

Concurring separate opinion of Judge María del Socorro Flores Liera

1. I concur with my colleagues that the Court has jurisdiction over the case of Mr El Hishri and that the Challenge must be rejected. However, I respectfully disagree with part of the reasons underpinning their conclusion; in particular, with their reiterated view that the scope of the 2011 UNSC referral, as contained in Resolution 1970, is sufficiently linked to the allegations of crimes brought by the Prosecution in the case of Mr El Hishri.

2. Consistently with the dissenting opinions I appended to several warrants issued in the Situation in Libya between April 2023¹ and January 2025², it is my view that the crimes alleged and described in the Application and retained in the Arrest Warrant issued for Mr El Hishri are not sufficiently linked to the situation of crisis that triggered the jurisdiction of the Court through Resolution 1970. As I have previously pointed out when dissenting in the recent case of Mr Njeem (the ‘*Njeem* Dissenting Opinion’), where almost identical crimes in terms of temporal, geographical and material parameters are alleged, the fact that Resolution 1970 does not explicitly indicate a future point in time when the Court’s jurisdiction would stop cannot be read as tantamount to making that jurisdiction unlimited in time; this, *inter alia*, because referrals by the UNSC ‘are subject to the entire legal framework of the Statute and cannot be interpreted in a vacuum’.³ Based on the applicable legal framework, the wording of Resolution 1970 and the context in which it was issued, I had determined, and still believe, that the events underlying the allegations are ‘not related to those that triggered the referral by the Security Council’.⁴ The fact that the UNSC continues to recall the resolution does not affect the scope of the jurisdiction of the Court under Resolution 1970, neither does it imply a modification of its terms.

3. In the same Dissenting Opinion, I had also indicated that it might have been ‘factually correct that a situation of turmoil ha[d] been ongoing since the 2011 Resolution’, while clarifying that this factual continuity did ‘not automatically establish a sufficient link between the criminal allegations

¹ [Decision granting the Prosecution’s application to unseal six warrants of arrest](#), 4 October 2024, ICC-01/11-141-Red and related public annexes 1 to 6.

² [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](#), ICC-01/11-152-Anx, pages 36-42.

³ [Njeem Dissenting Opinion](#), para. 5, p. 37.

⁴ [Njeem Dissenting Opinion](#), para. 6, p. 37.

put forward by the Prosecutor and the situation as it was originally referred’.⁵ Crucially, I had expressly envisaged some developments which, should they materialise, would have required me to reach a different determination. In particular, I had pointed out that ‘Libya could voluntarily ratify the Statute and become a State Party or *could accept the jurisdiction of the Court under Article 12(3) of the Statute* (emphasis added), allowing in this way the Prosecution to broaden the scope of its investigations beyond the terms and scope of the 2011 Resolution’.⁶

4. Since then, several significant developments have intervened. On 12 May 2025, Libya lodged its Article 12(3) Declaration, declaring ‘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’ and requesting ‘to extend the duration of investigations undertaken by the Court, which currently cover the period from 2011 to the end of 2025 [...] with two additional years until the end of 2027, to ensure that the perpetrators of those crimes continue to be prosecuted’. On 29 May 2026, the Registry transmitted the Additional Communication on the Article 12(3) Declaration, consisting in a letter whereby Libya ‘reaffirm[ed] the contents’ of the Article 12(3) Declaration as regards their recognition of the jurisdiction of the Court in prosecuting ‘those responsible for international crimes stipulated in the Rome Statute and committed from 2011 until the end of 2027’. On 5 June 2026, Libya, through its Embassy to the Netherlands, submitted its Observations on the Challenge, in compliance with the Chamber’s order. In these Observations, Libya *inter alia* reiterated the validity of its Article 12(3) Declaration, the expansion of investigative competences and the extension of the Court’s jurisdiction until the end of 2027, as well as its commitment to close cooperation with the Court pursuant to the applicable framework.

5. As a result of these developments, there is no longer a risk that the Chamber’s affirming its jurisdiction over the case of Mr El Hishri results in, or might be read as, allowing the Court to ‘continue exercising its jurisdiction indefinitely over a non-State party’.⁷ Rather, Libya’s acceptance of the jurisdiction of the Court, its explicit request to the Court to exercise it, its continuing cooperation with various organs of the Court and its concrete engagement in the

⁵ [Njeem Dissenting Opinion](#), para. 9, p. 39.

⁶ [Njeem Dissenting Opinion](#), para. 15, p. 41.

⁷ [Njeem Dissenting Opinion](#), para. 10, p. 39.

proceedings triggered by the Challenge univocally signify its determination to actively contribute to the objectives underlying the Statute, including the eradication of impunity for the perpetrators of grave crimes. In stating (and repeatedly reiterating) its intention and willingness to subject itself to the jurisdiction of the Court, Libya has removed the jurisdictional obstacle I had previously identified, consisting in the distance in time and difference in nature between the historical events underlying Resolution 1970, on the one hand, and those underlying the Arrest Warrant, on the other.

6. Prior to, and in the absence of, the Article 12(3) Declaration, Libya's position as a non-state party required caution and restraint in identifying and drawing the scope of the Court's jurisdiction, so as not to overstep the boundaries within which the drafters of the Statute had provided for a referral by the UNSC as an exception to the principle that only States Parties to a treaty are bound by it. By virtue of the Article 12(3) Declaration, I can now – as I already did in the Arrest Warrant – join the Majority and conclude that Libya accepts the Court's jurisdiction over crimes committed on the Libyan territories from the year '2011 until the end of 2027', as well as the extension of the scope of investigations, particularly into 'the escalating and persisting crimes against humanity and war crimes, in addition to crimes related to prisons, detention facilities, enforced disappearances, murder, torture, kidnapping, human trafficking, and persecution'.⁸

7. The breadth of the potential factual scope within which Libya is willing to accept that the Court exercises jurisdiction appears significant in strengthening the Chamber's conclusion, as stated in the Arrest Warrant, that the conduct with which Mr El Hishri is charged – allegedly committed in Libya from around February 2015 to, at least, early 2020 – 'falls within the temporal and territorial jurisdiction, as accepted by Libya'.⁹

8. The Defence arguments to the effect that the Article 12(3) Declaration would be invalid because of formal and substantive defects are not persuasive.

9. As regards the alleged formal defects, consisting in the fact that the document would be undated, unsigned and lacking an official seal or deposit number,¹⁰ these allegations were based

⁸ [Article 12\(3\) Declaration](#), para. 2.

⁹ [Arrest Warrant](#), para. 5.

¹⁰ [Challenge](#), para. 27.

on the redacted version to which the Defence access had been initially limited; since then, the Declaration has been made available to the Defence in its original, unredacted form,¹¹ to which – as acknowledged by the Defence¹² – these considerations do not apply.

10. As regards the arguments relating to the substantive and procedural flaws which would vitiate the Article 12(3) Declaration, I note that the entirety of the Defence’s position is premised on a fallacious assumption: namely, that a declaration under article 12(3) of the Statute ‘is equivalent to a treaty’,¹³ as such requiring compliance with the internal law of the relevant State regarding the conclusion and ratification of international treaties and subject to the provisions of the VCLT. First, as clearly recognized in international law, every State can commit itself through acts whereby it unilaterally undertakes legal obligations. A unilateral declaration is not a treaty and it binds the State making it if it is made by an authority vested with the powers to do so, as done in the current case.¹⁴ Second, it is a likewise well-established principle of international law that, irrespective of the source of the obligation, the validity of the act of a State under international law is not affected by the internal law of that State.¹⁵

11. The wording of the Statute and the Rules of Procedure and Evidence (the ‘Rules’), as interpreted in the jurisprudence of the Court, are univocal in showing that a declaration under article 12(3) is a *sui generis* unilateral act of the State, triggering specific jurisdictional consequences, rather than a treaty. Pursuant to article 12(3) of the Statute, a State which is not a party to the Statute may accept the exercise of jurisdiction by the Court ‘by declaration lodged with the Registrar’; pursuant to rule 44(2) of the Rules, the Registrar shall inform the State concerned that the lodged declaration ‘has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply’. As clarified by the Appeals

¹¹ ICC-01/11-01/25-6-Conf-AnxII.

¹² Defence Response, para. 14.

¹³ [Challenge](#), para. 15.

¹⁴ ICJ, *Nuclear Tests (Australia v. France)*, [Judgment](#), 20 December 1974, ICJ Reports 1974, p. 253, paras 48-49; ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, [Judgment of 26 May 1961](#), ICJ Reports 1961, p. 17.

¹⁵ ICJ, *Reparation for Injuries suffered in the Service of the United Nations*, [Advisory Opinion](#), ICJ Reports 1949, p. 174; ICJ, *Eletronica Sicula S.p.A (ELSI)*, [Judgment](#), ICJ Reports 1989, p. 15; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, [Decision of 30 April 1990](#), UNRIIAA, Vol. XX, 1990, p. 215.

Chamber, the effects of a declaration under article 12(3) of the Statute ‘are that the Court may exercise its jurisdiction and that the State in question is obliged to cooperate with the Court in accordance with Part 9 of the Statute. Nevertheless, a State making a declaration under article 12(3) of the Statute does not, as a result, have all the rights or obligations of a State Party’.¹⁶

12. The unilateral nature of the act is also made apparent by the features of previous article 12(3) declarations, which have been signed and submitted to the Court by different State authorities, including Ministers of Justice,¹⁷ Ministers of Foreign Affairs,¹⁸ Presidents,¹⁹ acting Presidents²⁰ and also Embassies²¹ of the relevant State. Whilst they also widely differ in breadth and form, none of those documents has been challenged on account of them not having complied with the formalities required for instruments of ratification, acceptance or approval of the Statute, which – as it is indeed the case for international treaties – involve their deposit with the Secretary General of the UN pursuant to article 125 of the Statute.

13. The difference in nature between treaties, on the one hand, and declarations recognising the jurisdiction of an international court, on the other, including for the purposes of the regime of interpretation respectively applicable to them, is also apparent from the legal framework governing the ICJ. Article 36(2) of the ICJ Statute provides that state parties ‘may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court’ in respect of certain legal disputes. In this regard, the ICJ has stated that a declaration lodged pursuant to this provision ‘is a unilateral act of State sovereignty’ of a ‘sui generis character’,²² as such subject to a regime

¹⁶ Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings](#), 12 December 2012, ICC-02/11-01/11-321 (OA 2) (the ‘Gbagbo Appeals Decision’), para. 74. This interpretation is further supported by legal scholars: see e.g. Haupais, commentary on Art. 12, in J. Fernandez, X. Pacreau & M. Ubeda-Saillard (eds.), *Rome Statute of the ICC: Article-by-Article Commentary*, 2nd ed., Vol. I, Pédone, Paris, p. 761.

¹⁷ [Palestine](#), 21 January 2009.

¹⁸ [Côte d’Ivoire](#), 18 April 2003 ICC-02/11-01/11-129-Anx16 ; [Declaration by Ukraine lodged under Article 12\(3\) of the Rome Statute](#), 8 September 2015.

¹⁹ [Côte d’Ivoire](#), 14 December 2010, ICC-02/11-01/11-129-Anx14; [Palestine](#), 31 December 2014.

²⁰ [Myanmar](#), 20 August 2021.

²¹ [Ukraine](#), 9 April 2014 .

²² ICJ, *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, [Judgment](#), 4 December 1998, ICJ Reports 1998, p. 432, para. 46.

‘distinct’ from the one envisaged for treaties by the VCLT.²³ Whilst article 12(3) declarations are specific and unique to the Statute, the obvious similarity in denomination, structure and purpose between them and the declarations of acceptance pursuant to article 36 of the ICJ Statute makes the ICJ approach a relevant factor when addressing the matter of the nature of declarations of acceptance of the jurisdiction of the Court and of the legal framework applicable to them.

14. Contrary to the Defence argument to the effect that a declaration under article 12(3) of the Statute would be ‘an international agreement in every sense of the word’, because it ‘establishes mutual obligations’ on the part of both the State lodging it and the Court,²⁴ a declaration under article 12(3) does not result in the Court’s obligation to proceed, or to proceed within the specific boundaries detailed in the declaration itself. As further clarified by the Appeals Chamber, ‘subject to any stipulations made in the declaration of acceptance, if a State accepts the jurisdiction of the Court under article 12 (3) of the Statute, the acceptance is general’,²⁵ and may also extend to future events, if such acceptance is made prospectively. While the factual details referred to in a declaration under article 12(3) of the Statute may constitute a starting point and assist in identifying the scope of the accepted jurisdiction, the Court will always interpret those references in light of its statutory instruments and this is well known by the States making the declarations.

15. The legal impossibility of equating a declaration under article 12(3) to a treaty and the irrelevance of arguments premised on national law for the purpose of asserting the validity of a declaration under international law make it unnecessary for me to address the Defence’s arguments premised on that equation. More specifically, there is no need for me to consider either (i) the provisions of the Libyan constitution governing the State’s ‘ratification of international agreements and treaties’, or the role of the National Assembly;²⁶ or (ii) the documents relied upon by the Defence with a view to demonstrating that the Article 12(3) Declaration was objected to by a

²³ ICJ, *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, [Judgment](#), 11 June 1998, ICJ Reports 1998, p. 275, para. 30.

²⁴ [Challenge](#), para. 13.

²⁵ [Gbagbo Appeals Decision](#), para. 82.

²⁶ [Challenge](#), para. 17.

number of Libyan entities as adopted in violation of the rules governing the signing or ratification of international treaties and agreements.²⁷

16. As regards the Defence argument to the effect that the Article 12(3) Declaration's signature by the Ambassador of Libya to the Netherlands would 'rais[e] even more questions' about its validity,²⁸ I observe that this argument fails to take into account that the Article 12(3) Declaration was not the result of an autonomous act of the Ambassador. The Ambassador's role was limited to appending a signature to and transmitting the Article 12(3) Declaration to the Court by virtue of a specific authorisation by the Prime Minister, submitted to the Court simultaneously to the Article 12(3) Declaration itself. Contrary to the Defence's statement, the Ambassador did not 'conclude and draft' the Article 12(3) Declaration 'on his own'.²⁹ As regards the argument that the letter of authorisation is 'undated, unstamped, and contains no reference number', which would cast doubts *inter alia* as to the timing of its issuance, I note that the letter of authorisation was already available to the Defence at the time of the submission of the Challenge,³⁰ where no argument was developed to this effect.

17. As recognized in customary international law and constantly recalled by the ICJ³¹ and the International Law Commission,³² Heads of State, Heads of Government and Ministers for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including

²⁷ These documents include (i) the statement of the President of the UNSC, making reference to the role of the Libyan House of Representatives (see [Challenge](#), para. 18); (ii) the 18 May 2026 Libyan House of Representatives' letter allegedly addressed to the Prosecutor challenging the Declaration ([Challenge](#), para. 21; LBY-D37-0000-0024 (English translation of LBY-D37-0000-0001); see, however, Prosecution Response to the Challenge, footnote 151, clarifying that 'the Prosecution did not formally receive the letter from Libya's House of Representatives'); (iii) the 16 May 2025 statement issued by the Judicial and National Reconciliation Committee in response to the Prosecutor's briefing of the Security Council ([Challenge](#), para. 22; LBY-D37-0000-0044, translation of LBY-D37-0000-0021); (iv) the 14 July 2021 letter of the Supreme Judicial Council of Libya ([Challenge](#), para. 25; LBY-D37-0000-0045, English translation of LBY-D37-0000-0022) and (v) the Document submitted by the Defence on 18 May 2026 as an [Addendum](#) to the Challenge (ICC-01/11-01/25-119-Red, and confidential Annex I thereto).

²⁸ Defence Response, para. 14.

²⁹ Defense Response, para. 17.

³⁰ ICC-01/011-01/25-6-AnxI was reclassified by the Chamber as confidential by email order dated 14 April 2026, at 12:28.

³¹ 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](#), 3 February 2006, ICJ Reports 2006, p. 6, para. 46 (including references therein); 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](#), 11 July 1996, ICJ Reports 1996 (II), p. 595, para. 44.

³² International Law Commission, [Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations](#), with commentaries thereto, 2006, Guiding Principle 4.

the performance on behalf of the said State of unilateral acts having the force of international commitments.³³ There is no need for those persons to produce or justify their powers. I note that the Article 12(3) Declaration, the Additional Communication and Libya's Observations have all been submitted by Mr Abdulhamid Mohammed Aldabaiba in his capacity as Prime Minister of the Libya Government of National Unity and transmitted to the Court via the Embassy of Libya to the Netherlands as the channel of communication between Libya and the Court. Mr Aldabaiba was appointed to this capacity on 25 February 2021 and is included as Head of the Government in the List issued by the UN Protocol and Liaison Services dated 11 May 2025 (the 'UN Protocol List'). Since his appointment as Head of the Government of National Unity, and to this day, Mr Aldabaiba has been recognised as legitimately representing Libya; as such, he was, and remains, presumed able to validly and bindingly act on behalf of Libya in the context of international relations. Between at least 2022 and 2026, he has led Libya's government in the context of the negotiation, conclusion and signature of several international agreements.³⁴ As recently as on 22 May 2026, his acts, including the Article 12(3) Declaration, have been referred to by the Permanent Representative of Libya to the UNSC.

18. The precedent of the situation in Egypt, referred to by the Defence as an example of the need that an article 12(3) declaration be submitted by an individual having 'full powers',³⁵ further corroborates, rather than disturbs, this conclusion. In that situation, a document purportedly constituting a declaration under article 12(3) was submitted to the Registrar by lawyers acting on behalf of, among others, a national political party, without any involvement of any State authority or official channel of communication, and then subsequently transmitted to the Prosecution. Having regard to the Court's regulatory framework, general principles of public international law, the UN Protocol List of the time and the acts of the UN General Assembly, the Prosecution determined that the none of the submitters were vested with the authority to legitimately represent

³³ *Idem*.

³⁴ See LBY-OTP-05567221 (newspaper article dated 26 October 2022 relating to the signature of agreements enhancing military cooperation with Türkiye); LBY-OTP-05567222 (newspaper article dated 10 June 2026 relating to the signature of an agreement with Morocco on marine fishing and aquaculture); and LBY-OTP-05567224 (newspaper article dated 20 May 2026 relating to the signature of a MoU with Morocco in the health sector).

³⁵ [Challenge](#), para 15.

the State of Egypt; accordingly, it concluded that the document constituted a communication within the meaning of article 15 of the Statute.³⁶

19. Finally, likewise irrelevant, also because of its speculative nature, is the alleged adverse impact that the Court's proceeding in the Situation in Libya and in this specific case on the basis of the Article 12(3) Declaration would have on Libya's internal political debate or security situation.³⁷ The Defence's submissions and some of the documents relied upon seem to point to internal issues and it is not for the Court to undertake their analysis. As long as a declaration under article 12(3) of the Statute emanates from an authority recognised as legitimately representing the State, the Court must be able to assume and consider that it faithfully and truthfully mirrors the will of that State, and to act upon it as valid and binding.

20. For these reasons, I am satisfied that the Article 12(3) Declaration is suitable to validly establish and ground the Court's jurisdiction in this case and that the Challenge must be rejected.



Judge María del Socorro Flores Liera

³⁶ [The determination of the Office of the Prosecutor on the communication received in relation to Egypt](#), 8 May 2024.

³⁷ [Challenge](#), para. 26.