

Open-source evidence at a crossroad: the (pending) case against Mr Hassan at the International Criminal Court and the fundamental right to fair trial.

by **Stefano Trevisan**¹

“The future of accountability will inevitably be intertwined with the advancement of technology”

E. Piracés (2018)

“What cannot (at present) in principle be overthrown by criticism is (at present) unworthy of being seriously considered”

K. Popper (1968)

Summary. **1.** Introduction. – **2.** The probative value of United Nations documents in the criminal proceedings against Mr Hassan. – **2.1.** The Prosecutor’s submission. – **2.2.** The Defence’s objections. – **2.3.** The decision of the Chamber and the so-called “submission approach”. **3.** Conclusions.

Introduction.

Timbuktu was once considered the end of the earth, sitting at the cross road between the Sahara Desert and north Africa Savana. In ancient times the city was a prosperous trade centre, where caravans met to exchange salt for gold, ivory, and slaves. From the 13th to 16th centuries, Timbuktu flourished as a major learning and cultural centre, home to a 25,000-student university and

¹ LL.M., licensed lawyer and open-source investigator. Previous publications include “Open-source information in criminal proceedings: lessons from the International Criminal Court and the Berkeley Protocol” (2021); “Post-sale Services as Unlawful Arms Exports: a Legal Guide for Investigators” (2020); “Due diligence delle imprese e diritti umani: profili penalistici dell’esportazione di armamenti” (2020); “Punishing the facilitation of irregular migration. A comparative criminal law analysis of Germany and Italy” (2019); “2013-2015 EUBAM Libya: Analysis of an EU Crisis Management Mission” (2018). The author thanks Aimel Yousfi-Roquencourt (legal consultant for international criminal tribunals and mechanisms) and Niamh Quille (lawyer at Birnberg Peirce) for their invaluable feedback and peer-review.



other madrasahs. The great teachings of Islam, from astronomy and mathematics to medicine and law, were collected and produced here in several hundred thousand manuscripts.

In the recent past, Timbuktu has been plagued by armed conflicts and authoritarian rulers. In 2012, following a separatist rebellion and a military coup, the Islamist groups al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine took control of the city, imposing a harsh regime over the population. According to human rights organizations², abuses committed by these groups included beatings, floggings, and arbitrary arrests against those engaging in behaviours decreed as *haram* (forbidden), such as smoking or selling cigarettes, consuming or selling alcoholic beverages, listening to music on portable audio devices, and failing to attend daily prayers. The Islamist groups routinely punished women for failing to adhere to their dress code, for wearing perfume or jewellery, and for having contact with men other than their family members. They have carried out executions and limb amputations as punishment, and systematically destroyed numerous religious shrines of cultural and religious importance. They have also recruited several hundred children, some as young as 12, into their forces.

On 13 July 2012, the Government of Mali referred the situation to the International Criminal Court³ ("ICC"), pursuant to Art. 14 of the Rome Statute. After conducting a preliminary examination of the situation, the ICC Prosecutor concluded that there was reasonable basis to believe that serious crimes had been committed in the country, and decided to open a criminal investigation.

In March 2018, Pre-Trial Chamber I issued a warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud⁴. Mr Hassan has been accused of crimes against humanity and war crimes, including rape, torture, forced marriage, passing of sentences without previous court judgement and sexual slavery. According to the Prosecutor, Mr Hassan was the *de facto* chief of the Islamic police and he "*played an essential and undeniable role in the system of persecution established by the armed groups in Timbuktu*"⁵. He was surrendered by Mali to the ICC, arriving in the Netherlands on 31 March 2018. On 30 September 2019, the Pre-Trial Chamber confirmed the charges of war

² Human Rights Watch, "*Mali Conflict and Aftermath*", pag. 128, available at [this link](#).

³ Referral letter by the Government of Mali, available at [this link](#).

⁴ Pre-Trial Chamber I, The Prosecutor v. Al Hassan, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01-18-2-tENG, 27 March 2018, available at [this link](#).

⁵ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 14 July 2020.

crimes and crimes against humanity brought by the Prosecutor against Mr Al Hassan and committed him to trial⁶.

In the ongoing trial, the Prosecutor decided to rely significantly on open-source evidence to prove the criminal liability of the Accused. She requested the admission of 63 official documents published by United Nations bodies and specialised agencies that are publicly available⁷. These documents include reports, press releases, and resolutions downloaded from various UN body websites, including the Security Council, the Secretary General, the Office of the UN High Commissioner for Human Rights, the Multidimensional Integrated Stabilisation Mission in Mali and the Educational, Scientific and Cultural Organization (“UNESCO”).

While the use of digital open-source evidence is now a well-established practice in international criminal proceeding⁸, the case against Mr Hassan reveals unprecedented features that deserve attention. In the written pleadings, both the Prosecutor and the Defence discussed in detail the admissibility of such items, presenting unique legal reasoning. Therefore, the case in question exemplifies the procedural legal framework of open-source evidence at the ICC and underlines the most controversial aspects of such items.

The article analyses the specific legal arguments put forward by the Prosecutor in seeking the admission of these items, the objections raised by the Defence and the decision delivered by the Chamber⁹. In our conclusion, we argue that by adopting the so-called “submission approach”¹⁰, the judges of the Trial Chamber have missed the opportunity to address the specific legal challenges pertaining to the admission of open-source evidence raised by the Accused. As a result, the probative value of open-source in international criminal proceedings still remains to be tested at trial.

⁶ Cf. Chambre préliminaire I, Procureur c. Al Hassan, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 novembre 2019, ICC-01/12-01/18-461-Corr-Red, available at [this link](#).

⁷ Trial Chamber X, Prosecutor v. Al Hassan, Prosecution’s second request for the admission of documentary evidence from the bar table, 13 April 2021, ICC-01/12-01/18-1412, available at [this link](#).

⁸ Trevisan S., “Open-source information in criminal proceedings: lessons from the International Criminal Court and the Berkeley Protocol”, in *Giurisprudenza Penale Web* (2021); Freeman L., Vazquez R., “Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age” *Journal of International Criminal Justice* (2021); Dubberley S., Koenig A., Murray D. (editors), “Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation and Accountability”, Oxford University Press (2020).

⁹ Trial Chamber X, Prosecutor v. Al Hassan, Decision on Prosecution application submitting 63 open-source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514, available at [this link](#).

¹⁰ Trial Chamber X, The Prosecutor v. Al Hassan, Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras. 27 ff, available at [this link](#); Trial Chamber X, Prosecutor v. Al Hassan, Decision on Prosecution application submitting 63 open source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514, para. 4.

2. The probative value of United Nations documents in the criminal proceedings against Mr Hassan.

2.1. The Prosecutor's submission.

In the trial against Mr. Al Hassan the Prosecutor sought the admission of 63 official documents published by United Nations bodies and specialised agencies through a 'bar table' motion, pursuant to Articles 64(9), 69(3), 69(4) of the Rome Statute, and rule 63(2) of the Rules of Procedure and Evidence and the Directions on the conduct of proceedings¹¹. Accordingly, the Chamber must assess the admissibility of documentary evidence without direct oral testimony by taking into account three key factors: i) the relevance of the evidence to the issues at trial; ii) its probative value; and iii) the prejudicial effect (if any) of its introduction as weighed against the probative value of the evidence¹².

The Prosecutor argued that bar table submission would have contributed to the expeditious conduct of the trial and that there was no requirement that any documentary evidence should, where possible, be admitted through a witness¹³.

The Prosecutor alleged that these open-source documents published by the United Nations proved important facts at trial, such as the existence of a non-international armed conflict (including the nature of Ansar Dine/AQIM as organised armed groups), the common purpose of Ansar Dine/AQIM, and the protected character of the buildings subject to attack. In addition, the open-source evidence was allegedly relevant to factors that may be considered in sentencing, such as the gravity of the crimes and the extent of the damage caused, in particular the harm caused to the victims and their families.

In addition, the Prosecutor submitted that these documents contain "*sufficient indicia of reliability, including authenticity*"¹⁴, to be submitted into evidence. Notably, the Prosecutor argued that such items are "*self-authenticating as they are official documents publicly available from official sources*"¹⁵. It is stressed the documents submitted contain other indicia of reliability, including logo and letterhead, dates of publication, authors, and methodology or context of preparation.

¹¹ Trial Chamber X, Prosecutor v. Al Hassan, Prosecution's second request for the admission of documentary evidence from the bar table, 13 April 2021, ICC-01/12-01/18-1412, available at [this link](#); citing to Trial Chamber X, The Prosecutor v. Al Hassan, Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras. 77-78, available at [this link](#).

¹² Ibidem, para. 8.

¹³ Ibidem, para. 21.

¹⁴ Ibidem, para. 14.

¹⁵ Ibidem, para. 15.

The Prosecutor acknowledged that the author of the UN documents (including reports, photographs and press release) is in general unknown. Therefore, such evidence can be considered as anonymous hearsay. However, it is submitted that the fact that evidence is hearsay does not necessarily deprive it of probative value, and that the weight or probative value afforded to it will depend upon “*the infinitely variable circumstances which surround hearsay evidence*”¹⁶. According to the Prosecutor, information based on anonymous sources may also be considered as corroboratory evidence.

In conclusion, the Prosecutor alleged that each of the proposed items possessed sufficient indicia of reliability to warrant its submission and to enable the Chamber to fairly evaluate it.

2.2. The Defence’s objections.

The Defence submitted that the open-source UN documents filed with the court were inadmissible¹⁷ as they should have been submitted through a witness. The Defence argued that the inability to proceed with an in-court testimony to verify the reliability and authenticity of such items is deemed detrimental to the rights of the Accused, as the majority of the tendered documents deny any assessment of the source of the information.

Furthermore, it is claimed that such documents are “*almost uniformly based on anonymous hearsay*”¹⁸, and that it was impossible to verify whether the information included in the open-source UN documents was derived from “*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*”¹⁹.

In addition, the documents are deemed inadmissible as they amount to “*opinion evidence*”²⁰. In this view, the Defence submitted that the UN Security Council is a political body, and therefore its resolutions are triggered by political determinations rather than objective forensic analysis. Resolutions can allegedly be relied upon only for the purpose of establishing that there was a resolution, and not for the truth of their contents. Similarly, UN human rights fact-finding missions’ reports have allegedly a distinct purpose, which is not akin to the process of collecting evidence for establishing individual criminal responsibility.

¹⁶ Ibidem, para. 19.

¹⁷ Trial Chamber X, Prosecutor v. Al Hassan, Defence Response to Prosecution’s Second Request for the Admission of Documentary Evidence from the Bar Table, ICC-01/12-01/18-1446.

¹⁸ Ibidem, para. 22.

¹⁹ Ibidem, para. 9.

²⁰ Ibidem, para. 11.

The Defence also challenged the authenticity of such items, as the inclusion of UN logo, document number and/or standard layout does not provide sufficient information regarding the source of the evidence. Furthermore, the Defence submitted that the Prosecution had adduced no evidence or information that would allow the Chamber to independently verify the originality, integrity and location of photographs included in the open-source documents and relatedly argued that statements from the photographer would be required to authenticate these exhibits²¹.

The Defence also claimed that certain exhibits or excerpts submitted were too vague to be relevant and that admission was therefore prejudicial. In this regard, and often pointing to the absence of specific time and location or identified alleged perpetrators or victims, the Defence submitted that it was impossible to conclude if the information fell within the scope of the charges²².

In conclusion, the Defence claimed that the Prosecutor had failed to demonstrate that such UN documents were reliable, as they lacked information concerning methodology and 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”*²³. The recycling of such UN reports allegedly risked to further entrenching narratives which may *“well be false”*²⁴.

2.3. The Chamber’s decision and the submission approach.

On June 15, 2021, the Trial Chamber X issued its decision on the Prosecution application submitting 63 open-source exhibits into evidence²⁵.

The Chamber dismissed the Defence’s abovementioned objections and *“recognized as formally submitted”* all the open-source documents filed by the Prosecutor, except one item that was considered *“testimonial in nature”*²⁶. In the view of the judges, the Prosecution had provided specific submissions on the relevance and probative value of each document submitted. The

²¹ Trial Chamber X, Prosecutor v. Al Hassan, Decision on Prosecution application submitting 63 open- source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514, <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-1514>, para 14.

Evidence

²² Ibidem, para 10.

²³ Trial Chamber X, Prosecutor v. Al Hassan, Defence Response to Prosecution’s Second Request for the Admission of Documentary Evidence from the Bar Table, ICC-01/12-01/18-1446, para. 5.

²⁴ Ibidem, para 22.

²⁵ Trial Chamber X, Prosecutor v. Al Hassan, Decision on Prosecution application submitting 63 open-source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514, available at [this link](#).

²⁶ Ibidem, para 17.

Chamber saw no reason to exceptionally consider these objections at this point in the proceedings, and therefore deferred the decision on the admissibility of such items until the final judgment, as it was convinced that consideration thereof will be “*better rendered in light of the entirety of the evidence brought before it*”²⁷.

In line with its Directions on the conduct of proceedings²⁸ and case-law²⁹, the Chamber endorsed the so-called “submission approach” and therefore decided not issue rulings on admissibility for each submitted item of evidence in this phase of the proceedings. Rather, the Chamber recognised 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*”³⁰.

3. Conclusions.

In the case against Mr Hassan the Chamber has refused to rule on the objections raised by the Defence and decided to defer any consideration on admissibility of evidence until deliberating the final judgment. In doing so, the judges have exercised the discretionary powers that are permitted by the evidence regime set out in the Rome Statute.

According to Rule 63(2) the Chamber has the authority, “to assess freely” all evidence submitted in order to determine its relevance or admissibility, and must exclude those evidence that have been obtained by means of a violation of the Statute or international human rights (see Art. 69). Rule 64 lays down the procedure relating to the admissibility of evidence. Accordingly, parties to the proceeding must raise any issue relating to admissibility issue “*at the time when the evidence is submitted*”. *Par contre*, the Chamber is under no obligation to hand down a decision on this matter in a specific time frame.

From the above it follows that the submission approach endorsed in the case at hand formally complies with the Court Rules of Procedure and Evidence. However, it is argued that the current approach is highly problematic, especially when it is applied to open-source evidence.

²⁷ Ibidem, para 18.

²⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

²⁹ The ICC first adopted the “submission approach” in 2015 in the Bemba et al case to defer the assessment of the admissibility criteria in relation to the evidence to the judgment phase, except when ruling on certain procedural bars is mandatory (see Article 69 [7] or Rules 68, 71 and 72) or appropriate for reasons of fairness. Cfr. ICC, Decision of 6.5.2020 – ICC-01/12-01/18-789-AnxA (Directions on the conduct of proceedings), paras. 27–34.

³⁰ Trial Chamber X, Prosecutor v. Al Hassan, Decision on Prosecution application submitting 63 open source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514, available at [this link](#), para 4.



Publicly available information present unique challenges to criminal proceedings, including authenticity, reliability, integrity and veracity³¹. In most cases the source of information cannot be identified. Therefore, online evidence gathering including United Nations reports must be subject to a thorough verification process, in line with the Berkley Protocol³². International standards now require investigators to verify open-source information using different techniques, including geolocation, chronolocation, source analysis, and to triangulate documentary, physical, and testimonial evidence. The Chamber submission approach arguably falls below international standards of open-source verification and may cause potential prejudice to the principle of equality of arms and the rights of the Accused as a whole. The present contribution has revealed that Mr Hassan's defence lawyers are "left in the dark" until the end of the trial as to what evidence the Chamber will eventually admit and take into consideration. This places on the defence the onerous burden of responding to all evidence submitted, regardless of its relevance or probative value³³. Hence, the right to adequate time and facilities to prepare a defence, which is significantly upon fair trial rights under Art. 14 of the 1966 International Covenant on Civil and Political Rights, is seriously put in question.

The Chamber has missed an opportunity to thoroughly test in trial open-source evidence.

Bibliography

Amnesty International, "*Appeal judgment raises serious questions regarding the fairness of the ICC's approach to evidence*", available at [this link](#) (2018)

Amnesty International, "*Admitting mistakes on admitting evidence – It's not too late for the ICC to get it right*", available at [this link](#) (2018)

Amnesty International, "*Time to Clarify ICC Rules on Admission of Evidence*" available at [this link](#) (2018)

³¹ D'Alessandra F., Sutherland K. "The Promise and Challenges of New Actors and New Technologies in International Justice", *Journal of International Criminal Justice*, Volume 19, Issue 1, (2021).

³² United Nation Office of the High Commissioner for Human Rights and UC Berkley Law School, "Berkeley Protocol on Digital Open-Source Investigations" (2021).

³³ Amnesty International, "Admitting mistakes on admitting evidence – It's not too late for the ICC to get it right", available [at this link](#).



Dubberley S., Koenig A., Murray D. (editors), *“Digital Witness: Using Open-Source Information for Human Rights Investigation, Documentation and Accountability”*, Oxford University Press (2020)

D’Alessandra F., Sutherland K. *“The Promise and Challenges of New Actors and New Technologies in International Justice”*, Journal of International Criminal Justice, Volume 19, Issue 1, (2021)

Freeman L., Vazquez R., *“Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age”* Journal of International Criminal Justice (2021)

Murphy P., *“No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials”* Journal of International Criminal Justice, Volume 8, Issue 2 (2010)

Trevisan S., *“Open-source information in criminal proceedings: lessons from the International Criminal Court and the Berkeley Protocol”*, in Giurisprudenza Penale (2021)