



Original: English

No. **ICC-02/05-01/20**
Date: **27 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

Decision on Defence's Request Pursuant to Article 64(6)(d) of the Rome Statute

To be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Section**

Other

I. Procedural background

1. On 25 January 2023, Trial Chamber I (the ‘Chamber’) heard the testimony of P-1062, an expert witness with the Netherlands Forensic Institute (‘NFI’).¹ During his testimony, the Chamber 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’.²
2. On 30 January 2023, the Chamber recognised as formally submitted on the record of the case 68 items used during P-1062’s testimony (‘Evidence Submission Decision’), including the two expert reports and their annexes.³
3. On 2 February 2023, by way of e-mail,⁴ the Prosecution shared a courtesy copy of a letter from P-1062, on behalf of the NFI, in response to the direction of the Chamber above (the ‘Letter’).⁵
4. On 9 February 2023, the Defence filed a request pursuant to Article 64(6)(d) of the Rome Statute (the ‘Statute’) (the ‘Request’),⁶ requesting that the Chamber orders the NFI and/or P-1062 in his personal capacity to produce the underlying material to his expert reports (the ‘Notes’).
5. On 20 February 2023, the Prosecution filed a response to the Request (the ‘Response’).⁷
6. On 22 February 2023, the Defence filed a reply (the ‘Reply’).⁸

II. Submissions

7. In its Request, the Defence states that, although over the course of his testimony, P-1062 made several references to the Notes, these were not provided to the parties.⁹

¹ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG.

² Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 65, lines 24-25 to p. 66, lines 1-2.

³ Email from the Chamber, 30 January 2023, at 14:25.

⁴ Email of 2 February 2023, at 13:40.

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

⁶ Defence Request Pursuant to Article 64(6)(d) of the Rome Statute, ICC-02/05-01/20-867.

⁷ Prosecution Response to “Defence Request Pursuant to Article 64(6)(d) of the Rome Statute”, 9 February 2023, ICC-02/05-01/20-867, ICC-02/05-01/20-877 (notified on 21 February 2023).

⁸ Reply to Prosecution Response to “Defence Request Pursuant to Article 64(6)(d) of the Rome Statute”, ICC-02/05-01/20-879.

⁹ Request, ICC-02/05-01/20-867, para. 2.

The Defence submits that despite being given the opportunity to produce them voluntarily, the NFI and/or P-1062 declined to do so. P-1062 stated in the Letter that it is a matter of NFI policy and that the Notes ‘do not bring additional information’. The Defence argues that irrespective of its intended internal use, the Notes are relevant for the assessment of the methodology and summary findings of P-1062’s reports.¹⁰

8. The Defence further submits that it is not for the NFI and/or P-1062 to determine whether or not the Notes ‘bring additional information’. The Defence contends that absent these Notes, P-1062’s conclusions cannot be subject to adequate and appropriate scrutiny, and are consequently unreliable.¹¹

9. The Defence therefore requests that the Chamber: (i) order the NFI and/or P-1062 to produce the Notes, and (ii) issue an addendum to its Evidence Submission Decision recognising the courtesy copy of the Letter as formally submitted.

10. In its Response, the Prosecution contends that the Defence gives no indication of which conclusions of P-1062’s reports require scrutiny.¹² It argues that the Defence had the opportunity to scrutinise the conclusions in P-1062’s reports and to request P-1062’s Notes before his testimony.¹³ The Prosecution further submits that the Defence fails 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, particularly considering that: (i) P-1062 testified in detail about the methodology the examiners followed; (ii) P-1062 has over 20 years’ experience in conducting such analyses; (iii) the expert analysis complied with NFI practice; and (iv) the reports’ conclusions were reached by consensus.¹⁴

11. The Prosecution further submits that the Notes lack probative value. It argues that P-1062 alluded to the lack of probative value of the Notes and that, contrary to the Defence’s submission, P-1062 is ideally suited to assess their value given his vast experience.¹⁵

¹⁰ Request, ICC-02/05-01/20-867, para. 5.

¹¹ Request, ICC-02/05-01/20-867, para. 6.

¹² Response, ICC-02/05-01/20-877, para. 5.

¹³ Response, ICC-02/05-01/20-877, paras 6-7.

¹⁴ Response, ICC-02/05-01/20-877, para. 8.

¹⁵ Response, ICC-02/05-01/20-877, paras 9-10.

12. Finally, the Prosecution contends that P-1062 complied with the Chamber's request of 25 January 2023 to see if underlying material was still available and whether there was any objection in handing them over. It argues that the Letter confirms that, as per NFI policy, the Notes are for internal use only.¹⁶

13. The Prosecution does not oppose the formal submission of the Letter.¹⁷

14. In its Reply, the Defence submits that the reports' conclusions which require adequate scrutiny 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' 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 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'.¹⁸ The Defence avers that the Notes would allow it to test the correctness and reliability of these conclusions.¹⁹ The Defence further submits that the Prosecution did not argue that the Notes could not be of relevance when it had the opportunity to do so.²⁰

15. The Defence also contends that it did not seek disclosure of the Notes before P-1062's testimony as it had never been suggested that such Notes were made.²¹ The Defence states that P-1062's examination-in-chief was the first time there was any hint of their existence.²²

16. The Defence further argues that it is for the Chamber, and not for P-1062 or the NFI, to determine the probative value of the Notes. In its submission, P-1062 cannot know the use to which the Defence will put the Notes or what the Chamber will make of them in its assessment of P-1062's testimony, reports and conclusions.²³ The Defence reiterates that the only way to ascertain the Notes' probative value 'is to see

¹⁶ Response, ICC-02/05-01/20-877, para. 11.

¹⁷ Response, ICC-02/05-01/20-877, para. 13.

¹⁸ Reply, ICC-02/05-01/20-879, para. 3.

¹⁹ Reply, ICC-02/05-01/20-879, para. 4.

²⁰ Reply, ICC-02/05-01/20-879, para. 4.

²¹ Reply, ICC-02/05-01/20-879, para. 6.

²² Reply, ICC-02/05-01/20-879, para. 7.

²³ Reply, ICC-02/05-01/20-879, para. 9.

and assess them, which in turn requires the requested order for disclosure under Article 64(6)(d).²⁴ The Defence requests that the Chamber order the NFI and/or P-1062 to produce the Notes.

III. Analysis

17. The Chamber notes the Defence's request to recognise the Letter as formally submitted into evidence and that it is unopposed.²⁵ Accordingly, as per Article 69(3) of the Statute, for the completeness of the record, the Chamber hereby recognises the Letter as formally submitted into evidence through P-1062.

18. As regards the remainder of the Request, the Chamber accepts the Defence's submission that the Notes are necessary for the adequate and appropriate scrutiny of the methodology and summary findings of P-1062's reports.²⁶ The Chamber notes that sources used in support of expert reports must be clearly indicated and easily accessible to the opposing party upon request as this is necessary to test or challenge the probative value of such evidence.²⁷ Moreover, as stated by the Defence, the existence of the Notes only arose during P-1062's testimony in court.²⁸ The Defence was therefore unable to request the Notes before P-1062's testimony, let alone be able to test or challenge the probative value of P-1062's reports on the basis of the Notes.

19. The Chamber is not persuaded by the Prosecution's submission that P-1062 alluded to the lack of probative value of the Notes multiple times and that given his experience, he is 'ideally suited to assess' their value.²⁹ As noted above, the non-calling party must be able to assess the sources used in an expert report. By the same token, the non-calling party is also entitled to access to material or information the expert chose not to rely upon in the production of the report as this could be important for

²⁴ Reply, ICC-02/05-01/20-879, para. 9.

²⁵ Response, ICC-02/05-01/20-877, para. 13.

²⁶ Request, ICC-02/05-01/20-867, para. 5.

²⁷ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert, 11 February 2019, ICC-02/04-01/15-1443, para. 7 (hereinafter: the '*Ongwen* Decision on the disclosure of material of a defence expert'); Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the "Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report", 21 February 2017, ICC-02/04-01/15-709, para. 12.

²⁸ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 44, line 22 to p. 45, line 1; p. 59, lines 3-11.

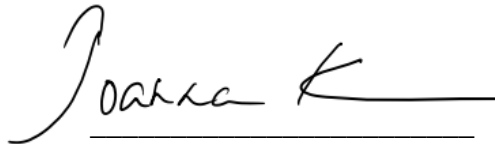
²⁹ Response, ICC-02/05-01/20-877, paras 9-10.

understanding and effectively assessing an expert report.³⁰ The Chamber further notes that in its Reply, the Defence has clearly indicated the conclusions of P-1062's reports which it intends to scrutinise.³¹ The Chamber therefore rejects the Prosecution's objection in this regard.

20. The Chamber further observes that the probative value of the Notes, as stated by the Defence,³² is for the Chamber to determine. The Chamber recalls that in accordance with its Directions on the conduct of proceedings, the relevance, probative value and potential prejudice of the evidence will ultimately be assessed by the Chamber when deciding on the guilt or innocence of the accused in its judgment pursuant to Article 74 of the Statute.³³

21. For the reasons set out above, the Chamber:

- A. Recognises the Letter as formally submitted into evidence through P-1062;
- B. Orders the Registry to reflect the formal submission of the Letter³⁴ in the e-Court's metadata; and
- C. Orders P-1062, through the Prosecution, to produce the Notes.



Judge Joanna Korner
Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 27 February 2023

At The Hague, The Netherlands

³⁰ *Ongwen* Decision on the disclosure of material of a defence expert', ICC-02/04-01/15-1443, paras 8-9.

³¹ Reply, ICC-02/05-01/20-879, para. 3.

³² Reply, ICC-02/05-01/20-879, para. 9.

³³ Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478, para. 25.

³⁴ DAR-OTP-00001035.