

**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, B and C

Public Redacted Version of “Defence Response to ‘Corrigendum to Prosecution’s fourth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2101-Conf)’”, 18 February 2022, ICC-01/12-01/18-2120-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:

The Office of the Prosecutor

Karim A. A. Khan QC
Nazhat Shameen Khan
Mame Mandiaye Niang

Counsel for the Defence

Melinda Taylor
Michiel Pestman

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction¹

1. The Defence opposes the submission into evidence of the 24 items in Annex B and 33 items in Annex C identified by the Office of the Prosecutor ('Prosecution') in its 'Corrigendum to Prosecution's fourth 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 object to the submission into evidence of the 6 items in 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 23bis(2) of the Regulations of the Court, this filing is submitted confidentially as it responds to a filing of the same classification.

² [ICC-01/12-01/18-2101-Conf-Corr](#), notified on 3 February 2022, with Confidential Annexes A, B and C.

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 The Prosecution’s arguments in defence of anonymous hearsay are inapposite since they relate only to ‘hearsay’ not anonymous hearsay.¹⁵ 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;¹⁶ 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’).¹⁷ This is not the

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, 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 Request, [ICC-01/12-01/18-2101-Conf-Corr](#), para. 26.

¹⁶ *Bemba et al.*, [ICC-01/05-01/13-2275-Red](#), paras 874-875.

¹⁷ *Ngudjolo*, [ICC-01/04-02/12-271-Corr](#), para. 226; [ICC-01/04-02/12-3-tENG](#), paras 440 and 496.

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 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.¹⁸
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.¹⁹ 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’.²⁰ 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,²¹ and second, the majority of the tendered documents deny any assessment of the source/s of information.²² 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.

¹⁸ ICTY, [Prlić](#), para. 26.

¹⁹ *Gbagbo*, [ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019, paras 48 and 49.

²⁰ *Ongwen*, [ICC-02/04-01/15-615](#), para. 10.

²¹ For example, Documents 10-16 of Annex B and the 33 documents of Annex C 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; *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 12.

²² See, for example, each of Documents 10-16 of Annex B and the 33 documents of Annex C [REDACTED], and Documents 17-19 of Annex B [REDACTED].

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.²³ The Defence further adopts additional categories relevant to these items: Category 14: [REDACTED], Category 15: [REDACTED]; and Category 16: [REDACTED].

Category 14: [REDACTED]

12. Documents 1-4 and 18-24 of Annex B allegedly emanate from [REDACTED]. The mere fact that these items may have been given to the Prosecution by [REDACTED] does not provide a basis for their acceptance as authentic, probative and/or reliable, particularly where there is no evidence of the sources of the information and/or methods of verification or authentication of information. Furthermore, as Chambers of this Court have found, ‘whether the source of the information has an allegiance towards one of the parties or has a personal interest in the outcome of the case, or whether there are other indicators of bias’ is relevant to determining reliability²⁴ and that the fact that evidence may contain ‘assertions made by interested persons severely diminishes their probative value.’²⁵ The [REDACTED] represents an entity with a personal interest in the outcome of the case and on that basis, the Chamber should find these items not sufficiently reliable for submission. Furthermore, the Defence notes that in *Bemba et al*, the Appeals Chamber found that documents similarly requested and produced for the purposes of the Prosecution’s use in ICC proceedings were of a testimonial nature and ought to have been submitted through Rule 68.²⁶

²³ [ICC-01/12-01/18-1446](#), paras 11-20; [ICC-01/12-01/18-2091-Conf](#), paras 12-25.

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

²⁵ *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 32.

²⁶ *Bemba et al.*, [ICC-01/05-01/13-2275-Red](#), paras 303-304:

‘303. The Appeals Chamber notes that Mr Smetana testified before the Trial Chamber from 2 until 4 November 2015.684 Document CAR-OTP-0092-0018, which, as noted, is dated 3 November 2015, was thus prepared, in the midst of Mr Smetana’s testimony at trial. As also noted, this document was prepared by and, the two investigators of the Office of the Prosecutor who directly accessed information in the Western Union database in October and November 2012. It provides an account of certain facts, primarily on a meeting between them a senior public prosecutor from the Austrian Ministry of Justice allegedly held on 16 March 2011, during which access to Western Union financial information was discussed “in general terms”. It was about these same circumstances – in particular, on the direct access to Western Union financial information by the two investigators concerned – that Mr Smetana was testifying before the Trial Chamber when the document at issue

Category 15: [REDACTED]

13. Documents 8-9 and 17 of Annex B allegedly emanate from [REDACTED]. Documents 8 and 9 [REDACTED] are a compilation of reports from various different sources, none of which seem to be verified. Document 17 [REDACTED] is a document with [REDACTED], which purports to set out [REDACTED] of relevant individuals connected with the events of 2012. The mere fact that these items may have been given to the Prosecution by an unknown [REDACTED] does not provide a basis for their acceptance as authentic, probative and/or reliable, particularly where there is no evidence of the sources of the information and/or methods of verification or authentication of information. Similarly, as with Category 14, [REDACTED] represents an entity with a personal interest in the outcome of the case, given [REDACTED], and for the same reasons, the Chamber should find these items not sufficiently reliable for submission.

Category 16: [REDACTED]

14. Documents 10-16 of Annex B are all reports, [REDACTED], allegedly deriving from the archives [REDACTED]. Annex C comprises 33 [REDACTED] allegedly deriving from the archives [REDACTED]. Each of these 40 reports fall within Category 16: [REDACTED] and respond to the Prosecution's submissions on these documents.²⁷

15. These documents [REDACTED] are [REDACTED] contemporaneous with the events and as identified by [REDACTED], may contain information later identified to be incorrect,²⁸ and should not be relied upon without the appropriate indicia of finality (being stamps and signatures²⁹). As noted in the Annexes, the Prosecution could and

was prepared and disclosed.

304. The Appeals Chamber considers that document CAR-OTP-0092-0018 cannot be considered to be a mere internal document of the Office of the Prosecutor, or a document prepared for purposes other than being relied upon in the context of the legal proceedings before the Trial Chamber. Rather, it was written, at that particular point in time (on the second day of Mr Smetana's testimony at trial) for the purpose of being submitted in the present proceedings, that is, to be presented with a view to proving or disproving the facts in issue before the Trial Chamber. Indeed, the Appeals Chamber considers that the content of the document, as well as the timing and context of its preparation and submission in the proceedings, reveal that its exclusive purpose was to provide the Trial Chamber with the account of [REDACTED] and [REDACTED] of certain relevant facts on which the Prosecutor, in turn, intended to rely. In the view of the Appeals Chambers, these circumstances indicate that document CAR-OTP-0092-0018 is testimonial in nature.'

²⁷ Request, [ICC-01/12-01/18-2101-Conf-Corr](#), paras 34-35, 53-57.

²⁸ See e.g. Document 29 of Annex C [REDACTED].

²⁹ See e.g. Documents 10-13 and 15 and 16 of Annex B [REDACTED] and Documents 1 and 2 of Annex C [REDACTED].

should have attempted to submit these items through Witness [REDACTED] and/or another witness [REDACTED]. Its failure to do so means that it cannot submit these documents through the bar table.³⁰

Category 17: Audio and Video Recordings

16. Documents 5-7 [REDACTED] concern an audio file allegedly recorded by [REDACTED].

17. Electronic recordings are ‘a special category of evidence in that in and of themselves, they bear no prima facie indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.’³¹ As such, ICTY Trial Chambers have consistently required the introduction of at least *some* evidence in respect of the methodology of collection and attribution before considering admission from the bar table.³² Similarly, Chambers of this Court have upheld that ‘before video or audio material can be admitted, the Chamber will require evidence of originality and integrity. [...] Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard.’³³

³⁰ *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 12; *Ntaganda*, [ICC-01/04-02/06-1838](#), para. 46; *Ruto and Sang*, [ICC-01/09-01/11-1353](#), para. 42.

³¹ *Tolimir*, [Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table](#), para. 14; See *Karadžić*, [Decision on the Prosecution’s First Bar Table Motion](#), para. 13.

³² *Tolimir*, [Decision on Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table](#), para. 14: ‘the Chamber notes, as submitted by the Prosecution, that a large collection of intercepts have already been admitted in this case as a result of the testimony of numerous experienced and trained ABiH and MUP intercept operators who have established the reliability of the interception process and have been able to speak to the authenticity of the intercepts. The Chamber finds, therefore, that the reliability and authenticity of this general collection of intercepts has already been established. The Proposed Intercepts form part of the general collection of intercepts already admitted in this case and as such, the Chamber is satisfied that the reliability and authenticity of the Proposed Intercepts was sufficiently established for the purposes of admitting them into evidence from the bar table’; *Karadžić*, [Decision on Prosecution’s First Bar Table Motion for the Admission of Intercepts](#), para. 15: ‘weight to be attributed to the Intercepts. The Chamber has also received evidence relating to the methodology used for obtaining, transcribing and storing the Intercepts, the method used for identifying speakers, and the procedure adopted in handing over the Intercepts to the Prosecution. The Chamber is therefore satisfied that there are sufficient indicia of reliability to negate the Accused’s submission that this category of documents is “not sufficiently reliable to be admitted in general.”’

³³ *Katanga and Ngudjolo*, [ICC-01/04-01/07-2635](#), para. 24.

18. The requirement to demonstrate authenticity of such data is also reflected in domestic practice. In *Lorraine v. Markel American Insurance Co.*, the US Federal Court for Maryland emphasised that it is necessary for an authenticating witness:³⁴

to provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so.

19. In the aforementioned *Bemba et al.* case, the Single Judge emphasised the broad scope of the right to challenge the lawfulness of the collection of digital evidence, and related obligation on the part of the Prosecution to furnish information on such matters:³⁵

The Single Judge and Chamber have rendered several pronouncements confirming the defence teams' broader understanding of the Prosecution's disclosure obligations on this point. Most notably, the Chamber held the following: The Chamber considers that material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution's disclosure obligations as set out in Rule 77 of the Rules. **It is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.** Similar considerations were made in ruling that the Prosecution was required to disclose its requests for assistance. When the Prosecution was ordered to provide these requests, it then argued that this ruling only applied to intercepted communications. Subsequently, the Single Judge rejected this argument and emphasised that 'all requests for assistance be disclosed to the Defence, regardless of whether domestic authorities executed the requests for assistance or whether the requests for assistance pertained to intercepted communications or other measures'.

20. At the level of internationally recognised human rights law, the right of the Defence to challenge evidence against it (and as a corollary to receive information relevant to the exercise of that right) is an incident of the internationally recognised human right to fair trial.³⁶

³⁴ US, *Lorraine v Markel Insurance Co.*, 241 FRD 534, US Dist LEXIS 33020 (DMd 2007) at 545. See also UK practice: *R v. Shephard*, [1993] 1 AC 380 at 387; *R v. Dean and Bolden*, (1998) 2 Cr App R 171 (Ct App); *Darby v. DPP*, [1995] RTR 294, 159 JP 553 (Div Ct).

³⁵ [ICC-01/05-01/13-1632](#), paras. 14-14.

³⁶ [ICC-01/04-01/06-649](#), p. 4 ; ECHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para 90; ECHR, *Schenk v. Switzerland*, Series A No. 140, 12 July 1988, paras. 46 and 48; ECHR, *Khan v. United Kingdom*, App. No. 3539/97, 12 May 2000, para 35; ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-T, [Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence](#), 26 September 1996, para. 9; See also, [UN Basic Principles on the Role of Lawyers](#), A/Conf .144/28 Rev.1, 1990, Principle 21.

21. Given these issues, the Chamber should reject submission of these recordings which has been submitted without any information being provided concerning its integrity, authenticity or reliability.

Conclusion

22. 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.
23. 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.³⁷ 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

24. 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

³⁷ See, for example: *Bemba et al.*, [ICC-01/05-01/13-2275-Anx](#), paras 43 to 46.