

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR v. KHALED MOHAMED ALI EL HISHRI

Public

Public redacted version of “Prosecution response to Defence challenge to the Court’s jurisdiction”, ICC-01/11-01/25-132-Conf, 12 June 2026

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I. INTRODUCTION

1. The Prosecution respectfully submits that the Defence challenge to the Court's exercise of jurisdiction over Mr El Hishri should be dismissed.¹

2. Consistent with article 13(b) of the Rome Statute, the Court's jurisdiction is based on United Nations Security Council ("UNSC") Resolution 1970.² As chambers have repeatedly affirmed for almost ten years, the Resolution provides for the Court's exercise of jurisdiction not only over alleged crimes committed in 2011 but also subsequent crimes if "associated with" the conflict which began in 2011—understood to extend to alleged crimes until at least 2024.³

3. More recently, further amplifying the support for the Court's exercise of jurisdiction under the Resolution which its own representatives expressed to the UNSC, Libya also filed a declaration pursuant to article 12(3) of the Statute.⁴ This significantly overlaps with the scope of the Resolution. While the Declaration is not required for the Court's exercise of jurisdiction in this case, it underlines Libya's further acceptance of the Court's jurisdiction *ad hoc*.⁵ The ostensible Defence concern for Libyan consent and Libyan interests is thus not only irrelevant but misplaced.

4. Like many other cases pending before the Court, the case against Mr El Hishri falls within the parameters of the situation as defined by the Resolution, or is in any event sufficiently linked to them, such that the Court is properly exercising its jurisdiction. The Challenge shows nothing to the contrary. The Defence claim that the parameters of the situation must be defined more narrowly than suggested by the Resolution itself is both incorrect and implausible, and contrary to the object and purpose of the Statute. Likewise, as the Appeals Chamber previously

¹ [ICC-01/11-01/25-108-Conf-Corr](#) ("Challenge").

² UNSC Resolution 1970, [LBY-OTP-0001-0004](#) ("the Resolution").

³ See e.g. [ICC-01/11-01/17-2](#) ("Werfalli First Arrest Warrant"), para. 23 (affirming the exercise of jurisdiction over events in 2016-2017); [ICC-01/11-01/17-13](#) ("Werfalli Second Arrest Warrant"), para. 20 (jurisdiction over events in 2018); [ICC-01/11-01/20-26-Anx-Red](#) ("Sneidel Arrest Warrant"), para. 4 (jurisdiction over events in 2016-2017); [ICC-01/11-141-Anx1](#) ("Al Kani Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-141-Anx2](#) ("Doumah Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-141-Anx3](#) ("Al Lahsa Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-141-Anx4](#) ("Salheen Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-141-Anx5](#) ("Al Shaqqaqi Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-141-Anx6](#) ("Al Zinkal Arrest Warrant"), para. 13 (jurisdiction over events until at least 2020); [ICC-01/11-152-Anx](#) ("Njeem Arrest Warrant"), para. 11 (jurisdiction over events until at least 2024). The Prosecution underlines its submission that it is the *factual* connection to the armed violence originating in 2011 which may be relevant for the purpose of jurisdiction, irrespective whether as a matter of law the ongoing hostilities in Libya are best characterised as one or multiple armed conflicts. See further below para. 23.

⁴ [ICC-01/11-01/25-6-AnxII-Red](#) ("Declaration").

⁵ See also [ICC-01/11-01/25-7](#) ("Arrest Warrant"), para. 5.

affirmed in *Abd-Al-Rahman*, the Court's exercise of jurisdiction on the basis of a UNSC resolution occasions no necessary concern about the principle of legality. Rather, it is for the Defence to substantiate any such claim, which it has failed to do.

5. Finally, even if the Court's jurisdiction were to depend on the Declaration (which it does not), there can be no doubt about its validity under international law. It is a unilateral act of Libya, made by officials with the requisite authority under international law to represent Libya before the Court and to make such unilateral commitments on its behalf. Irrespective of the Defence claims, this is all that international law (and therefore this Court) requires. The Challenge does not show otherwise—and most particularly in circumstances when the validity of the Declaration has not been challenged by Libya itself [REDACTED].⁶

II. CLASSIFICATION

6. This response is filed confidentially, consistent with regulation 23bis(2) of the Regulations of the Court. A public redacted version will be provided in due course.

III. SUBMISSIONS

7. The Defence arguments in the Challenge lack merit and show no defect in the Court's lawful exercise of jurisdiction. The Prosecution has reordered its response to the three arguments raised by the Defence so that it initially addresses the primary basis of the Court's jurisdiction in this situation. As such, in the following submissions, the Prosecution will first show that the Defence is incorrect to argue that the case against Mr El Hishri is not "caught by" the Resolution⁷ and, second, that the Court's exercise of jurisdiction under the Resolution is fully consistent with article 22 of the Statute.⁸ Finally, in any event and in the interest of completeness, the Prosecution will show that the Declaration is valid as a matter of international law.⁹

III.A The Court's jurisdiction over Mr El Hishri is correctly based on the Resolution

8. The Defence tacitly accepts that the UNSC acted lawfully under the UN Charter in adopting the Resolution. Instead, it relies upon its claim of a vague and unspecified obligation upon the Court to read the Resolution "narrowly", so as to exclude the crimes charged in the

⁶ See [REDACTED].

⁷ See [Challenge](#), paras. 37-53, 61-84.

⁸ See [Challenge](#), paras. 54-60, 85-97.

⁹ See [Challenge](#), paras. 12-36.

case against Mr El Hishri.¹⁰ However, this claim is unfounded, both as a matter of general international law and under the terms of the Statute itself. There is no *a priori* obligation either to interpret all UNSC resolutions narrowly, nor specifically to do so for referrals to the Court. What matters, rather, is that such documents are interpreted *correctly*.¹¹

9. Likewise, the Defence places undue emphasis on the reference in some decisions of the Court to a “situation of crisis” precipitating the trigger of the Court’s exercise of jurisdiction.¹² This term of art does not, however, imply that the Court’s jurisdiction is limited to those specific events. Rather, as the Court’s constant practice reflects, the correct approach is two-fold. First, situations are defined and understood with reference to objective parameters, rather than to a particular historical event. Second, even if a particular case falls beyond those parameters, the Court may nonetheless properly exercise its jurisdiction if that case is “sufficiently linked” to those parameters.¹³ This does not create a vague or open-ended jurisdiction, but rather strikes the correct balance between the twin needs for certainty and effectiveness in delivering the mandate of the Court—which, indeed, is the reason why situations are referred to the Court in the first place.

10. Finally, the Defence is incorrect to conclude that applying the correct approach to interpreting the Resolution entails the exclusion of the Court’s jurisdiction over this case.¹⁴ To the contrary, as a factual matter, it is clear that the charged crimes were associated with the Libyan conflict(s) originating in the 2011 revolution. As such, the case against Mr El Hishri falls within the parameters of the situation as they have consistently been defined, or are otherwise sufficiently linked to them, such that it falls within the Court’s exercise of jurisdiction. This is plain from consideration of the factual allegations themselves. Furthermore, the common understanding by States that such crimes would fall within the scope of the Court’s jurisdiction resulting from the referral is evident from the UNSC’s own proceedings.¹⁵

¹⁰ *Contra e.g.* [Challenge](#), paras. 38-39. *See further* paras. 40-53. In the context of its further arguments for a narrow reading of the Resolution, based on the principle of legality under article 22 of the Statute (addressed separately below), *see also e.g.* paras. 59-60. On the principle of legality, *see below* paras. 36-54.

¹¹ *See below* paras. 11-17.

¹² *Contra e.g.* [Challenge](#), paras. 61-62.

¹³ *See below* paras. 18-20.

¹⁴ *Contra e.g.* [Challenge](#), paras. 63-84.

¹⁵ *See below* paras. 21-35.

III.A.1 There is no *a priori* obligation to interpret referrals narrowly

11. The Challenge identifies no legal requirement for a narrow interpretation of UNSC resolutions in general, nor UNSC referrals to the Court in particular, either under general international law or the Statute.¹⁶ There is none.

12. As a matter of general international law, clear rules exist to facilitate the correct interpretation of treaties, including by requiring joint consideration of the relevant text in its ordinary meaning, considered in context, and in light of the object and purpose of the treaty.¹⁷ The object of the exercise is to discern the meaning *correctly*, not simply to favour the narrowest interpretation.

13. Critically, while the rules on treaty interpretation “may provide guidance” in interpreting UNSC resolutions, the ICJ has stressed that the “differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account”.¹⁸ This is due to the “very different process” leading to the drafting of a UNSC resolution, and in particular may require a broader assessment not only of the resolution itself but also relevant statements by UNSC members at the time of adoption, other resolutions on the same issue, and the subsequent practice of relevant UN organs and affected States.¹⁹ It is thus implicit that the correct interpretation of a UNSC resolution may become clear not only from the face of the document but also in light of relevant practice, as in this situation.²⁰ Again, this is inconsistent with any notion that the narrowest interpretation is to be adopted.

14. Nor does the principle of State sovereignty affect this conclusion, even where a binding UNSC resolution imposes obligations upon a UN Member State to cooperate with the Court even though it is not a State Party to the Rome Statute.²¹ This is because all UN Member States have consented to the plenary authority of the UNSC to make binding decisions when acting

¹⁶ *Contra* [Challenge](#), paras. 47-48.

¹⁷ See e.g. [Vienna Convention on the Law of Treaties](#) (“VCLT”), art. 31.

¹⁸ [ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403](#) (“Kosovo Advisory Opinion”), para. 94. See also [Challenge](#), para. 62.

¹⁹ [Kosovo Advisory Opinion](#), para. 94. See also e.g. [ICTY, Prosecutor v. Tadić, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995](#) (“Tadić Jurisdiction Appeal Judgment”), para. 75. See further e.g. [M. Wood, ‘The interpretation of Security Council resolutions, revisited,’ \[2016\] 20 Max Planck Yearbook of United Nations Law 3](#), pp. 20-27, 34-35.

²⁰ On practice relevant to interpreting the Resolution, see further below e.g. paras. 33-35.

²¹ *Contra* [Challenge](#), paras. 41-42, 46, 53.

under Chapter VII, as a consequence of their acceptance of the UN Charter.²² While this authority may be conditional on identification of a threat to international peace and security, this does not fetter the scope of the measures which the UNSC may then take.²³ Rather, precisely to achieve its mandate, the UNSC has broad power to take the measures which it considers necessary to address the threat.²⁴

15. In this light, the Challenge does not—and cannot—claim that the UNSC exceeded its powers under the UN Charter in the Resolution.²⁵ Nor is the Defence assisted by reference to the separate opinion of ICTY Judge Sidhwa, who merely questioned whether the creation of an international criminal court with *general jurisdiction* might exceed the broad discretion afforded to the UNSC.²⁶ Yet this concern is inapposite when considering a UNSC referral to this Court, since by definition it concerns neither the creation of a new body nor does it grant general jurisdiction. To the contrary, as the Court’s own established practice makes clear, referrals are limited by objective parameters often including with regard to time, territory, material, and personal scope, as in this situation.²⁷ As such, there is simply no risk of “perpetual” jurisdiction.²⁸ Yet the necessary existence of such parameters does not, however, imply that they must be subject to arbitrary or artificial limitations—which would, indeed, defeat the object of the referral in the first place.

16. Further, while appropriate parameters for the Court’s exercise of jurisdiction are necessary, it also remains the case that the validity of a referral depends upon its compatibility with the Statute, and this is ultimately a question to be determined by the Court itself.²⁹ As a consequence, there may be certain ostensible limitations which cannot be enforced. While such concerns do not arise on the facts of the present case, the principle is significant—for example in illustrating that, on the one hand, the scope of a referral must be defined but, on the other, it must not be overly prescriptive (such as a referral which unduly fetters the ability of the

²² See [ICC-02/05-01/09-397 OA2](#) (“*Bashir Jordan Referral Appeal Judgment*”), paras. 139-140 (referring to article 25 of the UN Charter), 145. See also [Challenge](#), para. 42.

²³ See [UN Charter](#), art. 39.

²⁴ *Contra* [Challenge](#), para. 44. See [Tadić Jurisdiction Appeal Judgment](#), para. 31.

²⁵ Cf. [Challenge](#), paras. 43, 46, 53.

²⁶ *Contra* [Challenge](#), para. 45 (citing [ICTY, Prosecutor v. Tadić, IT-94-1, Separate Opinion of Judge Sidhwa on the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995](#) (“*Tadić Jurisdiction Appeal Judgment, Separate Opinion of Judge Sidhwa*”), para. 63).

²⁷ See below paras. 18-20. See also [Tadić Jurisdiction Appeal Judgment, Separate Opinion of Judge Sidhwa](#), para. 63.

²⁸ *Contra* [Challenge](#), paras. 46, 52.

²⁹ See e.g. [ICC-02/05-01/20-503 OA8](#) (“*Abd-Al-Rahman Jurisdiction Appeal Judgment*”), paras. 45-46. The Appeals Chamber noted that not all inconsistencies with the Statute would necessarily invalidate a referral. See also [Bashir Jordan Referral Appeal Judgment](#), para. 135.

Prosecutor to investigate impartially and objectively, or constrains the discretion to determine which case to prosecute). Likewise, given the nature of the events which trigger referrals to the Court, it would be self-defeating to frame such referrals *too* narrowly.³⁰

17. Indeed, contradicting the Defence claim of any *a priori* obligation to interpret referrals narrowly (*i.e.*, to impose arbitrary limits on the parameters defining the situation), the Appeals Chamber has repeatedly endorsed the view that the concept of a “situation” under the Statute is used “loosely, specifically with a view to extending enough flexibility to the Prosecutor to investigate independently and impartially.”³¹ Nor is the Defence assisted by its reference to other situations before the Court.³² Notably:

- In *Mbarushimana* and *Mudacumura*, the Pre-Trial Chamber merely sought to confirm that those cases fell within the parameters of the *DRC* situation, or were otherwise sufficiently linked to them.³³ This was a case-sensitive assessment, based on the chamber’s understanding of the relevant parameters in that situation. Nothing in those decisions is inconsistent with the Chamber in this case affirming that it falls within the parameters of the *Libya* situation or is otherwise sufficiently linked to them.³⁴
- The Prosecution’s own practice in considering whether to open ‘second’ investigations in the *CAR II* and *Venezuela II* situations was not based on any *a priori* obligation to interpret referrals narrowly, but merely reflected *in concreto* assessments whether the alleged crimes in question did or did not fall within the parameters of an existing situation.³⁵ Again, the Prosecution emphasised that this was a fact-driven assessment, based on a proper understanding of the parameters of the referrals in question.³⁶
- While the Defence properly acknowledges situations such as the *DRC* situation where the Prosecution considered that a subsequent referral still fell *within* the parameters of an

³⁰ In the context of authorisations to investigate under article 15(4) of the Statute, by analogy, *see e.g.* [ICC-02/17-138 OA4](#) (“*Afghanistan* Article 15(4) Appeal Judgment”), para. 63.

³¹ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 25; [ICC-01/18-481 OA3](#) (“*Palestine* Article 18(1) Appeal Judgment”), para. 82.

³² *Contra* [Challenge](#), paras. 47-52.

³³ *See* [ICC-01/04-01/10-1](#) (“*Mbarushimana* Article 58 Decision”), paras. 4-7; [ICC-01/04-01/12-1-Red](#) (“*Mudacumura* Article 58 Decision”), paras. 14-17.

³⁴ *Contra* [Challenge](#), paras. 47-48. Concerning the facts of this case and situation, *see further below* paras. 21-32.

³⁵ *See e.g.* [ICC Office of the Prosecutor, Situation in the Central African Republic II: Article 53\(1\) Report, 24 September 2014](#), paras. 2, 8-10, 45-47; [ICC Office of the Prosecutor, 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](#).

³⁶ *Contra* [Challenge](#), paras. 49-50, *especially* para. 49 (referring to the Prosecution’s supposed “understanding of the need to narrowly interpret referrals”).

existing situation,³⁷ it fails to recognise that this undermines any claimed *a priori* obligation to interpret referrals narrowly. The mere fact that the Prosecution took jurisdictional questions “seriously” implies no such thing.³⁸ Rather, it illustrates that both State Party referrals and UNSC referrals are treated in the same impartial, fact-driven manner.³⁹

III.A.2 The Court’s exercise of jurisdiction is circumscribed by the objective parameters of the situation

18. The Challenge does not fully set out the law or established practice defining the scope of situations before the Court, but merely emphasises decisions referring to a “situation of crisis” precipitating the trigger of the Court’s exercise of jurisdiction.⁴⁰ However, this term of art does not imply that the Court’s jurisdiction is limited to a narrow set of historical events, and the Appeals Chamber has implicitly cautioned against misreading the significance of this term in the *Mbarushimana* decision.⁴¹

19. Rather, as the Appeals Chamber has consistently affirmed, the scope of a situation is defined by objective parameters which are discerned from the referral in the context of the underlying facts.⁴² These parameters may typically be geographic, temporal, material, and/or personal,⁴³ but none is a *sine qua non*—rather, the parameters “may vary depending on the circumstances of each specific situation”.⁴⁴ The Court may exercise jurisdiction over all cases

³⁷ See [Challenge](#), para. 51. See further e.g. [ICC-01/23-4-Red](#) (“DRC II Determination”), paras. 2, 6-8. By contrast, the Defence fails to address the judgment of the Appeals Chamber in the *Situation in the State of Palestine*, where it was recognised that subsequent referrals in the same situation may simply be submitted “with a view to urging the Prosecutor to advance the investigation”: [Palestine Article 18\(1\) Appeal Judgment](#), para. 105. As such, the incidence of a second referral or similar State action does not necessarily imply any view concerning the breadth or otherwise of an existing situation.

³⁸ Cf. [Challenge](#), para. 51.

³⁹ Cf. [Challenge](#), para. 49 (fn. 70: citing *inter alia* [Njeem Arrest Warrant](#), Dissenting Opinion of Judge Flores Liera, para. 13 (expressing concern at the possibility that “the Court’s jurisdiction triggered by the Security Council referral [...] seems to be interpreted more expansively when compared with situations where the Court’s jurisdiction has been triggered by State referrals”)).

⁴⁰ *Contra* e.g. [Challenge](#), paras. 61-62 (citing e.g. [Mbarushimana Article 58 Decision](#), para. 6: “it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated”).

⁴¹ See e.g. [Palestine Article 18\(1\) Appeal Judgment](#), para. 83.

⁴² See e.g. [Palestine Article 18\(1\) Appeal Judgment](#), para. 127; [ICC-02/18-89 OA](#) (“Venezuela Article 18(2) Appeal Judgment”), paras. 114, 218, 227-228; [ICC-01/21-77 OA](#) (“Philippines Article 18(2) Appeal Judgment”), paras. 107-108; [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), paras. 25-27; [Afghanistan Article 15\(4\) Appeal Judgment](#), paras. 59-62; [ICC-01/15-12](#) (“Georgia Article 15(4) Decision”), paras. 62-64. In the practice of the Court, the term “situation of crisis” is sometimes used in the context of describing such parameters.

⁴³ See e.g. [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), paras. 25-26; [Mudacumura Article 58 Decision](#), para. 14. See also [Palestine Article 18\(1\) Appeal Judgment](#), para. 58.

⁴⁴ [Philippines Article 18\(2\) Appeal Judgment](#) para. 106; [Palestine Article 18\(1\) Appeal Judgment](#), para. 127.

falling within those parameters, or otherwise sufficiently linked to them.⁴⁵ Applying this principle, the Appeals Chamber has for example rejected the notion that situations are limited to specific incidents identified exhaustively in advance or events which have already occurred at the time of the referral.⁴⁶ The Prosecutor can and must be able to investigate “the situation as a whole.”⁴⁷

20. The Defence concern that situations before the Court may become open ended is thus misplaced. To the contrary, the Court’s jurisdiction in each situation is defined in scope by objective parameters. But this does not mean that it need be limited to particular pre-defined events or subject to arbitrary or artificial limitations.⁴⁸ Furthermore, quite apart from the Defence misconception about situations before the Court in general, it is clear that no such concern arises with regard to the *Situation in Libya* in particular.

III.A.3 The case against Mr El Hishri falls within the parameters of the situation, or is otherwise sufficiently linked to them

21. The case against Mr El Hishri falls within the parameters of the *Situation in Libya*, or is otherwise sufficiently linked to them, such that it falls within the exercise of the Court’s jurisdiction. On the face of the Resolution, the parameters of the situation are geographic (Libyan territory), temporal (15 February 2011 onwards), and personal (Libyan nationals, and others).⁴⁹

22. The Resolution is silent about any material parameter in addition to those expressly set out. However, even if such a parameter were considered to be implicit, a contextual reading makes clear that such a parameter would not be limited only to alleged crimes against humanity committed by the Gaddafi regime but would also encompass other alleged crimes under the Statute—especially war crimes—committed by any party to the relevant conflict(s).⁵⁰ Indeed,

⁴⁵ See e.g. [Palestine Article 18\(1\) Appeal Judgment](#), para. 135; [Georgia Article 15\(4\) Decision](#), paras. 62-64; [Mudacumura Article 58 Decision](#), para. 14; [ICC-01/04-01/10-451](#) (“*Mbarushimana* Jurisdiction Decision”), para. 21. See also [Afghanistan Article 15\(4\) Appeal Judgment](#), paras. 57-64 (rejecting a “closely linked” test).

⁴⁶ See [Palestine Article 18\(1\) Appeal Judgment](#), paras. 74, 76, 82, 134-135; [Venezuela Article 18\(2\) Appeal Judgment](#), para. 230; [ICC-02/17-218 OAS](#) (“*Afghanistan* Article 18(2) Appeal Judgment”), paras. 57-60; [Afghanistan Article 15\(4\) Appeal Judgment](#), paras. 61, 64; [Mudacumura Article 58 Decision](#), para. 14; [Mbarushimana Jurisdiction Decision](#), para. 21; [Mbarushimana Article 58 Decision](#), para. 6.

⁴⁷ [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 60.

⁴⁸ See also above paras. 16, 19.

⁴⁹ [ICC-01/11-172](#) (“Arrest Warrant Application”), para. 9.

⁵⁰ See further below para. 23.

it remains to be seen whether a referral purporting to confine the jurisdiction of the Court to a particular crime or crimes would even be compatible with the Statute as a matter of law.⁵¹

23. In a line of cases beginning with *Al Werfalli*,⁵² the Pre-Trial Chamber has further affirmed that cases will fall within the parameters of the situation, or at least be sufficiently linked to those parameters, if “associated with” the “conflict” which began in 2011.⁵³ Importantly, the Prosecution submits that it is the *factual* connection to the conflict which may be relevant in this sense, irrespective whether as a matter of law the ongoing hostilities in Libya are best characterised as one or multiple armed conflicts.⁵⁴ As one means of establishing this connection—but not necessarily the only means—the *Al Werfalli* Pre-Trial Chamber took into account that relevant actors were also “involved” in the conflict “ever since the days of the revolution against the Gaddafi regime”.⁵⁵

24. The Challenge fails to show that the case against Mr El Hishri exceeds the parameters of the situation, or is otherwise not sufficiently linked to them. To the contrary, as the factual allegations make clear, the charges in the case are factually “associated with” the Libyan conflict(s) originating in the 2011 revolution. Furthermore, the continuing proceedings before the UNSC pursuant to the Resolution, and the clear statements of participants in those proceedings, illustrate the close connections between the 2011 events and more recent events, as well as the common understanding and expectation that cases such as that against Mr El Hishri would fall within the scope of the Court’s jurisdiction.⁵⁶

(i) *The charges in this case are “associated with” the Libyan conflict(s) originating in the 2011 revolution*

25. In issuing warrants of arrest in this situation, this Chamber has previously determined that the ongoing situation of crisis in Libya since 2011 is a fact of common knowledge;⁵⁷ that the fighting that started during the 2011 revolution continued after the fall of the Gaddafi regime and was amplified by proxy conflicts;⁵⁸ and that there are reasonable grounds to believe that

⁵¹ See above para. 16.

⁵² See further e.g. [Werfalli First Arrest Warrant](#), para. 23; [Werfalli Second Arrest Warrant](#), para. 20; [Sneidel Arrest Warrant](#), para. 4; [Al Kani Arrest Warrant](#), para. 13; [Doumah Arrest Warrant](#), para. 13; [Al Lahsa Arrest Warrant](#), para. 13; [Salheen Arrest Warrant](#), para. 13; [Al Shagaqi Arrest Warrant](#), para. 13; [Al Zinkal Arrest Warrant](#), para. 13; [Njeem Arrest Warrant](#), para. 11.

⁵³ [Werfalli First Arrest Warrant](#), para. 23.

⁵⁴ See also [Arrest Warrant Application](#), para. 12.

⁵⁵ [Werfalli First Arrest Warrant](#), para. 23.

⁵⁶ [Njeem Arrest Warrant](#), para. 10; [Arrest Warrant Application](#), para. 41.

⁵⁷ [Njeem Arrest Warrant](#), para. 5.

⁵⁸ [Njeem Arrest Warrant](#), para. 5.

SDF/RADA emerged as a result of the 2011 crisis that triggered the resolution, and in the aftermath of the crisis.⁵⁹ The Prosecution has previously amplified the evidentiary basis for these conclusions in its submissions in this case.⁶⁰

26. The Challenge fails to show any sufficient basis to doubt this evidence. Evidence provided by witnesses and expert reports on the conduct of relevant actors and their evolution into SDF/RADA are not “inconsistent and unclear”, but rather reflect the fluidity and complexity of the situation.⁶¹ The Defence does not accurately depict the statements of Prosecution witnesses in relation to SDF/RADA, its origins, or its significance more widely in the situation.

27. First, the Defence emphasises that one of the four witnesses⁶² tying SDF/RADA to the “Martyrs of Souq Al Jomaa” mentions that the group was created after the 2011 Revolution.⁶³ On this basis, they claim that it is unclear if “this similarly-named group is the SAJR to which the Prosecution refers or if it even existed during the revolution”. However, the Defence fails to consider the evidence of at least four additional Prosecution witnesses linking the group initially named “Martyrs of Souq Al Jomaa” to SDF/RADA,⁶⁴ most of them confirming that either the group existed during the Revolution or that its members participated in it.⁶⁵ The evidence of a sole witness [REDACTED] placing the creation of the group slightly later than other witnesses does not suggest that there might be several groups with the same name. Rather, it is emblematic of the fluid and fractured geopolitical context in Libya at the time allowing militias to change their names, structure and alliance dynamically and often informally, rendering it difficult to track exact dates.

28. Second, [REDACTED] evidence does not throw the connection between the SAJR and SDF/RADA into doubt, when the evidence is considered in its totality. [REDACTED] did not “explicitly state[]” that the groups were “entirely separate”.⁶⁶ Rather, in describing key battalions at Mitiga during the liberation of Tripoli in 2011, [REDACTED] referred to “the Martyrs of Souq Al Jumaa battalion led by the same person who led the Military

⁵⁹ [Njeem Arrest Warrant](#), para 7.

⁶⁰ See e.g. [REDACTED].

⁶¹ *Contra* [Challenge](#), para. 73.

⁶² See [Challenge](#), para 77. The Defence cites [REDACTED].

⁶³ See [Challenge](#), para 77.

⁶⁴ See e.g. [REDACTED].

⁶⁵ See e.g. [REDACTED]referring to the “Souq Al Jumaa” group as a “revolutionary battalion which was later renamed SDF/RADA”.

⁶⁶ [Challenge](#), para 77.

Council of Souq AL-Jumma, [...]” and “The Anti-Drug Unit led by Abdel Raouf KARA (which would later evolve into the RADA force)” amongst other groups.⁶⁷ He did not delve into the links, or lack thereof, between such groups and further explained that they constantly changed names to obtain financial allocations from the government. As an example, he cited another group created by KARA comprising the same group of people and for the sole purpose of obtaining financial gains.⁶⁸

29. Third, the Defence does not substantiate its assertions that all but one Prosecution witness [REDACTED] “maintain that SDF/RADA was not involved in actions connected to any supposed continuation of the revolution after Gaddafi’s fall”,⁶⁹ and “one witness explicitly states that SDF/RADA was not involved in the fighting in the conflicts that followed Gaddafi’s overthrow”.⁷⁰ Not only do these statements appear contradictory on their face, but they omit to consider the evidence of at least 10 additional Prosecution witnesses demonstrating that there *was* a connection between the actions of SDF/RADA and continued anti-Gaddafi activities.⁷¹

30. Furthermore, the Defence’s depiction of the evidence of [REDACTED]—who they claim to be the sole witness who “ties SDF/RADA to anti-Gaddafi activities post-revolution”—is partial. The Defence suggests that [REDACTED] only knew of that link because he heard that former Gaddafi regime supporters were held at Mitiga Prison.⁷² However, [REDACTED] had direct knowledge of such connection. For example, [REDACTED] asserted that [REDACTED] the Martyrs of Souk Al Jumma because their arrests were arbitrary and people from GADDAFI’s regime were being killed by the Martyrs of Souk Al Jummah at the time”, and believes that this led [REDACTED].⁷³ [REDACTED], and stated that Mr El Hishri was in charge of the torture.⁷⁴ [REDACTED] a named prisoner who was held because of his ties to the Gaddafi regime.⁷⁵

⁶⁷ [REDACTED].

⁶⁸ [REDACTED]; [Challenge](#), para. 77.

⁶⁹ [Challenge](#), para. 79. The sole witness cited is P-0720.

⁷⁰ [Challenge](#), para. 79 (citing [REDACTED]). Note, however, that at para 112 of the same statement, [REDACTED] describes the existence of “prisoner fighters”. [REDACTED] explains that SDF/RADA offered prisoners with prior fighting experience to join SDF/RADA. Those who accepted underwent sniper training and received a weekly salary in addition to being able to sleep outside the prison.

⁷¹ *See e.g.* [REDACTED].

⁷² [Challenge](#), para 79.

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

31. Fourth, the Defence avers that the “general consensus” amongst Prosecution witnesses is that SDF/RADA’s mandate “was limited to the enforcement of criminal law, with a focus on drug crimes and combatting ISIS.”⁷⁶ This is incorrect. The defence cites three witnesses for this assertion, but none of them suggest that the role of SDF/RADA was limited in this way. To the contrary, all of them acknowledge the widespread violence committed at Mitiga Prison.⁷⁷ The description of mistreatment, sexual violence, killing and financial extortion by SDF/RADA contained in the statements of the 63 witnesses relied upon by the Prosecution for the confirmation proceedings clearly establish that, while some state that SDF/RADA was involved in some operations akin to law enforcement, they did not perceive the group’s function as limited to the enforcement of criminal law. [REDACTED]’s description is typical:

“Soon after the Revolution of 2011, these gangs had their eyes on people close to the GADDAFI regime. The gangs knew about each person's financial value. They attacked and loot [*sic*] homes, robbed people, appropriated plots of land and then re-sell [*sic*] them. Bit by bit, at the beginning of 2012, RADA became more powerful. RADA would also use the prisoners as workers so they acted as middle men with the government to run the prison. RADA made their money and power in every illegal way possible.”⁷⁸

32. Lastly, neither the alleged common plan nor the ideology of some or all perpetrators need be directly related to the events that ignited the conflict and triggered the referral.⁷⁹ What matters is that there is at least a sufficient link between the case against Mr El Hishri and the parameters of the situation. Whether this link is made out is to be assessed on the basis of the case as a whole, and not individual elements of the charged crimes considered in isolation. For all the reasons set out above, the charged conduct in the case (including that by SDF/RADA) amply meets this requirement.⁸⁰

⁷⁶ [Challenge](#), para 79.

⁷⁷ [Challenge](#), para 79. The Defence cites P-0595, P-1044 and P-1059. *A contrario*, see e.g. [REDACTED] describing extortion by members of SDF/RADA, their power to detain anyone, their refusal to comply with court orders and their denial of family visits. See [REDACTED], describing killings of individuals under arrest, torture and financial extortion. See [REDACTED] for his account of the treatment of detainees at Mitiga which included, *inter alia*, beatings, killings, enslavement, torture and sexual violence.

⁷⁸ [REDACTED].

⁷⁹ *Contra* [Challenge](#), paras. 81-82.

⁸⁰ See *above* paras. 18-24.

(ii) UNSC proceedings further illustrate the common understanding that crimes such as those charged against Mr El Hishri formed part of the referral to the Court

33. While jurisdictional matters are for the Court to decide, it may be relevant to take account of the views of the entity which referred a situation to the Court when considering the parameters of a situation.⁸¹ This may include subsequent practice of relevant UN organs and affected or interested States.⁸²

34. The Resolution expressed the UNSC's "grave concern at the situation in the Libyan Arab Jamahiriya" and condemned the "violence and use of force against civilians",⁸³ stating that it may constitute "crimes against humanity",⁸⁴ before stating its decision "to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court"⁸⁵ and inviting the Prosecution to address the UNSC "every six months thereafter on actions taken pursuant to this resolution".⁸⁶

35. Since 2011, the relevant practice of the UNSC has been unequivocal in confirming the understanding that the scope of this situations extends well beyond 2011.⁸⁷ At no point has the UNSC expressed the view that the Court is exceeding its jurisdiction, but rather has continued to receive information about the conduct of various investigations and prosecutions concerning conduct significantly after 2011. In particular, the UNSC continues to convene a bi-annual briefing from the Office of the Prosecutor so that it can present an update on its activities. In this context, among other lines of inquiry, the Prosecution has expressly referred to the line of inquiry concerning crimes allegedly committed at Mitiga Prison, which form the basis for the present charges.⁸⁸ Representatives of States participating in these UNSC proceedings have consistently acknowledged (and frequently expressed approval of) the inclusion of such lines of inquiry within the scope of the Court's investigation.⁸⁹

⁸¹ See e.g. [Mbarushimana Jurisdiction Decision](#), paras. 27-39; [Njeem Arrest Warrant](#), para. 10.

⁸² See *above* para. 13.

⁸³ UNSC Res. 1970 (2011), Preamble.

⁸⁴ UNSC Res. 1970 (2011), Preamble.

⁸⁵ UNSC Res. 1970 (2011), para. 4.

⁸⁶ UNSC Res. 1970 (2011), para. 7.

⁸⁷ See [Arrest Warrant Application](#), paras. 39-43.

⁸⁸ See [Arrest Warrant Application](#), para 41. See also [Office of the Prosecutor, Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 \(2011\), 23/11/2021](#), para. 20.

⁸⁹ [Arrest Warrant Application](#), paras. 14, 41.

III.B The principle of legality does not require a narrow interpretation of the Resolution, nor is it violated by the Resolution

36. The Court's exercise of jurisdiction under the Resolution is fully consistent with the principle of legality (*nullum crimen sine lege*) under article 22 of the Statute. Contrary to the Defence's submission, a person need not have foresight of a particular court's jurisdiction,⁹⁰ and the criminal nature of the charged conduct was foreseeable to a person in Mr El Hishri's position.⁹¹ These arguments are addressed separately in the subsections below.

III.B.1 The principle of legality does not require foresight of a particular court's jurisdiction

37. The Defence submits that the principle of legality requires a narrow reading of the Resolution, as "[o]nly 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*."⁹² To the contrary, under article 22, it need not be reasonably foreseeable whether a particular court may exercise its jurisdiction.

38. In *Abd-al-Rahman*, the Appeals Chamber determined that the principle *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".⁹³ It did not state that this included foresight of *which* court will exercise jurisdiction over the criminal conduct.⁹⁴

39. Requiring foresight of the specific court that would exercise jurisdiction runs counter to: (i) articles 12 and 13 of the Statute, given that the Court's jurisdiction and/or exercise of jurisdiction is subject to conditions which may not be satisfied until after a person has carried out relevant conduct; (ii) customary international law, where the body which comes to exercise jurisdiction (such as an *ad hoc* tribunal) may not even exist at the time of the relevant conduct, and; (iii) the doctrine of universal jurisdiction, where a potentially large number of States may have a legal basis to prosecute under their own law. Even under national law, there is commonly

⁹⁰ *Contra* [Challenge](#), paras. 54-60, 85.

⁹¹ *Contra* [Challenge](#), paras. 85-97.

⁹² [Challenge](#), para. 60 (emphasis added). *See also* paras. 54-59, 85.

⁹³ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 85. *See also* [ICC-02/05-01/20-1240](#) ("*Abd-Al-Rahman TJ*"), para. 30.

⁹⁴ *See e.g.* [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), paras. 86-92.

no requirement of notice as to which particular national judicial body may exercise jurisdiction, provided this is governed by law.⁹⁵

40. In any event, it is plain from both the Statute and the UN Charter that a situation may be referred to the Court by the UNSC acting under Chapter VII, even regarding conduct on the territory of a non-State Party such as Libya. As such, while legally unnecessary, a reasonable person could have foreseen the possibility that the Court could exercise its jurisdiction.

IV.B.2 The substantive law governing the charges was foreseeable and accessible

41. The Defence further argues that the “imprecision” of the Resolution makes its application—and the application of the Statute—“unforeseeable”. In its submission, this would be particularly grave as some of the charged offences were not criminalised “under domestic Libyan law or under customary international law” at the relevant time. In particular, the Defence questions the foreseeability of prosecution for the crime against humanity of other inhumane acts, and the crime against humanity and war crime of other forms of sexual violence,⁹⁶ as well as of the modes of liability of co-perpetration and indirect co-perpetration.⁹⁷ Again, these submissions lack merit.

42. First, as conceded by the Defence, “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”.⁹⁸ Since the crimes for which Mr El Hishri is charged (including the crime against humanity of other inhumane acts, and the crime against humanity and war crime of other forms of sexual violence) occurred well after the Resolution referring the situation to the Court, there is no question that their prosecution under the Statute was both foreseeable and accessible.

43. Second, in addition to the Resolution providing notice that the crimes under the Statute apply, the criminal nature of the charged conduct was foreseeable to a person in the position of Mr El Hishri based on international and Libyan domestic law.⁹⁹

⁹⁵ ECtHR, *Kononov v. Latvia*, Judgment, 36376/04, 17 May 2010 (“*Kononov v. Latvia*”), paras. 241, 243; [Guide on Article 7 of the European Convention on Human Rights](#), para. 46.

⁹⁶ [Challenge](#), paras. 85-89.

⁹⁷ [Challenge](#), paras. 90-97.

⁹⁸ [Challenge](#), para. 58.

⁹⁹ This assessment is objective rather than subjective, see [Abd-Al-Rahman TJ](#), para. 30. See also below para. 47.

44. Under international law, as held by the Appeals Chamber in *Abd-Al-Rahman*, crimes under the Statute are generally representative of the state of customary international law when the Statute was drafted: “[t]his weighs heavily in favour of the foreseeability of facing prosecution for crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute”.¹⁰⁰

45. In *Abd-Al-Rahman*, the Appeals Chamber further held that the crimes charged in that case for acts associated with rape—including the crime against humanity of other inhumane acts under article 7(1)(k), and outrages upon personal dignity as a war crime under article 8(2)(c)(ii)—“draw upon norms that were recognised globally, including in Sudan, and were fully ascertainable at the time of the conflict in Darfur”.¹⁰¹ It also determined that the referral of the situation in Darfur under UNSC Resolution 1593¹⁰² “encompassed violations of binding international obligations carrying a risk of individual criminal liability”.¹⁰³ The same can be said in relation to the Libya situation and the UNSC Resolution 1970.¹⁰⁴ Thus, just as in *Abd-Al-Rahman*, the charged crimes in this case also violate internationally recognised norms which carry a risk of individual criminal responsibility.¹⁰⁵

46. While this alone could have been sufficient to provide notice and affirm the Court’s exercise of jurisdiction in a UNSC referral case,¹⁰⁶ the majority of the Appeals Chamber in *Abd-Al-Rahman* considered it necessary—based on the facts before it, which, unlike the present

¹⁰⁰ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 89.

¹⁰¹ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 77.

¹⁰² [Resolution 1593 \(2005\)](#).

¹⁰³ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 79.

¹⁰⁴ See e.g. UNSC Resolution 1970, [LIBY-OTP-0001-0004](#) (“Deplores the gross and systematic violation of human rights [...], Welcoming the condemnation [...] of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya, [...] Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, [...]”).

¹⁰⁵ It is noteworthy that Judge Ibáñez, in a separate opinion, recalled that “the prohibition to commit international crimes which violate the core human rights is also a *ius cogens* norm.” As a consequence, she also found that the Statute itself was sufficient to “address any possible concern regarding a potential infringement of the principle of *nullum crimen sine lege*” and that there was no reason to examine the question under customary international law: [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 95. Judge Ibáñez further opined that “[t]he content of the Statute, including in particular the crimes under its jurisdiction and the applicable penalties, has been public since its adoption”, and, considering that Sudan participated in the diplomatic negotiations that led to its adoption and signed the Rome Statute, “the law was public and known for Sudan and the accused”.

¹⁰⁶ [Kononov v. Latvia](#), para. 237; [ECtHR, Šimšić v. Bosnia and Herzegovina, Admissibility Decision, 51552/10, 10 April 2012](#) (“Šimšić Decision”), para. 23; [ECtHR Maktouf & Damjanović v. Bosnia and Herzegovina, 2312/08 & 34179/08, Judgment \(Grand Chamber\), 18 July 2013](#), para. 55; [ECCC, Prosecutor v. Nuon Chea and Khieu Samphan \(“Case 002/01”\), 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016](#) (“Case 002/01 AJ”), para. 763; [ECCC, Prosecutor v. Kaing Guek Eav alias Duch \(“Case 001”\), 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012](#) (“Case 001 AJ”), para. 96. See also [ICC-02/05-01/20-427 OA8](#), paras. 32, 35, 46-50; [ICC-02/05-01/20-347](#), paras. 2, 8-13, 27-37.

case, concerned crimes allegedly committed before the adoption of the relevant UNSC Resolution—to examine the legal framework applicable to the conflict. In doing so, it had recourse to: (i) the treaties, human rights instruments, and agreements relating to internal armed conflict binding Sudan at the relevant time;¹⁰⁷ and (ii) provisions of national law of Sudan.

47. Even if unnecessary, a similar analysis in the present case reveals that, at the time of the charged conduct, international instruments applicable to Libya,¹⁰⁸ peace agreements signed throughout the conflict,¹⁰⁹ and Libyan national law¹¹⁰ made explicit the illegal character of Mr El Hishri's conduct.

¹⁰⁷ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 78.

¹⁰⁸ By 2014, Libya was party to, *inter alia*: the four Geneva Conventions; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention Against the Taking of Hostages; the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity; the Convention on the Abolition of Slavery, the Slave Trade and Slavery-like Customs and Practices; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention on the Prevention and Punishment of the Crime of Genocide; the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on human and people's rights on the rights of women in Africa; the African Youth Charter; the African Charter on the Rights and Welfare of the Child; the Arab Charter on Human Rights; the Forced Labor Convention.

¹⁰⁹ See e.g. Libyan Political Agreement (Shkirat Agreement), [LBY-OTP-0053-0959](#), p. 0961 ("Affirming their commitment to take into consideration the general international law, including the international humanitarian law and obligations stemming from international treaties to which Libya is a party, as well as the pertinent Security Council Resolutions, while underscoring the need to maintain the Libyan sovereignty."); Ceasefire Agreement in Tripoli (Zawiyya Agreement), [LBY-OTP-00011160](#), English version accessible at <https://unsmil.unmissions.org/sites/default/files/agreement-english-agreement-4-september-2018.pdf>: "III. Ensure civilians are not put at risk and human rights are respected as stipulated by national and international law.

¹¹⁰ Penal Code, [LBY-OTP-03703754](#), *inter alia* arts. 99 (Offenders and Their Punishment), 100 (Accessories), 104 (Cooperation in Negligent Offences), 217 (Attack on the Political Rights of Citizens), 231 (Extortion), 234 (Abuse of Office that is Detrimental to the Interest of Public Administration or the Judiciary), 258 (Failure to Report Information), 262 (False Accusation), 289 (Interference with the Performance of Religious Rites and Insulting Sacred Things), 290 (Attack upon Religions), 294 (Concealment of Corpses), 296 (Massacre), 303 (Removal of Means of Protection against Work Injuries), 305 (Epidemic Diseases), 309 (Trading in Polluted Food and Drugs), 315 (Negligence to Take Precautions against Disasters or Work Injuries), 317 (Incitement to Commit an Offence), 319 (Incitement to Disobedience of the Laws), 321 (Criminal Gangs), Article 322 (Assisting Gang Members), 348 (Destruction, Damage, or Concealment of Authentic Documents), 368 (Intentional Homicide with Premeditation), 369 (Premeditation), 372 (Intentional Homicide without Premeditation or Lying in Wait), 374 (Beating without Intention to Kill), 377 (Homicide without Intention or Wilfulness), 378 (Assault), 379 (Slight Injury), 380 (Gross Injury), 381 (Severe Injury), 382 (Aggravating Circumstances), 383 (Exceeding Intention in Assault), 384 (Negligent Personal Injury), 385 (Death or Injury Resulting from another Offence), 390 (Abortion without Consent), 393 (Death or Injury of a Pregnant Woman), 407 (Sexual Intercourse by Force), 408 (Indecent Assault), 409 (Incitement of a Minor to Indecent Acts), 412 (Abduction for the Commission of Lewd Acts), 415 (Incitement to Prostitution), 416 (Compulsion to Prostitution), 420*bis*, 421 (Indecent Acts or Items), 425 (Enslavement), 428

48. Concerning the specific Defence challenge to the crime of other inhumane acts,¹¹¹ this was recognised as a crime against humanity under customary law since at least 1945, when it was included in the charters of the International Military Tribunal and the International Military Tribunal for the Far East.¹¹² The UN General Assembly unanimously considered these instruments to reflect general principles of international law.¹¹³ Furthermore, convictions for this crime were entered by the Nuremberg Military Tribunal,¹¹⁴ the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)¹¹⁵ and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).¹¹⁶

49. Likewise, with regard to the Defence challenge to the war crime and crime against humanity of other forms of sexual violence,¹¹⁷ the illegality of this conduct has been recognised in international law since at least 1949.¹¹⁸ Such crimes were further addressed in the jurisprudence of the ICTY¹¹⁹ and the International Criminal Tribunal for Rwanda (“ICTR”).¹²⁰ The relevant conduct has thus been prosecuted internationally since at least the 1990s. It is irrelevant that this conduct may have been ‘labelled’ differently, since reasonable foresight is required only of the risk of prosecution for material conduct, regardless of the legal

(Abduction of persons), 429 (Use of Force to Compel Another), 430 (Threats), 431 (Abuse of Authority against an Individual), 432 (Searching Persons), 433 (Unlawful Arrest), 434 (Unjustified Restriction of Personal Liberty), 435 (Torture of Prisoners), 438 (Insult), 439 (Defamation), 465 (Misappropriation), 467 (Infractions against Orders of Authority), 471 (Disturbing People by Noise or Disturbance of Their Rest), 501 (Indecent Acts and Obscene Language); Decree n. 168/2005 on the executive regulation for the law on Correction and Rehabilitation Institutions, [LBY-OTP-00018691](#), e.g. arts. 3-4, 8-9, 13-15, 22, 29, 31, 57; General National Congress Resolution No. (127) of 2013, [LBY-OTP-00018665](#).

¹¹¹ [Challenge](#), paras. 86-87.

¹¹² [IMT Charter](#), art. 6(c); [IMTFE Charter](#), art. 5(c).

¹¹³ See [Case 001 AJ](#), paras. 109-112; [Case 002/01 AJ](#), para. 576; [UNGA Res. 95\(I\)](#) (1946); ILC, [Nuremberg Principles](#), 1950, principle VI(c).

¹¹⁴ See [Case 002/01 AJ](#), para. 576 (citing [NMT, Ministries case](#), pp. 467-468; [US v. Brandt et al.](#), Judgment, 1946, reprinted in [Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10](#), Vol. II (“Medical case”), p. 198).

¹¹⁵ See e.g. [Case 002/01 AJ](#), Disposition. See also paras. 578-586.

¹¹⁶ See e.g. [ICTY, Prosecutor v. Stakić, Judgment, IT-97-24-A, 22 March 2006](#), para. 315.

¹¹⁷ [Challenge](#), paras. 86-87.

¹¹⁸ [Geneva Convention IV](#), art. 27(2): “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ([Protocol I](#)), of which Libya is a party since 1978, art. 76: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.

¹¹⁹ See e.g. [Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 \(1993\), S/25704](#), para. 48 (“Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called ‘ethnic cleansing’ and widespread and systematic rape and other forms of sexual assault, including enforced prostitution”). The Foča cases at the ICTY dealt with similar conditions of sexual violence compounded with torture in a detention setting, see e.g. [ICTY, Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001](#), paras. 728-729, 749, 766-774.

¹²⁰ [ICTR, Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1998](#), paras. 10A, 417, 449, 693-695.

classification. Further, the 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind listed “other forms of sexual abuse” as a crime against humanity.¹²¹ Other instruments adopted after the Rome Statute further confirm that this crime forms part of customary international law.¹²²

50. Third, Libyan domestic law contains provisions criminalising conduct akin to all charged conduct, including the crimes of other inhumane acts and other forms of sexual violence.¹²³

51. The flagrantly unlawful nature of the conduct, therefore, was apparent to a person in Mr El Hishri’s position even with the most cursory reflection,¹²⁴ based on established and general prohibitions under international and national law.¹²⁵

52. Finally, the Defence’s selective reliance on certain factual considerations in *Abd-Al-Rahman* is unpersuasive and misleading.¹²⁶ The Defence is not assisted by its submission, based on *Abd-Al-Rahman*, that such foresight would be impossible if a person had not participated in formal military service and received training in international humanitarian law.¹²⁷ Not only were these purely factual considerations specific to the litigation in *Abd-Al-Rahman* (and therefore not necessarily relevant in the present case),¹²⁸ but in any event the Defence partly misstates the facts since the Trial Chamber in *Abd-Al-Rahman* found it immaterial for this assessment whether the accused had received any training in international humanitarian law.¹²⁹

¹²¹ See [Draft Code of Crimes against the Peace and Security of Mankind \(1996\)](#), art. 18(j).

¹²² See [Statute of the Special Court for Sierra Leone](#), art. 2(g); [United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15](#), sections 5.1(g), 6.1(b)(xxii), 6.1(e)(vi); [Republic of Kosovo, Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s office](#), art. 13(1)(g). See also [Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights \(Malabo Protocol\)](#), Annex I, art. 28C(g).

¹²³ See above fn. 110.

¹²⁴ [Kononov v. Latvia](#), para. 238; [ECtHR, K.-H. W. v. Germany](#), 37201/97, Judgment (Grand Chamber), 22 March 2001, para. 104; [ECtHR, Milanković v. Croatia](#), 33351/20, Judgment, 20 January 2022, para. 64; [Šimšić Decision](#), para. 24; [ICTY, Prosecutor v. Milutinović et al.](#), IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (“*Milutinović et al.* Jurisdiction Appeal Judgment”), para. 42.

¹²⁵ [Abd-Al-Rahman Jurisdiction Appeal Judgment](#), para. 89; [Milutinović et al. Jurisdiction Appeal Judgment](#), para. 41.

¹²⁶ [Challenge](#), paras. 88-89.

¹²⁷ [Challenge](#), para. 89.

¹²⁸ See [Abd-al-Rahman TJ](#), paras. 52-59 (considering multiple case specific factual circumstances—ignored by the Defence).

¹²⁹ [Abd-al-Rahman TJ](#), para. 57.

53. With regard to the charged modes of liability, Mr El Hishri's prosecution as a principal (individually or jointly with others) was also foreseeable to a reasonable person at the time the crimes were committed based on the Resolution,¹³⁰ and the fact that the Rome Statute had been published for sixteen years and in force for twelve years prior to the time of the charged crimes. Even this Court's first decisions interpreting the modes of liability specifically challenged by the Defence had been published by the time the charged conduct took place.¹³¹

54. Moreover, at that point it was well established in international law that a person could be held responsible for the commission of crimes as a perpetrator individually or jointly with others.¹³² Similarly, as acknowledged by the Defence, Libyan law recognises a *broader* form of criminal responsibility for joint perpetration.¹³³ Mr El Hishri's individual criminal responsibility, therefore, was entirely foreseeable to a reasonable person in his position at the time the charged conduct took place.

III.C The Declaration is valid

55. The Chamber should dismiss the Defence submissions challenging the validity of the Declaration by Libya under article 12(3) of the Statute. [REDACTED].

56. In essence, the Defence argues that an article 12(3) declaration is akin to signing or ratifying a treaty. According to its understanding of Libyan national law, this required the consent of the House of Representatives (Libyan Parliament). Since this domestic procedure was not followed, the Defence argues that the Declaration is invalid. Yet, as explained below: (1) an article 12(3) declaration is a *sui generis* unilateral act which is not directly analogous to treaty accession; (2) [REDACTED]; and (3) even if an article 12(3) declaration is governed by treaty law, the Declaration would still be valid pursuant to the Vienna Convention on the Law of Treaties (VCLT).

¹³⁰ See above para. 42.

¹³¹ On co-perpetration, see e.g. [ICC-01/04-01/06-803-tEN](#) ("Lubanga Confirmation Decision"), paras. 322-367; [ICC-01/04-01/06-2842](#) ("Lubanga TJ"), paras. 976-1018; [ICC-01/04-01/06-3121-Red](#) ("Lubanga AJ"), paras. 460-473; [ICC-01/04-01/07-717](#) ("Katanga & Ngudjolo Chui Confirmation Decision"), paras. 480-486; [ICC-01/09-02/11-382-Red](#) ("Kenyatta et al. Confirmation Decision"), para. 296; [ICC-01/05-01/08-424](#) ("Bemba Confirmation Decision"), paras. 346-348. On indirect co-perpetration, see e.g. [ICC-01/05-01/08-14-tENG](#) ("Bemba Article 58 Decision"), paras. 78-84; [Katanga & Ngudjolo Chui Confirmation Decision](#), paras. 487-539; [Bemba Confirmation Decision](#), paras. 348-349; [Kenyatta et al. Confirmation Decision](#), paras. 297-298.

¹³² See e.g. [Tadić Appeal Judgement](#), paras. 190 ss.

¹³³ [Challenge](#), para. 93.

III.C.1 An article 12(3) declaration is a *sui generis* unilateral act which is not directly analogous to treaty accession

57. The Defence claim that the Declaration is invalid depends on the assumption that it is substantially similar to the act of acceding to a treaty, and therefore subject to treaty law.¹³⁴ Since this is legally incorrect, however, the Challenge must fail, and the Defence submissions regarding the purported invalidity of the Declaration should be rejected. As described further below, [REDACTED]—a fact which the Defence does not dispute.

58. First, it is plain from the Statute that separate provision is made for declarations under article 12(3)—by which the jurisdiction of the Court is accepted *ad hoc*—and for acceding to the Statute under articles 125 and 126. While the Court’s legal framework applies in both instances, the legal nature of the State’s act is different. Correspondingly, it bears different legal implications in terms of the rights and obligations which may ensue. Nothing in the Statute implies that an article 12(3) declaration is directly analogous to the act of acceding to the Statute. Indeed, this would establish legal relationships with all other ICC States Parties and not merely affect the standing of the declaring State *vis-à-vis* the Court itself.

59. Second, as a matter of general international law, the VCLT applies to agreements between States (treaties) and governs such legal relationships. While the Statute is a creature of treaty law, this does not mean that all legal acts pursuant to the Statute are treaties. Notably, an article 12(3) declaration is a unilateral act which requires no approval or reciprocity from another State,¹³⁵ but rather confers obligations only upon the declaring State primarily *vis-à-vis* the Court itself. As such, contrary to the Defence submissions, the Declaration does not create “mutual obligations”¹³⁶ between States because the Court is not itself a party to the Statute but

¹³⁴ [Challenge](#), para. 16, fns. 12-13. See [VCLT](#), art. 46 (“Provisions of internal law regarding competence to conclude treaties 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”).

¹³⁵ See N. Haupais, ‘Article 12’, in J. Fernandez, X. Pacreau & M. Ubeda-Saillard (eds.), *Statut de Rome de la Cour Pénale Internationale : Commentaire article par article* (2nd Ed., 2019), Vol. 1, p. 762 (“Juridiquement, l’option doit être analysée comme un acte unilatéral de l’Etat, l’article 12-3 du Statut visant à déterminer par avance son effet, c’est-à-dire établir qu’il est supposé produire des effets au regard de la compétence de la Cour”). See also [ICJ, Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States of America\), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392](#), para. 59 (“Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make”).

¹³⁶ [Challenge](#), para. 13.

rather is the object of it.¹³⁷ It is thus inapposite to claim a direct analogy between an article 12(3) declaration and treaty accession.

60. The ICJ has endorsed a similar approach to State declarations accepting its jurisdiction. According to article 36(2) of the ICJ Statute, States may declare that they recognise the jurisdiction of the ICJ “as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation”.¹³⁸ In *Spain v. Canada*, the ICJ stated that the VCLT does not apply to such declarations:

“A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, *is a unilateral act of State sovereignty*. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and ‘makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance’ [...] *The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties* [...]. Spain has suggested in its pleadings that ‘[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties’. *The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court's jurisdiction.*”¹³⁹

III.C.2 The [REDACTED] validly authorised [REDACTED] the Declaration

61. [REDACTED], the Declaration has been validly issued.¹⁴⁰ The Declaration was issued by an authorised Libyan official and is therefore valid. It is undisputed that Abdulhamid

¹³⁷ See [ICC-01/09-01/11-2024 OA10](#) (“*Ruto and Sang* Rule 68 Appeal Judgment”), para. 41 (“The Appeals Chamber observes that the Rome Statute is a treaty between *States*, the Court being the object of that treaty reflecting the agreement between the States ‘to establish an independent permanent International Criminal Court’”, reference omitted, emphasis supplied).

¹³⁸ In this sense, declarations pursuant to article 12(3) of the Statute are similar to declarations pursuant to article 36(2) of the ICJ Statute. The ICJ interpretation is even more compelling with regard to article 12(3) declarations since they do not create any system of mutual obligations between the declaring State and States Parties (in contrast with declarations pursuant to article 36(2) of the ICJ Statute for settling future disputes before the ICJ).

¹³⁹ [ICJ, Fisheries Jurisdiction \(Spain v. Canada\), Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432](#), para. 46 (emphasis added). See also [ICJ, Case concerning the Land and Maritime Boundary between Cameroon and Nigeria \(Cameroon v. Nigeria\), Preliminary Objections, Judgment, ICJ Reports 1998, p. 275](#), para. 30.

¹⁴⁰ [REDACTED].

Aldabaiba is the Prime Minister and acting Minister of Foreign Affairs of Libya,¹⁴¹ [REDACTED] to make the Declaration.

62. Heads of State, Heads of Government and Ministers of Foreign Affairs, by virtue of their functions, are considered under international law as representing their State without having to produce full powers.¹⁴² They are “deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments.”¹⁴³ The ICJ has confirmed this approach in *Bosnia and Herzegovina v. Yugoslavia* when it held that, “[a]ccording to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations”.¹⁴⁴

63. Likewise, these three officials may empower other agents to represent the State and to bind it by unilateral acts.¹⁴⁵ This is also reflected in rule 24 of the Rules of Procedure of the Assembly of States Parties which provides that “the credentials shall be issued by the Head of State or Government or by the Minister for Foreign Affairs *or by a person authorized by either of them*”.¹⁴⁶

¹⁴¹ See [Challenge](#), paras. 6, 19, 31.

¹⁴² The Prosecution otherwise agrees that an article 12(3) declaration can only be submitted by a person with “full powers” to represent the State accepting the exercise of the Court’s jurisdiction.

¹⁴³ [ICJ, Case concerning Armed Activities on the Territory of the Congo \(New Application: 2002\) \(Democratic Republic of the Congo v. Rwanda\), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6](#) (“DRC v. Rwanda Jurisdiction and Admissibility Judgment”), para. 46 (including references therein). See also [Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Office of Legal Affairs, U.N. Doc. ST/LEG/7/Rev.1](#), (“UNSG Depositary Practice”) paras. 101-102, 105; [Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN Doc. A/61/10](#), p. 372 (Guiding Principle 4); [VCLT](#), art. 7.

¹⁴⁴ [ICJ, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Yugoslavia\), Preliminary Objections, Judgment, ICJ Reports 1996 \(II\), p. 595](#), para. 44. In this case, Yugoslavia had objected to the admissibility of the application instituting the proceedings at the ICJ, arguing that: Alija Izetbegović did not serve as the President of the Republic of Bosnia and Herzegovina (only as President of the Presidency) when he authorised to initiate proceedings; such decision should have been taken by the Presidency or the Government as the competent organs; and the authorisation was granted in violation of a rule of internal law of fundamental significance.

¹⁴⁵ See e.g. [ICJ, Maritime Delimitation in the Indian Ocean \(Somalia v. Kenya\), Preliminary Objections, Judgment, ICJ Reports 2017, p. 3](#) (“Somalia v. Kenya Preliminary Objections”), para. 43 (“These State representatives, under international law, may also duly authorize other officials to adopt, on behalf of a State, the text of a treaty or to express the consent of the State to be bound by a treaty”); [ICJ, Case concerning the Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\), Judgment, ICJ Reports 2002, p. 3](#), para. 53 (“The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence”); [UNSG Depositary Practice](#), paras. 101-102. See also [DRC v. Rwanda Jurisdiction and Admissibility Judgment](#), paras. 47-48.

¹⁴⁶ [Rules of Procedure of the Assembly of States](#), rule 24 (emphasis added).

64. The Defence does not challenge the authenticity of the [REDACTED]. Furthermore, [REDACTED]. While the Defence suggests that the Declaration is invalid because “Abdulhamid Aldabaiba [is reduced] to a prime minister without the effective control of the entire State’s territory that is needed to legitimately act on its behalf”, this is neither developed nor supported. It is in any event irrelevant to assess the validity of the Declaration.¹⁴⁷

III.C.3 Libya has reaffirmed the validity of the Declaration and there is no “manifest” violation of Libyan law

65. Finally, even assuming *arguendo* that the VCLT provisions regulating treaty accession apply to the Declaration—which they do not because an article 12(3) declaration differs from treaty accession—its validity cannot be in doubt.

66. First, Libya has not challenged the validity of the Declaration. To the contrary, it has repeatedly reaffirmed its validity to the Court: in a communication dated 22 May 2026, Prime Minister Aldabaiba reaffirmed the content of his letter “concerning the State of Libya’s recognition of the jurisdiction of the International Criminal Court”;¹⁴⁸ and [REDACTED].¹⁴⁹ Libya has also reaffirmed its continuous commitment to the Declaration, and by implication its validity, before the UNSC.¹⁵⁰

67. Further, no Libyan official with the authority to represent Libya before the Court has challenged the validity of the Declaration. According to article 67 of the VCLT, such a challenge “shall be carried through an instrument communicated to the other parties”, and “[i]f the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.”

¹⁴⁷ *Contra Challenge*, paras. 32-33; [T-004-ENG](#), pp. 50:25-51:6.

¹⁴⁸ See [ICC-01/11-01/25-123](#); [ICC-01/11-01/25-123-Anx.](#)

¹⁴⁹ [REDACTED]. According to article 45 of the VCLT a State may no longer invoke a ground for invalidating a treaty if it has expressly agreed that the treaty is valid; or, by reason of its conduct, it must be considered as having acquiesced in the validity of the treaty. See also [Somalia v. Kenya Preliminary Objections](#), para. 49.

¹⁵⁰ See e.g. [UNSC, 10052nd meeting, U.N. Doc. S/PV.10052, 25 November 2025](#), p. 20 (“We welcome the progress made by the ICC on the situation in Libya over the past six months, as the protection of the rights of Libyan victims is a priority for the Libyan Government and the relevant authorities. This was also manifested in the cooperation announced until the end of 2027 and the guarantee of accountability in partnership with the Libyan institutions under Article 12, paragraph 3, of the ICC Statute in order to strengthen the rule of law and human rights in the country. This will advance international justice and the aspirations of Libyans in their goal of ending impunity and protecting the rights of innocent Libyans”); [UN Web TV, Security Council, The Situation in Libya, 22 May 2026](#), at 01:24:09-01:24:22 (the Permanent Representative of Libya to the United Nations, Mr. El-Sonni, quoted Prime Minister Aldabaiba reaffirming “the commitment of the cabinet to cooperating closely with the ICC pursuant to article 12, paragraph 3”).

68. Alleged letters or public statements from State organs or officials, such as the House of Representatives or the Director of the Office of President of the Presidential Council, claiming irregularities in domestic procedure, without the authority to represent the State before the Court, do not affect the validity of the Declaration and should be disregarded. This is even more so when these were not submitted to the Court via the diplomatic or otherwise recognised channels,¹⁵¹ but rather via the legal representative of a suspect in the course of criminal proceedings. Furthermore, and contrary to the Defence’s arguments and documents in support, [REDACTED].”¹⁵²

69. Second, the requirements set out in article 46 of the VCLT—providing that “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”—are not met.

70. The starting point of article 46 is that a violation of internal laws cannot affect international obligations,¹⁵³ unless in exceptional circumstances that fulfil a double test: (1) a “manifest” violation which (2) concerns a rule of fundamental importance regarding the State’s competence to conclude treaties. These circumstances are so extraordinary that the Prosecution is not aware of *any* case—and the Defence did not refer to one¹⁵⁴—in which a treaty has been invalidated at the inter-State level pursuant to article 46 of the VCLT.¹⁵⁵

¹⁵¹ For the sake of clarity, and contrary to the assumption in the Challenge, the Prosecution did not formally receive the letter from Libya’s House of Representatives, dated 18 May 2025. See [Challenge](#), para. 21 (referring to [LBY-D37-0000-0001](#); [LBY-D37-0000-0024](#)).

¹⁵² [REDACTED].

¹⁵³ See also [VCLT](#), art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”).

¹⁵⁴ See [Challenge](#), para. 16 (“[r]esearch 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”, citing *inter alia* B. Conforti and A. Lobelia, ‘Invalidity and Termination of Treaties: The Role of National Courts,’ 1 *EJIL* 44 (1990), pp. 53-54). However, the Defence does not refer to any cases; it only refers—generally without any cites—to one source that mentions cases where national courts found an agreement invalid according to their own national laws in a *specific case*, which did not invalidate the treaty vis-à-vis other States; these cases, except for one, predates the VCLT, and the one that was decided after 1969 involved a decision of the Supreme Court of Bangladesh (in 1974), which never signed the VCLT.

¹⁵⁵ See also J. Klabbbers, ‘The Validity and Invalidity of Treaties,’ in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd Ed., 2020), fn. 2 (“While I would hesitate to make the absolute claim that no international tribunal has ever found a treaty to be invalid, the fact is that I have been unable to locate examples of such findings.”); J. Hill, *Aust’s Modern Treaty Law and Practice* (4th Ed., 2023) (“Hill”), p. 321 (noting that according to Aust, “in fifty-years of practice, he had only encountered one suggestion that a treaty might be invalid.”).

71. The ICJ has confirmed the high threshold required by article 46 and has consistently dismissed allegations with respect to violations of domestic law in concluding treaties. In the ICJ case of *Cameroon v. Nigeria*, Nigeria argued that its maritime boundary agreement with Cameroon—signed by the Nigerian Head of State—lacked legal validity because of non-compliance with its constitutional rules regarding the conclusion of treaties (as the agreement was never approved by the Supreme Military Council).¹⁵⁶ The ICJ rejected this argument, finding that it did not fulfil the “manifest” requirement in article 46:

“[...] a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention ‘[i]n virtue of their functions and without having to produce full powers’ are considered as representing their State.”¹⁵⁷

72. The ICJ added that “there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.”¹⁵⁸ The ICJ reached a similar conclusion in *Somalia v. Kenya*, which concerned an MoU signed by the Somali Minister for National Planning and International Co-operation, who was “authorized and empowered” to do so by the Prime Minister of the Transitional Federal Government of Somalia.¹⁵⁹ The ICJ rejected Somalia’s argument that its domestic laws required the MoU to be ratified by its Parliament, noting that “there is no reason to suppose that Kenya was aware that the signature of the Minister may not have been sufficient under Somali law to express, on behalf of Somalia, consent to a binding international agreement.”¹⁶⁰

¹⁵⁶ [ICJ, Case concerning Land and Maritime Boundary between Cameroon and Nigeria \(Cameroon v. Nigeria: Equatorial Guinea intervening\), Judgment, ICJ Reports 2002, p. 303](#) (“*Cameroon v. Nigeria* Judgment”), para. 258.

¹⁵⁷ [Cameroon v. Nigeria Judgment](#), para. 265.

¹⁵⁸ [Cameroon v. Nigeria Judgment](#), para. 266.

¹⁵⁹ [Somalia v. Kenya Preliminary Objections](#), para. 43.

¹⁶⁰ [Somalia v. Kenya Preliminary Objections](#), para. 49. See also M. Bothe, ‘Invalidity of Treaties: 1969 Vienna Convention,’ in O. Corten *et al.* (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2nd Ed., 2025) Vol. II, pp. 1241-1243 (with regard to an agreement between Germany, France and the United Kingdom, stating that “[e]ven if these agreements had been subject to constitutional requirement of parliamentary consent, this condition was not evident for third States. This violation of the constitution could not, thus, be invoked by the Federal Republic of Germany vis-à-vis the other parties to these agreements”; concluding that “[t]he rule which governs in practice, and which prevails in the application of Article 46 is that the violation of constitutional norms will as a rule not be regarded as sufficient reason for invalidating a treaty”); [Hill](#), p. 322.

73. Accordingly, even if the Declaration required the approval of the Libyan House of Representatives—as claimed by the Defence¹⁶¹—this does not constitute a “manifest” violation considering Prime Minister Aldabaiba’s representative status according to international law.

74. Finally, even according to the documents provided by the Defence in support of the Challenge, the *Prime Minister* is the official with the authority to represent Libya and to make binding commitments on its behalf. The Defence concedes that, according to the Libyan Political Agreement (‘Skhirat Agreement’), the Presidency Council of the Council of Ministers has the power to “[c]onclude international agreements and conventions provided that they are endorsed by the House of Representatives”.¹⁶² The Presidency Council is also empowered to “[re]present the State in its foreign relations”, without involvement or endorsement of any other organs of the State.¹⁶³ The Prime Minister chairs the Presidency Council of the Council of Ministers.¹⁶⁴

75. Even if Libya’s Constitution requires the National Assembly to “*ratify* international treaties and agreements”,¹⁶⁵ this does not affect the authority of the Prime Minister (or Minister of Foreign Affairs) to *conclude* such agreements. Processes at the national level concerning the endorsement of a signed agreement do not affect the power to conclude such agreements at the international level.¹⁶⁶ Similarly, the requirement in domestic laws for treaties to be “endorsed” by the parliament does not necessarily constitute “internal law regarding *competence* to *conclude treaties*” according to article 46 of the VCLT.¹⁶⁷

76. In fact, Libya has concluded international agreements, even though, according to the Defence, it would have been impossible for the National Assembly to have endorsed any

¹⁶¹ See [Challenge](#), paras. 17, 24.

¹⁶² See [Challenge](#), para. 17. It seems the Defence mistakenly refers to article 8(2)(b) of the Libyan Political Agreement instead of article 8(2)(f).

¹⁶³ Libyan Political Agreement 17 December 2015, [LBY-OTP-0053-0959](#) at 0966 (art. 8(1)(a)).

¹⁶⁴ See [LBY-OTP-0053-0959](#) at 0964 (art. 1(3)).

¹⁶⁵ [Challenge](#), para. 17 (emphasis added).

¹⁶⁶ See [Hill](#), p. 115 (“[the] most common misconception about ratification is that it is a constitutional process. It is definitely *not*. As the definition makes it clear, *it is an ‘international’ act carried out on the ‘international’ plane*. Although parliamentary approval of a treaty may well be required—and be referred to, most misleadingly, as ‘ratification’—that is a quite different (and entirely domestic) process”, emphasis added).

¹⁶⁷ [VCLT](#), art. 46(1) (emphasis added). See Rensmann, ‘Article 46 Provisions of internal law regarding competence to conclude treaties,’ in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties A Commentary* (2012), pp. 786-787 (“Only internal law regarding competence to conclude treaties may be invoked as a ground for vitiating consent to be bound by a treaty. This qualification excludes provisions solely relating to the implementation and validity of treaties under domestic laws”).

agreement, since it is comprised of both the House of Representatives and the Senate, and the latter is yet to be established.¹⁶⁸

77. In addition, according to the translation of the Constitution upon which the Defence relies, the President may conclude “international agreements of *a technical nature*, as determined by law”.¹⁶⁹ Again, there is nothing in this provision limiting the powers of the Prime Minister (and Minister of Foreign Affairs) to conclude international agreements, technical or not. The Defence does not explain who has the authority to conclude agreements that are not “technical” in nature. Even the purported documents of the House of Representatives do not argue that the Prime Minister misappropriated the powers solely vested in the President to take unilateral international actions or to conclude international agreements.¹⁷⁰

78. Incidentally, and in contrast to the Defence’s description of Libya’s domestic laws on this matter, Prime Minister Aldabaiba and members of his government have reportedly concluded international agreements, such as the agreement signed in 2022 by Prime Minister Aldabaiba and the Turkish Defense Minister,¹⁷¹ the cooperation protocol signed in 2025 by Libya’s Minister of Marine Resources and Morocco’s Secretary of State,¹⁷² and the memorandum of understanding signed in 2026 by Libya’s and Morocco’s Ministers of Health.¹⁷³ This practice of concluding agreements, while disregarding any alleged limitations in domestic laws, is also relevant to assessing whether a domestic law was violated according to article 46 of the VCLT, because only effective internal law may be considered.¹⁷⁴

79. The Defence merely speculates when it suggests that confirming the validity of the Declaration “could aggravate internal tensions” and might jeopardise the peace and stability in

¹⁶⁸ See [Challenge](#), para. 17.

¹⁶⁹ [LBY-D37-0000-0026](#) at 0036 (art. 22(9)), (emphasis added). It is noted that the Defence omitted the emphasised part of the sentence: see [Challenge](#), para. 24.

¹⁷⁰ See [Challenge](#), paras. 21-23; [LBY-D37-0000-0024](#) (“[The government] mandate was strictly limited to preparing the ground for holding elections [...] This limitation applies *even to the normal competence of the executive authority, such as entering into international treaties*”, emphasis added); [LBY-D37-0000-0044](#) (“a government from which confidence has been withdrawn and whose mandate has expired”). It is noted that according to the Challenge, the “Supreme Judicial Council of Libya formally and explicitly declared their rejection of the Purported Article 12(3) Declaration”—referring to a letter that predates the Declaration: see [Challenge](#), para. 25 (referring to [LBY-D37-0000-0045](#): a letter dated 14 July 2021). In any case, this letter also does not negate the government’s power to make a declaration pursuant to article 12(3) of the Statute.

¹⁷¹ M. Aydoğan, “[Türkiye, Libya sign agreements on enhancing military cooperation](#)”, *AA*, 26 October 2022, [LBY-OTP-05567221](#).

¹⁷² M. Ahmed, “[Libyan-Moroccan agreement on marine fishing and aquaculture](#)”, *The Libya Observer*, 9 February 2025, [LBY-OTP-05567222](#).

¹⁷³ S. Zaptia, “[Libya signs Health MoU with Morocco on the sidelines of the 79th World Health Assembly in Geneva](#)”, *Libya Herald*, 20 May 2026, [LBY-OTP-05567224](#).

¹⁷⁴ See [Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989](#), Reports of International Arbitral Awards, Vol. XX, pp. 119-213, para. 56.

Libya.¹⁷⁵ Furthermore, this is irrelevant to the questions before the Chamber. As the Court has held in another situation, “the fact that [a decision] might entail political consequences shall not prevent the Chamber from exercising its mandate”.¹⁷⁶ The Chamber should be guided—as it is—solely by the Court’s legal framework.

IV. CONCLUSION

80. For all the reasons above, the Prosecution respectfully requests the Chamber to dismiss the Challenge.



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 22nd day of June 2026

At The Hague, The Netherlands

¹⁷⁵ [Challenge](#), para. 26. *See also* paras. 28-31.

¹⁷⁶ *Cf.* [ICC-01/18-143](#) (“*Palestine* Article 19(3) Decision”), para. 57 (“the fact that the present decision on the Prosecutor’s Request might entail political consequences shall not prevent the Chamber from exercising its mandate”).