

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **18 February 2022**
Date of submission: **15**
March 2022

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 Annexes A and B

Public Redacted Version of “Defence Response to ‘Corrigendum to Prosecution’s fifth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2098-Conf)’”, 18 February 2022, ICC-01/12-01/18-2121-Conf

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. Introduction¹

1. The Defence opposes the submission into evidence of 146 of the items in Annex A and all 4 items in Annex B identified by the Office of the Prosecutor ('Prosecution') in its Fifth Request for the Admission of Documentary Evidence from the Bar Table ('Request').² 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. The Defence does not oppose the submission of Documents 27-28, 41-42, 64-65, 92-93, 124 and 150-151 of Annex A, subject to the provisos contained therein.

II. Submissions

2. The Defence notes the Chamber's previous finding that it 'will not issue rules on admissibility for each item of evidence during the course of proceedings' and will instead 'recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.'³ The Defence also notes the finding of the Chamber that documents that are testimonial in nature may be submitted only through satisfying the procedural requirements of Rule 68 of the Rules of Procedure and Evidence.⁴
3. Relevance, probative value, and prejudicial effect are 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.⁵ The Chamber is to assess, first, whether the proffered item is relevant to a live issue in the case, and, only 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.
4. 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

¹ Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this filing is submitted confidentially as it responds to a filing of the same classification.

² [ICC-01/12-01/18-2098-Conf-Corr](#), notified on 3 February 2022, with Confidential Annexes A and B.

³ [ICC-01/12-01/18-1514](#), para. 4.

⁴ [ICC-01/12-01/18-1514](#), para. 17.

⁵ [ICC-01/12-01/18-2079-Conf](#), para. 9.

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.’⁶ 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.

Relevance

5. 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.’⁷ The Prosecution fails to do so in respect of a number of the documents it seeks to submit.

Probative value

6. 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).⁸ The Prosecution makes little effort to demonstrate these elements beyond stating basic indicia of authenticity, which is rudimentary and does not enhance probative value.⁹ 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

⁶ Gbagbo, [ICC-02/11-01/15-995](#), para. 56.

⁷ 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.

⁸ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 24; Ntaganda, [ICC-01/04-02/06-1181](#), para. 11.

⁹ Katanga and Ngudjolo, [ICC-01/04-01/07-2635](#), para. 22.

concerning the facts and circumstances of the case, and the means used to compile the data or information in question.¹⁰

7. 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.’¹¹ 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.¹² Assessment of the probative value of anonymous hearsay requires an extremely cautious approach because the source of the information is, by definition, unknown and cannot be evaluated.¹³ 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.’¹⁴ 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;¹⁵ 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’).¹⁶ This is not the nature of the items tendered.
8. 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

¹⁰ *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 27.

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

¹² *Ntaganda*, [ICC-01/04-02/06-2359](#), para. 453 and 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 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.

¹³ *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.’

¹⁴ *Bemba*, [ICC-01/05-01/08-3343](#), para. 238.

¹⁵ *Bemba et al.*, [ICC-01/05-01/13-2275-Red](#), paras 874-875.

¹⁶ *Ngudjolo*, [ICC-01/04-02/12-271-Corr](#), para. 226; [ICC-01/04-02/12-3-tENG](#), paras 440 and 496.

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.¹⁷

9. 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.¹⁸ It is perfectly possible that two items independently 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

10. 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’.¹⁹ 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,²⁰ and second, the majority of the tendered documents deny any assessment of the source/s of information.²¹ 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.

11. The Defence provides category-specific objections below, and document-specific objections in the annex to this filing. For ease of reference in assessing the totality of material whose submission is sought through the mechanism of bar tables, the Defence retains the numbering of the ‘Categories’ employed in its submissions in response to the Prosecution’s previous requests for the admission of documentary evidence from the bar table.²² The Defence notes that it has created additional Categories 14, 15, 16

¹⁷ ICTY, [Prlić](#), para. 26.

¹⁸ *Gbagbo*, [ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019, paras 48 and 49.

¹⁹ *Ongwen*, [ICC-02/04-01/15-615](#), para. 10.

²⁰ For example, Documents 11, 62-63 and 95-97 of Annex A ought to have been tendered through [REDACTED]. See *Ntaganda*, [ICC-01/04-02/06-1838](#), para. 46; *Ruto and Sang*, [ICC-01/09-01/11-1353](#), para. 42.

²¹ See e.g. Documents 6, 15-16, 23, 27-30, 33, 50, 71, 74 and 77-78 of Annex A.

²² [ICC-01/12-01/18-1446](#); [ICC-01/12-01/18-2091-Conf](#).

and 17 for its response to the Prosecution's Fourth Request, and has created additional Categories 18, 19, 20 and 21 which are relevant to this Fifth Request, being Category 18: African Union and ECOWAS Documents; Category 19: Documents deriving from the armed groups; Category 20: Documents deriving from unknown sources; and Category 21: US Government Documents.

Category 2: United Nations Security Council and its subsidiary organs

12. Document 18 of Annex A emanates from the United Nations Security Council. The Defence repeats and relies on its submissions previously provided concerning documents falling within Category 2.²³

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

13. Documents 100-101 of Annex A emanate from the United Nations Office of the High Commissioner for Human Rights. The Defence repeats and relies on its submissions previously provided concerning documents falling within Category 4.²⁴

Category 6: United Nations Educational, Scientific and Cultural Organisation

14. Documents 21-22, 52-53 and 67 of Annex A emanate from UNESCO. The Defence repeats and relies on its submissions previously provided concerning documents falling within Category 6.²⁵

Category 12: Non-Governmental Organisation Reports

15. Documents 72-73 [REDACTED], 105 [REDACTED], 123 [REDACTED], and 131 [REDACTED] of Annex A all emanate from non-governmental organisations. The Defence repeats and relies on its submissions previously provided concerning documents falling within Category 12.²⁶

Category 13: News media publications

16. Documents 5-11, 15-17, 19, 23, 29-34, 43-46, 50-51, 57-61, 71, 74-91, 94-99, 102-104, 106-122, 125-130, 132-133, 149, 155-157 of Annex A all comprise news media reports, being written interviews, video broadcasts or audio recordings. The Defence repeats

²³ [ICC-01/12-01/18-1446](#), para. 12.

²⁴ [ICC-01/12-01/18-1446](#), para. 14.

²⁵ [ICC-01/12-01/18-1446](#), paras 16-17.

²⁶ [ICC-01/12-01/18-2091-Conf](#), paras 21-23.

and relies on its submissions previously provided concerning documents falling within Category 13.²⁷

Category 17: Audio and Video Recordings

17. Documents 7-17, 24-26, 29-61, 68-70, 79-88, 112-113, 117-119, 127-128, 136-138 and 153-157 of Annex A are audio and video recordings. The Defence repeats and relies on its submissions provided in its Response to the Prosecution's Fourth Request concerning documents falling within Category 17.²⁸

Category 18: African Union and ECOWAS Documents

18. Documents 1-3 are all documents allegedly emanating from the African Union and ECOWAS. For the same reasons as set out by the Defence as concerning material issued by the United Nations Security Council or Secretary General,²⁹ these documents, being political in nature and motivated by issues of diplomacy rather than the establishment of the truth, have very little probative value or relevance.

Category 19: Documents deriving from the armed groups

19. Documents 12-14 [REDACTED], 20 [REDACTED], 24 [REDACTED], 35-37 [REDACTED], 38-40 [REDACTED], 47-49 [REDACTED], 54-56 [REDACTED], 62-63 [REDACTED], 66 [REDACTED], 68-70 [REDACTED], 134-135 [REDACTED], 136-138 [REDACTED], 141-147 [REDACTED] of Annex A and Documents 1-2 [REDACTED] of Annex B are all documents which allegedly derive from armed groups involved in the events of 2012.

20. The Defence notes that the Prosecution itself concedes that some of these items are propaganda videos or otherwise for the purpose of spreading the word of the groups. The Defence objects to submission of items in such circumstances where they lack any form of reliability as to the information contained therein. The purpose for which the item was created is relevant to the Chamber's appreciation of reliability.³⁰ Documents created for propaganda purposes have the same issues of reliability as documents created for a political purpose, but the caution associated with the latter applies *a fortiori* due to the risk of material being of a more incriminating nature. Rejection of

²⁷ [ICC-01/12-01/18-2091-Conf](#), paras 21-23.

²⁸ Defence Response to the Prosecution's Fourth Request, filed simultaneously, paras 16-21.

²⁹ [ICC-01/12-01/18-1446](#), paras 11-13.

³⁰ *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 27.

the request to submit these items would be consistent with the jurisprudence of this Court where Chambers have declined to admit material without its proper context.³¹

Category 20: Documents deriving from unknown sources

21. Documents 25-26 of Annex A [REDACTED] are derived from an anonymous [REDACTED] account. The video itself is short and contains no indicia of authenticity: it is impossible to identify the location of the filming, there are no markers of this footage being prepared or assembled by any professional organisation or media outlet and the account which alleged posted the video has been terminated, meaning that the video is no longer available. Given that it is impossible to identify the source of the item, to confirm its contemporaneity and/or evaluate the item itself in terms of originality and integrity,³² the Defence objects to its submission.

Category 21: US Government Documents

22. Documents 139-140 [REDACTED] and 148 [REDACTED] of Annex A derive from the US Government. For the same reasons as set out by the Defence as concerning material issued by the United Nations Security Council or Secretary General,³³ these documents, being political in nature and motivated by issues of diplomacy rather than the establishment of the truth, have very little probative value or relevance. As such, the Defence does not disagree with the fact that these documents were issued, but does object to their being upon for the truth of their contents.

Regulation 35 Issues

23. The Defence notes that Document 63 of Annex A was not included on the Prosecution's List of Evidence and has not been the subject of any Regulation 35 Request (including in the Request). Given the Prosecution's failure to include these items on their list and/or seek the authorisation of the Chamber to add these items, these documents (and the documents to which it is an accessory, Document 62 of Annex A) should not be accepted for submission.

Conclusion

24. 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.

³¹ *Ntaganda*, [ICC-01/04-02/06-2240](#), para 10.

³² *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), paras 24(d) and 27.

³³ [ICC-01/12-01/18-1446](#), paras 11-13.

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.

25. 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.³⁴ 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.

III. Relief

26. For all the reasons herein, the Defence respectfully requests that the Chamber **REJECT** the Request.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 18th Day of February 2022
At The Hague, The Netherlands

³⁴ See, for example: *Bemba et al.*, [ICC-01/05-01/13-2275-Anx](#), paras 43-46.