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

**Prosecution Response to "Defence Request Pursuant to Article 64(6)(d) of the
Rome Statute", 9 February 2023, ICC-02/05-01/20-867**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution respectfully opposes the Defence request (“Request”) for Trial Chamber I (the “Chamber”) to order, pursuant to article 64(6)(d) of the Rome Statute (“Statute”), the Netherlands Forensic Institute (“NFI”) and/or Witness P-1062 to produce notes (“the Notes”) made in the course of their expert reports.¹

2. The Request should be denied because, as P-1062 makes clear, the Notes “do not bring additional information compared to the anonymized summary we [the NFI] provided.”² Moreover, the Defence fail to justify the need for an order pursuant to article 64(6)(d).

II. SUBMISSIONS

3. On 25 January 2023, upon the completion of his testimony, P-1062 was requested by the Chamber to “see whether any of the underlying material was still available and whether there was any objection from the NFI to it being handed over.”³ The witness agreed to make this enquiry.⁴

4. On 2 February 2023, the Prosecution received a response letter from the NFI/P-1062 (the “NFI Response”), stating that the request had been discussed with colleagues, concluding that “the notes are for internal use only as by NFI policy.”⁵

5. The Defence now argues that without the Notes, P-1062’s conclusions have not been subjected to “adequate and appropriate scrutiny”.⁶ However the Request does not specify which conclusions require scrutiny. This further undermines the asserted purported relevance of these Notes.

6. The Defence were provided with the NFI’s first report, dated 11 January 2022, on 31 January 2022⁷, and were provided with the NFI’s second report, dated 12 January

¹ ICC-02/05-01/20-867.

² Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.

³ ICC-02/05-01/20-T-109, p.64-65, ll.25-2.

⁴ ICC-02/05-01/20-T-109, p.65, l.3.

⁵ Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.

⁶ ICC-02/05-01/20-867, para. 5.

⁷ First NFI Report, DAR-OTP-0223-0443.

2023 on 13 January 2023 ('Second Report') (together, the "Reports").⁸ The Second Report was provided two weeks in advance of P-1062's testimony and makes clear that it did not include an observation list facial comparison form ("Comparison Form"). At no point did the Defence make a request for the Notes in advance of P-1062's appearance.⁹ It would not have been novel, and indeed is standard practice, to request notes or other materials from an expert like P-1062 *before* testimony. The Defence chose not to do so.

7. Furthermore, the Defence had the opportunity to scrutinise the conclusions contained in the Reports during the cross examination of P-1062. When cross-examined about the absence of a Comparison Form for the Second Report, P-1062 extensively explained why and provided reasons for the methodology followed.¹⁰

8. The Defence fail to show why the Notes are necessary to scrutinise the NFI's methodology and summary findings or how the absence of the Notes render the conclusions "unreliable".¹¹ P-1062 testified in detail about the methodology used by the NFI.¹² He also provided the Court with a seven page annex titled "Forensic method comparison of facial images", prepared by the NFI, outlining the methodology the examiners followed.¹³ P-1062, together with the two other senior forensic scientists who conducted the expert analysis, have each conducted biometric and image analysis for over 20 years.¹⁴ The comparison they conducted in this case complied with standard NFI practice and their conclusions were by consensus.¹⁵

9. During the course of his testimony, P-1062 alluded to the lack of probative value of the Notes multiple times. P-1062 testified that sometimes the comparers took *no* notes, because the results were filled out directly onto the Comparison Form and that

⁸ Second NFI Report, DAR-OTP-00000976.

⁹ The Defence asked only whether there was a Comparison Form for the Second Report, following which, on 17 January 2023 at 18:11, the Prosecution confirmed that no Comparison Form accompanied the Second Report.

¹⁰ P-1062: T-109, p.58-59, ll.2-17.

¹¹ ICC-02/05-01/20-867, paras 5-6.

¹² P-1062: T-109, p.15-17, ll.2-9; p.20-24, ll.21-4; p.58-59, ll. 16-2.

¹³ "Forensic method comparison of facial images", DAR-OTP-0223-0454 at 0458, section 5.4.

¹⁴ P-1062: T-109, p.14, ll.20-25.

¹⁵ Second NFI Report: DAR-OTP-00000976 at 000002 "The three examiners discussed the results and came to the consensus based on their findings".

when¹⁶ notes were made, they were for personal use.¹⁷ The NFI Response confirms that notes made by NFI examiners are never included in forensic comparison of facial image reports¹⁸ and that P-1062 and his colleagues “compared the complete video and not just single frames from the video”.¹⁹ Accordingly, the Notes have no probative value and will not assist the Chamber.

10. The NFI Response stated that the Notes “do not bring additional information compared to the anonymized summary we provided”.²⁰ The Defence submit that it is not for P-1062 to determine whether the Notes “bring additional information”.²¹ As an expert for over 20 years, drafting an average of 20 reports on biometrics and facial comparison annually,²² P-1062 is ideally suited to assess the value of the Notes relative to the anonymised survey provided.

11. The Defence fail to demonstrate why the Chamber should, pursuant to article 64(6)(d), issue an order to the NFI/P-1062 for the production of the Notes. P-1062 complied with the Chamber’s request of 25 January 2023 to see whether any of the underlying material was still available and whether there was any objection from the NFI to making this available to the Chamber.²³ The NFI’s Response confirms, that as per NFI policy, the Notes are for internal use only.

12. Given the lack of probative value of these Notes, which provide no additional information to the unanimous findings of the NFI Reports, there is no valid justification for an order under article 64(6)(d).

¹⁶ P-1062: T-109, p.23-24, ll.24-4 (*emphasis added*).

¹⁷ P-1062: T-109, p.58-59, ll.25-2.

¹⁸ P-1062: T-109, p.58-59, ll. 16-2; Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.

¹⁹ Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.

²⁰ Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.

²¹ ICC-02/05-01/20-867, para 6.

²² P-1062: T-109, p.3, ll.12-14, 18-19.

²³ ICC-02/05-01/20-T-10, p.64-65, ll.25-2.

CONCLUSION

13. For the above reasons, the Request should be dismissed. The Prosecution have no objection to the formal submission of the NFI Response.²⁴



Karim A. A. Khan QC

Prosecutor

Dated this 20th day of February 2023

At The Hague, The Netherlands

²⁴ Letter from P-1062/NFI to the OTP, dated 2 February 2023, DAR-OTP-00001035.