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No. ICC-01/11-01/25
Date: 06 May 2026

PRE-TRIAL CHAMBER I

Before: **Judge Iulia Antoanella Motoc, Presiding**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN LIBYA

IN THE CASE OF THE PROSECUTOR v. KHALED MOHAMED ALI EL HISHRI

PUBLIC

Public Redacted Version of "Corrected Version of 'Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute'" (ICC-01/11-01/25-108-Conf-Corr)

Source: **Defence for Mr Khaled Mohamed Ali El Hishri**

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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☐ **Legal Representatives of the Victims**	☐ **Legal Representatives of the Applicants**
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☒ **The Office of Public Counsel for Victims**	☐ **The Office of Public Counsel for the Defence**
☐ **States' Representatives**	☐ **Amicus Curiae**

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☒ **Victims and Witnesses Unit**	☒ **Detention Section**
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I. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri ("Defence") exercises the right under Article 19 of the Rome Statute of Mr El Hishri to challenge the jurisdiction of the Court in the case of the *Prosecutor v. Khaled Mohamed Ali El Hishri.*

2. This challenge does not repeat, but should be read in conjunction with, the Defence's "Defence written notes and observations relating to factual and legal elements of the Prosecution's case against Mr Khaled Mohamed Ali El Hishri", filed on 28 April 2026.[1]

II. CLASSIFICATION

3. This request is classified as confidential pursuant to Regulation 23*bis*(2) of the Regulations of the Court because it contains references to documents filed with the same classification.

III. PROCEDURAL HISTORY

4. On 26 February 2011, the United Nations Security Council ("UNSC"), acting under Chapter VII of the Charter of the United Nations, referred the situation in Libya since 15 February 2011 to the Court, in accordance with Article 13(b) of the Statute.[2]

5. On 3 April 2025, the Prosecution, under seal and *ex parte*, applied for a warrant of arrest for Mr El Hishri for crimes against humanity and war crimes allegedly committed in Libya from around February 2015 to, at least, early 2020.[3]

6. On 12 May 2025, the Libyan Prime Minister Abdulhamid Aldabaiba purported to convey to the Registrar of the Court his acceptance of the Court's jurisdiction over its territory from 2011 to the end of 2027 ("Purported Article 12(3) Declaration").[4]

7. On 10 July 2025, Pre-Trial Chamber I ("PTC I") issued the warrant of arrest against Mr El

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[1] ICC-01/11-01/25-107-Conf
[2] United Nations Security Council, Resolution 1970, para. 4, 26 February 2011, S/RES/1970 (2011) ("Resolution 1970")
[3] Prosecution's application under Article 58 for a warrant of arrest against Khaled Mohamed Ali El Hishri, 3 April 2025, ICC-01/11-172-US-Exp.
[4] Transmission of Article 12(3) Declaration by the State of Libya, 20 May 2025, ICC-01/11-180-Conf-Exp, with the declaration pursuant to Article 12(3) of the Statute annexed as Annex I and an English translation thereof as Annex II.

Hishri.[5]

8. On 16 July 2025, Mr El Hishri was arrested in the Federal Republic of Germany pursuant to the warrant of arrest.

9. On 1 December 2025, Mr El Hishri was surrendered to the Court and arrived at the Court's Detention Centre that same day.

IV. APPLICABLE LAW

10. Articles 12 and 13 of the Rome Statute establish that the ICC's jurisdiction is limited to situations in which the crimes were committed on the territory of a State Party, by a national of a State Party, on the territory of a state that has accepted the Court's jurisdiction under article 12(3), or in a situation that was referred by the UNSC under article 13(b).

11. Libya is not a State Party to the Rome Statute, the alleged crimes were committed solely on Libyan territory, and Mr El Hishri is a national of Libya only. Therefore, the only two potential bases for jurisdiction for Mr El Hishri's case are Resolution 1970 and the purported Article 12(3) Declaration.

V. SUBMISSIONS

A. Libya's Purported Article 12(3) Declaration accepting the Court's jurisdiction is invalid

12. Article 12(3) of the Rome Statute allows "a State which is not a Party to this Statute" to, "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question". It further obligates the accepting State to "cooperate with the Court without any delay or exception in accordance with Part 9." Rule 44(2) of the Rules of Procedure and Evidence further elaborates that if such a declaration is lodged, "the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply."

13. Given that an article 12(3) declaration has a significant impact on the rights of individuals by altering the jurisdiction for criminal adjudication and places significant treaty-like cooperation

[5] Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-188-US-Exp, 10 July 2025; ICC-01/11-188-US-Exp-tARB, 15 July 2025; reclassified as public on 31 July 2025

obligations on the State, only an organ of the State with the legal capability to bind the State to international treaties may lodge such a declaration.[6] This declaration is an international agreement in every sense of the word for it is not a unilateral commitment, but rather establishes mutual obligations on the part of the Libyan State regarding its territory and citizens, and an obligation on the part of the International Criminal Court to carry out legal proceedings, from investigations, to arrests and trials, and to assume responsibility for all other aspects of the judicial process.

14. In its decision on the authorisation of the investigation in Côte d'Ivoire, Pre-Trial Chamber III made clear that such a declaration cannot be made by just anyone.[7] It must be an official with "the authority to sign a valid declaration on behalf of" the State. In the case of Côte d'Ivoire's article 12(3) declaration, it was the Minister of Foreign Affairs.[8]

15. In its analysis of a purported article 12(3) acceptance of jurisdiction by a political party in another non-State Party, the Prosecution took this even further and specifically stated that this purported declaration was invalid because it "was not submitted, as a matter of international law, by any person with the requisite authority or bearing 'full powers' to represent the State."[9] To reach the conclusion that the person submitting the declaration did not have these full powers, the Prosecution looked at the UN Protocol List to determine which official Head of State was listed there and analysed whether the person who submitted the declaration had "effective control" of the State's territory.[10] This specific reference to the need of the individual submitting the declaration to have full powers as defined in the Vienna Convention on the Law of Treaties ("VCLT") demonstrates clearly that an article 12(3) declaration is equivalent to a treaty and, therefore, must be consented to in line with the full requirements of the VCLT on treaty consent.

16. Under the VCLT, "Heads of State, Heads of Government and Ministers for Foreign Affairs" are generally considered to have the capacity to enter into treaty agreements on behalf of their

[6] *Côte d'Ivoire,* Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", ICC-02/11-14-Corr, 15 November 2011, para. 14; ICC Office of the Prosecutor, "Press Release: The determination of the Office of the Prosecutor on the communication received in relation to Egypt", 8 May 2014.
[7] *Côte d'Ivoire,* Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", ICC-02/11-14-Corr, 15 November 2011, para. 14.
[8] *Ibid.*
[9] ICC Office of the Prosecutor, "Press Release: The determination of the Office of the Prosecutor on the communication received in relation to Egypt", 8 May 2014
[10] *Ibid.*

States.[11] However, even consent to a treaty by an official with this capacity may be invalid if such consent "has been expressed in violation of a provision of its internal law regarding competence to conclude treaties [if] that violation was manifest and concerned a rule of its internal law of fundamental importance."[12] Such a violation is considered to be manifest if "it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[13] Research into domestic case law on the invalidity of treaties under this provision indicates that the most frequently successfully invoked provisions relate to questions of separation of powers and the role of legislatures in the ratification of treaties.[14]

17. Provisions of this nature are also relevant to the Purported Article 12(3) Declaration. Both the 2015 Libyan Political Agreement ("the Skhirat Agreement") and the 2023 amendments to the Libyan Constitution provide a clear and undeniable role to the legislature in the ratification of international agreements and treaties. Article 8(2)(b) of the Skhirat Agreement grants the Presidency Council of the Council of Ministers, which includes the Prime Minister, the power to "[c]onclude international agreements and conventions provided that they are endorsed by the House of Representatives."[15] Similarly, article 16 of the Constitution of Libya provides that "[t]he National Assembly shall ratify international treaties and agreements by a majority of its members."[16] The National Assembly is defined as "compris[ing] two chambers: the House of Representatives and the Senate."[17]

18. The House of Representatives referenced in the Skhirat Agreement and the Constitution was duly elected in June 2014.[18] Elections for the Senate have been continuously postponed and that body has, therefore, not been established yet.[19] The House of Representatives remains the sole official legislative body in Libya that must "endorse" all "international agreements and

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[11] VCLT, art. 7(2)(a).
[12] *Ibid.*, art. 46(1).
[13] *Ibid.*, art. 46(2).
[14] B. Conforti and A. Lobelia, "Invalidity and Termination of Treaties: The Role of National Courts", 1 Eur. J. Int'l L. 44 (1990). *See also* M. Bothe, "Invalidity of Treaties: 1969 Vienna Convention", in Olivier Corten, and others (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2nd Edition, Oxford Commentaries on International Law (2025).
[15] Libyan Political Agreement (17 December 2015), art. 8(2)(b), https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf.
[16] Constitution of Libya, art. 16, LBY-D37-0000-0003; LBY-D37-0000-0026.
[17] *Ibid.*, art. 3.
[18] International Parliamentary Union, "Parline: Libya: House of Representatives Election Results", https://data.ipu.org/parliament/LY/LY-LC01/election/LY-LC01-E20140625/
[19] UN News, "Libya: UN mission chief laments lack of progress towards national renewal", 22 April 2026, https://news.un.org/en/story/2026/04/1167357

conventions."[20] The President of the UNSC has explicitly recognised the continued and vital role of the House of Representatives in Libya's domestic legal framework and peaceful transition.[21] The UNSC President has also recognised the legal validity of the 2023 amendments to the Libyan Constitution that grant the House of Representatives its powers in the conclusion of international agreements.[22]

19. The Purported Article 12(3) Declaration on behalf of Libya was transmitted [REDACTED].[23] [REDACTED].[24] [REDACTED].[25] The Purported Article 12(3) Declaration itself "declares its recognition of the jurisdiction of the International Criminal Court to prosecute those responsible for international crimes under the Rome Statute, committed in Libya from 2011 to the end of 2027."[26]

20. It is clear from the context of the Purported Article 12(3) Declaration that the use of the word [REDACTED]. It is equally clear that [REDACTED] in no way includes the House of Representatives that is constitutionally-mandated to endorse all international agreements.

21. On 18 May 2025, the House of Representatives wrote a letter to the ICC Office of the Prosecutor denouncing this purported acceptance of jurisdiction.[27] In this letter, the House of Representatives "expresse[d] its dismay and disapproval of this measure taken by the Al-Dabaiba Government".[28] The House of Representatives [REDACTED] powers do not extend to "entering into international treaties, whether explicitly or implicitly. Among these is the recognition of the jurisdiction of the International Criminal Court over the entire Libyan territory, which is within the inherent competence of the House of Representatives as the sole legitimate legislative

[20] Libyan Political Agreement (17 December 2015), art. 8(2)(b), https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf.
[21] S/PRST/2023/2 (16 March 2023), para. 3.
[22] *Ibid.*
[23] Annex I to the Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-Conf-AnxI1.
[24] *Ibid.*
[25] *Ibid.*
[26] Annex II to the Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-AnxII-Red.
[27] Letter from the House of Representatives to Prosecution (20 May 2025), LBY-D37-0000-0001; LBY-D37-0000-0024. *See also* International Commission of Jurists, "Libya's acceptance of the International Criminal Court's jurisdiction: stakes and implications - Questions & Answers", August 2025, p. 5; Allibiya TV Facebook Post, 20 May 2025; Oya Newspaper Facebook Post, 20 May 2025; Nabd, "Aqila to Khan: We reject Dbeibah's decision to usurp the jurisdiction of the Libyan judiciary and grant it to the International Criminal Court", 20 May 2025; Journalism Today Facebook Post, 9 July 2025; Benghazi Revolution of Dignity Facebook Post, 20 May 2025; Al Bosco Facebook Post, 20 May 2025.
[28] Letter from the House of Representatives to Prosecution (20 May 2025), LBY-D37-0000-0001; LBY-D37-0000-0024.

authority in Libya."[29]

22. The day before the letter from the full House of Representatives, the Judicial and National Reconciliation Committee of the House of Representatives wrote an open letter on the same issue in response to the Prosecutor's briefing of the UN Security Council.[30] In this letter, they "express[ed their] astonishment at [the Prosecutor's] statements regarding the extension of his mandate based on a declaration accepting the jurisdiction of the International Criminal Court by a government from which confidence has been withdrawn and whose mandate has expired."[31] They specifically argued that these actions "undermine national reconciliation efforts in Libya."[32]

23. It is clear from these letters that the House of Representatives did not endorse this purported acceptance of treaty-like obligations by the Prime Minister on behalf of the State of Libya.[33] These letters also made manifest to the Office of the Prosecutor that there had been a violation of the fundamental rule in Libyan domestic law on the role of the legislature in the conclusion of treaties and international agreements. The purported acceptance of the Court's jurisdiction was made without the consent of the Libyan Parliament, as required by a fundamental rule of the Libyan Constitution regarding competence to conclude treaties, and this violation was made manifest by the fact that that very Parliament wrote to the Prosecution and published a letter stating in the clearest of terms that the purported declaration had been made in violation of Libyan internal law.

24. Additionally, under the Libyan Constitution, the Prime Minister is not given any role in the signing or ratification of international treaties and agreements. The President, in consultation with the National Assembly (comprising the House of Representatives and the Senate), is the

[29] *Ibid.*
[30] Open Letter from Judicial and National Reconciliation Committee of the House of Representatives, LBY-D37-0000-0021, LBY-D37-0000-0044. *See also* Eye of Libya, "The House of Representatives rejects the expansion of the International Criminal Court's jurisdiction and affirms the sovereignty of the judiciary", 17 May 2025; AlSaaa24, "House of Representatives: The jurisdiction of the International Criminal Court over crimes in Libya is rejected", 17 May 2025; Al Marsad, "The House of Representatives Rejects the ICC's Intervention Through the Dbeibah Mandate", 17 May 2025.
[31] Open Letter from Judicial and National Reconciliation Committee of the House of Representatives, LBY-D37-0000-0021, LBY-D37-0000-0044.
[32] *Ibid.*
[33] Letter from the House of Representatives to Prosecution (20 May 2025), LBY-D37-0000-0001; LBY-D37-0000-0024. *See also* International Commission of Jurists, "Libya's acceptance of the International Criminal Court's jurisdiction: stakes and implications - Questions & Answers", August 2025, p. 5; Allibiya TV Facebook Post, 20 May 2025; Oya Newspaper Facebook Post, 20 May 2025; Nabd, "Aqila to Khan: We reject Dbeibah's decision to usurp the jurisdiction of the Libyan judiciary and grant it to the International Criminal Court", 20 May 2025; Journalism Today Facebook Post, 9 July 2025; Benghazi Revolution of Dignity Facebook Post, 20 May 2025; Al Bosco Facebook Post, 20 May 2025.

only official with “the authority to conclude treaties and agreements.”[34] Mohammed Al-Menfi has been duly appointed as President and has participated in international meetings, including speaking at the UN General Assembly on 25 September 2025, indicating his international recognition as President.[35] Despite this, both [REDACTED] accompanying the Purported Article 12(3) Declaration and the [REDACTED] make no reference at all to the participation of the President in the decision to bind Libya to the treaty-like obligations inherent in an article 12(3) acceptance of the ICC’s jurisdiction.[36] Accordingly, [REDACTED] cannot give rise to any legal obligation upon the Libyan State or its citizens and cannot represent a valid acceptance of the exercise of the ICC’s jurisdiction.

25. One of the most significant grounds for demonstrating that the actions taken by Abdulhamid Aldabaiba were unlawful – not merely by virtue of being contrary to the Constitution and Libyan law, but also by virtue of being in direct opposition to the highest judicial institution in Libya, namely the Supreme Judicial Council of Libya, which is the body representing the judiciary in Libya – is that this very Supreme Judicial Council formally and explicitly declared their rejection of the Purported Article 12(3) Declaration on the basis that it strips the Libyan judiciary of its jurisdiction to examine and adjudicate all unlawful acts that have occurred or are occurring on Libyan territory.[37] The Supreme Judicial Council considers itself fully competent to apply Libyan criminal law and, indeed, to give effect to the rules of international law in respect of all acts constituting crimes committed on Libyan territory.[38] This was confirmed by the ruling issued in the case of Mr Al-Senussi, in which the International Criminal Court held that his trial before the International Criminal Court was inadmissible and that Libya was willing and able to try him before national courts.[39] This constitutes a full acknowledgement of the competence and capability of the Libyan judiciary, which calls into serious question the Purported Article 12(3) Declaration.

26. Upholding the validity of the purported declaration risks escalating the dispute between the Libyan parties and could aggravate internal tensions, thereby placing Libyan civil peace and

[34] Constitution of Libya, art. 22, LBY-D37-0000-0003; LBY-D37-0000-0026.
[35] S/RES/2796 (2025), 31 October 2025.
[36] Annex II to the Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-AnxII-Red.
[37] LBY-D37-0000-0022, LBY-D37-0000-0045.
[38] *Ibid.*
[39] *Gadaffi and Al Senussi*, Judgement on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al Senussi", ICC-01/11-01/11-565, 24 July 2014.

security in serious jeopardy — a development that would have serious repercussions both domestically and regionally, as has been made clear in numerous United Nations resolutions concerning Libya.

27. The Purported Article 12(3) Declaration also suffers from formal defects that indicate that the process for its creation was hurried and not in line with valid domestic process. It is undated, unsigned, and bears neither the official seal of the Libyan State nor a deposit reference number with the authorities responsible for depositing laws in Libya.[40] The purported declaration has not been published in the Libyan Official Gazette. These factors and the clear fact that neither institution (the House of Representatives and the President) empowered by the Libyan Constitution to participate in the conclusion of international agreements was consulted by the Prime Minister on on this issue indicate that this declaration was not a formal, valid acceptance of international obligations by the State of Libya. It was instead issued unilaterally and personally without publication, and without giving the public the opportunity to review it. This renders it a document issued by an individual acting on his own behalf and not lawfully on behalf of his State.

28. Additionally, as referenced by the Justice and National Reconciliation Committee of the House of Representatives in its letter to the ICC Prosecutor, the unilateral acceptance of the ICC's jurisdiction by one party to the Skhirat Agreement of 2015 threatens any chance of sustainable peace in Libya and threatens to violate international obligations to ensure a peaceful transition in Libya. In this context, the UN Security Council has issued numerous resolutions affirming its full commitment to Libya's sovereignty, independence, territorial integrity, and national unity.[41] It also urged Libyan officials and institutions to refrain from taking any unilateral actions that increase tensions, undermine trust, and deepen divisions among institutions and discord among Libyans, and to address these issues urgently.[42]

29. In relation to support for peaceful transition in Libya, a large number of Security Council Resolutions affirm the Security Council's "strong commitment to an inclusive, Libyan-led and Libyan-owned political process facilitated by the United Nations and supported by the

[40] Annex II to the Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-AnxII-Red.
[41] S/RES/2656 (2022), 28 October 2022, para. 2; S/RES/2702 (2023), 30 October 2023, para. 7; S/RES/2769 (2025), 16 January 2025, paras 2, 4; S/RES/2796 (2025), 31 October 2025, para. 6.
[42] S/RES/2656 (2022), 28 October 2022, para. 2; S/RES/2702 (2023), 30 October 2023, para. 7; S/RES/2769 (2025), 16 January 2025, paras 2, 4; S/RES/2796 (2025), 31 October 2025, para. 6.

international community”,[43] the importance of “an inclusive, comprehensive national dialogue and victim-centred reconciliation process based on the principles of transitional justice, welcom[ing] the efforts of the Presidential Council to launch the national reconciliation process”[44]; the Council’s “strong commitment to the sovereignty, independence, territorial integrity, and national unity of Libya,”[45] and its call “on Libyan actors and institutions to urgently refrain from and address any unilateral actions which increase tensions, undermine trust and further entrench institutional divisions and discord amongst Libyans.”[46]

30. In addition, the UNSC consistently affirms the “safeguard[ing of] the independence of the judiciary” in Libya;[47] “the efforts of the Presidential Council to launch the national reconciliation process”,[48] and urges Member States to “respect the sovereignty, independence, territorial integrity and national unity of Libya, and refrain from external interference which seeks to undermine Libya’s sovereignty and foment conflict and instability in Libya and the wider region.”[49]

31. Prime Minister Abdulhamid Aldabaiba’s involvement in making and [REDACTED] the Purported Article 12(3) Declaration appears to be in direct conflict with the UNSC’s oft-stated positions regarding Libya.

32. Additionally, the indisputable geographical, political and military division that has effectively taken hold in Libya, which the UNSC has acknowledged and confirmed, warned against, and called upon the UN Support Mission in Libya to address by increasing its operations in eastern and southern Libya,[50] reduces Abdulhamid Aldabaiba to a prime minister without the effective control of the entire State’s territory that is needed to legitimately act on its behalf.

33. As recognised by the Office of the Prosecutor in its response to the article 12(3) declaration purportedly communicated on behalf of another non-State Party, only “the entity which is in fact in control of a State’s territory, enjoys the habitual obedience of the bulk of the population, and

[43] S/RES/2656 (2022), 28 October 2022, para. 2.
[44] S/RES/2702 (2023), 30 October 2023, para. 7.
[45] S/RES/2769 (2025), 16 January 2025, para. 2.
[46] *Ibid.*, para. 4.
[47] S/RES/2796 (2025), 31 October 2025, para. 6
[48] *Ibid.*, para. 8.
[49] *Ibid.*, para. 12.
[50] Resolution No. 2796/2025/3

has a reasonable expectancy of permanence, is recognized as the government of that State under international law."[51] Allowing "authorities" without such effective control over a State's territory to bind that State to international obligations could lead to an untenable situation where there is "one putative authority exercising effective control over the territory of a State, and the other competing authority retaining international treaty-making capacity."[52] This would lead to a State being unable to live up to its international obligations, by virtue of the fact that the entity making these obligations has no *de facto* ability to enforce these obligations on the State's territory.

34. In conclusion, the Purported Article 12(3) Declaration was made in manifest violation of fundamental rules of Libyan internal law regarding competence to conclude treaties. The duly-elected legislature mandated by the Libyan Constitution to "endorse" all international agreements was not consulted. In fact, it publicly and vehemently has rejected the declaration. There is no evidence that the duly-appointed and internationally-recognised President with the sole constitutional power to "conclude" international agreements was ever consulted. The Prime Minister, who has no constitutional role in the making of international agreements on behalf of the State of Libya took unilateral action to bind Libya to international obligations with the Court.

35. It would be as unacceptable as it would be dangerous for the International Criminal Court to set a precedent that an unmandated individual within the government of a State may bind that State to the exercise of the jurisdiction of the Court, in clear violation of domestic treaty-making provisions. Any declaration accepting the jurisdiction of the ICC is a grave and consequential act that can only be made following the sovereign and lawful process determined by the State itself to make such a declaration.

36. The Court cannot base its jurisdiction upon proceedings that are contrary to law, and contrary to legal determinations contained in UNSC resolutions. Were it to do so, it would have encouraged disregard for the law — not merely the disregard of a legal rule, but an infringement upon the personal and collective rights of individuals and groups — and it would also have acted in contravention of UN resolutions, whether those adopted by the General Assembly or those of the Security Council.

[51] ICC Office of the Prosecutor, "Press Release: The determination of the Office of the Prosecutor on the communication received in relation to Egypt", 8 May 2014
[52] *Ibid.*

(B) The case against Mr El Hishri is not caught by Resolution 1970

37. In Resolution 1970, the UNSC *inter alia*:

> Express[ed] grave concern at the situation in the Libyan Arab Jamahiriya and condemn[ed] the violence and use of force against civilians,
>
> Stress[ed] the need to hold to account those responsible for attacks, including by forces under their control, on civilians,
>
> Reaffirm[ed] its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.
>
> Act[ed] under Chapter VII of the Charter of the United Nations, and [took] measures under its Article 41,
>
> Demand[ed] an immediate end to the violence and call[ed] for steps to fulfil the legitimate demands of the population; [and]
>
> Decide[d] to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.[53]

38. Given the significant changes in Libya in the four years between the passage of Resolution 1970 and the facts alleged in the case against Mr El Hishri, on any careful analysis, there is no reasonable basis for the conclusion that these facts fall within the scope of the Resolution, and every reason to conclude that they do not. Since these facts do not fall within the scope of Resolution 1970 the Resolution cannot form the basis of the Court's jurisdiction in this case.

39. In this Chapter, the Defence submits that Resolution 1970 must be read narrowly given, firstly, the capital importance of State consent as the foundation of the international legal system. Secondly, the fundamental human right for all criminal defendants that is expressed in the principle of legality (or *nullum crimen sine lege*) powerfully demonstrates that the Resolution must be read narrowly and not expansively. Such a narrow reading compels a determination that the facts alleged against Mr El Hishri did not "occur[] in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court" through the Resolution.[54]

40. Moreover, the Defence relies on the principle of legality as a standalone basis to show that, in the absence of foreseeability and accessibility of the criminal law instrumentalised by the

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[53] Resolution 1970, 26 February 2011, S/RES/1970 (2011).

[54] *Njeem*, Corrected version of the 'Warrant of Arrest', ICC-01/11-152-Anx, 18 January 2025, para. 4; *Al Lahsa*, Warrant of Arrest, ICC-01/11-141-Anx3, 6 April 2023, para. 6; *Al Shaqaqi*, Warrant of Arrest, ICC-01/11-141-Anx5, 18 July 2023, para. 6; *Al Zinkal*, Warrant of Arrest, ICC-01/11-141-Anx6, 18 July 2023, para. 6; *Doumah*, Warrant of Arrest, ICC-01/11-141-Anx2, 6 April 2023, para. 6; *Salheen*, Warrant of Arrest, ICC-01/11-141-Anx4, 6 April 2023, para. 6; *Al Kani*, Warrant of Arrest, ICC-01/11-141-Anx1, 6 April 2023, para. 6; *Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/10-1, 28 September 2010, para. 6.

Prosecution against Mr El Hishri, the Court has no jurisdiction.

(1) Resolution 1970 must be read narrowly on the basis of State consent and the protection of State sovereignty

41. Because all States are sovereign and equally sovereign, they can only be subjected to international legal obligations to which they have consented.[55] One (or more) State(s) cannot impose obligations on another equally sovereign State. Such a non-consensual imposition of obligation would create a hierarchy within States whereby some do not have full sovereign rights, and others have the power to dictate how these States act within their sovereign competencies.

42. In the case of resort of the UNSC to its Chapter VII powers, which now includes referrals to the ICC, this all-important consent is given by the State when it ratifies the UN Charter and consents to the specific but powerful role of the UNSC in "determin[ing] the existence of any threat to the peace, breach of the peace, or act of aggression and [...] decid[ing] what measures shall be taken [...] to maintain or restore international peace and security."[56] The UN Charter also grants the UNSC the power to "call upon the Members of the United Nations to apply" the measures it decides to implement.[57] Under this provision, the UNSC is mandated to pass Resolutions with binding force that compel UN member states to take certain actions, and can override a State's sovereign capacity to decide whether to take these actions.[58]

43. For such a binding Resolution not to violate the primacy of State consent and the principle of sovereign equality of States, it must fall within the scope of what the State consented to when ratifying the Charter. In other words, a Resolution must be within the power of the UNSC as delineated in the Charter, and not be *ultra vires*.[59]

44. Article 39 of the UN Charter makes clear that any measures decided by the UNSC under Chapter VII of the Charter must be in response to a *specific* "threat to the peace, breach of the peace, or act of aggression" and made with the purpose of "maintain[ing] or restor[ing]

[55] J. Crawford, *Brownlie's Principles of Public International Law*, OUP (9th edition, 2019), chapter 20; L.M. Hinojosa Martínez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits", 57(2) International and Comparative Law Quarterly (2008) 333, pp. 339, 354
[56] UN Charter, art. 39
[57] *Ibid.*, art. 41
[58] *Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 44
[59] *See* A.S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Brill Nijhoff (2018); Hinojosa Martínez, *supra* note 55, p. 345

international peace and security" that is threatened or breached by this specific concern.[60] Actions taken under Chapter VII, therefore, cannot amount to broad, general, and indefinite measures that tackle vague threats to peace or threats that had not yet emerged at the time the Resolution was passed.

45. In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber found that UNSC Resolutions in response to threats to peace may include the creation of international criminal jurisdiction,[61] but that, in passing these Resolutions, the UNSC's "discretion is not unfettered."[62] In his Separate Opinion, Judge Sidhwa described potential limitations to the UNSC's powers. He wrote that "an international criminal court with general jurisdiction" could potentially face a valid objection but that the establishment of the ICTY was within the UNSC's powers because it "was of a limited nature, for a limited purpose, for a limited time, for a limited territory and for offenders who had committed offences within the territory of the Former Yugoslavia."[63]

46. These limitations on nature, purpose, time, territory, and personal jurisdiction apply equally to UNSC referrals to the ICC under Article 13(b) of the Rome Statute since broad, perpetual UNSC Resolutions in these circumstances are particularly deleterious to State consent and sovereign equality. A broad, open-ended referral with no detailed factual specification on the situation referred essentially places any affected State that is a non-State Party to the ICC (as, in the case at issue, is Libya) in the same jurisdictional position as a State Party with none of the powers of a State Party. Without the ability to terminate its acceptance of the ICC's jurisdiction by withdrawing from the Court, the targeted State is in effect subject to the permanent jurisdiction of the Court.[64] Additionally, the State has no voice and no vote in meetings of the Assembly of States Parties on potential amendments to the Statute or significant procedural changes.

47. In the context of referrals of situations by State Parties under Article 13(a) of the Rome Statute where the targeted State Party would have the ability to terminate its acceptance of jurisdiction through withdrawal from the Statute, in addition to all the other powers of a State

[60] UN Charter, art. 39

[61] *Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 40.

[62] *Ibid.*, para. 32

[63] *Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Sidhwa, 2 October 1995, para. 63

[64] *See Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx, 18 January 2025, para. 13

Party, the Court has, nonetheless, narrowly interpreted the relevant referrals and attempted to avoid perpetual referrals. For example, in the *Mbarushimana* Arrest Warrant Decision, a different composition of this Pre-Trial Chamber I carefully analysed a State Party's referral that, on its face, appeared to be a straightforward referral of all Article 5 crimes within the jurisdiction of the Court committed on that State Party's territory after a certain date.[65] In this case, the Democratic Republic of the Congo ("DRC") had referred *"la situation qui se déroule dans mon pays depuis le 1er juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis"*.[66] The Chamber took seriously the reference to the "situation unfolding in my country" and analysed whether the facts alleged in the arrest warrant application were sufficiently linked to this situation.[67] This demonstrates an understanding that referrals, even from State Parties, are not open-ended and must be interpreted narrowly.

48. Pre-Trial Chamber II indicated its concurrence with the need to interpret the DRC's referral narrowly in its decision on the arrest warrant application in the *Mudacumura* case.[68] In this case, the Chamber conducted a similar analysis of the linkage between the situation referenced in the referral and the crimes alleged in the arrest warrant application.[69]

49. The Prosecution's approach in similar circumstances has also indicated its understanding of the need to narrowly interpret referrals and prevent them from being applied indefinitely.[70] For example, in the Situations in the Central African Republic ("CAR'), the Prosecution has treated investigations based on the CAR Government's two referrals as separate investigations, despite the fact that the first referral had no end date.[71] On 7 January 2005, the Government of CAR referred the situation on its territory since 1 July 2002 with no end date.[72] On 20 May 2014, the

[65] *Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/10-1, 28 September 2010, paras 4-9
[66] *Ibid.*, para. 5 ("the situation unfolding in my country since July 1, 2002, in which it appears that crimes falling under the jurisdiction of the International Criminal Court have been committed.")
[67] *Ibid.*, paras 4-9
[68] *Mudacumura,* Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red, 13 July 2012, paras 9-17
[69] *Ibid.*
[70] *See Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, 18 January 2025, ICC-01/11-152-Anx, paras 11-13
[71] ICC Office of the Prosecutor, "Press Release: Prosecutor receives referral concerning Central African Republic", 7 January 2005, https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic; ICC Office of the Prosecutor, Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, 24 September 2014, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-opening-second-investigation . *See ibid.*, para. 11.
[72] ICC Office of the Prosecutor, "Press Release: Prosecutor receives referral concerning Central African

Government of CAR referred the situation on its territory since 1 August 2012.[73] Rather than simply add the investigation into crimes committed after 1 August 2012 to its pre-existing investigation based on the 2005 referral, the Prosecution recognised that these two referrals related to two separate situations that required two separate investigations: hence CAR I and CAR II.[74] This prosecutorial recognition that referrals that, on their face, are perpetual nevertheless can and must end offers a useful model for the interpretation of the UNSC referral of the situation in Libya.

50. Similarly, in the Situations in the Bolivarian Republic of Venezuela, the Prosecution treated two separate referrals as two separate potential investigations. On 12 February 2014, six States Parties from the region referred the situation in Venezuela (which at the time was itself a State Party) since 12 February 2014 (with no end date) to the Prosecutor.[75] Venezuela itself referred the situation on its territory on 13 February 2020.[76] Venezuela's own referral focused on specific allegations that sanctions placed on the country by the United States had caused crimes against humanity on Venezuelan territory.[77] Rather than fold these new allegations into its existing investigation into Venezuela, the Prosecution opened a new Preliminary Examination into "Venezuela II".[78] In its statement announcing the launch of the new Preliminary Examination, the Prosecution stated that even though the two referrals "appear to overlap geographically and temporally" further examination was required to determine "whether the referred scope of the two situations is sufficiently linked to constitute a single situation."[79] Simply because alleged crimes occur within the same geographical and temporal scope does not necessarily mean that

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Republic", 7 January 2005, https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic

[73] ICC Office of the Prosecutor, Press Release: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, 24 September 2014, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-opening-second-investigation

[74] *Ibid.*

[75] Governments of the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, Referral to the ICC of the Situation in Bolivarian Republic of Venezuela, 26 September 2018, https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf

[76] President of the Bolivarian Republic of Venezuela, Letter to ICC Prosecutor Fatou Bensouda, 12 February 2020, https://www.icc-cpi.int/itemsDocuments/200212-venezuela-referral.pdf

[77] *Ibid.*

[78] ICC Office of the Prosecutor, "Press Release: Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by Venezuela regarding the situation in its own territory", 17 February 2020, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-referral-venezuela; ICC, "Preliminary Examination: Venezuela II" https://www.icc-cpi.int/venezuela-ii. Note: The Prosecution ultimately decided the allegations in Venezuela's referral did not merit a full investigation

[79] ICC Office of the Prosecutor, "Press Release: Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by Venezuela regarding the situation in its own territory", 17 February 2020, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-referral-venezuela.

they constitute the same situation.

51. The Prosecution's decision-making upon receiving a second referral in relation to the DRC further indicates how seriously this question of whether two referrals can be considered the same situation should be taken, even in the case of States Parties. The DRC first referred the situation on its territory to the Prosecutor on 3 March 2004.[80] It referred the situation since 1 July 2002 with no end date indicated.[81] On 15 June 2023, the DRC submitted a second referral to the Prosecutor of crimes committed from 1 January 2022 until the date of the referral.[82] Again, rather than immediately fold these new allegations into its pre-existing investigation, the Prosecution launched a separate Preliminary Examination with a focus on determining whether this new referral constituted the same situation.[83] Over a year later, on 14 October 2024, the Prosecution determined that the new referral "would fall within the parameters of, and [is] in any event sufficiently linked to, the situation referred on 3 March 2004."[84]

52. The care shown by Chambers and the Prosecution itself in analysing these Article 13(a) referrals related to States Parties indicates that referrals that are, on their face, open-ended are not perpetual and cannot be used indefinitely to prosecute any Article 5 crimes committed on the State's territory. If this is the case for States Parties that can (and, in the case of Venezuela, have begun to)[85] terminate their acceptance of the Court's jurisdiction by withdrawing from the Statute, the same considerations must apply *a fortiori* for non-States Parties in respect of which ICC jurisdiction is based on an Article 13(b) UNSC referral.[86] These States cannot leave the Court and exercise their sovereign rights to end jurisdiction. An interpretation of such referrals that is expansive and not narrowly drawn would lock these States into perpetual ICC jurisdiction from which they could never withdraw and leave them in a position of inequality vis-à-vis States Parties to the Court – dealing a blow to sovereign equality and creating a situation where some States, acting through the UNSC, could apparently legally establish control over others.

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[80] *Katanga*, Annex 1 to "Prosecution's Submission of Annexes and Other Materials", ICC-01/04-01/07-32-Anx1, 22 June 2007.
[81] *Ibid.*
[82] Annex I to the Decision assigning the Situation in the Democratic Republic of the Congo II to Pre-Trial Chamber I, ICC-01/23-1-AnxI, 14 June 2023.
[83] Public redacted version of "Notification concerning the Prosecution's determination with respect to the referral of the Democratic Republic of the Congo dated 23 May 2023", ICC-01/23-4-Red, 13 October 2024.
[84] *Ibid.*, para. 7.
[85] Reuters, "Venezuelan Lawmakers Pave Way for Withdrawal from International Criminal Court", 12 December 2025, https://www.reuters.com/world/americas/venezuelan-lawmakers-pave-way-withdrawal-international-criminal-court-2025-12-11/.
[86] *See Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx, 18 January 2025, para. 13.

53. Under the UN Charter, States consent only to the UNSC's specific power to issue binding decisions to confront specific and identified threats to or breaches of international peace and security. Perpetual ICC jurisdiction without careful and narrow interpretation of the relevant referral would not fall within this band of consent. Perpetual ICC jurisdiction would not be targeted to deal with a specific threat or breach and would likely often relate to a situation that did not even exist at the time the UNSC Resolution was passed. It could not be said that the State consented to acceptance of such jurisdiction by virtue of its ratification of the UN Charter and its Chapter VII, and, therefore, the State would be placed in a position where it is under the control of other States and no longer treated as equal to other States.

*(2) Resolution 1970 must be read narrowly on the basis of the principle of legality (*nullum crimen sine lege*)*

54. As underlined by the Appeals Chamber in its Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", the principle of legality, or *nullum crimen sine lege*, is a "fundamental" human rights norm that the Court must apply as part of its duty under Article 21(3) of the Statute to apply and interpret the law "consistent[ly] with internationally recognized human rights."[87]

55. *Nullum crimen sine lege* "requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law."[88] To ensure that the alleged perpetrator can reasonably expect prosecution, such prosecution must be "foreseeable" and the law under which the individual is to be prosecuted must be "accessible".[89] For prosecution to be foreseeable, the allegedly criminal acts must have been prohibited by a source of international or domestic law that was applicable to the acts at the time they were committed.[90] For the law to be accessible, it must not be secret, must be available to the accused, and must be "sufficiently clear".[91] Given these restrictions, the law applicable to the alleged offender at the time must be based on the national law of the State with usual jurisdiction over the alleged offence, treaty law applicable to that State, or customary

[87] *Abd-al-Rahman,* Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20 OA8, 1 November 2021, para. 83.
[88] *Ibid.*, para. 85.
[89] *Ibid.*
[90] *Ibid.*, para. 86. *See* K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, CUP (2009), p. 339.
[91] *Abd-al-Rahman,* Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20 OA8, 1 November 2021, para. 85; Gallant, *supra* note 90, p. 364.

international law that was applicable at the time.

56. The principle of legality is contained in all general international and regional human rights treaties[92] as well as the constitutions of 162 UN member states,[93] with all other UN member states accepting the principle either through statute or treaty membership.[94] Not only is this principle universally accepted, it is also vital to ensure the legitimacy and integrity of the international criminal justice system as a whole.[95] A criminal law that is unknown to individuals cannot effectively deter them from committing crimes.[96] Additionally, if people do not know what conduct they may be punished for, they may constantly fear that even legal conduct will be made punishable retroactively.[97]

57. In the Rome Statute, this principle is embodied in article 22, which provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." However, as identified by the Appeals Chamber in *Abd-Al-Rahman*, this provision is only sufficient to protect this vital human right if the State of nationality of the alleged perpetrator or the State on whose territory the crime was committed was a State Party to the Rome Statute at the time the alleged offences occurred.[98] Otherwise, the fact that the crimes and modes of liability are enumerated in the Rome Statute does nothing to put the alleged offender on notice that they might be subject to its provisions. This is further evidenced by the fact that articles 10 and 22(3) of the Statute allow for the possibility that not all crimes or modes of liability in the Statute will form part of customary international law and, therefore, be punishable under a preexisting law applicable at the time.[99]

58. It is undeniably the case that, in the context of Article 13(b) UNSC referrals to the ICC,

[92] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 11(2) (10 December 1948); International Covenant on Civil and Political Rights (hereinafter ICCPR), art. 15, G.A. Res. 2200A (XXI), 21 GAOR Supp. No. 16, p. 52, UN Doc. A/6316, 993 U.N.T.S. 171 (16 December 1966, entered into force 23 March 1976); African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev.5, art. 7(2) (27 June 1981); Arab Charter on Human Rights, art. 15, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) (22 May 2004; entered into force 15 March 2008); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 7; American Convention on Human Rights, Treaty Series, No. 36, Organization of American States, 1969, art. 9.

[93] *E.g.*, Constitution of Benin (1990), art. 17; France, Declaration of the Rights of Man and the Citizen, art. 5; Constitution of Mexico (1975, rev. 2015), art. 14; Constitution of Romania (1991, rev. 2003), art. 15(2); Constitution of Spain (rev. 2024), arts. 9(3), 25. *See* Gallant, *supra* note 90, pp. 241-251.

[94] *See* Gallant, *supra* note 90, pp. 241-251.

[95] *Ibid.*, pp. 11-30; J. Nicholson, "Strengthening the Effectiveness of International Criminal Law through the Principle of Legality", 17 International Criminal Law Review (2017) 656, p. 658.

[96] Gallant, *supra* note 90, pp. 26-28.

[97] *Ibid.*, pp. 27-28.

[98] *Abd-al-Rahman,* Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20 OA8, 1 November 2021, para. 86.

[99] *See* Galand, *supra* note 59, p. 104.

arguments of lack of notice for the alleged offender apply to alleged offences committed *before* the relevant referral was made. It may be suggested that the question is different in the context of alleged offences that post-date an Article 13(b) UNSC referral. UNSC referrals are public documents that can put all nationals of the affected State on notice that the Rome Statute now applies to any Article 5 crimes committed within the context of the referred situation. However, this necessarily requires that the parameters of the situation referred are sufficiently clear to allow a reasonable person to know that their actions fall within the referred situation and are, therefore, subject to the entire applicability of the Rome Statute.

59. This is precisely the reason any UNSC referral resolution must be interpreted narrowly. Potential suspects such as Mr El Hishri must be able to reasonably foresee that the referral applies specifically to their actions. Otherwise, they will potentially face prosecution, conviction and punishment for conduct that was not reasonably foreseeable as criminal under the law applicable to them. In this way, their fundamental human rights will be violated.[100]

60. Only by interpreting Resolution 1970 in a narrow and non-expansive way can the PTC determine whether it was reasonably foreseeable that Mr El Hishri's conduct could come within the ICC's jurisdiction. Any doubt about whether the Resolution applies to Mr El Hishri's conduct must be resolved to his benefit.

(3) The crimes alleged against Mr El Hishri did not "occur[] in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court" through Resolution 1970

61. Consistent ICC jurisprudence establishes that for alleged crimes to be within the ICC's jurisdiction on the basis of a UNSC referral they must "have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through" the referral resolution.[101]

62. Determining exactly which "situation of crisis" triggered the referral requires a thorough and, as discussed in detail above, narrow interpretation of the UNSC Resolution. The

[100] The principle of legality is discussed further at Chapter C below as a standalone challenge to the Court's jurisdiction.

[101] *Njeem*, Corrected version of the 'Warrant of Arrest', ICC-01/11-152-Anx, 18 January 2025, para. 4; *Al Lahsa*, Warrant of Arrest, ICC-01/11-141-Anx3, 6 April 2023, para. 6; *Al Shaqaqi*, Warrant of Arrest, ICC-01/11-141-Anx5, 18 July 2023, para. 6; *Al Zinkal*, Warrant of Arrest, ICC-01/11-141-Anx6, 18 July 2023, para. 6; *Doumah*, Warrant of Arrest, ICC-01/11-141-Anx2, 6 April 2023, para. 6; *Salheen*, Warrant of Arrest, ICC-01/11-141-Anx4, 6 April 2023, para. 6; *Al Kani*, Warrant of Arrest, ICC-01/11-141-Anx1, 6 April 2023, para. 6; *Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/10-1, 28 September 2010, para. 6.

interpretation of UNSC Resolutions is not identical to the interpretation of international treaties due to differences in the manner in which the two types of documents are drafted.[102] According to the International Court of Justice in the *Kosovo* Advisory Opinion, "the Vienna Convention on the Law of Treaties may provide guidance"[103] on the interpretation of UNSC Resolutions and the interpretation of such Resolutions "may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."[104]

63. Resolution 1970 focuses exclusively on condemning the "gross and systematic violation of human rights, including the repression of peaceful demonstrators, […] the deaths of civilians, and […] the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government [under Muammar Gaddafi]."[105] This focus is further solidified by the Resolution's reference to "the Libyan authorities' responsibility to protect its population"[106] and by its exhortation to the "Libyan authorities to [a]ct with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors".[107]

64. The paragraph of the Resolution containing the referral to the Court is brief and simply states that it "Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."[108] This brief paragraph must be read in the context of the entire Resolution, which clearly indicates that the Referral was triggered by concerns about potential war crimes and crimes against humanity committed by the Gaddafi

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[102] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, p. 403 at p. 442, para. 94. *See also* M. Wood, "The Interpretation of Security Council Resolutions, Revisited", 20 Max Planck YB UN L (2016) 3.
[103] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, p. 403 at p. 442, para. 94.
[104] *Ibid.*
[105] United Nations, Security Council, Resolution 1970, 26 February 2011, S/RES/1970 (2011), Preamble. *See Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx, 18 January 2025, paras 5-6; *Al Lahsa*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx3, 6 April 2023, paras 5-6; *Al Shaqaqi*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx5, 18 July 2023, paras 5-6; *Al Zinkal*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx6, 18 July 2023, paras 5-6; *Doumah*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx2, 6 April 2023, paras 5-6; *Salheen*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx4, 6 April 2023, paras 5-6; *Al Kani*, Warrant of Arrest, Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-141-Anx1, 6 April 2023, paras 5- 6.
[106] United Nations, Security Council, Resolution 1970, 26 February 2011, S/RES/1970 (2011), Preamble.
[107] *Ibid.*, para. 2.
[108] *Ibid.*, para. 4.

regime. Statements made by representatives of member States of the UNSC in the session adopting the Resolution reinforce this interpretation of the ICC referral paragraph. The representative of the United States celebrated the referral to the ICC because it would mean that "Libya's leaders will be held accountable for violating these rights and for failing to meet their most basic responsibilities to their people."[109] Similarly, the Colombian representative emphasised that "those responsible for attacks against the population must answer for their crimes".[110] The German representative stated that "[t]he international community will not tolerate the gross and systematic violation of human rights by the Libyan regime."[111] The representative of Bosnia and Herzegovina pointed to the "unacceptable level of violence against Libyan civilians" and the "violations of human rights and international humanitarian law" as the reasons for the ICC referral.[112]

65. Contemporaneous and subsequent statements by Libyan Government representatives as the "State[] affected by th[is] given resolution[]" are particularly illustrative of the most accurate interpretation of the Resolution.[113] Although Libya was not a member of the UNSC at the time, its accredited representative who had distanced himself from the Gaddafi regime was allowed to speak in the UNSC session when the Resolution was adopted.[114] He warned "officers in the armed forces in Libya" to "abandon the regime of Colonel Al-Qadhafi" to avoid "be[ing] tried by the International Criminal Court", demonstrating his clear understanding that they were the most likely defendants in a future case at the ICC.[115]

66. Subsequently, Abdulhamid Aldabaiba expressed his interpretation of the Resolution in his 2025 letter purportedly authorising acceptance of the Court's jurisdiction under article 12(3) of the Rome Statute.[116] In this letter, he states that the purported acceptance would "include[] the extension of the scope of investigations into the following crimes: crimes against humanity, the increasing and ongoing war crimes, **crimes related to prisons and places of detention**, enforced disappearances, killings, torture, abductions, human trafficking, and persecution."[117] The

[109] S/PV.6491, pp. 3-4, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20PV%206491.pdf
[110] *Ibid.*, p. 5.
[111] *Ibid.*, p. 6.
[112] *Ibid.*
[113] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403 at p. 442, para. 94
[114] S/PV.6491, pp. 7-8.
[115] *Ibid.*, p. 7.
[116] Annex I to the Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-Conf-AnxI.
[117] *Ibid.* (emphasis added).

statement that investigations into "crimes related to prisons and places of detention" would constitute an *extension* of any pre-existing jurisdiction indicates the Libyan Prime Minister's understanding that the initial Resolution did not establish this jurisdiction. If the Prime Minister of Libya interpreted the Resolution as not including crimes committed in prisons and places of detention such as Mitiga Prison, it is impossible to conclude that Mr El Hishri could reasonably have foreseen the ICC's jurisdiction over his alleged actions in Mitiga Prison on the basis of that Resolution.

67. The Prosecution argues that the subsequent practice of the UNSC and related UN organs has endorsed the Court's exercise of jurisdiction over similar cases in Libya, and that such an endorsement should impact the interpretation of the Referral resolution. The evidence put forth by the Prosecution to support the proposition that the UNSC has endorsed the ICC's continuing jurisdiction consists of approving statements from a small selection of UNSC members and the general lack of negative response to the Prosecutor's periodic reporting to the UNSC.[118] It also argues that the UNSC's acceptance of reports from the UN Secretary General on alleged human rights violations and crimes committed in Libya during the charged period and the practice of other UN organs in investigating such alleged human rights violations and crimes constitutes acceptance of the expansion of ICC jurisdiction to the instant allegations.[119]

68. The subsequent practice of the UNSC referenced by the Prosecution is not in fact any such thing, but rather statements of a limited number of its member States – some of whom were not even members of the UNSC at the time Resolution 1970 was adopted.[120] Subsequent statements by a few member States cannot alter the clear interpretation of the majority of member States who spoke at the time the Resolution was passed.[121] Mere comments suggesting the general desirability of the expansion of jurisdiction to crimes committed outside of the initial situation of crisis cannot equate to a reality by which such jurisdiction is in fact or in law expanded. Alterations to UNSC Resolutions may only be made through further UNSC Resolutions.[122] That

[118] *El Hishri*, Prosecution's Application under Article 58 for a Warrant of Arrest against Khaled Mohamed Ali El Hishri, ICC-01/11-172-US-Exp, 3 April 2025, paras 40-41.
[119] *Ibid.*, paras 40, 42-43.
[120] LBY-OTP-00018876, p. 5 (acknowledging investigation of the 2014-2020 operations under UNSCR 1970).
[121] *See* Iraq Inquiry, Transcript Wilmshurst (26 January 2010) 17 (line 15) - 18 (line 15), at http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmshurst-S3.pdf; Wood, *supra* note 102, pp 33-34.
[122] UN Charter, Chapter VII; S/96/Rev.7, Chapter VI; S/2017/507, Part IV; *Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx, 18 January 2025, para. 15.

has not happened in this case.[123]

69. Additionally, the practice of other organs of the UN and the UN Secretary General in investigating and reporting on alleged crimes committed in Libya has no relevance to the question of the Court's jurisdiction. UN organs frequently investigate allegations of human rights violations and international crimes for which there is no international jurisdiction.[124] Some of these investigative reports in relation to Libya reference the Court's jurisdiction under Resolution 1970 and/or the fact that the Prosecutor is investigating allegations that go beyond the initial situation of crisis of Gaddafi's oppression of his people.[125] Simple references to the contextual fact that the ICC Prosecutor is investigating in no way constitutes approval of that expansion of jurisdiction.

70. For the reasons set out in detail above any referral must be interpreted narrowly to ensure the protection of the sovereign equality of States and of the human right to only be prosecuted for acts that were reasonably foreseeably criminal at the time of their commission. An open-ended and broad interpretation that allows for jurisdiction over any and all alleged Article 5 crimes committed on Libyan territory after 15 February 2011 would go beyond Libya's limited

[123] E.g., S/RES/2819 (2026) (containing no reference to ICC); S/RES/2259 (2015) ("Recalling its decision in resolution 1970 (2011) to refer the situation in Libya to the Prosecutor of the International Criminal Court and affirming the importance of the Government of National Accord's full cooperation with the International Criminal Court and the Prosecutor"); S/RES/2174 (2014) ("Recalling its decision in resolution 1970 (2011) to refer the situation in Libya to the Prosecutor of the International Criminal Court, and reaffirming the importance of the Government of Libya's cooperation with the International Criminal Court and the Prosecutor"); S/RES/2016 (2011) ("Recalling its decision to refer the situation in Libya to the Prosecutor of the International Criminal Court, and the importance of cooperation for ensuring that those responsible for violations of human rights and international humanitarian law or complicit in attacks targeting the civilian population are held accountable"); S/RES/1973 (2011) ("Recalling its decision to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court, and stressing that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account"). *See Njeem*, Corrected version of the 'Warrant of Arrest', Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx, 18 January 2025, para. 15.

[124] *See, e.g.* United Nations Human Rights Council, "Human Rights Council-mandated Investigative Bodies", https://www.ohchr.org/en/hr-bodies/hrc/list-hrc-mandat (listing all UN Human Rights Council-mandated investigative bodies, including investigations into Iran, Ethiopia, Yemen, South Sudan, Iraq, Eritrea, Syria, and North Korea).

[125] LBY-OTP-0009-0015, para. 78 ("However, pursuant to the Rome Statute, the Security Council referred the situation of Libya to the Prosecutor of the ICC in Resolution 1970. The ICC can exercise jurisdiction over war crimes, crimes against humanity and genocide as defined in the Rome Statute. There have been no allegations of genocide in the context of Libya thus far. However, there have been allegations of facts which may constitute war crimes and/or crimes against humanity under the Statute."); A/HRC/31/47, 15 February 2016, para 69 ("In its resolution 1970 (2011), the Security Council referred the situation of Libya to the Prosecutor of the International Criminal Court. The Prosecutor of the Court affirmed her belief that the crimes under international law committed in 2014 and 2015 fell within the purview of the referral."); A/HRC/48/83, Annex I, (29 November 2021) para. 1 ("In this regard, the Mission noted that the Office of the Prosecutor of the International Criminal Court ("ICC") has investigated the situation in Libya since 15 February 2011 further to a referral by the United Nations Security Council and that its investigations extend to events falling within the Mission's temporal mandate.").

consent to the UNSC taking specific actions to counter specific threats to international peace and security and would violate Mr El Hishri's ability to reasonably foresee that his acts would fall within the ICC's jurisdiction.

71. A narrow interpretation of the Resolution does not restrict the Prosecution to investigating only one side of the conflict between the Gaddafi regime and Libyans who rose up against him in 2011.[126] The Prosecution can, and must, investigate the entire situation.[127] However, investigations and any resulting prosecutions can only arise from that situation of crisis between the Gaddafi regime and its opponents from 2011.

72. Mr El Hishri is charged with alleged offences committed "between 1 May 2014 and 30 June 2020".[128] In the three years between the situation of crisis that triggered the Court's jurisdiction and the alleged offences set out in the Document Containing the Charges ("DCC"), the situation in Libya has changed drastically. Muammar Gaddafi has been killed.[129] His regime has been replaced with three different successive governments.[130] A full-scale civil war has broken out.[131] A rift has arisen between east and west, with two different governments claiming control over each region.[132] The Libyan political and military landscape has fundamentally shifted and the nation is simply not what it was in 2011 when the Gaddafi regime's oppression of the Libyan people triggered the jurisdiction of the Court.

73. Given these radical shifts, it is not in the slightest bit surprising that expert reports and Prosecution witnesses alike are so inconsistent and unclear about the potential connections between groups that existed and were active during the 2011 revolution against the Gaddafi regime and the group that Mr El Hishri is allegedly tied to between 2014 and 2020. The Prosecution alleges that Mr El Hishri committed crimes as a member of a group known as SDF/RADA.[133] It further alleges that this group is the "present incarnation" of a counter-Gaddafi revolutionary group known as the Souk Al Jumaa Revolutionaries Battalion (SAJR Battalion).[134]

74. In their expert report for PWP Conflict Studies, Jalel Harchaoui, and Mohamed-Essaid Lazib

[126] Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, 5 March 2020, para. 60.
[127] *Ibid.*
[128] DCC, para. 1.
[129] LBY-OTP-0070-3941; LBY-OTP-0053-1369; LBY-OTP-0070-3925.
[130] LBY-OTP-0070-3941 at 3950.
[131] LBY-OTP-0053-1369; LBY-OTP-0070-3925.
[132] LBY-OTP-0018826-0006.
[133] *El Hishri*, Pre-Confirmation Brief, ICC-01/11-01/25-94-Conf, 26 March 2026, para. 2.
[134] *Ibid.*

describe SDF/RADA as a "special offshoot of Nawasi", which it describes as the 2012 version, "after a few minor changes" of the "Suq al-Jumaa Martyrs."[135] Although this description ties SDF/RADA to the anti-Gaddafi revolutionary group that the Prosecution calls the SAJR Battalion, it is far from saying that SDF/RADA is the "present incarnation" of that group. In fact, it explicitly states that it is not this present incarnation as it directly states that Nawasi was the same group, but that SDF/RADA was not – even if it may have arisen from that group. Additionally, Harchaoui and Lazib emphasize that SDF/RADA "focused on providing local security, confiscating alcohol, breaking drug-trafficking networks, and running an extrajudicial prison" and "kept away" from fighting in the conflict between the Government of National Accord ("GNA") and the so-called Libyan National Army ("LNA") under General Khalila Haftar.[136] Even if SDF/RADA was formed by members of the SAJR Battalion, it is clear that it was formed for an entirely different purpose and was not involved in any activities connected to the situation of crisis of the Gaddafi regime's oppression that triggered the jurisdiction of the Court.

75. In contrast, in their expert report for the United States Institute of Peace, Peter Cole and Fiona Mangan do not tie SDF/RADA to any anti-Gaddafi revolutionary group at all.[137] They describe the group as having been created by Abdulrauf Kara in January 2013, "aimed at countering narcotics and immigration".[138] They also describe the group as a "type of self-appointed religious and moral police."[139] Neither of these descriptions include any tie to any group that existed at the time of the situation of crisis that triggered the jurisdiction of the Court. Instead, they indicate that SDF/RADA was created *after* the overthrow of Gaddafi to serve purposes that were utterly unrelated to the revolution against Gaddafi.

76. In their expert report for Security Assessment in North Africa ("SANA") and the Small Arms Survey, Wolfram Lacher and Alaa al-Idrissi indicate that SDF/RADA was a separate institution from the Nawasi Battalion that other experts identify as the successor to the SAJR Battalion. They frequently refer to them as separate entities with phrases such as "with the Suq al-Jum'a-based Nawasi Battalion, as well as with Kara's Special Deterrence Force (SDF)"[140] and "the Suq al-Jum'a-based SDF and the Nawasi Battalion".[141] They describe the origins of the SDF/RADA

[135] LBY-OTP-0070-3925 at 3937.
[136] *Ibid.*
[137] LBY-OTP-0070-3941.
[138] *Ibid.* at 3953.
[139] *Ibid.* at 3952.
[140] LBY-OTP-0070-4009 at 4015.
[141] *Ibid.*

as being a result of the dismantling of the National Transitional Council's Supreme Security Committee ("SSC") in 2013 and 2014 and the attempt to find "new institutional cover" for the units of the SSC.[142] These experts acknowledge that the SDF/RADA and the Nawasi Battalion had "strong social ties" related to the 2011 conflict and "pre-existing neighbourhood or family ties."[143] Such ties do not, however, mean that SDF/RADA is the "present incarnation" of the Nawasi Battalion or the SAJR Battalion. SDF/RADA was created after the revolution for reasons entirely disconnected from the revolution.

77. Prosecution witnesses similarly present a mixed picture of the origins of SDF/RADA and any potential links that it had to the SAJR Battalion or the conflict between the Gaddafi regime and the Libyan people that led to the jurisdiction of the Court. Although [REDACTED] directly tie SDF/RADA to a group they call the "Martyrs of Souq Al Jomaa"[144], [REDACTED] states that this group was created "after the revolution."[145] It is, therefore, unclear if this similarly-named group is the SAJR to which the Prosecution refers or even if it existed during the revolution. It is additionally unclear if SDF/RADA was connected to this group as [REDACTED] explicitly states that it was entirely separate from that group.[146]

78. [REDACTED] state that SDF/RADA was generally connected with revolutionary groups.[147] However, [REDACTED] involvement of major personalities in SDF/RADA in revolutionary groups, which does not necessarily entail continuity between these groups and SDF/RADA.[148] Additionally, [REDACTED] state that SDF/RADA was established after the revolution and entirely unrelated to it.[149] [REDACTED].[150]

79. [REDACTED], Prosecution witnesses maintain that SDF/RADA was not involved in actions connected to any supposed continuation of the revolution after Gaddafi's fall. The general consensus of Prosecution witnesses who discuss the specifics of SDF/RADA's mandate is that it was limited to the enforcement of criminal law, with a focus on drug crimes and combatting

[142] *Ibid.* at 4013. This description of SDF/RADA's founding is also found in LBY-OTP-00018826-0001 at 0049.
[143] *Ibid.* at 4022.
[144] [REDACTED]
[145] [REDACTED]
[146] [REDACTED]
[147] P-0595: LBY-OTP-0074-0889-R01 at 0897, para. 26; P-1073: LBY-OTP-00020267-0001-R01 at 0005, para. 16; at 0006, para. 23.
[148] P-0595: LBY-OTP-0074-0889-R01 at 0897, para. 26; P-1073: LBY-OTP-00020267-0001-R01 at 0006, para. 23.
[149] P-1044: LBY-OTP-00018699-0001-R01 at 0008, para. 33; P-1059: LBY-OTP-03218972-0001 at 0006.
[150] P-1044: LBY-OTP-00018699-0001-R01, at 0008-0009, paras. 33-36.

ISIS.[151] [REDACTED] states that former Gaddafi regime supporters were held at Mitiga Prison.[152] [REDACTED] did not have first-hand knowledge of the matter.[153] Additionally, [REDACTED] explicitly states that SDF/RADA was not involved in the fighting in the conflicts that followed Gaddafi's overthrow.[154]

80. The scattered and contradictory evidence of both expert reports and Prosecution witnesses cannot support the contention that SDF/RADA was the "present incarnation of the SAJR Battalion" or even that it was directly connected to any groups that were active during the revolution. If the group that is alleged to have committed the crimes has no provable connection to the situation of crisis that triggered the jurisdiction of the Court, it is submitted that those crimes can only fall within the jurisdiction of the Court if other factors tie them to the situation of crisis.

81. The Prosecution argues that "there are compelling factual links between the events precipitating the 2011 referral to the Court, and the events continuing until the present day".[155] Even if this is the case, that does not necessarily imply that the specific events related to the charges against Mr El Hishri are linked to the events that triggered the jurisdiction of the Court. If, as the Prosecution argues, the hostilities that occurred during the charged period "exhibited continuities" with those between the Gaddafi regime and those who sought to unseat him, that does not mean that *all* actions taken at the same time within Libya were sufficiently linked to that situation of crisis related to the Gaddafi regime's oppression of the Libyan people. As argued above, there is insufficient and contradictory evidence as to whether the group that Mr El Hishri was allegedly connected to had any involvement at all in the referenced hostilities.

82. Additionally, the Common Plan alleged by the Prosecution is wholly disconnected from these hostilities and from anything related to the previous conflict between the Gaddafi regime and the Libyan people. The Prosecution alleges that the goal of the Common Plan was the "pursuit of SDF/RADA interests or views and/or those of its members."[156] According to the Pre-Confirmation Brief, these interests included "to punish or neutralise perceived opponents, to

[151] P-0595: LBY-OTP-0074-0889-R01 at 0898, para. 28; P-1044: LBY-OTP-00018699-0001 at 0008, para. 33; P-1059: LBY-OTP-03218972-0001 at 0006-0008.
[152] P-0720: LBY-OTP-0083-0052-R01 at 0057, para. 27.
[153] *Ibid.*
[154] P-1073: LBY-OTP-00020267-0001-R01 at 0021, para. 110.
[155] *El Hishri*, Public Redacted Version of "Prosecution's application under Article 58 for a warrant of arrest against Khaled Mohamed Ali El Hishri", ICC-01/25-4-Red, 3 April 2025, para. 15.
[156] *El Hishri*, Pre-Confirmation Brief, ICC-01/11-01/25-94-Conf, 26 March 2026, para 210.

coerce or intimidate persons in support of SDF/RADA interests or views and those of its members, and to exploit persons perceived as useful."[157] More specifically, the Prosecution alleges that the Common Plan aimed to allow SDF/RADA to "'make money and to have power'"[158] and to ensure that everyone "'knows who RADA is and understands the consequences of speaking ill about RADA'".[159] Taking these alleged goals of the Common Plan at face value, there is not only no sufficient link, but no link *at all*, to the situation of crisis of Gaddafi's oppression of his people that triggered the jurisdiction of the Court. It goes without saying that goals related to establishing personal or institutional power and wealth are unrelated to the conflict between Gaddafi loyalists and counter-Gaddafi revolutionaries. The views allegedly pursued by this Common Plan were a "Salafist/Madkhali-based" ideology.[160] This particular interpretation of Islam and Islamic law has no connection to the conflict between the Gaddafi regime and counter-Gaddafi revolutionaries.

83. The crimes alleged against Mr El Hishri are not sufficiently linked to the "situation of crisis" that triggered the jurisdiction of the Court through Resolution 1970. The Resolution relates solely to the oppression of the Libyan people by the Gaddafi regime and the armed violence between the Gaddafi regime and Libyan revolutionaries that this oppression sparked. The crimes alleged against Mr El Hishri relate to a group that was established after the fall of the Gaddafi regime and whose goals had no connection to the struggle against the Gaddafi regime. The specific goals pursued by the group and by the alleged Common Plan were domestic criminal enforcement, particularly of drug and terrorism crimes, and personal enrichment and power. These goals and the crimes allegedly committed in pursuit of them were unrelated to the Gaddafi regime and cannot be said to have any connection to the initial "situation of crisis".

84. It is not enough that criminal conduct that takes place on the territory of the same country as a UNSC referral, without more, will automatically fall within the terms or intention of the referral and, therefore, the jurisdiction of the Court. UNSC referrals are narrowly-tailored to respond to specific threats to or breaches of international peace and security. Criminal defendants have the right to be able to reasonably foresee that their conduct may render them liable for criminal prosecution, which, in the context of the ICC, requires reasonable foreseeability that the ICC will have jurisdiction, and to a narrow interpretation of the referrals of jurisdiction to ensure such

[157] *Ibid.*, para. 215.
[158] *Ibid.* (quoting [REDACTED]).
[159] *Ibid.* (quoting [REDACTED]).
[160] *Ibid.*, para. 141.

foreseeability. Even without such a narrow interpretation, it is impossible to conclude that the crimes alleged against Mr El Hishri fall within the situation of crisis referred by the UNSC. With such a narrow interpretation, there is no argument that these alleged crimes fall within this referred situation.

C. The lack of precision in Resolution 1970 creates the conditions for a violation of nullum crimen sine lege

85. Regardless of the interpretation of Resolution 1970, the very imprecision of that Resolution creates the conditions for a violation of *nullum crimen sine lege*. The uncertainty of the ambit of the Resolution makes its application "unforeseeable" and, therefore, a violation of the *nullum crimen sine lege* principle. Mr El Hishri cannot reasonably be expected to foresee his prosecution under this allocation of jurisdiction.

86. This is particularly important in the instant case as there is no reasonable basis for the conclusion that at least some of the offences of which he is accused in the Document Containing the Charges were criminalised at the time under domestic Libyan law or under customary international law. He is charged, *inter alia,* with at least three crimes with insufficiently precise definitions for there to be certainty that they were criminalised in laws directly applicable to him. These are: the crime against humanity of other inhumane acts (count 6 in the DCC) and the crime against humanity and war crime of other forms of sexual violence (counts 9 and 10 respectively).

87. Without reference to the Rome Statute and the jurisprudence of the ICC, there is no foreseeability of what specific acts would fall under these so-called "residual" categories.[161] Other inhumane acts must be "of a character similar to" other crimes against humanity listed in the Statute.[162] The exact meaning of this without expert knowledge of international criminal law is entirely unclear. Similarly, other forms of sexual violence must be "of a gravity comparable to" other listed sexual crimes against humanity and war crimes.[163] The vagueness of these crimes under the Rome Statute makes it difficult to foresee whether they would be interpreted in a way that would encompass acts criminalised in a treaty,[164] under customary international law, or

[161] Nicholson, *supra* note 95, p. 671.
[162] Elements of Crimes, p. 8.
[163] *Ibid.*, p. 7.
[164] Libya is a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which includes by reference all crimes against humanity in the Charter of the International Military Tribunal (IMT) at Nuremberg that included "other inhumane acts". However, it is unclear whether the Rome Statute definition tracks that of the IMT Charter. *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, art. I(b), https://ihl-

domestic law that was applicable in Libya at the relevant time and that could allow Mr El Hishri to foresee his prosecution for such acts. Scholars have also specifically criticised the definitions of these crimes as violating the principle of legality by criminalising conduct on the basis of analogy with other crimes – a direct violation of Article 22(2) of the Rome Statute.[165]

88. On the general question of the foreseeability of prosecution for war crimes, the Appeals Chamber in the *Abd-al-Rahman* case emphasised the relevance of the accused's membership in a State's armed forces that had undertaken to educate its military members on international humanitarian law.[166] The Chamber in this case concluded that because Mr Abd-Al-Rahman was a non-commissioned officer in the Sudanese military he was "in a position to understand and comply with his obligations in armed conflict under international law."[167]

89. Mr El Hishri, by contrast, has no such formal military service or its associated training in international humanitarian law and, therefore, cannot be expected to foresee his prosecution for crimes defined in international humanitarian law.

90. Additionally, at least two of the modes of liability with which he is charged were not established in the domestic Libyan law applicable to Mr El Hishri at the time. It is important to highlight that the principle of legality applies both to the substantive crimes and the modes of liability used to hold accused persons to account for those substantive crimes because it requires that the "act or omission" of the accused be established as punishable at the time of commission.[168] Even if the crime the act is eventually tied to is clearly punishable, the principle of legality is violated if the act itself was not. This is particularly relevant for modes of liability aimed at tying persons other than the physical perpetrators to crimes such as indirect perpetration, co-perpetration, and indirect co-perpetration. The DCC alleges that Mr El Hishri is criminally responsible under all Rome Statute modes of liability, including indirect perpetration, co-

databases.icrc.org/assets/treaties/435-IHL-65-EN.pdf.
[165] G.P. Fletcher and J.D. Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case", 3 Journal of International Criminal Justice (2005) 539, pp. 551-553. *See also Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12, 18 December 2012, para. 18. Rome Statute, article 22(2) says "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."
[166] *Abd-al-Rahman*, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20 OA8, 1 November 2021, paras 88-89.
[167] *Ibid.*, para. 89.
[168] ICCPR, *supra* note 92, art. 15. *See* Milutinović et al., IT-99-37-ART72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 10; K. Ambos, "Article 25: Individual criminal responsibility", in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., C.H. Beck (2021), para. 2697.

perpetration, and indirect co-perpetration. Indirect co-perpetration and co-perpetration are the least likely to be applicable to Mr El Hishri under domestic Libyan criminal law and customary international law.

91. Indirect co-perpetration is the most controversial of these modes.[169] This mode of liability holds alleged offenders liable for the actions of persons entirely disconnected from them if those persons were used by the accused person's alleged co-perpetrators to commit the crime.[170] This mode of liability is not part of any law that was applicable to Mr El Hishri at the time. It was not part of customary international law,[171] it is not contained in any treaty in force in Libya at the relevant time,[172] and it is not part of Libyan domestic law.[173]

92. Under this mode of liability, Mr El Hishri would ostensibly be held liable for acts that he personally did not commit, that he did not direct anyone to commit, and that he did not agree with anyone to commit. According to the Prosecution's Pre-Confirmation Brief, in his case, this would include alleged acts of violence, including sexual violence, committed by Mitiga detainees against other detainees even when Mr El Hishri had no knowledge that they were in the same cell[174] and alleged acts of sexual violence and torture committed by prisoners at the behest of other prison officials.[175] It was not foreseeable to Mr El Hishri that these acts could be attributed to him on the basis of any law applicable to him at the time.

93. Mr El Hishri is also charged under co-perpetration liability. This mode of liability too was

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[169] Y. Tan, *The Rome Statute as Evidence of Customary International Law (Doctoral Thesis)*, Meijers-reeks (2019), pp. 189-191; *Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12, 18 December 2012, paras 52, 55, 57.
[170] *Katanga & Ngudjolo*, Decision on Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para 493. *See* Tan, *supra* note 169, pp. 191-198,
[171] *Ibid.*, chapter 5.
[172] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention against Torture) (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art. 4; International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter CERD), United Nations, Treaty Series, vol. 660, p. 195, 21 December 1965, art, 4; Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention), United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, art. 3.
[173] LBY-OTP-03703754-0020, Libyan Criminal Code, art. 99 ("Any person who commits the following shall be deemed an offender: 1. Anyone who commits the offence by himself or with another. 2. Anyone who participates in the commission of the offence, if it consists of a number of acts, and intentionally commits one of its component acts."), art. 100 ("Any person who commits the following shall be deemed an accessory: 1. Anyone who incites the commission of the act constituting the offence, if such act is performed based on the incitement. 2. Anyone who gives the offender or offenders arms or other instruments of any kind used in the commission of the offence, with knowledge thereof, or assists the offender or offenders in any other manner in acts that prepare, facilitate or complete the commission of the offence. 3. Anyone who agrees with another person to commit an offence, and the offence is committed on the basis of this agreement.")
[174] *El Hishri*, Pre-Confirmation Brief, ICC-01/11-01/25-94-Conf, 26 March 2026, paras 74, 95.
[175] *Ibid.*, para. 68.

likely inapplicable to him at the time under customary international law, in any treaty in force in Libya at the relevant time, or under Libyan domestic law. Libyan law does contain a form of joint perpetration, which is defined in its Criminal Code as "[a]nyone who participates in the commission of the offence, if it consists of a number of acts, and intentionally commits one of its component acts."[176] However, this mode of liability is sufficiently dissimilar to co-perpetration under the Rome Statute, such that Mr El Hishri could not have foreseen that he could be prosecuted under it.

94. Co-perpetration under the Rome Statute holds alleged perpetrators liable as principals if they provide an "essential contribution"[177] to crimes committed on the basis of a "common plan".[178] Although similar to the concept under Libyan law of committing a "component act" of a joint crime, ICC case law has indicated that this liability can extend beyond the planning of criminal activity in and of itself and include common plans where there is "risk that implementing the common plan (which is specifically directed at the achievement of a noncriminal goal) will result in the commission of the crime [and they] accept such an outcome."[179] Additionally, even for plans that are in themselves criminal, co-perpetrators under the Rome Statute can be held liable for acts that go beyond the specific crime planned and include acts that "in the ordinary course of events, the implementation of the common plan would inevitably result in."[180]

95. This form of co-perpetration is also not established under customary international law or under any treaty[181] to which Libya was a party at the relevant time. Appeals Chambers of both the ICTY and the SCSL have made clear their interpretation that the Rome Statute form of co-perpetration does not form part of customary international law.[182] An analysis of domestic law as a potential source of customary international law indicates that a similar form of co-perpetration is common in civil law countries but generally not found in common law countries.[183] Such scattered practice cannot support a finding that this mode of liability

[176] LBY-OTP-03703754-0020, Libyan Criminal Code, art. 99.
[177] *Lubanga*, Decision on Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 346.
[178] *Ibid.*, para. 343.
[179] *Ibid.*, para. 344.
[180] *Katanga*, Decision on Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 550.
[181] Convention against Torture, art. 4; CERD, art. 4; Genocide Convention, art. 3.
[182] Stakić, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 62; Taylor, SCSL-03-01-A, Appeal Judgement, 26 September 2013, para. 435.
[183] E. van Sliedregt, *Individual Criminal Responsibility in International Law*, OUP (2012), p. 95. Even within civil law countries that have ostensibly similar modes of liability in their legislation, there are significant differences in their details and interpretation. For example, Mexican and Spanish courts have incorporated a requirement that the accused person's contribution take place at the execution phase into their interpretations that differentiate the mode from the Rome Statute mode. *See* Eighth Collegiate Court for Criminal Matters in the First Circuit, criterion I.8o.P. J/2 (Mexico); Judgement in case 10483/2015, Criminal Chamber of the Supreme Tribunal (Spain).

constitutes customary international law.

96. In Mr El Hishri's case, he could potentially be held liable under this mode of liability for actions taken by other alleged members of the common plan whose actions did not contribute directly to the goal of the common plan and were utterly unrelated to any actions he may have expected to occur. This includes alleged acts of rape and sexual violence committed by both detainees and guards at Mitiga Prison outside of the view and control of Mr El Hishri,[184] alleged arrests of individuals without lawful basis with no involvement or knowledge of Mr El Hishri,[185] and allegedly inhumane conditions in parts of the prison that Mr El Hishri did not have control over.[186] There is no law applicable to Mr El Hishri at the time that could have allowed him to foresee that he would be held liable for conduct that was so removed from his own actions or anything he could have agreed to.

97. Mr El Hishri, as all criminal defendants, has the right to only be prosecuted for conduct that he could have reasonably foreseen was criminal at the time of its commission. This is a fundamental human right that cannot be ignored for the sake of expediency. For this right not to be violated in this case, it must have been reasonably foreseeable to Mr El Hishri that his alleged conduct was within the ICC's jurisdiction and, therefore, subject to the entirety of the Rome Statute. Otherwise, he will be prosecuted for conduct that he could not have known was criminal at the time of its commission.

D. The Court lacks jurisdiction **ratione loci, ratione temporis,** *and* **ratione personae** *over the crimes alleged against Mr El Hishri*

98. Libya is not a State Party to the Rome Statue. All alleged crimes were committed on the territory of Libya. Mr El Hishri is a national of Libya and no other state.

99. The purported 2025 article 12(3) acceptance of the Court's jurisdiction by Libya is invalid due to its evident violations of Libya's domestic law and basic constitutional provisions. Such an invalid declaration cannot serve as the basis for the Court's jurisdiction.

100. The crimes alleged against Mr El Hishri are not sufficiently linked to the "situation of crisis" that triggered the Court's jurisdiction through the 2011 UNSC Resolution. Therefore, this referral

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Additionally, in both Benin and France, co-perpetrators are only classed as accessories rather than as principles as under the Rome Statute. *See* Code pénal (France), art. 121(7); Code pénal (Benin), art. 22.

[184] *El Hishri*, Pre-Confirmation Brief, ICC-01/11-01/25-94-Conf, 26 March 2026, paras 68-77.

[185] *Ibid.*, paras 47-51.

[186] *Ibid.*, paras 62-64.

cannot serve as the basis of the Court's jurisdiction in this case.

101.With no valid article 12(3) declaration from Libya and no relevant UNSC referral, there is no basis for the Court's jurisdiction over crimes allegedly committed on the territory of a non-State party by a national of a non-State Party.[187]

VI. RELIEF SOUGHT

102. For the aforementioned reasons, the Defence submits that there is no valid basis for the exercise of the Court's jurisdiction over the crimes alleged against Mr El Hishri. Therefore, it requests that the Pre-Trial Chamber find that there is no legal basis for the continuation of the proceedings against Mr El Hishri and order his immediate and unconditional release, with prejudice.

Respectfully submitted,

Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 06 May 2026
at The Hague, The Netherlands

[187] Rome Statute, arts. 12-13.