

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **29 June 2026**

THE APPEALS CHAMBER

Before: Judge Erdenebalsuren Damdin, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Keebong Paek

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(“ALI KUSHAYB”)**

Public

Public redacted version of “Prosecution Response to ‘Defence Application for Leave to Reply’”, 2 June 2026, ICC-02/05-01/20-1341 Conf

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INTRODUCTION

1. The Defence seeks leave to reply to the Prosecution, in support of its appeal against conviction.¹ The Prosecution respectfully submits that the Request, which seeks leave to make further submissions on at least 21 issues, should be dismissed in its entirety. The Appeals Chamber is already fully equipped to adjudicate the grounds of appeal raised in this case, and will not be assisted by further rehearsal of the Defence arguments.

CONFIDENTIALITY

2. This response is filed confidentially because it refers to submissions in the Prosecution's brief responding to Mr Abd-Al-Rahman's appeal against conviction, which is currently only available in a confidential version.² The Prosecution anticipates filing a public redacted version of the Prosecution Response Brief shortly, and at that time will likewise either seek re-classification of this response or file a public redacted version.

SUBMISSIONS

3. The Prosecution recalls that leave to reply is not automatic, but will be granted only when the Appeals Chamber considers it necessary in the interests of justice.³ The ordering of a reply lies within the Appeals Chamber's discretion, to be decided on a case-by-case basis.⁴ Typically, the Appeals Chamber has authorised a reply where the response has raised a new issue, or an issue which could not reasonably have been anticipated by the appellant, or otherwise further submissions on that issue may assist the proper adjudication of the appeal.⁵ In line with these principles, an appellant should not be permitted to use a reply to strengthen or reformulate

¹ See [ICC-02/05-01/20-1339 A](#) ("Request").

² See [ICC-02/05-01/20-1320-Conf A](#) ("Prosecution Response Brief").

³ [Regulations of the Court](#), reg. 60(1).

⁴ See e.g. [ICC-01/14-01/18-2917 A A2 A3](#) ("Yekatom and Ngaïssona Leave to Reply Decision"), para. 21; [ICC-01/05-01/08-3480 A](#) ("Bemba Leave to Reply Decision"), para. 8. See also e.g. [ICC-01/14-01/18-799](#) ("Yekatom Leave to Reply Decision"), para. 8; [ICC-01/04-02/06-1994](#) ("Ntaganda July 2017 Leave to Reply Decision"), para. 9; [ICC-01/04-02/06-1813](#) ("Ntaganda March 2017 Leave to Reply Decision"), para. 8.

⁵ See e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), paras. 32-34, 36; [Bemba Leave to Reply Decision](#), para. 8. See also [Request](#), para. 4. In the context of interlocutory appeals under regulation 24(5), see further e.g. [ICC-02/18-66](#) ("Venezuela Leave to Reply Decision"), paras. 10-11; [ICC-01/21-72](#) ("Philippines Leave to Reply Decision"), paras. 6-7; [ICC-02/17-206](#) ("Afghanistan Leave to Reply Decision"), paras. 7-8; [Ntaganda July 2017 Leave to Reply Decision](#), para. 9; [ICC-02/11-01/15-284 OA7](#) (*Gbagbo and Blé Goudé* Leave to Reply Decision"), para. 11; [ICC-01/04-02/12-296-tENG](#) ("Ngudjolo Leave to Reply Decision"), para. 7; [ICC-01/04-01/06-824 OA7](#) ("Lubanga Provisional Release Appeal Judgment"), para. 67.

arguments previously advanced,⁶ to repeat submissions already made in the appeal brief,⁷ or merely to disagree with arguments made in response.⁸ Issues addressed in a reply should be narrowly tailored, rather than being “broad” or “imprecise”.⁹

4. The Defence fails to show that leave to reply is necessary in the interests of justice for any of the issues identified in the Request. In particular, the Request fails to identify any issue which is new or could not reasonably have been anticipated, nor any issue on which further submissions may assist the Appeals Chamber. Rather, as illustrated below, the Request merely seeks further opportunity to rehearse or augment its primary arguments on appeal, or to disagree with the Prosecution arguments in response.¹⁰ Additionally—and impermissibly—the Request contains submissions on the merits of the appeal. For example, the Request submits, without foundation, that the Appeals Chamber should dismiss aspects of the Prosecution Response Brief *in limine*.¹¹ These submissions should themselves be summarily dismissed.

5. Finally, noting the Appeals Chamber’s preliminary indication that it does not consider an oral hearing may be required to determine the appeals of which it is seised, and having regard to the written submissions of the parties and participants, the Prosecution defers to the Chamber’s discretion on this matter.¹² Nevertheless, the Prosecution remains ready to assist the Appeals Chamber with any further submissions, if so required.

Proposed issues concerning Part A of the Appeal (Grounds 1-5: principle of legality)

6. The Prosecution’s arguments responding to the Defence appeal concerning the correct application of article 22 are not “new”; rather, the Defence misses the point.¹³ Notably, the Defence had argued that the Trial Chamber violated article 22, and the Prosecution duly contested this in its response—on the obvious basis that the Defence showed no error in the

⁶ Notably, using replies in this fashion undermines procedural fairness and the expeditious conduct of proceedings, as well as the established page limits for appeal briefs, which should “set out the legal and/or factual reasons in support of each ground of appeal”: [Regulations of the Court](#), reg. 58. See also [Ngudjolo Leave to Reply Decision](#), para. 7.

⁷ See e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), paras. 24 (prohibiting a reply from “repeat[ing] submissions already made in the appeal brief”), 27. See also [ICC-01/04-02/06-2488](#) (“Ntaganda March 2020 Leave to Reply Decision”), para. 8.

⁸ See e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), para. 28.

⁹ See e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), paras. 25, 28, 35. Should the Appeals Chamber grant leave to reply on any issue, it should be narrowly tailored, must not exceed the scope of the relevant ground(s) of appeal, and should be subject to an appropriate page limit: see e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), para. 24 (setting a page limit of five pages for a reply on a single issue).

¹⁰ See below paras. 6-19.

¹¹ See e.g. [Request](#), paras. 8, 11. See further below paras. 9, 11.

¹² Cf. [Request](#), paras. 22-24. See also e.g. [Yekatom and Ngaïssona Leave to Reply Decision](#), para. 22.

¹³ Contra [Request](#), para. 6.

Chamber’s interpretation or application of this provision.¹⁴ This could reasonably have been anticipated by the Defence, and a reply is not justified simply because the respondent does not accept legal assumptions made by the appellant in framing their appeal. Nor does the Defence accurately characterise the Prosecution’s response in asserting that “the Prosecution suggests a reversal of the burden of proof”.¹⁵ Finally, the Defence is incorrect to suggest that it was “never proposed at trial” that the customary international law status of a crime would satisfy the principle of legality—to the contrary, the Appeals Chamber itself had expressly reminded the Defence of this fact, which it had contested.¹⁶

Proposed issues concerning Part B of the Appeal (Grounds 6-7, 9-13, 16-17, 19, 21: fair trial)

7. In support of its grounds of appeal concerning the fairness of the trial, the Defence identifies eight issues on which it seeks leave to reply. These concern, variously: (i) article 4(2) of the Statute (Grounds 6-7);¹⁷ (ii) Sudan’s “non-cooperation” concerning certain documents (Ground 9, 11);¹⁸ (iii) witness protection (Ground 12);¹⁹ (iv) logistical arrangements for Defence investigative missions (Grounds 13, 16-17);²⁰ (v) information protection (Ground 19),²¹ and; (vi) the page limit applicable to the Defence Final Brief (Ground 21).²² None of these submissions justifies the grant of leave to reply, but rather they repeat foreseeable arguments or mischaracterise the Prosecution’s submissions.

8. First, the three issues purportedly identified by the Defence for the purpose of Grounds 6-7 were not raised “for the first time” in the Prosecution’s response, and could reasonably have been anticipated by the Defence.²³ In particular, the Prosecution could have been expected to rely on the interlocutory appeal judgment in *Bashir*—handed down in 2019—when addressing the Defence arguments,²⁴ since this judgment was cited both by the Pre-Trial

¹⁴ See [Prosecution Response Brief](#), paras. 3-60.

¹⁵ *Contra* [Request](#), para. 6.

¹⁶ *Contra* [Request](#), para. 6. See e.g. [ICC-02/05-01/20-503 OA8](#) (Jurisdiction Appeal Judgment), paras. 64, 69-70, 85 (“the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law”, emphasis added), 87, 89.

¹⁷ See [Request](#), para. 7. *But see further generally* [Prosecution Response Brief](#), paras. 62-91.

¹⁸ See [Request](#), paras. 8-9. *But see further generally* [Prosecution Response Brief](#), paras. 105-117.

¹⁹ See [Request](#), para. 10. *But see further generally* [Prosecution Response Brief](#), paras. 125-137.

²⁰ See [Request](#), paras. 11-12. *But see further generally* [Prosecution Response Brief](#), paras. 138-150, 159-171.

²¹ See [Request](#), para. 13. *But see further generally* [Prosecution Response Brief](#), paras. 172-174.

²² See [Request](#), para. 14. *But see further generally* [Prosecution Response Brief](#), paras. 175-183.

²³ *Contra* [Request](#), para. 7.

²⁴ *Contra* [Request](#), para. 7 (first bullet point).

Chamber and Trial Chamber in this case.²⁵ Likewise, there was nothing remarkable in the Prosecution’s assertion that an appellant must show that the trial was actually unfair, and cannot merely identify an ostensibly harmless technical legal error.²⁶ The Defence is also incorrect to suggest that the Prosecution had argued generally that “the Vienna Convention on the Law of Treaties (‘VCLT’) does not apply to the Court”.²⁷ Rather, the Prosecution had merely highlighted that the Defence misrepresented the Trial Chamber’s reasoning, pointing out that the Chamber had found *inter alia* that the VCLT’s provisions on *registration* do not apply to an agreement between the Court (an international organisation) and a State (Sudan).²⁸

9. Second, concerning Grounds 9 and 11, the Defence argues that the Appeals Chamber should dismiss *in limine* Prosecution submissions which it contends seek to re-litigate final rulings of the Trial Chamber that were not appealed. A substantive request of this kind should not be made within the (procedural) context of a request for leave to reply. In any event, the Defence mischaracterises the Prosecution submission, which merely quoted the Chamber’s findings and explained why they were correct and reasonable.²⁹ As such, there was nothing “new” in the Prosecution response.

10. Third, concerning Ground 12, the Defence likewise mischaracterises the Prosecution position by claiming that the Prosecution made the “curious submission” that it had no “witness protection services”.³⁰ Yet the Prosecution had merely pointed out that the Defence did not substantiate its particular claim that “the OTP relied on its own witness protection services [REDACTED]”. It explained that the Prosecution had in fact relied on the [REDACTED] Protocol—which also applied, *mutatis mutandis*, to the Defence. The Prosecution expressly alluded to its prior expression of this same position at trial.

11. Fourth, concerning Grounds 13, 16 and 17, the Defence argues that the Appeals Chamber should dismiss *in limine* the Prosecution request to dismiss Defence arguments relying on *ex parte* documents. The Prosecution again submits that this request should not be made in the present context. In any event, the Defence partially mischaracterises the premise of the

²⁵ See e.g. [ICC-02/05-01/20-402](#) (“Procedural Challenges Decision”), para. 38 (fn. 36); [ICC-02/05-01/20-561-Red](#) (“Sudan Cooperation Decision”), para. 17 (fn. 28). See further [ICC-02/05-01/09-397 OA2](#) (“Bashir Jordan Appeal Judgment”), paras. 140-142.

²⁶ *Contra* [Request](#), para. 7 (third bullet point).

²⁷ *Contra* [Request](#), para. 7 (second bullet point).

²⁸ See [Prosecution Response Brief](#), para. 85.

²⁹ *Contra* [Request](#), paras. 8-9. See [Prosecution Response Brief](#), paras. 109-110.

³⁰ *Contra* [Request](#), paras. 10. See [Prosecution Response Brief](#), para. 132 (especially fns. 361, 365).

Prosecution submissions.³¹ More generally, the Defence fails to identify any “new” issue which could not reasonably have been anticipated, since counsel should know that they are obliged to respect the classification of documents filed before the Court and must ensure that any document relied upon in litigation is accessible to the other parties and participants.³² The further Defence claim that this was a matter *for the Prosecution* is wholly incorrect. Nor in any event can the Defence remedy this situation by purporting to consent to the reclassification of the relevant documents, since at least some of the documents in question appear to emanate from the Registry.³³

12. Fifth, concerning Ground 19, the Defence shows no new or unforeseeable issue by referring simply to the Prosecution’s (correct) quotation of the verbatim content of article 69(7) of the Statute.³⁴ To the contrary, if the Defence wished to argue that article 69(7) also extends to alleged violations of texts *not* mentioned in article 69(7), it was readily apparent that the Prosecution would refer to the plain wording of the provision.

13. Sixth, concerning Ground 21, the Defence cannot show that it was new or unforeseeable that the Prosecution would consider the page limit imposed by the Trial Chamber on the Defence Final Brief to be reasonable, irrespective of the Defence’s subjective characterisation of this position as a “radical departure” or its view that the relevant issues are “complex”. To the contrary, while the Prosecution took no position on the proper page allocation at trial, it was entirely to be expected that the Prosecution would defend that determination on appeal.³⁵

Proposed issues concerning Part C of the Appeal (Grounds 22, 24-26, 29: assessment of evidence)

14. In support of its grounds of appeal concerning the Trial Chamber’s approach to assessing the evidence, the Defence seeks leave to reply to correct (what it considers to be) two “misrepresent[ation]s” by the Prosecution of the Defence’s own position, and also to “underline how and to what extent the Prosecution’s submissions confirm and validate its own

³¹ See [Prosecution Response Brief](#), paras. 138, 160. Notably, while the Prosecution sought summary dismissal of the relevant grounds of appeal, this was because the Defence had failed to substantiate the impact of the alleged errors. With regard to the Defence reliance on *ex parte* filings—to which the Prosecution did not have access—the Prosecution merely requested summary dismissal of the particular arguments relying on those filings, to which the Prosecution could not properly respond.

³² *Contra* [Request](#), paras. 11-12.

³³ See e.g. [Prosecution Response Brief](#), para. 160.

³⁴ *Contra* [Request](#), para. 13. Compare e.g. [Statute](#), art. 69(7) (referring to “a violation of the Statute or internationally recognized human rights”).

³⁵ *Contra* [Request](#), para. 14. See also [ICC-02/05-01/20-1196](#) (“Prosecution Extension Request”), para. 1.

arguments”.³⁶ However, none of these considerations justifies granting leave to reply. To the contrary, with the benefit of the existing written submissions from both the Defence and the Prosecution, the Appeals Chamber itself is best equipped to determine whether the Prosecution correctly understood the position of the Defence, and to appreciate any extent to which the Defence and the Prosecution concur in their submissions.³⁷ By definition, any reply by the Defence on these points would amount—impermissibly—to repeating or rehearsing their own primary appellate submissions.

Proposed issues concerning Part D of the Appeal (Grounds 30-38: identity assessment)

15. The Defence incorrectly claims that the Prosecution argued “for the first time” that: (i) the Trial Chamber’s finding that Mr Abd-Al-Rahman was “Ali Kushayb” did not directly equate to a finding that he was responsible for the charged crimes, and; (ii) the Defence bore “the burden of proof of the impact of the public attribution of the alias [...] to Mr Abd-Al-Rahman on the credibility of the evidence”.³⁸ To the contrary, in the former respect, the Prosecution merely referred to the Chamber’s own prior statements to this effect—which were equally known to the Defence when framing their appeal.³⁹ In the latter respect, the Defence mischaracterises the Prosecution submissions, which merely acknowledged that the Chamber could properly rely on other factors in determining the credibility of witness evidence and there was no duty to disprove a mere hypothetical.⁴⁰ Consequently, no leave to reply should be granted.

Proposed issues concerning Part E of the Appeal (Grounds 40-53: authority over the *Janjaweed*)

16. The Defence is again mistaken in its claim that the Prosecution addressed three issues “for the first time” concerning Mr Abd-Al-Rahman’s authority over the *Janjaweed*.⁴¹ The Prosecution merely relied on the Trial Chamber’s own reasoning and decisions to show that the Chamber did not err. As such, these issues were not new, and in any event could reasonably have been anticipated by the Defence.⁴² Notably, to the extent that the Defence was selective in addressing the findings in the Judgment, it was wholly foreseeable that the Prosecution

³⁶ See [Request](#), paras. 15-17.

³⁷ See further e.g. [Prosecution Response Brief](#), paras. 184-221.

³⁸ *Contra* [Request](#), para. 18 (citing [Prosecution Response Brief](#), paras. 225, 228, 254-255). *But see generally* [Prosecution Response Brief](#), paras. 222-275.

³⁹ See e.g. [Prosecution Response Brief](#), paras. 225 (citing e.g. [ICC-02/05-01/20-1240](#) (“Judgment”), para. 246), 228.

⁴⁰ See e.g. [Prosecution Response Brief](#), paras. 254-255.

⁴¹ See [Request](#), para. 19.

⁴² See [Prosecution Response Brief](#), paras. 276-318.

would point this out.⁴³ Likewise, it was to be expected that the Prosecution would refer to findings by the Chamber which were consistent with conclusions disputed by the Defence—such as with regard to Mr Abd-Al-Rahman’s exercise of *de facto* authority over the *Janjaweed*. This was a natural response to Defence arguments concerning the absence of unnecessary findings (for example, “when” and “why” Mr Abd-Al-Rahman became a *Janjaweed* leader).⁴⁴ No reply is warranted.

17. The Defence submissions also mischaracterise the Prosecution’s position.⁴⁵ The Prosecution had merely observed that the Chamber was not required to make findings *beyond those already made* in the Judgment on the “nature” and “structure” of the *Janjaweed* or on Mr Abd-Al-Rahman’s position as a *Janjaweed* leader. Nor is there any contradiction between the Prosecution’s trial position that Mr Abd-Al-Rahman was the *agid al-ogada* and its appellate position that the Trial Chamber did not err in relying on Mr Abd-Al-Rahman’s apparent role as the *agid al-ogada*.⁴⁶

Proposed issues concerning Part H of the Appeal (Grounds 54, 56-57: mistake of law)

18. The Defence is incorrect to suggest that the Prosecution had stated for “the first time” that mistake of law under article 32(2) may exclude criminal responsibility only when knowledge of a legal characteristic is required by the mental elements of the offence.⁴⁷ To the contrary, the Prosecution had successfully advanced the same argument at trial, consistent with the Court’s prior caselaw, and the Defence had ample “prior opportunity to address” this issue to the extent it considered appropriate.⁴⁸ It should not be afforded leave to reply simply to supplement its position.

⁴³ Compare e.g. [Request](#), para. 19 (fn. 17), with [Judgment](#), para. 983 (“The evidence does not clearly reveal why a retired *Musa’id* in the medical corps of the SAF, who became a pharmacist, should have achieved [the position of a *Janjaweed* leader] in the area. *However, the evidence does clearly reveal that he had such a position*”, emphasis added).

⁴⁴ *Contra* [Request](#), para. 19 (third bullet point).

⁴⁵ *Contra* [Request](#), para. 19 (first and second bullet points).

⁴⁶ The Defence continues to mischaracterise the Judgment by claiming that the Prosecution failed to prove what an *agid al-ogada* was.

⁴⁷ *Contra* [Request](#), para. 20.

⁴⁸ See e.g. [ICC-02/05-01/20-1206-Red](#) (“Prosecution Final Brief”) para. 683 (“Mistake of law may only exclude criminal responsibility where the mental elements applicable to a particular crime require a specific legal appreciation. No such crime is charged in this case,” citing [ICC-01/12-01/18-2594-Red](#) (“*Al Hassan* Trial Judgment”), para. 1769). See further [Prosecution Response Brief](#), paras. 319-357, especially para. 323. *Contra* [Request](#), para. 20.

Proposed issues concerning Part K of the Appeal (Grounds 77-78: persecution)

19. The Defence again mischaracterises the Prosecution Response Brief in claiming that the Prosecution suggested that “proof of the socially constructed gender role perception in Sudan” had “to be adduced by the Defence”, reversing the burden of proof.⁴⁹ The Prosecution made no such submission. Rather, it merely disputed the Defence claim that the *Prosecution* was required to call expert evidence on this question.⁵⁰ Since this response could reasonably have been anticipated, and the Defence claim of a “new” argument is based solely on its own misapprehension, no reply on this issue is justified.

CONCLUSION

20. For the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to dismiss the Request.



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 29th day of June 2026

At The Hague, the Netherlands

⁴⁹ *Contra* [Request](#), para. 20 (citing [Prosecution Response Brief](#), para. 477).

⁵⁰ See [Prosecution Response Brief](#), paras. 462-482, especially para. 477.