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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
With Confidential Annex 1 and Public Annexes 2-3

Public Redacted Version of
Defence Reply to Registry's Submission #1352 (ICC-02/05-01/20-1358-Conf, 9 July 2026)

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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☒ Counsel Support Section

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☐ Detention Section

☐ Victims Participation and Reparations
Section

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1. With the leave of the Honourable Trial Chamber I (“Trial Chamber”),¹ the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”, “Defence”) hereby replies to the Registry’s submission ICC-02/05-01/20-1352-Conf-Red (“Response”)² in response to application ICC-02/05-01/20-1347-Conf (“Application”)³ for reclassification of the Registry’s Report ICC-02/05-01/20-1328-US-Exp (“Report”)⁴ as “Confidential” and notification thereof to the Defence.

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), the Reply is classified confidential. Annex 1 is confidential to protect the identity of persons referred to in the relevant correspondences. Annexes 2-3 are public. The Defence will submit public redacted versions of its Application, its application for leave to reply⁵ and this Reply in due course.

3. There were five topics on which leave to reply was sought and granted.⁶ Topic (i) in relation to the impact on the Defence’s submissions on reparations has been essentially resolved by the Chamber’s email of 2 July 2026⁷ authorizing the Defence to complete, where necessary, its submissions on reparations upon receipt of the unredacted version of the Report.⁸ The Defence thus has no further submission to make on this first point. Topics (ii) and (iv) are related to the same issue, i.e. the level of classification applied to information received [REDACTED] in the Report. These are addressed together.

Topics (ii) and (iv): Classification of information received [REDACTED]

4. There are two different legal sources concerning the classification of information before the Court. The first, with which the Judges are most familiar, is regulation 14 of the Regulation of the Registry (“RoR”) and applies to “*judicial records and material*”; the second is found in relevant ICC policies referred to at paragraphs 10-11 of the Application,⁹ namely Administrative Instruction ICC/AI/2006/002 for protectively marked information provided by governmental and intergovernmental organizations (“ICC/AI/2006/002”)¹⁰ and Administrative Instruction ICC/AI/2007/001 for other ICC records (“ICC/AI/2007/001”).¹¹ Two major differences between

¹ Email to the Defence, 2 July 2026, 15h24.

² [ICC-02/05-01/20-1352-CONF-RED](#).

³ [ICC-02/05-01/20-1347-Conf](#).

⁴ [ICC-02/05-01/20-1328-Conf-Red](#). This is the confidential redacted version of the Report notified to the Defence.

⁵ [ICC-02/05-01/20-1353-Conf](#).

⁶ [ICC-02/05-01/20-1353-Conf](#), para. 4.

⁷ Email to the Defence, 2 July 2026, 15h24.

⁸ Email to the Defence, 2 July 2026, 15h24.

⁹ [ICC-02/05-01/20-1347-Conf](#), paras. 10-11.

¹⁰ [ICC/AI/2006/002](#): ICC Information Protection Policy for Protectively Marked Information Provided by Governmental and Intergovernmental organizations, 20 December 2006.

¹¹ [ICC/AI/2007/001](#): ICC Information Protection Policy, 19 June 2007.

the first and the second sources are that the “Under Seal” classification level provided under regulation 14(c) of the RoR has no equivalent under the relevant ICC policies and that the “Restricted” level of information provided under the ICC policies¹² has no equivalent under regulation 14 of the RoR. With respect to the “Under Seal” level of classification under regulation 14(c) of the RoR, section 5.13 of ICC/AI/2007/001 provides only that *“the protection level ‘[ICC] SECRET’ shall be applied to Information provided by the parties to the legal proceedings as ‘UNDER SEAL’ unless ordered otherwise by the relevant Chamber.”*¹³ Section 5.13 of ICC/AI/2007/001 has no equivalent under ICC/AI/2006/002.

5. For the sake of clarity, the Defence has summarised the various levels of classification in the below table:

Classification Level	Regulation 14 RoR	ICC/AI/2006/002	ICC/AI/2007/001
Public	RoR 14(a)		Section 3.3(a) (“Unclassified”)
Restricted		Section 3.5(d)	Section 3.3(b)
Confidential	RoR 14(b)	Section 3.5(c)	Section 3.3(c)
Under Seal	RoR 14(c)		Section 5.13 (“Secret”)
Secret	RoR 14(d)	Section 3.5(b)	 Section 3.3(d)
Top Secret		Section 3.5(a)	

6. In its Response, the Registry does not dispute the accuracy of the above information already provided at paragraphs 10-11 of the Application. The Registry is fully aware of that information. Under the chairmanship of Lead Counsel – prior to his appointment in the case -, the Legal Advisory Committee of the ICC Bar Association (“ICCBA”) issued in February 2018 a legal analysis on the same topic that remains available on the website of the ICCBA.¹⁴ Once every year, Lead Counsel also sends to the ICC Registrar an update of the Index of Administrative Issuances that formed the main document of the *ICC Vademecum of Administrative Issuances* (“ICC Vademecum”). The ICC Vademecum should have been maintained by the Registry,¹⁵ as part of its role as central register of ICC Administrative

¹² [ICC/AI/2006/002](#), sect. 3.5(d); “IPASS RESTRICTED”; [ICC/AI/2007/001](#), sect. 3.3(b); “[ICC] RESTRICTED”.

¹³ [ICC/AI/2007/001](#), sect. 5.13.

¹⁴ ICCBA Legal Advisory Committee, “[Legal Analysis: ICC Information Protection Policy Framework](#)”, February 2018.

¹⁵ Information Circular [ICC/INF/2012/020](#): “Declassification of Administrative Issuances and Publication of the *Vademecum* of Administrative Issuances”, 22 November 2012.

Issuances.¹⁶ At some point in 2015, the Registry stopped fulfilling this aspect of its mandate. The Lead Counsel, acting in his private capacity, nevertheless continued updating it and sending an updated version to the Registry once a year.¹⁷ The latest version, dated 31 January 2026, is annexed to this Reply as Public Annex 2. Every year, the updated versions identify issues impacting on the validity of the current ICC policies and provides proposals as to how these should be remedied. The inconsistency of ICC/AI/2007/001 with regulation 14 of the RoR has been flagged every year.¹⁸ In January 2020, Lead Counsel, still in his private capacity, even sent to the then Registrar and Presidency a draft Administrative Instruction harmonizing the various levels of protection. The draft is provided in Public Annex 2. These issues are thus perfectly known and are not novel.

7. Without access to the information received [REDACTED], the Defence cannot know whether it is marked with a specific level of classification, such as “Confidential” or “Secret”. The Registrar submission, at paragraph 11 of its Response, that “*any variation in [the classification of the information received [REDACTED]] would ordinarily require providing that State with an opportunity to provide any information it may have*” suggests that [REDACTED] has expressed no views as to the level of classification of the information provided to the Court or its disclosure to the Defence. To avoid making assumptions, the Defence addresses both situations where (a) the information is not marked as classified and (b) where it is marked.

(a) The information is not marked [REDACTED]

8. If, as suggested at paragraph 11 of the Response, the information received [REDACTED] is not marked as classified, ICC/AI/2006/002 does not apply. Indeed, under its section 2.1, “*this administrative instruction sets out the practice of the International Criminal Court (“the Court”) for protecting the confidentiality of IPASS [namely “information that is protectively marked by the Provider as a State Secret and provided as such to the Court”¹⁹] throughout the Information’s lifecycle within the Court its operations [sic]*”. Section 2.3 of ICC/AI/2006/002 clarifies: “*Information provided to the Court in confidence shall not be considered as IPASS unless provided as such and provided under an equivalent information security regime.*” The classification of information received from States cannot be presumed by the Court. The specific

¹⁶ Presidential Directive [ICC/PRES/D/G/2003/001](#): “Procedures for the Promulgation of Administrative Issuances”, 9 December 2003, sect. 6.

¹⁷ [REDACTED].

¹⁸ In the latest version provided in Annex 1, see p. 10 “Confidentiality – Classification of Information – Levels of Classification” and p. 61. Issues are flagged with a red bold “(!)”, as explained on pages 2 and 60.

¹⁹ [ICC/AI/2006/002](#), sect. 1.17.

level of classification, if any, shall be clearly marked on the information or otherwise communicated by the provider State. Based on the indication provided by the provider State as to the level of protection required by the information, the Court then proceeds to its internal classification on the basis of the levels provided under section 3.5 of ICC/AI/2006/002, with the following guidance: “*Information shall be given a security classification which shall be as low as possible, but as high as necessary. Applying too high a security classification can inhibit access, lead to unnecessary protective controls, and impair the efficiency of the activities of the Court*”.²⁰ In the absence of an indication as to a specific level of classification, ICC/AI/2006/002 does not apply and the classification of the information is governed by ICC/AI/2007/001, as the default policy applicable to the classification of information within the Court.²¹

9. Under ICC/AI/2007/001, information received [REDACTED] had to be classified according to the levels of classification provided under its section 3.3. The same guidance against applying an excessively high classification level is provided under section 4.1 of ICC/AI/2007/001. By default, the information should be classified “Restricted”, “*unless and until the Provider [namely “the Person or entity, independent and external to /from the Court, which supplied Information to the Court”*”²², in the present case [REDACTED]] *specifies a particular handling or level of sensitivity or the information is available in the public domain*”.²³ In the absence of an indication of a level of classification [REDACTED], the information should thus be classified “[ICC] RESTRICTED” by default under section 5.15 of ICC/AI/2007/001. This level of classification only means that it is “*determined to be for internal use within the Court*”.²⁴ It has no equivalent under regulation 14 of the RoR,²⁵ but the definition of the “[ICC] RESTRICTED” level under sections 3.3(b) and 5.5-5.6 of ICC/AI/2007/001 is equivalent to the definition “*not to be disclosed to the public*” corresponding to the level of classification “Confidential” under regulation 14(b) of the RoR. If not marked otherwise [REDACTED], the information should thus have been classified “[ICC] RESTRICTED” under ICC/AI/2007/001 and “Confidential” under regulation 14 of the RoR, which is exactly what the Defence is asking for.²⁶ The information should be reclassified accordingly.

10. The level of classification “[ICC] RESTRICTED” under ICC/AI/2007/001 and “Confidential” under regulation 14 of the RoR in no way justifies the endorsement “*ex parte*”

²⁰ [ICC/AI/2006/002](#), sect. 3.3.

²¹ [ICC/AI/2007/001](#), sect. 2.1-2.3.

²² [ICC/AI/2007/001](#), sect. 1.25.

²³ [ICC/AI/2007/001](#), sect. 5.15. See also sect. 5.7.

²⁴ [ICC/AI/2007/001](#), sect. 3.3(b), 5.5-5.6.

²⁵ [ICC/AI/2007/001](#), sect. 5.7.

²⁶ [ICC-02/05-01/20-1347-Conf](#), para. 10.

currently applied by the Registry to the information received [REDACTED]. This endorsement is irreconcilable with the default classification of the information as “[ICC] RESTRICTED” under ICC/AI/2007/001, which only aims at preventing its dissemination to the public. Disclosing the information to the Defence in no way amounts to disclosure to the public and is fully compatible with the desired “*internal use*” of that information. The Defence is bound by its confidentiality obligations and has always scrupulously complied with these, including reporting instances of apparent non-compliance by other Parties or the Registry. The Registry thus cannot justify the current *ex parte* endorsement by a risk of dissemination of the information to the public. The *ex parte* restriction should be removed accordingly.

(b) *The information is marked as classified [REDACTED]*

11. If the information received [REDACTED] is marked as classified, ICC/AI/2006/002 applies. The information shall be classified in accordance with the levels of classification provided under its section 3.5.²⁷ “Under Seal” is not an option, because it does not exist under ICC/AI/2006/002.

12. Whatever the level of classification applied, there can be no endorsement “*ex parte*” applicable to it, unless the [REDACTED] specifically restricted the dissemination of the information as applied by the Registry. For the information to be endorsed “*ex parte* – Registry, OTP only -” as the Report is, [REDACTED] must have specifically excluded its communication to the Defence. Absent a specific exclusion, the Registry had no basis to presume that [REDACTED] intended it thus pursuant to Section 2.3 of ICC/AI/2006/002.²⁸ In the event [REDACTED] specifically requested that information not to be disclosed to the Defence, the Registry was not bound by that request and should have considered it against the applicable dissemination principles provided under Section 12.1 of ICC/AI/2006/002, especially its sub-section (c): “*Without prejudice to the provisions of the Rome Statue, the dissemination of IPASS within the Court shall be on a need-to-know and a need-to-have basis. An individual's specific function or tasks shall be the principal determinant of that individual's need to know and of the consequent scope of access to IPASS.*” In applying the need-to-know dissemination principle, the Registry should have taken into account the fair trial requirements and the need of the Defence to address that information in its submissions on reparations before the Trial Chamber. The Registry’s Response manifestly shows that it did not do so. In its assessment of [REDACTED]’s

²⁷ [ICC/AI/2006/002](#), sect. 3.5.

²⁸ [ICC/AI/2006/002](#), sect. 2.3.

specific requirements regarding the classification or dissemination of the information, the Registry should also have taken into account the factors addressed under topic (v) below.

13. For the foregoing reasons, the current classification “Under Seal *ex parte* – Registry, OTP only -” of the information received [REDACTED] is invalid, as inconsistent with the applicable policies of the Court. This classification should be varied to “Confidential” with no further endorsement and the information should be disclosed to the Defence without delay.

Topic (iii): Investigations under Regulation 117 RoC and 132(5) RoR

14. In its Response, the Registry concedes that the Office of the Prosecutor (“OTP”) itself has no objection to the sharing of the information contained in the Report with the Defence.²⁹ Nonetheless, the Registry persists in maintaining the current level of classification and redactions in view of its financial investigation under regulation 132(5) of the RoR and regulation 117 of the RoC.³⁰ The two justifications it provides are devoid of merit for the following reasons.

15. The trial proceedings are over. Appeal submissions are now completed. The essence of the Defence’s representation is now over. Since June 2020, the Registry had every opportunity to conduct its financial investigation for the purpose of indigence verification under regulation 132 of the RoR, with the full cooperation of the Defence team. At such a late stage of the proceedings, regulation 132 can no longer serve as a valid basis for denying access to the Defence to information that is potentially relevant for its submissions on reparations.

16. Regulation 117 of the RoC falls under the discretionary power of the Presidency. Under that regulation, there could be a “*monitoring of financial situation of the sentenced person*”, which is not an investigation. The Presidency can decide to monitor “*if necessary*” and “*as appropriate*”, which means that it has full discretion to do so or not and when. The Registry cannot presume that the Presidency will engage in such monitoring at any point in the future and cannot rely on a mere presumption that it may do so to refuse disclosure of the redacted information to the Defence, whereas the Defence has a legitimate interest in making submissions on that information in the context of reparations proceedings. In any case, Mr Abd-Al-Rahman has stated his unconditional accord to comply with any monitoring measures under Regulation 117 of the RoC.³¹

17. Further justifications are apparently provided at paragraphs 9-10 of the Response, but these are redacted and the Defence cannot address them. Out of fairness, the Defence requests that the Chamber disregard justifications redacted from the Response, as the Defence is left with

²⁹ [ICC-02/05-01/20-1352-CONF-RED](#), para. 6.

³⁰ [ICC-02/05-01/20-1352-CONF-RED](#), paras. 7-8.

³¹ [ICC-02/05-01/20-1338-Red](#), para. 30.

no opportunity to address them. The invalidity of all other justifications provided in the Response is a sufficient indicator that the Registry's submissions should not followed without being tested.

18. As the main organ of the Court in charge of investigations, the OTP is in the best place to assess what information could be shared with the Defence and which information should not. Its non-objection to the Defence's application³² should strongly militate in favour of the reclassification of the undisclosed information. The Registry fails to behave as a neutral provider of services to the Judges and the Parties in the proceedings by refusing the disclosure of the information to the Defence against the OTP's considered views on the matter. Its submissions should be dismissed.

Topic (v): Consequences of the non-cooperation finding

19. At paragraph 11 of its Response, the Registry finally submits that "*any variation in [the classification of the information received [REDACTED]] would ordinarily require providing [REDACTED] with an opportunity to provide any information it may have.*" By doing so, it fails to draw the legal consequences of the non-cooperation [REDACTED],³³ which has relieved the Court from any obligation [REDACTED].

20. [REDACTED].³⁴ [REDACTED].

21. [REDACTED] that treaty would be governed by the rules of Public International Law on treaties, in particular the rules of Customary International Law codified in the Vienna Convention on the Law of Treaties ("VCLT 69")³⁵ and the Vienna Convention on the Law of Treaties between States and International Organisations ("VCLT 86").³⁶ Although VCLT 86 is not yet in force and has not been signed by the Court, its adoption aimed at codifying the Customary International rules of the Law of Treaties applicable between States and International Organisations, in the same way as its predecessor, VCLT 69, codified the Customary International Rules of the Law of Treaties between States.³⁷ Both VCLT 69 and VCLT 86 include the same provision with respect to the "*Termination or suspension of the operation of a treaty as a consequence of its breach*" according to which "*A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.*"³⁸ [REDACTED] This material breach triggered

³² [ICC-02/05-01/20-1352-CONF-RED](#), para. 6.

³³ [REDACTED]

³⁴ [REDACTED].

³⁵ [Vienna Convention on the Law of Treaties](#), 23 May 1969.

³⁶ [Vienna Convention on the Law of Treaties between States and International Organisations](#), 21 March 1986.

³⁷ International Court of Justice, [Gabčíkovo-Nagymaros Project Case \(Hungary v. Slovakia\)](#), Judgment, 25 September 1997, para. 46.

³⁸ [VCLT 69](#), article 60(1); [VCLT 86](#), article 60(1).

the application of the customary principle of reciprocity codified under Article 60(1) of VCLT 69 and VCLT 86, thereby relieving the Court from any obligation [REDACTED], including the obligation to comply with [REDACTED] confidentiality requirements.

22. [REDACTED]³⁹ The Registry therefore cannot rely on its obligations [REDACTED] as an excuse for the non-disclosure of the information received [REDACTED] to the Defence. The Defence is not suggesting that the Registry can totally disregard confidentiality [REDACTED], but that it is under no obligation preventing it from disclosing information necessary to the Defence for the purpose of its submissions on reparations. If any ever existed, such obligation disappeared as a result of [REDACTED] material breach of its obligations towards the Court [REDACTED].

FOR THE FOREGOING REASONS, THE DEFENCE PRAYS THE TRIAL CHAMBER TO ORDER the reclassification of the Report and its Annexes I, II and III as “Confidential” pursuant to Regulation 23*bis*(3) of the RoC and their immediate notification to the Defence.

Mr Cyril Laucei
Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 10 July 2026

At The Hague, The Netherlands.

³⁹ [REDACTED].