



Original: **English**

No.: **ICC-02/05-01/20**

Date: **9 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

Defence Request Pursuant to Article 64(6)(d) of the Rome Statute

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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Unrepresented Victims

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INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”) respectfully requests that the Trial Chamber order the Netherlands Forensic Institute (“NFI”) and/or Witness P-1062 in his personal capacity, to produce the notes that underlie his reports, pursuant to Article 64(6)(d) of the Rome Statute (“Statute”).

PROCEDURAL BACKGROUND

2. On 25 January 2023, during cross-examination, Witness P-1062 made several references to internal notes compiled by himself and his NFI colleagues which are of relevance to the Defence’s assessment of the NFI reports.¹ These underlying notes had not been provided to the Prosecution and had not, therefore, been disclosed to the Defence.² The Defence formally requested in court that these underlying notes be sent to the Prosecution so that they could be disclosed to the Defence.³ At the end of Witness P-1062’s testimony, the Presiding Judge invited him to “*see whether any of the underlying material is still available and whether there’s any objection from [the NFI] to them being handed over*”.⁴

3. On 2 February 2023, the Prosecution forwarded to the Defence a courtesy copy of a letter received from Witness P-1062 of the same date (“the Letter”), refusing to produce the underlying material, stating that “*the notes are for internal use only as by NFI policy*”.⁵

SUBMISSIONS

4. Article 64(6)(d) of the Statute provides that the Trial Chamber may “*[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties*”.

¹ ICC-02/05-01/20-T-109-ENG ET WT 25-01-2023, [Open session], p.22, l.20 to p.23, l.5 and p.59, l.19 to p.60, l.5.

² ICC-02/05-01/20-T-109-ENG ET WT 25-01-2023, [Open session], p.44, l.18 to p.45, l.1; p.58, l.12 to p.59, l.2.

³ ICC-02/05-01/20-T-109-ENG ET WT 25-01-2023, [Open session], p.59, l.19 to p.60, l.12.

⁴ ICC-02/05-01/20-T-109-ENG ET WT 25-01-2023, [Open session], p.64, l.25 to p.65, l.3.

⁵ Formally disclosed on 7 February 2023 as DAR-OTP-00001035.

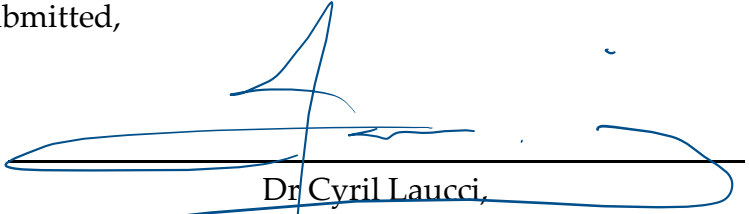
5. The Defence submits, firstly, that, despite being given the opportunity to produce the underlying notes voluntarily, the NFI and/or Witness P-1062 have declined to do so. Witness P-1062 stated in the Letter that this is a matter of NFI policy and that the notes “*do not bring additional information*”. It is submitted that, whether or not the underlying notes are “*for internal use*”, they are nevertheless relevant and important in order that the Defence might subject the methodology and summary findings set out in Witness P-1062’s reports to adequate and appropriate scrutiny; in other words, to “*check [his] homework*”.⁶ The Prosecution did not argue otherwise or oppose the Chamber’s invitation.

6. It is further submitted that it is not for the NFI and/or Witness P-1062 to determine whether or not the underlying notes “*bring additional information*”. Absent an order from the Trial Chamber, it is clear that neither the NFI nor Witness P-1062 will voluntarily produce the notes. And absent the underlying notes, the Defence will inevitably submit that P-1062’s conclusions have not been subjected to adequate and appropriate scrutiny, and are consequently unreliable.

7. Secondly, the Defence respectfully requests that the Trial Chamber issue an addendum to its decision in which 68 items associated with Witness P-1062’s evidence were recognised as formally submitted,⁷ and recognise the Letter as also formally submitted.

8. For the aforementioned reasons, the Defence respectfully requests that the Trial Chamber order the NFI and/or Witness P-1062 to produce the underlying notes.

Respectfully submitted,


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

Dated this 9th day of February 2023 at The Hague, The Netherlands

⁶ ICC-02/05-01/20-T-109-ENG ET WT 25-01-2023, [Open session], p.59, ll 4-5.

⁷ Email sent on behalf of Trial Chamber I, 30 January 2023 at 14:25.