

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/11-01/25

Date: 5 June 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

CONFIDENTIAL

**Defence response to “Transmission of Additional Communication from the State of
Libya in relation to the Article 12(3) Declaration” (ICC-01/11-01/25-123)**

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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I. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri (“Defence”) responds to the letter dated 21 May 2026 from Libyan Prime Minister Abdulhamid Mohammed Aldabaiba to the Registrar (“May 2026 Letter”) regarding the jurisdiction of the International Criminal Court (“ICC” or “the Court”) in Libya.¹ The May 2026 Letter is intended to be a “clarification” of the Purported Article 12(3) Declaration dated 12 May 2025 (“Purported Article 12(3) Declaration”) claiming to recognise the ICC’s exercise of jurisdiction over crimes committed on Libyan territory from 2011 to the end of 2027.²

2. In this response, the Defence makes two submissions: i) The May 2026 Letter cannot retroactively cure the defects of the Purported Article 12(3) Declaration; and ii) the attempt in the May 2026 Letter to limit the Court’s jurisdiction solely to the “criminal aspect” to the exclusion of the “civil aspect and compensations [sic] in particular” is legally impermissible and fatal to the validity of the Purported Article 12(3) Declaration.

II. PROCEDURAL HISTORY

3. 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.³

4. 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 2020.⁴

5. On 12 May 2025, Libyan Prime Minister Abdulhamid Aldabaiba (“Mr 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 2027.⁵

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

¹ ICC-01/11-01/25-123-Anx

² ICC-01/11-01/25-6-Corr-Red

³ United Nations Security Council, Resolution 1970, para. 4, 26 February 2011, S/RES/1970 (2011) (“Resolution 1970”)

⁴ ICC-01/11-172-US-Exp

⁵ ICC-01/11-01/25-6-Corr-Red

Hishri.⁶

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

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

9. On 30 April 2026, the Defence submitted the Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute ("Jurisdiction Challenge").⁷

10. From 19 to 21 May 2026, the Confirmation of Charges hearing was held.

11. On 21 May 2026, Mr Aldabaiba sent the May 2026 Letter to the ICC Registrar in relation to the Purported Article 12(3) Declaration.⁸

12. On 29 May 2026, the May 2026 Letter was filed.⁹

III. CLASSIFICATION

13. This response is classified as confidential pursuant to Regulation 23bis(2) of the Regulations of the Court because it is responsive to a document filed with the same classification. However, nothing contained in this response is inherently confidential and the Defence has no objection to its reclassification as public should the May 2026 Letter be reclassified as public.

IV. SUBMISSIONS

A. The May 2026 Letter cannot retroactively cure the defects of the Purported Article 12(3) Declaration

14. The Defence takes this opportunity to reiterate the submission made in its Jurisdiction Challenge that the Purported Article 12(3) Declaration is "invalid due to its evident violations of

⁶ ICC-01/11-188-US-Exp, 10 July 2025; ICC-01/11-188-US-Exp-tARB

⁷ ICC-01/11-01/25-108-Conf-Cor

⁸ ICC-01/11-01/25-123-Anx

⁹ ICC-01/11-01/25-123

Libya's domestic law and basic constitutional provisions".¹⁰ Additionally it maintains its submissions that the initial Purported Article 12(3) Declaration "suffers from formal defects that indicate that the process for its creation was hurried and not in line with valid domestic process."¹¹ These defects include the fact that the Purported Article 12(3) Declaration "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".¹² It is self-evident that legal documents that emanate from governments must contain these elements that validate their official nature.

15. Such defects cannot now be corrected by the May 2026 Letter notwithstanding the fact it is dated, signed, and stamped with the official seal of the Libyan State. The May 2026 Letter does not claim to be a new Article 12(3) Declaration accepting the Court's jurisdiction. Instead, it "reaffirm[s] the contents" of the defective Purported Article 12(3) Declaration.¹³ Such a reaffirmation of the contents of the previous formally and procedurally flawed Purported Article 12(3) Declaration in a letter that is dated, signed, and stamped does not change the fact that the Purported Article 12(3) Declaration did not contain these formalities.

16. In fact, the May 2026 Letter demonstrates exactly what the formal deficiencies of the Purported Article 12(3) Declaration were. The May 2026 Letter is dated, is signed by Mr Aldabaiba, bears the official stamp of the Government of National Unity (GNU), has a reference number, and is on the government's official letterhead.¹⁴ There is no indication on the record of the case that the Purported Article 12(3) Declaration ever contained any of these elements of validity. The Defence can propose no obvious explanation for this difference in formality.

17. The Defence can only operate on the basis of documents in its possession. Furthermore, the case can only rely on documents that have been formally and fully disclosed to the Party. As stated by the Defence during the Confirmation of Charges Hearing, the version of the Purported Article 12(3) Declaration that is in the Defence's possession and that was formally disclosed to it is unsigned, undated, and unstamped.¹⁵ Should a version of the document be in the possession of any organ of the Court or party to this case that is signed, dated, and/or stamped, the Defence

¹⁰ ICC-01/11-01/25-108-Conf-Cor, para. 99.

¹¹ *Ibid.*, para. 27.

¹² *Ibid.*

¹³ ICC-01/11-01/25-123-Anx

¹⁴ *Ibid.*

¹⁵ ICC-01/11-01/25-T-006-ENG, p. 2, lines 19-25.

would ask for its formal disclosure and inclusion in the record of the case.

B. The attempt in the May 2026 Letter to limit the Court's jurisdiction solely to the "criminal aspect" to the exclusion of the "civil aspect and compensations [sic] in particular" is legally impermissible and fatal to the validity of the Purported Article 12(3) Declaration

18. The May 2026 Letter attempts to limit the Court's jurisdiction by declining to recognise the Court's competence with respect to the "civil aspect and compensations [sic] in particular".¹⁶ On the basis of the original Arabic text, this clarification is properly understood as an attempt to exclude the reparations phase of Court proceedings from the scope of any accepted jurisdiction, with "civil aspect and compensations" being understood as the reparations procedure and reparations in general, respectively.¹⁷ The Defence submits that the attempted exclusion of the reparations phase in the May 2026 Letter is, therefore, legally impermissible under the Rome Statute framework and acts to fundamentally undermine the validity of the Purported Article 12(3) Declaration.

19. Article 12(3) of the Rome Statute provides that a State which is not a Party to the Statute "may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question". The provision further specifies that "[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9". The plain text of Article 12(3) does not provide any mechanism by which an accepting State may carve out or selectively exclude particular phases or aspects of the Court's proceedings from the scope of accepted jurisdiction. The Purported Article 12(3) Declaration must, therefore, be rejected in its entirety.

20. In its Decision on the Defence's jurisdictional challenge in the *Gbagbo* case, Pre-Trial Chamber I of the ICC clarified that States accepting the Court's jurisdiction under Article 12(3) do not have the freedom to decide which parts of the Rome Statute framework to accept when they accept the Court's jurisdiction. According to the Chamber in this case, "while States may choose to consent or not to the jurisdiction of the Court through declarations provided for in article 12(3) of the Statute, the scope of such declarations is predetermined by the ICC legal

¹⁶ ICC-01/11-01/25-123-Anx

¹⁷ The phrase "يُنحصر فقط في الجانب الجنائي دون أن يمتد إلى الجانب المدني والتعويضات بالخصوص" is properly understood as the reparations procedure (being the civil element of criminal cases) and reparations in general (with "compensation" being the literal translation of the term reparations in Arabic "تعويضات" as seen in the Arabic translation of The Rome Statute).

framework”.¹⁸

21. This position was confirmed by the Office of the Prosecutor itself in 2018: “a non-State Party which lodges an *ad hoc* declaration under Article 12(3) is obliged to cooperate with the Court without any delay or exception in accordance with Part 9, and the *entire legal framework of the Statute* applies to such situations”.¹⁹ The phrase “entire legal framework” is unambiguous: it encompasses the provisions of the Statute governing reparations under Article 75. A non-State Party that accepts jurisdiction under Article 12(3) cannot selectively opt out of the legal framework it has triggered; this includes reparations proceedings.

22. The Defence submits that the attempt to limit the Court’s jurisdiction in the May 2026 Letter is not merely an impermissible qualification, but is fatal to the validity of the declaration as a whole. A declaration that purports to accept jurisdiction on a conditional basis departs from the legal framework of the Statute as set out above. As the May 2026 Letter is a clarification of the Purported Article 12(3) Declaration, the latter must now be interpreted in light of this official clarification, meaning that it contains the same impermissible limitation. The Purported Article 12(3) Declaration, therefore, fails to satisfy the requirements of Article 12(3) and must be treated as null and void. Any jurisdiction exercised by the ICC in reliance on the Purported Article 12(3) Declaration is therefore without valid foundation.

V. CONCLUSION

23. The Defence accordingly submits that the Chamber must find that neither the Purported Article 12(3) Declaration nor the May 2026 Letter seeking to clarify it constitutes a valid declaration under Article 12(3) of the Rome Statute. The invalidity of the Purported Article 12(3) Declaration is compounded by its formal deficiencies (lack of date, signature, official stamp, and registration) and by the May 2026 Letter’s attempt to impermissibly limit the Court’s jurisdiction. Additionally, the Defence reiterates its submissions in its Jurisdiction Challenge that the case against Mr El Hishri is not caught by the UNSC’s referral of the Situation in Libya to the Court in Resolution 1970 (2011). Therefore, there is no valid basis for the exercise of the Court’s jurisdiction over the crimes alleged against Mr El Hishri and no legal basis for the continuation

¹⁸ *Gbagbo*, Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, ICC-02/11-01/11-212, 15 August 2012, para. 59.

¹⁹ Prosecution Response to the Hashemite Kingdom of Jordan’s Appeal against the “Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender [of] Omar Al-Bashir”, ICC-02/05-01/09, 3 Apr. 2018, para. 81 [emphasis added].

of the proceedings against him. The Defence, therefore, reiterates its request to the Pre-Trial Chamber to order his immediate and unconditional release, with prejudice.

Respectfully submitted,



Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 5 June 2026
at The Hague, The Netherlands