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No.: **ICC-02/05-01/20**
Date: **22 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

**Reply to Prosecution Response to
“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:

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for Mr Ali Muhammad Ali

Abd-Al-Rahman
Dr Cyril Laucci, Lead Counsel
Mr Iain Edwards, Associate Counsel

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. With the leave of the Trial Chamber,¹ the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”) replies to the Prosecution’s response² to the Defence request 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.³

SUBMISSIONS

2. As foreshadowed in the request for leave to reply, the Defence wishes to address three matters raised in the Response: (i) the Prosecution’s argument that the Defence has not specified which conclusions require scrutiny;⁴ (ii) the Prosecution’s submission that the Defence did not seek disclosure of the underlying notes before P-1062’s testimony;⁵ and (iii) the Prosecution’s argument regarding the probative value of the notes.⁶

3. Firstly, the Defence submits that the conclusions which require adequate scrutiny, but which will not be adequately scrutinised absent disclosure of the underlying notes, are self-evident. They are:

(i) that it is “very much more likely” that the main character depicted in the reference videos is the Accused than if the main character depicted in the reference videos is different from the Accused, but has similar general facial features, assuming that the main character in the two reference videos is the same person;⁷ and

(ii) that it is “much more likely” that the main characters depicted in the reference videos are the Accused than if the main characters depicted in the

¹ Email from Trial Chamber I, 21 February 2023 at 11:53.

² Prosecution Response to “Defence Request Pursuant to Article 64(6)(d) of the Rome Statute”, 9 February 2023, ICC-02/05-01/20-867, 20 February 2023, [ICC-02/05-01/20-877](#) (“Response”).

³ Defence Request Pursuant to Article 64(6)(d) of the Rome Statute, 9 February 2023, [ICC-02/05-01/20-867](#) (“Request”).

⁴ Response, para. 5.

⁵ Response, para. 6.

⁶ Response, paras 10-12.

⁷ NFI Report, “Biometric comparison of video files”, DAR-OTP-0223-0443 (“First NFI Report”), at section 6, DAR-OTP-0223-0452.

reference videos are different from the Accused, but have similar general facial features, without assuming that the main characters in the two reference videos are the same person.⁸

4. The Defence has put the Prosecution to strict proof with regards to these conclusions. An important feature of the assessment of the correctness and reliability of these conclusions is an analysis of the methodology employed by P-1062 and his colleagues in carrying out their biometric comparison of the reference videos with the comparison videos and photos. The notes that the NFI and/or Witness P-1062 refuse to disclose would provide important contemporaneous detail and context to the methodology used, including the researchers' initial impressions. The Defence is inevitably and substantially impeded in its ability to scrutinise the methodology employed if it is denied access to the underlying notes. It is, for example, entirely possible that the notes will disclose details of doubts and differences in assessments between P-1062 and his colleagues.

5. In these circumstances, it is submitted that the relevance of the underlying notes is obvious. Indeed, the Prosecution did not argue in court that the notes could *not* be of relevance when it had the opportunity to do so.⁹

6. Secondly, while it is true that the Defence did not seek disclosure of the underlying notes before P-1062's testimony, this is only because there had never been any suggestion in either of the two NFI reports, or in Annex 1 to the First NFI Report,¹⁰ that personal working notes were made during the biometric comparison exercise. All these documents merely refer to the researchers using an observation list facial comparison form during their analysis, such as the list at Annex 2 to the First NFI Report ("Comparison Form").¹¹

⁸ Second NFI Report, DAR-OTP-00000976, at page 2.

⁹ ICC-02/05-01/20-T-109-ENG ET WT, 25 January 2023, pp 60 and 65.

¹⁰ "Forensic method comparison of facial images", DAR-OTP-0223-0454.

¹¹ DAR-OTP-0223-0461. *See eg* First NFI Report at DAR-OTP-0223-0451; DAR-OTP-0223-0457 ("5.2 Comparison of face images [...] In this way, each facial component is evaluated according to a *list* of observations. [...]"; "5.3 Interpretation of the differences and similarities found, During the study, the researchers *make lists* of the assessment of compared features."; "5.4 Conclusion of the competition, the three researchers combine *their lists* after the study has been carried out [...]"). The Second NFI

7. The first time there was any hint that the experts might have made notes additional to the Comparison Form arose out of P-1062's examination-in-chief.¹² Even then, P-1062 stated that there may not even be any separate notes: "But the notes are not always written. They are just they [...] Not scraps of paper, but it might be just that they fill out the form based on their findings. [...] So there might not be a written note of that."¹³ It is submitted that this tends to support the reasonableness of the Defence's assumption that there were no notes. This is not a case where the Defence positively "chose not to" request prior disclosure of the notes.¹⁴

8. In any event, even had the Defence asked to see any underlying notes ahead of P-1062's evidence, there is no reason to believe that the NFI's response refusing disclosure would have been any different, thereby obviating the instant litigation.

9. Thirdly, it is a point so trite that it hardly needs stating, but it is for the Trial Chamber to determine the probative value of the underlying notes. It is not for the NFI or P-1062 – an admittedly accomplished forensic scientist, but not a jurist – to make that determination. P-1062 may genuinely believe that the notes have no probative value, but he does not, and cannot, know: (i) the use to which the Defence will put the underlying notes in its final submissions; or, more importantly, (ii) what the Trial Chamber will make of the notes in its assessment of his testimony, reports and conclusions. Allusions to an opinion that the underlying notes have no probative value are analogous to the oft-encountered situation where a witness takes issue with the relevance of counsel's (or even a judge's) question during cross-examination and invites the questioner to pose a different question.

10. The Prosecution's argument, if followed by the Trial Chamber, places the Defence in a catch-22 position:¹⁵ the Defence have not established that the notes have

Report did not even refer to a Comparison Form, hence the Defence's request of the Prosecution referred to at footnote 9 of the Response.

¹² ICC-02/05-01/20-T-109-ENG ET WT, 25 January 2023, pp 22-23.

¹³ ICC-02/05-01/20-T-109-ENG ET WT, 25 January 2023, pp 23-24.

¹⁴ *Contra* Response, para. 6.

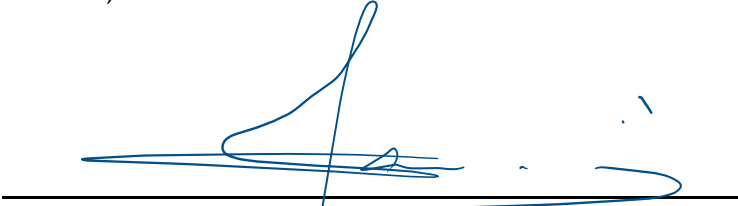
¹⁵ *Catch-22*, Joseph Heller, Simon & Schuster (1961). "The 'catch' in *Catch-22* involves a mysterious Army Air Forces regulation which asserts that a man is considered insane if he willingly continues to fly dangerous combat missions but that if he makes the necessary formal request to be relieved of such missions, the very act of making the request proves that he is sane and therefore ineligible to be

probative value, and so disclosure should not be ordered. But the only way to determine if the notes truly have probative value is to see and assess them, which in turn requires the requested order for disclosure under Article 64(6)(d).

11. Finally, the Defence acknowledges the Prosecution's indication that it does not object to the formal submission of the NFI response letter of 2 February 2023.

12. The Defence respectfully reiterates its request 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 22nd day of February 2023 at The Hague, The Netherlands

relieved. The term catch-22 entered the English language meaning 'a problematic situation for which the only solution is denied by a circumstance inherent in the problem.'"

<https://www.britannica.com/topic/Catch-22-novel-by-Heller>.