

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/25

Date: 22 July 2026

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

PUBLIC

Public redacted version of ‘Defence consolidated request for leave to reply to “Observations on behalf of Victims on the Defence’s Challenge to the Court’s Jurisdiction” (ICC-01/11-01/25-130-Conf) and “Prosecution response to Defence challenge to the Court’s jurisdiction” (ICC-01/11-01/25-132-Conf)’

Source: Defence for Mr Khaled Mohamed Ali El Hishri

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☒ States' Representatives

☐ Amicus Curiae

The State of Libya

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☒ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and Reparations
Section

☐ Other

I. INTRODUCTION

1. Pursuant to Regulations 24 and 34 of the Regulations of the Court (“RoC”), the Defence files this consolidated request for leave to reply to the Observations on behalf of Victims on the Defence’s Challenge to the Court’s Jurisdiction (“Victims’ Observations”)¹ and the Prosecution response to Defence challenge to the Court’s jurisdiction (“Prosecution Response”).²

II. PROCEDURAL HISTORY

2. On 26 February 2011, the United Nations Security Council (“UNSC”), acting under Chapter VII of the Charter of the United Nations, referred the situation in Libya since 15 February 2011 to the Court, in accordance with Article 13(b) of the Statute.³

3. On 3 April 2025, the Prosecution, under seal and *ex parte*, applied for a warrant of arrest for Mr El Hishri for crimes against humanity and war crimes allegedly committed in Libya from around February 2015 to, at least, early 2020.⁴

4. On 12 May 2025, Libyan Prime Minister Abdulhamid Aldabaiba purported to convey to the Registrar of the Court his acceptance of the Court’s jurisdiction over its territory from 2011 to the end of 2027 (“Purported Article 12(3) Declaration”).⁵

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

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

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

8. On 30 April 2026, the Defence submitted the *Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute* (“Jurisdiction

¹ ICC-01/11-01/25-130-Conf.

² ICC-01/11-01/25-132-Conf.

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

⁴ ICC-01/11-172-US-Exp.

⁵ ICC-01/11-01/25-6-Corr-Red.

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

Challenge”).⁷

9. On 6 May 2026, PTC I issued the *Order Setting Time Limits for Observations in Relation to the Defence’s Challenge to the Jurisdiction of the Court pursuant to Article 19 of the Statute*, in which it “invite[d] Libya to submit observations, if any, to the [Jurisdiction] Challenge by 5 June and “instruct[ed] the Office of Public Counsel for Victims (“OPCV”) to submit Observations on behalf of any victim” on the Jurisdiction Challenge by 12 June 2026.”⁸

10. On 18 May 2026, the Defence filed its *Addendum to the Corrected Version of the “Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute* (“Addendum”)⁹ through which it placed on the record a letter that it received from the Office of the President of the Libyan Presidential Council (“Presidential Council Letter”) challenging the legal status of the Purported Article 12(3) Declaration.¹⁰

11. On 5 June 2026, the Registry transmitted the Observations authored by the Ambassador of Libya to The Netherlands.¹¹

12. On 12 June 2026, the OPCV filed the Victims’ Observations.¹²

13. Also on 12 June 2026, the Office of the Prosecutor filed the Prosecution Response.¹³

III. CLASSIFICATION

14. This response is classified as confidential pursuant to Regulation 23bis(2) of the RoC because it is responsive to documents filed with the same classification. A public redacted version will be filed shortly thereafter.

IV. APPLICABLE LAW

15. Pursuant to Regulation 24(5) of the RoC, “[p]articipants may only reply to a response with the leave of the Chamber.” Such a reply must, “[u]nless otherwise permitted by the Chamber, [...] be limited to new issues raised in the response which the replying participant could not

⁷ ICC-01/11-01/25-108-Conf-Corr.

⁸ ICC-01/11-01/25-116.

⁹ ICC-01/11-01/25-119-Conf.

¹⁰ ICC-01/11-01/25-119-Conf-AnxI.

¹¹ ICC-01/11-01/25-129.

¹² ICC-01/11-01/25-130-Conf.

¹³ ICC-01/11-01/25-132-Conf.

reasonably have anticipated.”¹⁴

16. Regulation 34(c) of the RoC additionally specifies that “[a] request for leave to reply shall be filed within three days of notification” of the response that is to be replied to.

V. SUBMISSIONS

A. Submissions relating to the Purported Article 12(3) Declaration

17. First, as regards the Presidential Council Letter – attached to the Addendum to the Jurisdiction Challenge – the Prosecution's Observations seek to discredit the authenticity of the letter and to impugn the authority of its signatory, the Director of the Presidential Council, who serves as the legitimate liaison of the Presidential Council for external communications.¹⁵ The Prosecution does not address the fact that the letter bears the official stamp of the Office of the Presidential Council, which confirms its status as a formal statement from the Presidential Council and the President of the Presidential Council through the Director of the Office of the President, and which stands as a formal objection from the Office of the Head of State to Mr. Aldabaiba's purported authority to issue the Article 12(3) Declaration. The OPCV, for its part, elected not to address the existence of this letter entirely, notwithstanding that its Observations speak at length on Mr. Aldabaiba's purported authority.

18. Second, the Prosecutor creates a false dichotomy between international agreements and the Purported Article 12(3) Declaration as a *sui generis* unilateral act.¹⁶ The Defence maintains that any Article 12(3) Declaration amounts to an international agreement. But even if *arguendo* the Purported Article 12(3) Declaration can properly be described as a *sui generis* unilateral act, it nevertheless can only be concluded by the President of the Presidential Council under Libyan domestic law because of the nature of the obligations imposed.

19. Third, the OPCV invokes the Court's practice in relation to the Article 12(3) Declarations of Palestine and Côte d'Ivoire as authority for the proposition that a Pre-Trial Chamber is not required to examine parliamentary authorisation or compliance with domestic constitutional requirements.¹⁷ If granted leave, the Defence will make submissions on the extent to which these situations are distinguishable from the instant case, with a focus on the fact that there is a Defence

¹⁴ Regulations of the Court, regulation 24(5).

¹⁵ ICC-01/11-01/25-108-Conf-Corr, para. 68.

¹⁶ ICC-01/11-01/25-108-Conf-Corr paras 57-60.

¹⁷ ICC-01/11-01/25-132-Conf, para. 62.

challenge to jurisdiction during which the Defence has pointed to constitutional irregularities in Libya, and the fact that those earlier declarations proceeded on different jurisdictional bases. The Defence will make additional submissions on the precedential value the OPCV attributes to these earlier cases.

20. Fourth, the Defence would seek to reply to the various and fundamental mischaracterisations of Libyan law as set out in both the Victims' Observations and the Prosecution Response. The authority to enter into international agreements is specifically governed by the 13th Amendment in 2023 to the Libyan Constitution. The Victims' Observations and Prosecution Response proceed on a materially incorrect reading of that Amendment and of the broader structure of Libyan law, which the Defence should, as a matter of fairness have the opportunity to address.¹⁸

21. Fifth, in support of Mr Aldabaiba's authority to enter into international agreements, the Prosecution references a press release on an agreement reportedly signed by Mr Aldabaiba, which the disclosed material establishes was dated 26 October 2022.¹⁹ This places the instrument squarely prior to the 2023 Constitutional Amendment, under which the authority to conclude such agreements was expressly reserved to the Presidential Council. The Prosecution's account of the chronology of Libyan law on this point either misinterprets or misrepresents the applicable legal framework.

22. The Defence respectfully submits that the Prosecution Response and Victims' Observations introduce arguments that were not previously before the Chamber and to which the Defence has had no prior opportunity to respond. The arguments advanced in respect of purported authority to issue the Article 12(3) Declaration, the nature of Article 12(3) declarations, the relevance of the Court's practice in Palestine and Côte d'Ivoire, and the interpretation of the 13th Amendment to the Libyan Constitutional Declaration are each raised for the first time in the Observations. These are not arguments that the Defence could have anticipated and addressed in its Jurisdiction Challenge or its Addendum. Leave to reply is therefore necessary to ensure that the Chamber has the benefit of the Defence's submissions on these novel points before deciding on the Jurisdiction Challenge.

¹⁸ See ICC-01/11-01/25-108-Conf-Corr, paras 75-77; ICC-01/11-01/25-132-, paras 66, 69-71.

¹⁹ ICC-01/11-01/25-108-Conf-Corr, para. 78; M. Aydogan, "Türkiye, Libya sign agreements on enhancing military cooperation", AA, 26 October 2022, LBY OTP-05567221.

B. Submissions relating to UNSC Resolution 1970 (2011)

23. Firstly, as a general matter, both the Prosecution and the OPCV systematically mischaracterise the Defence's arguments in relation to UNSC Resolution 1970 (2011). Whether these mischaracterisations are based on a misunderstanding of the Defence's arguments, or intended to deliberately stand up a strawman in order to knock it down, the effect is that both engage in refutations of points that were never advanced by the Defence.

24. These mischaracterisations include:

- a. misstating that the Defence argues that the principle of *nullum crimen sine lege* requires that it be "reasonably foreseeable whether a particular court may exercise its jurisdiction."²⁰
- b. misstating that the Defence argues that the crime against humanity of other inhumane acts and the crime against humanity and war crime of other forms of sexual violence were not "recognised [...] under customary law."²¹
- c. misstating that the Defence argues that the scope of a UNSC referral should be limited to "a case against a specific individual."²²
- d. misstating that the Defence argues that *nullum crimen sine lege* requires that "the individual be able to predict the precise legal classification that may later be attached to that conduct or the specific mode of liability through which responsibility may ultimately be established."²³

25. The Defence submits that a Reply on these issues is required to correct these and other misstatements of the Defence's arguments, and the mistaken conclusions that the Prosecution and the OPCV make on the basis of these misapprehensions. Such a Reply would assist the Chamber in ensuring that it makes its decision on the basis of the Defence's arguments as actually made and not a strawman version of them as stood up by the Prosecution and the OPCV.

²⁰ ICC-01/11-01/25-132-Conf, para. 37.

²¹ *Ibid.*, paras 48-49.

²² ICC-01/11-01/25-130-Conf, para. 43.

²³ *Ibid.*, para. 55.

26. Secondly, both the Prosecution²⁴ and the OPCV²⁵ refer to arrest warrant decisions in the Situation in Libya as establishing the necessary standards for the application of UNSC Resolution 1970 (2011) and specifically to the Njeem Arrest Warrant Decision as establishing that the alleged actions of SDF/RADA fall within that Resolution. If granted leave, the Defence will advance submissions about how these references are inapposite as those decisions were made on the application of a lower standard ("reasonable grounds to believe")²⁶ and ex parte, without the benefit of any Defence arguments.

27. The Defence could not have reasonably anticipated the reliance of the Prosecution and the OPCV on decisions that were made under such conditions that significantly limit the ability of the Court to rely on them. A reasoned Reply from the Defence is necessary to fully rebut these arguments and assist the Chamber in its consideration.

28. Thirdly, in its response to the Defence's submissions on the lack of a factual connection between Mr El Hishri's alleged conduct and the situation that triggered the jurisdiction of the Court in Resolution 1970 (2011), the Prosecution references additional witness statements that it claims support a connection between Mr El Hishri's alleged conduct and the situation that triggered the Court's jurisdiction.²⁷

29. A reasoned Reply to the introduction of these additional witness statements that the Prosecution did not refer to in its Arrest Warrant Application is necessary to respond to the novel evidence contained in these statements and to point the Pre-Trial Chamber to the aspects of these statements that render them insufficient to support the Prosecution's argument. The Defence was, unfortunately, unable to reference many of these witness statements previously as the versions disclosed to the Defence are heavily redacted to the point where it is impossible to discern the source of the witnesses' supposed knowledge of the relevant facts.²⁸ If granted leave, the Defence will submit that evidence whose source the Defence cannot even verify at face value does not serve as adequate evidence for such an important proposition. A complete, reasoned Reply will allow the Defence to inform the Chamber of the extent and nature of the redactions that prevented it from relying on these witness statements in its Jurisdiction Challenge and of the additional

²⁴ ICC-01/11-01/25-132-Conf, paras 2, 23-25, 33.

²⁵ ICC-01/11-01/25-130-Conf, paras 29, 46-50, 57.

²⁶ Rome Statute, art. 58(1)(a).

²⁷ ICC-01/11-01/25-132-Conf, paras 25-32.

²⁸ E.g. [REDACTED]

inconsistencies²⁹ of these witness statements – even in their redacted form.

30. Fourthly, the Prosecution³⁰ and the OPCV³¹ appear to rely on either the Prosecution's own submissions to the UNSC, or the UNSC's silence in response to these submissions, as evidence of how the UNSC interprets Resolution 1970 (2011). Although the Defence discussed the (lack of) relevance of certain statements by specific UNSC member states in its Jurisdiction Challenge and made broad submissions on the lack of interpretative force of silence by the UNSC, it could not anticipate the Prosecution and OPCV's focus on silence by the UNSC or the Prosecution's own submissions for the interpretation of Resolution 1970 (2011).³² Therefore, a reasoned Reply is necessary to scrutinise the details of the value of silence in the interpretation of international legal documents and the issue of the essentially circular argument that the Prosecution's own statements before the UNSC can be used as evidence supporting the Prosecution's argument.

V. CONCLUSION

25. For the foregoing reasons, the Defence submits that it could not reasonably have anticipated the referenced arguments raised in the Victims' Observations and the Prosecution Response, and respectfully requests leave to file its reply.

Respectfully submitted,



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Dated this 22 July 2026
at The Hague, The Netherlands

²⁹ *E.g.* [REDACTED]

³⁰ ICC-01/11-01/25-132-Conf, paras 33-35.

³¹ ICC-01/11-01/25-130-Conf, para 29.

³² ICC-01/11-01/25-108-Conf-Corr, paras 67-69.