

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/11-01/25

Date: 12 June 2026

PRE-TRIAL CHAMBER I

Before: Judge Iulia Antoanella Motoc , Presiding Judge
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 the “Observations on behalf of Victims on the
Defence’s Challenge to the Court’s Jurisdiction
(No. ICC-01/11-01/25-108-Conf-Corr)”**

Source: Office of Public Counsel for Victims

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

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☒ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

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(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Others

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Mr. Osvaldo Zavala Giler

☐ Counsel Support Section

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Reparations Section

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I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the “OPCV”), appointed to represent participating and potential victims (the “Common Legal Representatives”),¹ request Pre-Trial Chamber I (the “Chamber”) to dismiss the Defence’s challenge to the Court’s jurisdiction under article 19 of the Rome Statute (the “Defence Challenge” or “Challenge”, and the “Statute”, respectively)² in its entirety.

2. The Common Legal Representatives submit that the Challenge is without merit. Neither the principle of State consent nor the principle of legality supports the Defence’s restrictive interpretation of Security Council Resolution. Article 13(b) of the Statute was expressly designed to enable the Court to exercise jurisdiction in situations involving non-States Parties, while Resolution 1970 was adopted pursuant to the Security Council’s valid exercise of its powers under Chapter VII of the Charter of United Nations (the “UN”, and the “UN Charter”, respectively). Through said Resolution, the Security Council validly identified both the situation referred to the Court and the jurisdictional parameters of said referral. The charges brought against Mr Khaled Mohamed Ali El Hishri (“Mr El Hishri”) fall within the scope of these parameters. The Defence’s proposed interpretation would therefore introduce limitations into the referral that are unsupported by the Statute, Resolution 1970 itself, or the subsequent practice of the Security Council.

3. The Defence’s reliance on the principle of legality as a standalone basis is similarly misplaced. Resolution 1970 identified the referred situation with sufficient clarity and precision to satisfy the requirements of legal certainty and foreseeability. In any event, there can be little doubt that a reasonable person in Mr El Hishri’s

¹ See the “Order on the organisation of the legal representation of victims” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-47](#), 23 December 2025, para. 5; the “Decision on the legal representation of victims” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-84](#), 12 March 2026, para. 13; and the “Decision on victims’ participation and legal representation” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-117](#), 11 May 2026, para. 16.

² See the “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)”, [No. ICC-01/11-01/25-108-Conf-Corr](#) and [No. ICC-01/11-01/25-108-Corr-Red](#), 6 May 2026 (the “Defence Challenge”).

position would have understood that the conduct alleged in the Document Containing the Charges was manifestly unlawful and capable of giving rise to criminal prosecution under national or international law.

4. Finally, the Common Legal Representatives submit that Libya's article 12(3) declaration provides a distinct basis for the Court's exercise of jurisdiction. Nevertheless, the Defence's challenge to that declaration is ultimately of limited relevance, given that the Court's jurisdiction over the conduct alleged against Mr El Hishri already arises pursuant to Resolution 1970. Accordingly, even if the Defence's objections to the declaration were accepted, they would not affect the Court's jurisdiction in the present case.

II. PROCEDURAL BACKGROUND

5. On 26 February 2011, the UN Security Council, acting under Chapter VII of the UN Charter, referred the situation in the the Libyan Arab Jamahiriya ("Libya") since 15 February 2011 to the Court, in accordance with article 13(b) of the Statute ("Resolution 1970").³

6. On 3 April 2025, the Prosecution filed, under seal and *ex parte*, an application for a warrant of arrest for Mr El Hishri in respect of crimes against humanity and war crimes within the jurisdiction of the Court, committed in Libya between around February 2015 and at least early 2020.⁴

7. On 12 May 2025, Libya notified the Registrar of the Court of its acceptance of the Court's jurisdiction over its territory for the period from 2011 to the end of 2027 ("Libya's Article 12(3) Declaration").⁵

³ See Resolution 1970 (2011) adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc. [S/RES/1970 \(2011\)](#) (the "Resolution 1970").

⁴ See the "Prosecution's application under article 58 for a warrant of arrest against Khaled Mohamed Ali El Hishri ("Khaled AL HISHRI")", No. ICC-01/11-172-US-Exp and [No. ICC-01/11-01/25-4-Red](#), 3 April 2025.

⁵ See the "Transmission of Article 12(3) Declaration by the State of Libya", No. ICC-01/11-180-Conf-Exp and [No. ICC-01/11-01/25-6-Corr-Red](#), 20 May 2025, with the declaration pursuant to article 12(3) of the Statute annexed as Annex I and an English translation thereof as Annex II.

8. On 10 July 2025, the Chamber issued the warrant of arrest for Mr El Hishri.⁶
9. On 16 July 2025, Mr El Hishri was arrested in the Federal Republic of Germany pursuant to the warrant of arrest.
10. On 1 December 2025, Mr El Hishri was surrendered to the Court and arrived at the Court's Detention Centre that same day. His initial appearance hearing was held on 3 December 2025.
11. On 26 March 2026, the Prosecution filed the Document Containing the Charges, charging Mr El Hishri with crimes against humanity and war crimes within the Court's jurisdiction, committed in Libya between 1 May 2014 and 30 June 2020.⁷
12. On 30 April 2026, the Defence filed the Challenge, which it corrected on 6 May 2026.⁸
13. Following joint submissions from the Prosecution and the Defence,⁹ the Chamber issued an order instructing, *inter alia*: (i) Libya to submit observations, if any, on the Defence Challenge by 5 June 2026, and any responses thereto to be filed by 12 June 2026; and (ii) the OPCV to submit observations on the Defence Challenge on behalf of any victim who would have already communicated with the Court in relation to this case pursuant to regulation 81(4)(c) of the Regulations of the Court by 12 June 2026.¹⁰
14. On 18 May 2026, the Defence submitted an addendum to the Challenge.¹¹

⁶ See the "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" (Pre-Trial Chamber I), [No. ICC-01/11-01/25-7](#), 10 July 2025.

⁷ See the "Document Containing the Charges", [No. ICC-01/11-01/25-92](#), 26 March 2026.

⁸ See the Defence Challenge, *supra* note 2.

⁹ See the "Joint Prosecution and Defence submissions on residual issues ahead of the confirmation hearing", [No. ICC-01/11-01/25-109](#), 1 May 2026.

¹⁰ See the "Order setting time limits for observations in relation to the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute (ICC-01/11-01/25-108-Conf)" (Pre-Trial Chamber I), [No. ICC-01/11-01/25-116](#), 6 May 2026.

¹¹ See the "Addendum to 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)", [No. ICC-01/11-01/25-119-Conf](#) and [No. ICC-01/11-01/25-119-Red](#), 18 May 2026.

15. On 29 May 2026, the Registry transmitted an additional communication received from Libya on 22 May 2026 in relation to the declaration of acceptance of the Court's jurisdiction pursuant to article 12(3) of the Statute (the "Additional Communication").¹²

16. On 5 June 2026, the Defence submitted a response to the Additional Communication.¹³

17. On the same day, Libya submitted its observations in relation to the Defence Challenge.¹⁴

III. CLASSIFICATION

18. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the present filing is classified as "confidential", since it refers to a document filed with the same classification. A public redacted version is filed simultaneously.

IV. OBSERVATIONS ON BEHALF OF VICTIMS

19. The Defence advances three distinct arguments in support of its challenge to the Court's jurisdiction. First, it contests the validity of Libya's Article 12(3) Declaration.¹⁵ Second, it argues that the conduct alleged against Mr El Hishri falls outside of the scope of the situation referred to the Court pursuant to Resolution 1970.¹⁶ Third, it submits that Resolution 1970 lacks the precision required to satisfy the principle of legality (*nullum crimen sine lege*).¹⁷

¹² See the "Transmission of Additional Communication from the State of Libya in relation to the Article 12(3) Declaration", [No. ICC-01/11-01/25-123](#), with Public Annex [No. ICC-01/11-01/25-123-Anx](#), 29 May 2026.

¹³ See the "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)", [No. ICC-01/11-01/25-128-Conf](#), 5 June 2026.

¹⁴ See the "Annex to the Transmission of Observations from the State of Libya in relation to the Defence's Challenge to the Jurisdiction of the Court", [No. ICC-01/11-01/25-129-Conf-Anx-tENG](#), 5 June 2026.

¹⁵ See the Defence Challenge, *supra* note 2, paras. 12-36.

¹⁶ *Idem*, paras. 37-84.

¹⁷ *Idem*, paras. 85-97.

20. The Common Legal Representatives will first address the Defence's arguments concerning the scope and legal effect of Resolution 1970. These arguments are logically antecedent to the Defence's challenge to Libya's Article 12(3) Declaration, since the Court's jurisdiction over the Libya situation was already established pursuant to article 13(b) of the Statute following the Security Council referral. It is therefore appropriate to consider the Defence's submissions concerning Resolution 1970 before turning to its challenge to the Article 12(3) Declaration.

21. In preparing these observations, the Common Legal Representatives consulted with the lawyers of the 17 victims concerned by the "Decision on a Request for Leave to File Observations on the Defence Jurisdiction Challenge",¹⁸ as well as with civil society organisations, and received a substantial contribution by Libya Crimes Watch on Libya's transitional practice.

A. Resolution 1970 encompasses the conduct alleged against Mr El Hishri

22. The Defence submits that Resolution 1970 must be interpreted narrowly, having regard to the central role of State consent in international law and the principle of legality (*nullum crimen sine lege*).¹⁹ On this basis, it contends that the conduct alleged against Mr El Hishri did not occur within the "*ongoing situation of crisis*" that triggered the Court's jurisdiction through the Security Council referral, and therefore that Resolution 1970 cannot serve as a basis for the Court's jurisdiction in the present case.²⁰

23. The Common Legal Representatives disagree. As explained *infra*, neither the principle of State consent nor the principle of legality supports the restrictive interpretation advanced by the Defence. Nor do the text of Resolution 1970, the structure of article 13(b) of the Statute, or the subsequent practice of the Security Council support the conclusion that the referral was limited to the events immediately

¹⁸ See the « Decision on a Request for Leave to File Observations on the Defence Jurisdiction Challenge (ICC-01/11-01/25-124-Conf-Anx)» (Pre-Trial Chamber I), [No. ICC-01/11-01/25-127](#), 2 June 2026, para. 6.

¹⁹ See the Defence Challenge, *supra* note 2 para. 39.

²⁰ *Ibid.*

surrounding its adoption in February 2011. Accordingly, Resolution 1970 encompasses the conduct alleged against Mr El Hishri.

1. State consent and sovereignty do not require a restrictive interpretation of Resolution 1970

24. The Defence submits that considerations of State consent and sovereign equality require Resolution 1970 to be interpreted restrictively. In particular, it argues that the Resolution should not be construed in a manner that would permit an open-ended exercise of jurisdiction over a non-State Party, such as Libya, as this would exceed the scope of the consent given by such States when ratifying the UN Charter, and would place them in the same jurisdictional position as a State Party without the corresponding rights.²¹ In the view of the Common Legal Representatives, the Defence's submissions overlook the specific function of article 13(b) of the Statute and misconstrue the parameters of Resolution 1970.

25. Article 13 of the Statute provides an exhaustive list of three procedural mechanisms by which the Court's jurisdiction may be triggered, as defined by articles 5 to 8 *bis* (*ratione materiae*), article 11 (*ratione temporis*) and article 26 (*ratione personae*), and whose exercise is subject to the preconditions set out in article 12. The Office of the Prosecutor is entrusted with the mandate to investigate situations in which crimes under the Court's jurisdiction may have been committed. Hence, States Parties' and Security Council's referrals bring situations under the Prosecutor's attention. Article 13(b) of the Statute provides that the Court may exercise its jurisdiction over a crime referred to in article 5, if "[a] *situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations*".²²

26. The Common Legal Representatives recall that "*the referral by the UN Security Council was included in the Statute as a tool suitable to potentially broaden the jurisdictional reach of the Court, namely by allowing it to exercise its jurisdiction vis-à-vis scenarios where*

²¹ *Idem*, paras. 43-44, 46, and 52-53.

²² Emphasis added.

crimes as defined in the Statute would be allegedly committed on the territory of States not party to the Statute and no nationals of a State Party would be involved”.²³ As such, article 13(b) constitutes a necessary mechanism enabling the Court to exercise jurisdiction precisely in situations where the ordinary consent-based jurisdictional framework would otherwise preclude it. Indeed, this is “*the very raison d’être of that particular triggering mechanism*”.²⁴ To interpret Security Council referrals restrictively on the basis advanced by the Defence would risk “*preventing this mechanism from operating precisely vis-à-vis some of the scenarios which convinced the drafters of the Statute of its necessity, in particular those instances where a State is unwilling and/or unable (typically, because of the inadequacy of its own legal system) to investigate and prosecute the most serious crimes*”,²⁵ thereby undermining the Statute’s overarching objective of ending impunity for the perpetrators of such crimes.²⁶

27. This conclusion is reinforced by the relationship between article 13(b) of the Statute and the Security Council’s powers under Chapter VII of the UN Charter. Indeed, article 13(b) of the Statute operates in fact as a “*bridging mechanism*” between the Court and the Security Council’s Chapter VII powers.²⁷ The UN Security Council’s referral power may therefore be understood as enabling the Court to exercise jurisdiction in relation to any UN member State.²⁸ By virtue of article 25 of the Charter, UN Member States have agreed to accept and carry out the decisions of the UN Security Council.²⁹ Since the entry into force of the Statute on 1 July 2002, Libya has therefore been under an obligation to accept the material jurisdiction of the Court

²³ See the “Decision on the Defence ‘*Exception d’incompétence*’ (ICC-02/05-01/20-302)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-391](#), 17 May 2021, para. 41.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See the Preamble of the [Rome Statute](#). See also, *inter alia*, the “Judgment 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’” (Appeals Chamber), [No. ICC-01/11-01/11-565 OA 6](#), 24 July 2014, para. 217.

²⁷ See RASTAN (R.), “[Jurisdiction](#)”, in STAHN (C.) (Ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 157 and footnote. 74.

²⁸ See AKANDE (D.), “[The jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits](#)”, *Journal of International Criminal Justice*, vol. 1, 2003, pp. 625-626.

²⁹ See article 25 of the [Charter of the United Nations](#): “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

following a referral by the Security Council under Chapter VII of the UN Charter and article 13(b) of the Statute,³⁰ as also recognised by the Defence itself.³¹

28. The remaining question, therefore, is not whether Libya is bound by a Security Council referral, but whether Resolution 1970 should be interpreted as narrowly as the Defence suggests. In the view of the Common Legal Representatives, concerns that a broader interpretation of Resolution 1970 would result in a perpetual or open-ended exercise of jurisdiction³² are misplaced. The Court's jurisdiction is not detached from the situation referred by the Security Council. Rather, it remains anchored to the "*situation in the Libyan Arab Jamahiriya since 15 February 2011*" identified in Resolution 1970.³³ The fact that the Security Council has repeatedly reaffirmed Resolution 1970 and continued to address the situation in Libya as an ongoing situation threatening international peace and security under Chapter VII demonstrates that the Council itself has consistently regarded the situation giving rise to the referral as ongoing, rather than confined to the events immediately preceding the Resolution's adoption.³⁴

29. The same understanding is reflected in the Prosecutor's continuous reporting to the Security Council pursuant to Resolution 1970. Over the course of thirty-one reports submitted since the referral, the Prosecution has consistently treated crimes committed in later phases of the Libyan conflict – including conduct occurring between 2014 and 2020 – as falling within the framework of the referred situation.³⁵

³⁰ *Ibid.*

³¹ See the Defence Challenge, *supra* note 2, para. 42.

³² *Idem*, paras. 46, and 52-53.

³³ See Resolution 1970, *supra* note 3, para. 4.

³⁴ See, as a recent example, the Resolution 2796 (2025) adopted by the Security Council at its 10029th meeting, on 31 October 2025, UN Doc. [S/RES/2796 \(2025\)](#). Paragraph 11, for instance, states as follows: "*Recalls that the measures set out in resolution 1970 (2011), as modified by subsequent resolutions, shall apply to individuals and entities determined by the United Nations Sanctions Committee to be engaging in or providing support for acts that threaten the peace, stability or security of Libya or obstruct or undermine the successful completion of its political transition, including by obstructing or undermining the elections, and demands full compliance by all Member States with the arms embargo imposed under resolution 1970 (2011), as modified by subsequent resolutions, including by ceasing all support for and withdrawing all mercenaries, foreign fighters, and foreign forces, and demands all Member States not to intervene in the conflict or take measures that exacerbate the conflict*".

³⁵ See, most recently, the "[Thirty-First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Resolution 1970 \(2011\)](#)", 22 May 2026.

Most recently, in May 2026, the Deputy Prosecutor expressly described the proceedings against Mr El Hishri as representing a landmark step in the fulfilment of the mandate conferred by Resolution 1970, while reaffirming that investigations relating to crimes committed during the 2014-2020 period continue to be pursued under that mandate.³⁶ In this regard, the Common Legal Representatives also note the Chamber's finding that "[t]he fact that the Prosecutor continues reporting before the Security Council, including on contemporary matters, and no objection to these reports have been raised, is another indication of the ongoing jurisdiction of the Court over alleged crimes committed in the context of the ongoing crisis in Libya".³⁷

30. Accordingly, the Defence's reliance on State consent and sovereign equality does not justify the restrictive interpretation of Resolution 1970 that it advances. Article 13(b) was specifically designed to enable the Court to exercise its jurisdiction in situations involving non-States Parties, while Resolution 1970 was adopted pursuant to powers that UN Member States have accepted the Security Council may exercise under Chapter VII of the UN Charter. The Defence's proposed interpretation would therefore introduce limitations into the referral that find no basis in either the Statute or the Resolution itself.

2. The principle of *nullum crimen sine lege* does not support a restrictive interpretation of Resolution 1970

31. The Defence argues that Security Council referrals must be interpreted narrowly on the basis that individuals must be able to reasonably foresee whether their conduct falls within the scope of the referred situation and is therefore subject to prosecution before the Court. The Defence posits that a broader interpretation of Resolution 1970 would create an unacceptable degree of legal uncertainty and risk

³⁶ See the "[Statement of Deputy Prosecutor Nazhat Shameem Khan to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 \(2011\)](#)", 22 May 2026.

³⁷ See the "Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC-01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera" (Pre-Trial Chamber I), [No. ICC-01/11-152-Anx](#), 18 January 2025, para. 10.

exposing individuals to criminal liability that was not reasonably foreseeable at the time of the alleged conduct.³⁸

32. As recalled by the Defence,³⁹ *“in order to extend to an accused the guarantee of legality consistent with human rights norms, the principle of nullum crimen sine lege generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law”*.⁴⁰ When it comes to *“conduct that takes place on the territory of a State that is not a Party to the Statute, [...] a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged”*.⁴¹

33. In the view of the Common Legal Representatives, the Defence’s submissions conflate two distinct questions. The first is whether the alleged conduct was sufficiently criminalised under applicable national or international law such that a reasonable person could have foreseen exposure to criminal prosecution. The second is whether a particular jurisdictional mechanism, namely Resolution 1970, may ultimately provide a basis for the Court’s exercise of jurisdiction over that conduct. While the principle of legality is undoubtedly concerned with the former question,⁴² it does not follow that every uncertainty the Defence alleges in relation to the scope of a Security Council referral amounts to a violation of the principle *nullum crimen sine lege*.

34. In particular, in stating that *“[p]otential suspects such as Mr El Hishri must be able to reasonably foresee that the referral applies specifically to their actions”*,⁴³ and that the Chamber must *“determine whether it was reasonably foreseeable that Mr El Hishri’s conduct could come within the ICC’s jurisdiction”*,⁴⁴ the Defence appears to conflate the

³⁸ See the Defence Challenge, *supra* note 2, paras. 58-60.

³⁹ *Idem*, para. 55.

⁴⁰ See the “Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s ‘Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)’” (Appeals Chamber), [No. ICC-02/05-01/20-503](#), 1 November 2021, paras. 1 and 85.

⁴¹ *Idem*, para. 86.

⁴² See *supra*, para. 32.

⁴³ See the Defence Challenge, *supra* note 2, para. 59.

⁴⁴ *Idem*, para. 60.

foreseeability of criminal liability with the foreseeability of prosecution before a specific forum. The authorities cited by the Defence address whether a suspect or an accused could reasonably have anticipated exposure to prosecution under national or international law for the alleged conduct. They do not support the proposition that the principle of legality requires an individual to predict with precision the future jurisdictional basis upon which such prosecution might proceed. Rather, the relevant inquiry remains whether the conduct was criminal and prosecutable at the time it was committed, not whether the suspect or the accused could foresee the precise legal pathway by which a court might subsequently exercise jurisdiction over it.

35. In that regard, there can be little doubt that a reasonable person in Mr El Hishri's position would have understood that the conduct alleged in the Document Containing the Charges – including torture, murder, imprisonment, rape, enslavement, persecution, and other forms of severe mistreatment of detainees⁴⁵ – was “*flagrantly unlawful*”⁴⁶ and thus prohibited under both Libyan and international law, and capable of giving rise to criminal prosecution. A suspect or accused need only to be able to appreciate that the concrete conduct is criminal in the generally understood sense, without reference to any specific provision.⁴⁷ In addition, where the wrongful nature of the conduct is such that it could not have been ignored, its criminal character is reasonably foreseeable.⁴⁸

36. Furthermore, the Common Legal Representatives recall that “*the statutory crimes are a product of a concerted effort to codify the developing state of international law so as to provide the clarity that was lacking in the preceding international tribunals [and] were intended to be generally representative of the state of customary international law when the Statute was drafted*”, which “*weighs heavily in favour of the foreseeability of facing*

⁴⁵ See the “Document Containing the Charges”, *supra* note 7.

⁴⁶ See the “Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s ‘Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)’”, *supra* note 40, para. 85.

⁴⁷ See ICTY, *The Prosecutor v. Hadžihasanović et al.*, “[Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility](#)” (Appeals Chamber), Case No. IT-01-47-AR72, 16 July 2003, para. 34.

⁴⁸ See SCHABAS (W. A.), *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 74.

prosecution for crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute".⁴⁹ Accordingly, they submit that the requirements of foreseeability and accessibility are satisfied in the present circumstances.

37. Even if the Defence's approach were accepted, and the Chamber were required to assess whether it was reasonably foreseeable for Mr El Hishri that his conduct could come within the Court's jurisdiction pursuant to Resolution 1970,⁵⁰ the Defence's argument would still fail. Resolution 1970, adopted on 26 February 2011, referred to the Court "*the situation in the Libyan Arab Jamahiriya since 15 February 2011*".⁵¹ Far from creating uncertainty, the Resolution established a clear territorial and temporal framework for the exercise of the Court's jurisdiction, fully consistent with the manner in which situations are referred under the Statute.⁵²

38. Moreover, the referral had already been in force years before the conduct alleged against Mr El Hishri, which is said to have occurred between 2014 and 2020. As acknowledged by the Defence itself,⁵³ unlike situations in which jurisdiction is established only after the relevant conduct has taken place, the jurisdictional framework created by Resolution 1970 was publicly known and readily accessible throughout the entire period relevant to the present case. The Resolution was adopted in response to the Security Council's "*grave concern*" regarding "*serious violations of human rights and international humanitarian law*" occurring in Libya,⁵⁴ which were "*criminalised under international law at the time*",⁵⁵ and expressly referred the situation to the Court pursuant to article 13(b) of the Statute. The subsequent practice of the

⁴⁹ See the "Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's 'Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)'" , *supra* note 40, para. 89.

⁵⁰ See *supra*, para. 34.

⁵¹ See Resolution 1970, *supra* note 3, para. 4.

⁵² See *infra*, under 3. The conduct alleged against Mr El Hishri falls within the scope of the situation referred by Resolution 1970.

⁵³ See the Defence Challenge, *supra* note 2, para. 58.

⁵⁴ See Resolution 1970, *supra* note 3, Preamble.

⁵⁵ See the "Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's 'Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)'" , *supra* note 40, paras. 77, and 89.

Security Council, the Court and the Prosecution has consistently reflected the understanding that Resolution 1970 concerns the situation in Libya as an ongoing situation, rather than a discrete and short-lived episode confined to the events surrounding its adoption.⁵⁶

39. In these circumstances, it cannot plausibly be suggested that the parameters of the referral were so uncertain that individuals engaging in conduct amounting to war crimes or crimes against humanity in the context of the Libyan situation could not reasonably foresee the possibility of prosecution before the Court. On the contrary, a reasonable person assessing the legal framework applicable in Libya after February 2011 would have been aware that the situation had been referred to the Court and remained subject to ongoing scrutiny by both the Security Council and the Prosecution. The principle of legality, therefore, offers no support for the restrictive interpretation of Resolution 1970 advanced by the Defence.

3. The conduct alleged against Mr El Hishri falls within the scope of the situation referred by Resolution 1970

40. The Defence further contends that the conduct alleged against Mr El Hishri falls outside of the scope of the situation referred to the Court by Resolution 1970 and therefore cannot ground proceedings before the Court. Relying on its proposed restrictive interpretation of the Resolution – grounded in considerations of State consent and the principle of legality – it argues that the referral was limited to the situation of crisis that existed in Libya in 2011 and cannot extend to conduct allegedly committed between 2014 and 2020. In the Defence’s view, the substantial political and factual developments that occurred in Libya after 2011 severed the necessary link between the alleged crimes and the situation that originally triggered the Court’s jurisdiction.⁵⁷

41. For the reasons set out *supra*, the Common Legal Representatives posit that there is no basis for the restrictive interpretation of Resolution 1970 advanced by the

⁵⁶ See *supra*, paras. 28-29.

⁵⁷ See the Defence Challenge, *supra* note 2, *inter alia*, paras. 38, 61-62, 70-72, and 83-84.

Defence.⁵⁸ The question is therefore not whether the Security Council referral should be artificially confined to the events immediately surrounding its adoption, but whether the conduct alleged against Mr El Hishri falls within the scope of the situation referred to the Court.

42. In the view of the Common Legal Representatives, Resolution 1970 poses no difficulty in this regard. The Security Council validly exercised its discretion in identifying both a situation in Libya warranting referral under article 13(b) of the Statute and the jurisdictional parameters of that situation. Far from departing from the framework established by the Statute, Resolution 1970 reflects the manner in which situations have consistently been defined and understood in the Court's statutory scheme and jurisprudence. Indeed, *"a situation is 'generally defined in terms of temporal, territorial and in some cases personal parameters', possibly including 'not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral'"*.⁵⁹

43. This interpretation is fully consistent with both the text of article 13 of the Statute and the intentions of its drafters. As Pre-Trial Chamber II further observed in the *Abd-Al-Rahman* case, *"[a]rticle 13 of the Statute adopts the term 'situation' to identify the subject matter of a referral by the Security Council acting under Chapter VII of the Charter, without any further qualification"*, and there is therefore no basis for interpreting that term differently in the context of a referral by the Security Council referral.⁶⁰ The drafters' deliberate choice to employ the term 'situation', rather than 'case', reflected

⁵⁸ See *supra* under 1. State consent and sovereignty do not require a restrictive interpretation of Resolution 1970 and 2. The principle of *nullum crimen sine lege* does not support a restrictive interpretation of Resolution 1970.

⁵⁹ See the "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", *supra* note 20, para. 25, referring to: the "Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), [ICC-01/04-101-tEN-Corr](#), 19 January 2006 (dated 17 January 2006), para. 65; and the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-1](#), 28 September 2010 (reclassified public on 11 October 2010), para. 6.

⁶⁰ See the "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", *supra* note 20, para. 26.

the need for referrals to establish a broader *mandatory jurisdiction* framework while safeguarding the independence of the Prosecutor – who should “*be free to decide whether there [is] sufficient evidence to indict a particular individual for a crime*”.⁶¹ Accordingly, the Security Council was envisaged as referring “*a general matter or situation to the court, as opposed to bringing a case against a specific individual – which would preserve the independence and autonomy of the court in the exercise of its investigative, prosecutorial and judicial functions*”.⁶²

44. The Security Council enjoys broad discretion when acting under Chapter VII of the UN Charter, and only limited constraints apply to the exercise of said discretion. In fact, the Security Council “*cannot, in principle, act arbitrarily and unfettered by any restraints*”⁶³ or “*for an ulterior purpose*”.⁶⁴ Such limitations flow from the principle that the organs of the UN must act in accordance with the powers conferred upon them.⁶⁵ In other words, under article 39 of the UN Charter, the Security Council has discretion to determine whether a particular situation constitutes a threat to international peace

⁶¹ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I: Proceedings of the Preparatory Committee during March-April and August 1996, Supplement No. 22, UN Doc. [A/51/22](#), 13 September 1996, para. 133.

⁶² See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, Fiftieth Session, Supplement No. 22, UN Doc. [A/50/22](#), 6 September 1995, para. 120.

⁶³ See ICTY, *The Prosecutor v. Tadić*, “[Decision on the Defence Motion on Jurisdiction](#)” (Trial Chamber), Case No. (IT-94-1), 10 August 1995, paras. 14-15, citing BOWETT (D. W.), *The Law of International Institutions*, 4th Edition, Stevens & Sons for the London Institute of Foreign Affairs, London, 1982, p. 33; and BROWNLIE (I.), “[The Decisions of Political Organs of the United Nations and the Rule of Law](#)”, in ST. JOHN MACDONALD (R.) (Ed.), *Essays in Honour of Wang Tieya*, M. Nijhoff Publishers, Dordrecht, London, 1992, p. 95.

⁶⁴ *Idem*, para. 15. See also article 24(1) and (2) of the [Charter of the United Nations](#), providing that the UN Members: “*confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf*” and that in exercising its powers the Security Council may act only “*in accordance with the Purposes and Principles of the United Nations*”.

⁶⁵ See ICJ, *Reparations for injuries suffered in the service of the United Nations*, [Advisory Opinion of 11 April 1949](#), I.C.J. Reports, 1949, p. 182. See also, WOOD (M. C.), “[The Interpretation of Security Council Resolutions](#)”, *Max Planck Yearbook of United Nations Law*, Vol. 20, 2017, p. 77; FRANK (T.), “[The Power of Appreciation: Who is the ultimate guardian of UN legality?](#)”, *American Journal of International Law*, Vol. 86(3), 1992, p. 521; and PAENSON (I.), *Manual of the terminology of Public International Law (Law of Peace) and International Organizations*, Bruylant, Brussels, 1983, p. 362.

and security, and, once such a determination is made, to decide on the measures required to maintain or restore international peace and security.⁶⁶

45. This is precisely what the Security Council did in relation to Libya. Resolution 1970 was adopted on the basis of the Council's determination that "*serious violations of human rights and international humanitarian law*" were occurring in Libya and that the situation constituted a threat to international peace and security.⁶⁷ Acting under Chapter VII of the UN Charter, the Council referred to the Court "*the situation in the Libyan Arab Jamahiriya since 15 February 2011*".⁶⁸ In doing so, it validly exercised the discretion conferred upon it by article 39 of the UN Charter and defined the jurisdictional parameters of the referred situation through temporal and territorial criteria fully consistent with the Statute and the Court's jurisprudence. The conduct alleged in the Document Containing the Charges against Mr El Hishri therefore falls within the temporal and territorial scope of the referral; the only remaining question is whether it bears the requisite nexus to the situation referred by Resolution 1970.⁶⁹

46. In this regard, the Chamber has already addressed this question in the context of the situation in Libya. In the proceedings concerning Mr Osama Njeem, the Chamber was required to determine whether the alleged crimes were sufficiently linked to "*the situation of crisis that triggered the jurisdiction of the Court through*" Resolution 1970.⁷⁰ In doing so, it examined both the nature of the referred situation and the connection between that situation and the alleged conduct.

⁶⁶ See article 39 of the [Charter of the United Nations](#): "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*".

⁶⁷ See *supra*, para. 38.

⁶⁸ See Resolution 1970, *supra* note 3, para. 4.

⁶⁹ See *supra*, para. 42.

⁷⁰ See the "Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera", *supra* note 37, para. 4.

47. The Chamber concluded that there has been an ongoing situation of crisis in Libya since 2011.⁷¹ It observed that, although the violence initially arose in the context of the uprising against the Gaddafi regime, the fighting and civil unrest continued following the regime's fall and subsequently evolved into new forms of armed confrontation and instability.⁷² On the basis of information contained in reports of the UN Support Mission in Libya and the Independent Fact-Finding Mission on Libya, the Chamber was satisfied that a situation of turmoil has persisted since the adoption of Resolution 1970 and extended at least until October 2024.⁷³

48. The Chamber further found reasonable grounds to believe that the Special Deterrence Forces (SDF/RADA), within which both Mr Njeem and Mr El Hishri are alleged to have operated,⁷⁴ emerged from the 2011 crisis and its aftermath.⁷⁵ It noted, *inter alia*, that the group originated as a revolutionary military group involved in the conflict against Gaddafi forces, participated in the takeover of the Mitiga airbase in 2011, later established detention facilities at that location, and subsequently became integrated into the institutional structures that developed during the continuing Libyan conflict.⁷⁶ The Chamber also considered it significant that at least some detainees held at Mitiga Prison were detained for reasons connected to the ongoing tensions and fighting between groups involved in the Libyan crisis.⁷⁷

49. Those findings apply with equal force in the present case. According to the Document Containing the Charges, Mr El Hishri acted together with, *inter alia*, Mr Njeem and other members of the leadership of SDF/RADA, in the commission of the crimes alleged at Mitiga Prison.⁷⁸ The Prosecution specifically alleges that Mr El

⁷¹ *Idem*, para. 5.

⁷² *Ibid.*

⁷³ *Idem*, para. 6.

⁷⁴ See the "Document Containing the Charges", *supra* note 7, paras. 70-73.

⁷⁵ See the "Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera", *supra* note 37, para. 7.

⁷⁶ *Idem*, paras. 7-8.

⁷⁷ *Idem*, para. 9.

⁷⁸ See the "Document Containing the Charges", *supra* note 7, para. 71.

Hishri and Mr Njeem were co-perpetrators in a common plan through which crimes against humanity and war crimes were committed against detainees under SDF/RADA's control.⁷⁹ The same organisational structure, detention facility, time period and course of conduct that led the Chamber to conclude in the *Njeem* proceedings that the alleged crimes were sufficiently linked to the situation referred by Resolution 1970⁸⁰ are therefore present in the case against Mr El Hishri.

50. In these circumstances, there is no basis for reaching a different conclusion in the present case. If the conduct attributed to Mr Njeem was found to be sufficiently connected to the situation of crisis that triggered the Court's jurisdiction through Resolution 1970, the conduct attributed to Mr El Hishri – allegedly committed alongside Mr Njeem, within the same organisation, pursuant to the same common plan, and in the same detention facility – must equally be regarded as falling within the scope of the referred situation. The Defence's contention that the charges concern events detached from the situation referred by the Security Council⁸¹ is therefore incompatible with the Court's own assessment of that situation and of the very factual context from which the present case arises. Moreover, accepting the Defence's argument would require the Chamber to depart from the consistent understanding, reflected over more than a decade in the practice of the Security Council, the Prosecutor and the Court, that Resolution 1970 concerns the ongoing situation in Libya and is not confined to the events immediately surrounding the uprising against the Gaddafi regime in early 2011.⁸²

B. Resolution 1970 does not give rise to concerns under the principle of legality (*nullum crimen sine lege*)

51. Under this argument, the Defence, once more, invokes the principle of legality (*nullum crimen sine lege*). In doing so, it appears to advance two distinct propositions.

⁷⁹ *Idem*, para. 72.

⁸⁰ See the "Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera", *supra* note 37, para. 11.

⁸¹ See the Defence Challenge, *supra* note 2, paras. 72-83.

⁸² See *supra*, paras. 28-29.

On the one hand, it argues that Resolution 1970 is so imprecise that individuals could not reasonably foresee whether their conduct would fall within the Court's jurisdiction pursuant to the Security Council referral.⁸³ On the other hand, it contends that certain crimes and modes of liability charged against Mr El Hishri were not sufficiently established under the law applicable to him at the relevant time.⁸⁴

52. The Defence's first contention – that the alleged imprecision of Resolution 1970 gives rise, in itself, to a violation of the principle of legality⁸⁵ – cannot be accepted for the reasons already set out *supra*.⁸⁶ As demonstrated, the principle of *nullum crimen sine lege* requires that an individual be able to reasonably foresee that particular conduct may attract criminal liability under applicable law. It does not require that the individual be able to foresee with precision the jurisdictional mechanism or forum through which that liability may ultimately be enforced. The uncertainty identified by the Defence therefore concerns a question of jurisdiction, not legality in the sense protected by the principle of *nullum crimen sine lege*.

53. In any event, as demonstrated *supra*, Resolution 1970 validly identified both the situation referred to the Court and the jurisdictional parameters of that situation in a manner fully consistent with the Statute and the Court's jurisprudence.⁸⁷ The Defence's characterisation of the Resolution as imprecise or unforeseeable is therefore misplaced.

54. The Defence's remaining submissions concerning the principle of legality are equally unpersuasive. The Defence's contentions that certain crimes and modes of liability charged in the Document Containing the Charges were not sufficiently established under domestic Libyan law or customary international law at the relevant time⁸⁸ concern the substantive legality of the charges advanced by the Prosecution. They do not, however, call into question the Court's jurisdiction pursuant to

⁸³ See the Defence Challenge, *supra* note 2, para. 85.

⁸⁴ *Idem*, paras. 86-97.

⁸⁵ *Idem*, para. 85.

⁸⁶ See *supra*, paras. 33-34.

⁸⁷ See *supra*, paras. 42-45.

⁸⁸ See the Defence Challenge, *supra* note 2, paras. 86-97.

Resolution 1970. Even if accepted, such arguments would therefore have no bearing on whether the Security Council validly referred the situation in Libya to the Court or on the scope of that referral.

55. Even on the Defence's own terms, its submissions are inconsistent with the applicable standard under the principle of legality. As discussed *supra*, the relevant question is whether a reasonable person in Mr El Hishri's position could have foreseen that the conduct alleged was criminal and could give rise to prosecution under national or international law.⁸⁹ It is not necessary that the individual be able to predict the precise legal classification that may later be attached to that conduct or the specific mode of liability through which responsibility may ultimately be established. Rather, the principle of legality only requires that a suspect or an accused be able to appreciate that the concrete conduct is criminal in the generally understood sense, without reference to any specific provision.⁹⁰ In the present case, there can be little doubt that the conduct alleged in the Document Containing the Charges was sufficiently serious and manifestly unlawful to satisfy that standard.⁹¹

C. Libya's Article 12(3) Declaration provides an distinct basis for the Court's jurisdiction

56. The Defence further disputes the validity and legal effect of Libya's Article 12(3) Declaration.⁹² However, its challenge to that declaration is ultimately of limited relevance, given that the Court's jurisdiction over the conduct alleged against Mr El Hishri already arises pursuant to Resolution 1970.

57. At the outset, the Common Legal Representatives, recall that, in issuing the warrant of arrest against Mr El Hishri, the Chamber found that "*the Court's jurisdiction in the Libya Situation was based on article 13(b) of the Statute, but since then Libya accepted the Court's jurisdiction by stating as follows: 'Pursuant to article 12(3) of the Rome Statute of*

⁸⁹ See *supra*, paras. 34-36.

⁹⁰ See ICTY, *The Prosecutor v. Hadžihasanović et al.*, "Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility" (Appeals Chamber), *supra* note 47, para. 34.

⁹¹ See *supra*, para. 35.

⁹² See the Defence Challenge, *supra* note 2, paras. 12-36.

*the International Criminal Court, the State of Libya 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.’ Since the conduct addressed in the Application is allegedly committed in Libya from around February 2015 to, at least, early 2020, it falls within the temporal and territorial jurisdiction, as accepted by Libya’.*⁹³

58. The Security Council referral under article 13(b) and Libya’s acceptance of jurisdiction pursuant to article 12(3) are distinct jurisdictional mechanisms established by the Statute. The Court’s jurisdiction over the Libya Situation was triggered by the adoption of Resolution 1970 and does not depend upon on any subsequent confirmation, validation, or supplementation through Libya’s later consent. At the same time, Libya’s Article 12(3) Declaration constitutes a separate jurisdictional basis upon which the Court may exercise jurisdiction pursuant to article 12(3) of the Statute. These mechanisms rest on different legal foundations – one deriving from a binding Security Council referral, the other from the State’s voluntary acceptance of jurisdiction – and they need not coincide in scope.

59. While jurisdiction based on article 12(3) of the Statute may have practical implications, including in relation to cooperation with the Court and the broader legitimacy of proceedings, the existence of the declaration does not alter the conclusion that the Court already possesses jurisdiction pursuant to Resolution 1970. Notwithstanding the foregoing, and should the Chamber be minded to consider the Defence’s challenge to Libya’s Article 12(3) Declaration, the Common Legal Representatives briefly respond to the arguments advanced by the Defence.

60. The Defence argues that Libya’s Article 12(3) Declaration is “*an international agreement in every sense of the word*” and, therefore, could only be made in accordance with Libya’s domestic treaty-making procedures.⁹⁴ Unless this premise is established,

⁹³ See the “Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri” (Pre-Trial Chamber I), *supra* note 6 paras. 4 and 5.

⁹⁴ *Idem*, para. 13.

the remainder of the Defence's argument does not follow. However, it finds no support in the text of article 12(3) of the Statute, the Rules of Procedure and Evidence (the "Rules"), or the Court's jurisprudence. Article 12(3) provides that a State not party to the Statute may, "*by declaration lodged with the Registrar*", accept the jurisdiction of the Court. The provision does not refer to signature, ratification, accession, parliamentary approval, or the conclusion of an international agreement. Nor does rule 44 of the Rules impose any such requirement.

61. The legal effect of the declaration flows directly from the Statute once a State accepts the Court's jurisdiction pursuant to article 12(3). Said declaration is therefore more accurately characterised as a unilateral acceptance of jurisdiction, or a *sui generis* jurisdictional act, rather than a treaty. It does not require negotiation, agreement, ratification by another party, or reciprocal consent. The Defence cites no authority establishing that an article 12(3) declaration constitutes a treaty within the meaning of the Vienna Convention on the Law of Treaties (the "VCLT").⁹⁵

62. The Court's practice in relation to article 12(3) of the Statute confirms said understanding. In the *Palestine* proceedings, the 2009 declaration lodged by the Minister of Justice⁹⁶ and the subsequent 2015 declaration⁹⁷ gave rise to litigation concerning Palestine's status and the Court's territorial jurisdiction.⁹⁸ Likewise, in the *Côte d'Ivoire* situation, the declaration signed by the Minister of Foreign Affairs⁹⁹ was accepted as a valid declaration under article 12(3).¹⁰⁰ The Chamber did not require

⁹⁵ *Idem*, paras. 15-16.

⁹⁶ See MINISTER OF JUSTICE OF THE PALESTINIAN NATIONAL AUTHORITY, [Declaration recognizing the Jurisdiction of the International Criminal Court](#), 21 January 2009.

⁹⁷ See PRESIDENT OF THE STATE OF PALESTINE, [Declaration Accepting the Jurisdiction of the International Criminal Court](#), 31 December 2014.

⁹⁸ See OTP, [Determination on the Situation in Palestine](#), 3 April 2012; and the "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'", [No. ICC-01/18-143](#), 5 February 2021. See also, TALMON (S.), "[Germany publicly objects to the International Criminal Court's ruling on jurisdiction in Palestine](#)", 11 February 2021.

⁹⁹ See the "Déclaration de reconnaissance de la compétence de la CPI datée du 18 avril 2003", [No. ICC-02/11-01/11-129-Anx16](#), 25 May 2012.

¹⁰⁰ See the "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'", [No. ICC-02/11-14-Corr](#), 15 November 2011, para 14.

proof of parliamentary approval, legislative ratification, or compliance with domestic constitutional requirements. Indeed, the Court may only determine whether it retains jurisdiction on the basis of its own legal framework, and cannot be made contingent upon an assessment of the domestic law of the State concerned.¹⁰¹ Rather, the only relevant consideration is whether the declaration emanated from an authority capable of acting on behalf of the State externally.

63. This approach aligns with the International Law Commission's Guiding Principles on Unilateral Declarations, which recognise that a State may be bound by a unilateral act when made by an authority competent to act on its behalf.¹⁰² The International Court of Justice (the "ICJ") has likewise described declarations accepting international jurisdiction as unilateral acts¹⁰³ and has recognised that such declarations may generate legal obligations independently of treaty-making procedures.¹⁰⁴ This distinction is also reflected in Libya's own external practice, which includes the use of declarations, *notes verbales* and other diplomatic communications before international bodies outside ordinary treaty-making procedures.¹⁰⁵

64. These considerations suffice to demonstrate that the Defence has not established its central premise that an article 12(3) declaration constitutes a treaty subject to domestic treaty-making procedures. Its argument therefore relies on the inappropriate application of treaty-law concepts to a mechanism which the Statute

¹⁰¹ See, *inter alia*, the "Decision on the Central African Republic's challenge to the admissibility of the case against Edmond Beina" (Pre-Trial Chamber II), [No. ICC-01/14-217-Red](#), 12 September 2025, para. 42.

¹⁰² INTERNATIONAL LAW COMMISSION, "[Guiding Principles applicable to unilateral declarations of States, capable of creating legal obligations with commentaries thereto](#)", 2006, Principle 4 and commentary, identifying Heads of State, Heads of Government and Ministers for Foreign Affairs as officials whose representative capacity is generally recognised under international law.

¹⁰³ See ICJ, *Fisheries Jurisdiction Case (Spain v Canada)*, [Judgment of 4 December 1998](#), *I.C.J. Reports*, 1998, para. 46.

¹⁰⁴ See ICJ, *Nuclear Tests Case (Australia v. France)*, [Judgment of 20 December 1974](#), *I.C.J. Reports*, 1974, paras. 43-46.

¹⁰⁵ See, *inter alia*, PERMANENT MISSION OF LIBYA TO THE UNITED NATIONS, Note verbale dated 27 May 2025 from the Permanent Mission of Libya to the United Nations addressed to the Secretary-General, UN Doc. [A/79/916](#), 1 July 2025, concerning Libya's submissions before the Commission on the Limits of the Continental Shelf; and NEDOS (V.), [Libya declares contiguous zone of 24 nautical miles](#), 28 May 2023. These examples illustrate Libya's use of unilateral diplomatic communications and declarations before international bodies outside ordinary treaty-ratification procedures.

expressly frames as a declaration lodged with the Registrar. Similarly, the remaining Defence's arguments also fail.

65. The Defence contends that, under Libyan law, the President is the competent authority to represent Libya internationally and to conclude treaties and agreements.¹⁰⁶ Even assuming, *arguendo*, that its interpretation of the 13th Constitutional Amendment is correct, this does not resolve the issue at stake, as it presupposes that the authority required to lodge an article 12(3) declaration is identical to the authority required to conclude treaties; a proposition that remains unproven.

66. The Defence's submissions regarding President Al-Menfi's participation at the UN General Assembly on 25 September 2025¹⁰⁷ demonstrate only that he is recognised internationally in his capacity as President of the Presidential Council. They do not establish that he alone possesses authority to represent Libya internationally. At the relevant time, the UN continued to engage with the Government of National Unity (the "GNU") as a functioning executive authority under Prime Minister Abdul Hamid Dbeibeh. The UN Special Representative expressly stated that "*the international community still recognizes the GNU*", highlighting the ongoing international engagement with the GNU as Libya's executive authority.¹⁰⁸ This approach is consistent with the practice of the UN, which has repeatedly treated UN-backed

¹⁰⁶ See the Defence Challenge, *supra* note 2, para. 24.

¹⁰⁷ *Ibid.*

¹⁰⁸ See LIBYAN NEWS AGENCY, [UN envoy: The international community still recognizes the Government of National Unity, and we realize that it faces protests and opposition](#), 23 May 2025. See also, UN Security Council, *The situation in Libya*, UN Doc. [S/PV.10142](#), 22 April 2026, p. 4; Ms. Tetteh: "Starting on 3 March, Prime Minister Al Dabiba initiated, over a period of two weeks, ministerial appointments for approximately 21 ministerial and deputy ministerial positions, expanding the Cabinet to 32 ministers"; and UNSMIL (video), [SRSG Hanna Tetteh briefs Security Council on Libya](#), 18 February 2026, from 9:36 until 9:47: "*The Government of National Unity, Minister of Economy and Trade, reported in January that in accordance with studies, roughly about 30% of Libyans are living in poverty*". UNITED NATIONS SUPPORT MISSION IN LIBYA, "Report of the Secretary-General, Secretary-General", UN Doc. [S/2026/281](#), 6 April 2026, para. 41: "*On 3 and 4 December 2025, UNSMIL, in coordination with the Ministries of Defence, Foreign Affairs and Interior of the Government of National Unity, convened a meeting in Tripoli to advance the implementation of the code of conduct for military, police and security actors [...]*".

executive authorities as Libya's principal interlocutors and called upon States to engage with them rather than with competing institutions.¹⁰⁹

67. The Defence's reliance on the VCLT¹¹⁰ is also misplaced. An article 12(3) declaration is not a treaty within the meaning of the VCLT and, therefore, its validity is not governed by the Convention. At most, the VCLT provisions might be invoked by analogy. But even then, article 7 of the VCLT offers no support to the Defence. Article 7(2) recognises Heads of State, Heads of Government, and Ministers for Foreign Affairs as competent to represent the State internationally by virtue of their functions, without producing full powers.¹¹¹ The proper starting point is therefore one of apparent authority; invalidity cannot be presumed. Similarly, article 46 is inapplicable. Its scope is narrow: a State may invoke internal law only where the violation concerns a rule of fundamental importance and is "*manifest*", meaning objectively evident to a State acting in accordance with normal practice and in good faith.¹¹² In the *Case concerning the land and maritime boundary between Cameroon and Nigeria*, the ICJ confirmed that even constitutional limits on a Head of State's authority are not manifest unless properly publicised,¹¹³ and that States are under no general obligation to monitor the internal legislative and/or constitutional developments of other States.¹¹⁴

68. Since the GNU continued to be engaged by the UN and foreign States as an executive authority exercising governmental functions in Libya,¹¹⁵ the Court, like other international institutions, was entitled to treat acts performed by the GNU as emanating from an internationally recognised executive authority exercising

¹⁰⁹ See Resolution 2259 (2015) adopted by the Security Council at its 7598th meeting, on 23 December 2015, UN Doc. [S/RES/2259 \(2015\)](#), paras. 3-5. This resolution endorses the Government of National Accord as the sole legitimate government of Libya and calling upon Member States to engage with institutions established under the Agreement rather than parallel institutions.

¹¹⁰ See the Defence Challenge, *supra* note 2, paras. 15-16.

¹¹¹ See article 7(2) of the [Vienna Convention on the Law of Treaties](#), 1969 (the "VCLT").

¹¹² See article 46 of the VCLT.

¹¹³ See ICJ, *Case concerning the land and maritime boundary between Cameroon and Nigeria*, [Judgment of 10 October 2002](#), *I.C.J. Reports*, 2002, para. 265.

¹¹⁴ *Idem*, para. 266.

¹¹⁵ See *supra*, note 108.

governmental functions on behalf of Libya. Against that background, any alleged limitation upon the GNU's authority under domestic law could not reasonably be regarded as objectively evident to the Court.

69. Moreover, the Defence portrays Libya's constitutional framework as considerably more settled than it is in reality. While the 13th Constitutional Amendment grants the President authority to represent the State internationally and to conclude treaties and agreements,¹¹⁶ the Libyan Political Agreement allocates significant external-relations functions to other executive institutions.¹¹⁷ Article 8 entrusts the Presidency Council with representing the State internationally, while article 9(8) expressly authorises the Council of Ministers to negotiate international conventions and agreements. The Political Agreement was not treated by the Libyan Supreme Court as ordinary legislation but as a consensual constitutional instrument complementary to the Constitutional Declaration.¹¹⁸ Subsequent transitional arrangements adopted through the Libyan Political Dialogue Forum likewise preserved substantial executive functions within the GNU, describing it as the supreme administrative body of the State and assigning to the executive authority responsibility for managing Libya's foreign policy.¹¹⁹ The relevant legal framework therefore reflects overlapping and competing claims concerning the conduct of Libya's external relations, rather than a single, uncontested constitutional rule.

70. The present case therefore falls well short of the threshold contemplated by article 46 of the VCLT. The GNU remains an internationally recognised executive

¹¹⁶ See LIBYAN HOUSE OF REPRESENTATIVES, "Thirteenth Constitutional Amendment", *Official Gazette*, Issue No. 4, 23 February 2023, [LBY-D37-0000-0003](#) and [LBY-D37-0000-0026](#), article 22.

¹¹⁷ See the [Libyan Political Agreement](#), 17 December 2015.

¹¹⁸ See SUPREME COURT, [طعن دستوري رقم 1 لسنة 63 قضائية، بشأن الاتفاق السياسي الليبي، الرقابة الدستورية، الإعلان الدستوري](#) (Constitutional Appeal No. 1 of the Judicial Year 63, on the Libyan Political Agreement, Constitutional Control, Constitutional Declaration), 4 December 2025.

¹¹⁹ See the LIBYAN POLITICAL DIALOGUE FORUM, "[Chapter on Unified Executive Authority](#)", Art. 3(1): "*The Government of National Unity is the supreme administrative body of the State. [...] [T]he Council of Ministers of the Government shall be responsible for the rest of the competencies of the executive authority*". See also LIBYAN POLITICAL DIALOGUE FORUM, "[Roadmap 'For the Preparatory Phase of a Comprehensive Solution'](#)", Article 6(9): "*The executive authority shall manage the foreign policy of the Libyan state [...]*".

authority, while Libya's constitutional framework is characterised by competing texts, overlapping institutional claims, and divergent interpretations of authority.¹²⁰ The House of Representatives' challenge to the GNU's mandate¹²¹ merely underscores the existence of an unresolved constitutional dispute. More fundamentally, the Defence has not demonstrated that those objections produced any operative legal effect capable of depriving the GNU of its ability to act externally on behalf of Libya.¹²² Far from establishing a manifest defect, these competing constitutional claims demonstrate that any alleged limitation upon the GNU's authority could not have been objectively evident to the Court acting in good faith.

71. Accordingly, the Defence has failed to establish that article 12(3) declarations constitute treaties requiring domestic parliamentary ratification. Nor has it demonstrated that any alleged defect under Libyan law was manifest to the Court. Libya's Article 12(3) Declaration should therefore be treated as a valid declaration attributable to Libya for the purposes of article 12(3) of the Statute.

72. [REDACTED].¹²³ [REDACTED].¹²⁴ [REDACTED].¹²⁵

73. [REDACTED].¹²⁶ [REDACTED]. [REDACTED]. [REDACTED]¹²⁷ [REDACTED].

¹²⁰ See UN Security Council, *The situation in Libya*, UN Doc. [S/PV.10142](#), 22 April 2026, pp.4-5: Ms. Tetteh: *"I remain deeply concerned by the continued division of Libya's judiciary [...]. The persistence of two constitutional bodies, two parallel Supreme Judicial Councils, making unilateral decisions [...] has further entrenched institutional fragmentation and legal uncertainty. Progress is constrained by political interference and those obstructing the resolution of this critical issue should be held accountable"*. See also, REUTERS, [FACTBOX The legitimacy crisis in Libya's state institutions](#), 10 September 2024; and UNSMIL, [DSRSG Koury's remarks to the UN Security Council](#), 20 August 2024.

¹²¹ See the Defence Challenge, *supra* note 2, paras. 20-23.

¹²² See REUTERS, [Libya's eastern parliament pulls confidence from unity government](#), 21 September 2021. See also REPUBLIC OF TÜRKIYE, MINISTRY OF FOREIGN AFFAIRS, [Press Release Regarding the Decision of Libyan House of Representatives to Withdraw Vote of Confidence from the Government of National Unity](#), No. 314, 22 September 2021.

¹²³ See the Defence Challenge, *supra* note 2, para. 99; and the [REDACTED].

¹²⁴ See "Annex I to the Transmission of Article 12(3) Declaration by the State of Libya", [No. ICC-01/11-01/25-6-Conf-AnxI, 20 May 2025](#).

¹²⁵ See the Annex to the "Transmission of Additional Communication from the State of Libya in relation to the Article 12(3) Declaration", [No. ICC-01/11-01/25-123-Anx](#), 29 May 2026.

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

74. [REDACTED].¹²⁸ [REDACTED]. [REDACTED] “[REDACTED][REDACTED].

75. [REDACTED]. [REDACTED].¹²⁹ [REDACTED]. [REDACTED].

V. VICTIMS’ VIEWS AND CONCERNS

76. The present jurisdictional challenge must also be considered in light of the views and concerns expressed by victims during consultations conducted in the course of their representation. Victims have consistently emphasised that the proceedings before the Court constitute a unique and significant opportunity to secure recognition of the harms suffered at Mitiga Prison. For many, these proceedings provide the only realistic avenue through which their experiences may be acknowledged and subjected to judicial scrutiny at the international level.

77. The victims consulted include individuals who have been subjected to arbitrary detention, torture, inhuman treatment, sexual and gender-based violence, and other serious forms of abuse, as well as family members of persons who suffered such grave violations. Victims emphasised that the physical, psychological, social, and economic consequences of those events continue to affect them and their families to this day. In the victims’ view, meaningful accountability for the crimes committed at Mitiga Prison has remained elusive. Against this background, they attach particular importance to the continuation of the present proceedings and to the Court’s ability to exercise the jurisdiction conferred upon it by the Statute and applicable international law. Victims further explained that they regard these proceedings not only as a means of determining individual criminal responsibility, but also as an opportunity to establish an authoritative judicial record of the violations committed, and to acknowledge the suffering endured by those affected.

78. While recognising the right of the Defence to challenge the Court’s jurisdiction, victims expressed concern that efforts to exclude the Court’s jurisdiction may result in further delays and may

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

79. prolong the uncertainty that many have endured for years. Victims therefore emphasised their interest in the expeditious resolution of jurisdictional issues and in ensuring that the allegations before the Court are determined on their merits through a fair, independent and impartial judicial process. In their view, the interests of justice are best served by permitting the proceedings to move forward without undue delay, while fully safeguarding the rights of all participants.

VI. CONCLUSION

80. In light of these considerations, the Common Legal Representatives submit that the Defence Challenge must be dismissed in its entirety.



Sarah Pellet



Paolina Massidda

Dated this 12th day of June 2026

At The Hague, The Netherlands