charges.³⁰ The Report of the Special Rapporteur constitutes testimonial opinion evidence, which cannot be submitted from the bar without fulfilling the requirements of Rule 68.³¹ The extensive redactions also prevent any meaningful review of methodology or sources.

²³ MLI-OTP-0013-3441; MLI-OTP-0033-2301, MLI-OTP-0033-4336, MLI-OTP-0007-0185, MLI-OTP-0007-0188, MLI-OTP-0028-0375, MLI-OTP-0028-0833.

²⁴ MLI-OTP-0014-5183: 'Important challenges for the monitoring and reporting of grave violations persist and information available before and after the establishment of the Monitoring and Reporting Mechanism remains limited'; MLI-OTP-0001-2113 at 2118 (para. 25): 'Owing to the prevailing insecurity and access constraints, it has not been possible for the United Nations to verify reports and to determine the magnitude of violations or identify the perpetrators.'

²⁵ MLI-OTP-0033-1978, para. 2.

²⁶ [ICC-01/04-01/07-2635](#), para. 32.

²⁷ MLI-OTP-0001-1965.

²⁸ See *Kadi* paras 341-353, concerning the fact that it would be inconsistent with the principle of effective judicial protection to rely on either UN sanctions listings or the reasons for the sanctions listings, without any independent judicial review as concerns the sufficiency of reasons and evidential foundation for such listings.

²⁹ MLI-OTP-0062-4367, MLI-OTP-0073-0031.

³⁰ MLI-OTP-0014-5202, covering period of 1 July 2013 to 31 December 2013.

³¹ ICC-01/09-01/11-1353, para. 25; [ICC-01/04-01/07-2635](#), para. 31.

Category 4: United Nations Office of the High Commissioner for Human Rights

14. Human rights fact-finding missions have a distinct purpose, which is not akin to the process of collecting evidence for the purpose of establishing individual criminal responsibility.³² Given the absence of clear, detailed and verifiable information concerning methodology and sources,³³ they fail to satisfy the basic threshold for submission. The Reports of 6 June 2013 (MLI-OTP-0033-2301) and 20 March 2015 (MLI-OTP-0033-4336) also concern temporal periods that falls outside the charges (12 March-6 June 2013 and November 2013–December 2014).

Category 5: UN Multidimensional Integrated Stabilisation Mission in Mali

15. The Prosecution has adduced no evidence or information that would allow the Chamber to independently verify the originality, integrity and location of these photographs.

Category 6: United Nations Educational, Scientific and Cultural Organisation

16. The Prosecution seeks the submission of 21 documents – 17 of which are press releases³⁴ – downloaded from the UNESCO website. The Prosecution does not demonstrate their probative value, stating merely: ‘It is a contemporaneous document, downloaded from the UNESCO website’³⁵ or, worse, ‘it was downloaded from the UNESCO website.’³⁶ This bare indication of authenticity is not enhanced by the inclusion of ‘the UNESCO logo,’ a document number, and/or ‘a standard layout.’³⁷
17. There is sufficient material regarding UNESCO’s assessment criteria in evidence. The Prosecution’s submissions seeking to excuse its failure to introduce six UNESCO documents through the only relevant witnesses are a smoke-screen: (i) the Prosecution

³² ICC-01/09-01/11-1353, para. 44: ‘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.’

³³ MLI-OTP-0013-3500 at 3505, paras 2-4 (concerning methodology and sources); MLI-OTP-0033-2301 at 2305, paras 5-6 (noting difficulties in verifying allegations and manipulation of information).

³⁴ MLI-OTP-0001-1940, MLI-OTP-0001-1946, MLI-OTP-0006-3280, MLI-OTP-0006-3286, MLI-OTP-0006-3290, MLI-OTP-0014-0043, MLI-OTP-0007-0185, MLI-OTP-0007-0188, MLI-OTP-0007-0197, MLI-OTP-0007-0199, MLI-OTP-0007-0203, MLI-OTP-0007-0205, MLI-OTP-0014-0026, MLI-OTP-0014-0028, MLI-OTP-0014-0034, MLI-OTP-0028-0375 and MLI-OTP-0028-0833.

³⁵ MLI-OTP-0001-1940, MLI-OTP-0001-1946, MLI-OTP-0006-3280, MLI-OTP-0006-3286, MLI-OTP-0006-3290, MLI-OTP-0007-0185, MLI-OTP-0007-0197, MLI-OTP-0007-0199, MLI-OTP-0007-0203, MLI-OTP-0007-0205, MLI-OTP-0014-0026, MLI-OTP-0014-0028, MLI-OTP-0014-0034, MLI-OTP-0028-0375 and MLI-OTP-0028-0833.

³⁶ MLI-OTP-0001-1950, MLI-OTP-0007-0188.

³⁷ MLI-OTP-0006-2986, MLI-OTP-0014-4900, MLI-OTP-0021-0275.

had ample opportunity to discuss this material, which was on its own claim issued in 2012-2013, with both or either P-0151 and P-0431 in their extensive interviews or indeed when they testified in Al Mahdi; (ii) contrary to its claim of lack of time, the Prosecution used less than its allocated 45 minutes of additional examination of P-0151 and exceeded its two-hour estimate for the conduct of its examination of P-0431 without objection;³⁸ (iii) reference to ‘corroboration’ in this instance emphasises that the material is superfluous and speaks to evidentiary weight rather than probative value, and thus improperly invites the Court to make an extraneous consideration;³⁹ and (iv) where, as here, material ought properly to have been tendered through appropriate witnesses such that the Defence might have been afforded the opportunity to cross-examine thereon, the prejudicial effect of submission from the bar table outweighs any probative value. The bar table is not a mechanism for shoring up Prosecution failings in the presentation of its case.

Category 7: UN Office for the Coordination of Humanitarian Affairs

18. The OCHA situation report has **no** information concerning sources: it has even less probative value than a media article, and as such, fails to satisfy the minimum threshold for submission.

Categories 8, 9 and 11

19. The Defence does not oppose the Chamber’s reliance on treaties or information concerning the date of ratification.

Category 10: INTERPOL

20. INTERPOL notices are not a reliable or probative source of evidence.⁴⁰ INTERPOL does not independently verify the information it issues with the publication of a Red Notice.⁴¹ Given that Red Notices can be suspended or cancelled, they constitute an insufficiently reliable foundation to establish facts in criminal proceedings.

³⁸ Request, para. 22; T-034-CONF-ENG, pp. 5-19; T-062-CONF-ENG, pp. 9-44.

³⁹ Request, para. 23.

⁴⁰ See, for example: [Leke Prendi aka Aleks Kola v Albania \[2015\] EWHC 1809](#), paras 8 to 12, 41, 49 to 56; [Canada \(Citizenship and Immigration\) v. A76, 2014 FC 524 \(CanLII\)](#), para. 27; [Rihan v. Canada \(Citizenship and Immigration\), 2010 FC 123 \(CanLII\)](#), para. 90

⁴¹ [Leke Prendi aka Aleks Kola v Albania \[2015\] EWHC 1809](#), paras 49-50.

Conclusion

21. The Prosecution's descriptions of relevance do not identify the way in which the tendered documents uniquely contribute to making these facts more or less probable. The documents tendered universally provide little to no information on the sources of the specific points of information, so there is no way for the reliability to be interrogated. In the absence of relevance and/or probative value, the documents do not qualify for submission from the bar table. The impossibility of assessment of reliability means that the prejudicial impact eclipses their probative value.
22. Ultimately, the submission of material of unestablished or questionable relevance, authenticity and probative value is inherently prejudicial and undermines the fairness, efficiency and expeditiousness of the proceedings.⁴² The recycling of reports such as those tendered – almost uniformly based on anonymous hearsay – does not assist the Chamber. It merely risks further entrenching narratives which may well be false.
23. For all the reasons herein, and with the exception of categories 8, 9 and 11, the Defence respectfully requests that the Chamber deny the Prosecution's Request.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 26th Day of April 2021
At The Hague, The Netherlands

⁴² See, for example: Bemba et al., [ICC-01/05-01/13-2275-Anx](#), paras 43 to 46.