



Original: **English**

No.: **ICC-01/11-01/25**
Date: **28 September 2026**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR V. KHALED MOHAMED ALI EL HISHRI

Public

Prosecution response to “Defence consolidated request for leave to reply [...] (ICC-01/11-01/25-186) [...] [and] (ICC-01/11-01/25-188)”

Source: Office of the Prosecutor

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INTRODUCTION

1. Mr El Hishri's request for leave to reply in support of his appeal (against the Pre-Trial Chamber's decision affirming the Court's exercise of jurisdiction) should be dismissed.¹ The three issues proposed for a reply are not new, and could reasonably have been anticipated by Mr El Hishri. Impermissibly, he merely seeks to strengthen or repeat the arguments already made in his appeal.²

SUBMISSIONS

2. Consistent with Mr El Hishri's reference to regulation 24(5),³ the Appeals Chamber has granted leave to reply in circumstances where the reply addresses new issues that could not reasonably have been anticipated, or that the Appeals Chamber considered otherwise necessary for the adjudication of the matter before it.⁴ The ordering of a reply lies within the Appeals Chamber's discretion.⁵ In line with these principles, an appellant should not be permitted to use a reply to strengthen arguments previously advanced,⁶ or to repeat submissions already made in the appeal brief.⁷

3. In the present case, leave to reply is unwarranted for any of the three issues identified by Mr El Hishri.

4. First, when responding to his own appellate arguments challenging the correct interpretation of UN Security Council Resolution 1970 ("UNSCR 1970"), Mr El Hishri asserts that the Prosecution and Legal Representatives of the Victims ("LRV") submitted that the Pre-Trial Chamber "did not, in fact, rely (or at least not solely) on [subsequent] UN practice"⁸—which he defines as "UNSC Resolutions, UN Secretary-General Reports, and UNSC silence in response to Prosecution reporting".⁹ In his submission, this reading of the Pre-Trial Chamber's decision was "unanticipated" and "raises the novel question of which materials the PTC *did* in

¹ *Contra* [ICC-01/11-01/25-190 OA2](#) ("Request"). See also [ICC-01/11-01/25-142](#) ("Decision").

² See [ICC-01/11-01/25-175 OA2](#) ("Appeal").

³ [Request](#), para. 8 (recalling that "a reply must, [u]nless otherwise permitted by the Chamber, [...] be limited to new issues raised in the response which the replying participant could not reasonably have anticipated").

⁴ See 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; [ICC-01/04-02/06-1994](#) ("Ntaganda July 2017 Leave to Reply Decision"), para. 9.

⁵ [ICC-01/14-01/18-799](#) ("Yekatom Leave to Reply Decision"), para. 8; [Ntaganda July 2017 Leave to Reply Decision](#), para. 9; [ICC-01/04-02/06-1813](#) ("Ntaganda March 2017 Leave to Reply Decision"), para. 8.

⁶ [ICC-01/04-02/12-296-tENG](#) ("Ngudjolo Leave to Reply Decision"), para. 7.

⁷ [ICC-01/04-02/06-2488](#) ("Ntaganda March 2020 Leave to Reply Decision"), para. 8.

⁸ [Request](#), para. 10 (citing [ICC-01/11-01/25-186 OA2](#) ("LRV Observations"), paras. 51, 55; [ICC-01/11-01/25-188 OA2](#) ("Prosecution Response"), para. 73).

⁹ [Request](#), para. 10 (fn. 10).

fact rely upon”.¹⁰ Yet, in the paragraphs cited, the Prosecution and the LRV did no more than remind Mr El Hishri of the reasoning in the Decision.¹¹ As such, this response can hardly have been “unanticipated”.¹² Nor is it clear what precisely Mr El Hishri proposes to address—the Decision speaks for itself. Mr El Hishri’s concern that this goes “to the heart” of his argument is no reason to allow him a further opportunity to try and remedy the defects in his appeal.¹³

5. Second, Mr El Hishri seeks leave to address the significance of the Appeals Chamber’s judgment in *Duterte* on his argument, made at first instance, that a State addressed by a UN Security Council referral should not be disadvantaged relative to a State Party (on the premise that a State Party has the ability to withdraw from the Statute).¹⁴ The Prosecution addressed this argument out of an abundance of caution in response to Mr El Hishri’s vague attempt to incorporate by reference his first instance submissions into his appeal brief.¹⁵ As such, Mr El Hishri cannot have been surprised by a response to those submissions. Nor should the vagueness of Mr El Hishri’s appeal be rewarded by grant of a reply so that he can supplement those submissions, and seek to remedy his first instance oversight concerning *Duterte*.¹⁶

6. Third, Mr El Hishri claims—incorrectly—that “the Prosecution appears to import a novel ‘objective parameters’ test [...] that was not included in the [...] Decision”.¹⁷ In his view, this is “an entirely different interpretation” of UNSCR 1970, which could not “reasonably have been anticipated” and is “improper”.¹⁸ However, to the contrary, the Decision expressly refers to the established principle that the scope of a situation is defined by objective parameters.¹⁹

¹⁰ [Request](#), para. 10 (emphasis supplied).

¹¹ See e.g. [Prosecution Response](#), para. 73 (asserting that Mr El Hishri “shows no ‘deficiencies’ in the subsequent practice considered by the Majority”, and citing only the Appeal Brief and the Decision, specifically: [Appeal](#), paras. 61-75; [Decision](#), paras. 33-35, 42); [LRV Observations](#), paras. 51 (asserting that Mr El Hishri “seeks to ascribe determinative significance to matters which the Chamber expressly treated only as supporting indications”, citing [Appeal](#), paras. 53-55; [Decision](#), paras. 34-35), 55 (asserting that Mr El Hishri’s “submissions concerning the UNSC’s subsequent practice misconstrue the significance attributed to said practice by the Chamber”, citing [Appeal](#), paras. 68-70; [Decision](#), para. 33).

¹² *Contra* [Request](#), para. 10.

¹³ *Contra* [Request](#), para. 10.

¹⁴ [Request](#), para. 11 (citing [Prosecution Response](#), paras. 20-22). See further e.g. [ICC-01/11-01/25-108-Corr-Red](#) (“Jurisdiction Challenge”), paras. 46-47 (comparing the “jurisdictional position” of “any affected State that is a non-State Party to the ICC” with “a State Party”, and asserting that the non-State Party lacks the ability of the State Party “to terminate its acceptance of the ICC’s jurisdiction by withdrawing from the Court”).

¹⁵ See e.g. [Appeal](#), para. 20 (fn. 14: citing [Jurisdiction Challenge](#), paras. 41-53), 35 (fn. 25: citing [Jurisdiction Challenge](#)), paras. 41-53).

¹⁶ *Contra* [Request](#), para. 11. The Prosecution recalls that the *Duterte* appeal judgment was handed down on 22 April 2026, which was some weeks before Mr El Hishri filed his jurisdictional challenge on 6 May 2026.

¹⁷ [Request](#), para. 12 (citing [Prosecution Response](#), para. 52).

¹⁸ [Request](#), paras. 12-13.

¹⁹ [Decision](#), para. 42 (“the Majority recalls that the scope of a situation is defined by objective parameters which are discerned from the referral”). For further references to “parameters”, see also paras. 28, 37-38.

Likewise, at first instance, the Prosecution had made similar submissions to those on appeal.²⁰ Further, and in any event, the reference to the established caselaw of the Court in this respect does not imply a different interpretation of UNSCR 1970 itself, nor connote the application of “a lower standard” than the “situation of crisis” terminology which is also reflected in the Court’s caselaw.²¹ Rather, the Prosecution simply drew attention to the potential forensic interest in clarity in the use of these terms.

7. Finally, the Prosecution notes that Mr El Hishri makes no suggestion of the length that he might require for any reply which is granted, and only describes his proposed submissions in the broadest terms. Accordingly, notwithstanding the Prosecution’s submission that the Request is unwarranted and should be dismissed outright, the Appeals Chamber should grant no more than two pages for any reply which is granted.

CONCLUSION

8. For all the reasons above, the Appeals Chamber should dismiss the Request.



Mame Mandiaye Niang, Acting Prosecutor

Dated this 28th day of September 2026

At The Hague, the Netherlands

²⁰ Compare e.g. [ICC-01/11-01/25-132-Red](#) (“Prosecution Response to Jurisdiction Challenge”), paras. 18-24, with [Prosecution Response](#), paras. 19 (fn. 49), 51-52.

²¹ *Contra* [Request](#), paras. 12-13.