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Court

Original: English *No. ICC-01/11-01/25*

Date: 28 August 2026

THE APPEALS CHAMBER

Before: **Judge Gocha Lordkipanidze, Presiding**
Judge Tomoko Akane
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Erdenebalsuren Damdin

SITUATION IN LIBYA

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

PUBLIC

Appeal Brief against "Decision on the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute" (ICC-01/11-01/25-142)
With Public Annexes I and II

Source: **Defence for Mr Khaled Mohamed Ali El Hishri**

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I. INTRODUCTION

1. In accordance with article 82(1) of the Rome Statute ("Statute") and regulation 64(2) of the Regulations of the Court, the Defence for Mr El Hishri ("Defence", "Appellant") files its appeal brief in its appeal against Pre-Trial Chamber I's *Decision on the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute* ("Impugned Decision").

2. This appeal addresses the question of the Court's jurisdiction under UN Security Council Resolution 1970 (2011) ("Resolution 1970") only as the (majority) Impugned Decision made no operative findings on the question of jurisdiction under Libyan Prime Minister Abdulhamid Aldabaiba's purported conveyance of his acceptance of the exercise of the Court's jurisdiction under article 12(3) of the Statute ("Purported Article 12(3) Declaration"). For the avoidance of doubt, however, the Defence maintains the entirety of its submissions in its *Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute* of 28 April 2026 ("Jurisdiction Challenge").[1] The Defence respectfully submits that if the Appeals Chamber concludes that a determination of the validity of the Purported Article 12(3) Declaration is required, such a determination should be made by the Pre-Trial Chamber ("PTC") as the Chamber of first instance. It would not be appropriate for the Appeals Chamber to make such a first instance determination.

3. The Defence further submits that Judge Maria del Socorro Flores Liera's Concurrent Separate Opinion fully supports its argument that Resolution 1970 does not confer on the court jurisdiction over the Appellant's case.[2]

[1] These submissions are supported by a recent decision of the Tripoli Court of Appeal obtained by the Defence, which is annexed to this decision and states that the Purported Article 12(3) Declaration "overstepped the sovereignty of the State's domestic laws, which are of fundamental importance, and the fact is that it has no legal basis, particularly as its issuance occurred in the context of an abuse of power exceeding the limits of [the Prime Minister's] official jurisdiction, thereby infringing upon the principle of the separation of powers, which renders it null and void." (see Annex I, p. 34)
[2] Concurring separate opinion of Judge María del Socorro Flores Liera, ICC-01/11-01/25-142-OPI

4. The Defence advances two main grounds of appeal: a) the PTC erred in law by finding that UNSC referrals do not have to be interpreted narrowly on the basis of both the principle of legality and state consent; and b) the PTC erred in fact and law by finding that there was a sufficient link between the crimes alleged against Mr El Hishri and the situation referred by the Security Council ("UNSC") in Resolution 1970. The PTC's error in adopting an overly-broad interpretation of Resolution 1970 led, in part, to its error in finding a sufficient link between the situation referred in Resolution 1970 and the crimes alleged against Mr El Hishri. The erroneous finding of sufficient link, in turn, led to the ultimate erroneous finding of jurisdiction under Resolution 1970.

5. These two overarching errors were compounded by and ultimately the result of subsidiary errors of fact and/or law that are treated as sub-grounds in this appeal. For Appeal Ground A, the sub-grounds are: 1) the PTC erred in fact and law by mischaracterising the Defence's argument as "question[ing] the validity of Resolution 1970 on the basis of State consent"; 2) the PTC erred in fact and law by mischaracterising the Defence's argument as "conflat[ing] the foreseeability of criminal liability with the foreseeability of prosecution before a specific forum"; 3) the PTC erred in law by finding that indirect co-perpetration is a mode of liability under customary international law; and 4) the PTC erred in law by finding that the exact contours of what may be described as residual crimes in the Rome Statute are reasonably foreseeable. The mischaracterisations of the Defence's arguments led to the PTC's failure to adequately analyse and apply them to this case, which led to its error of law in finding that UNSC referrals do not have to be interpreted narrowly. This in turn directly led to the error addressed in Appeal Ground B.

6. For Appeal Ground B, the sub-grounds identified are: 1) the PTC erred in law by declining to consider whether there was enough evidence of a sufficient link between the Appellant's alleged crimes and the situation referred by the UNSC; 2) the PTC erred in law by finding that the failure of the UNSC to state affirmatively that Resolution 1970 does not apply to the Appellant's case indicates the UNSC's positive acceptance of its

application; and 3) the PTC erred in law in its interpretation of subsequent practice of the UNSC and other UN organs.

7. In addition, given the Appellant's essential human right to a fair and public hearing and the fact that this appeal raises novel issues of public international law that may well have a significant impact on future ICC cases, the Defence requests an oral hearing for this appeal.

II. PROCEDURAL HISTORY

8. On 26 February 2011, the 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]

9. On 3 April 2025, the Prosecution, under seal and *ex parte*, applied for a warrant of arrest for the Appellant for crimes against humanity and war crimes allegedly committed in Libya from around February 2015 to, at least, early 2020.[4]

10. On 12 May 2025, Libyan Prime Minister Abdulhamid Aldabaiba conveyed to the Registrar of the Court the Purported Article 12(3) Declaration accepting the Court's jurisdiction over Libyan territory from 2011 to the end of 2027.[5]

11. On 10 July 2025, the PTC issued the warrant of arrest against the Appellant.[6]

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

13. On 1 December 2025, Mr El Hishri was surrendered to the Court and arrived at

[3] United Nations Security Council Resolution 1970, para. 4, 26 February 2011, S/RES/1970 (2011).
[4] Prosecution's application under article 58 for a warrant of arrest against Khaled Mohamed Ali EL HISHRI ICC-01/11-01/25-4-Red, 3 April 2025.
[5] Corrected version of Transmission of Article 12(3) Declaration by the State of Libya, ICC-01/11-01/25-6-Corr-Red, 8 August 2025.
[6] Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-01/25-7 ,10 July 2025.

the Court's Detention Centre that same day.

14. On 30 April 2026, the Defence submitted the Jurisdiction Challenge.[7]

15. On 15 July 2026, the PTC issued the Impugned Decision along with Judge Flores' Separate Opinion.[8]

III. STANDARD OF REVIEW

16. With regard to alleged errors of law, the Appeals Chamber "will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law".[9]

17. In contrast, in analysing alleged errors of fact, the Appeals Chamber "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."[10]

IV. SUBMISSIONS

A. *The PTC erred in law by finding that UNSC referrals do not have to be interpreted narrowly on the basis of both the principle of legality and state consent*

18. In the Impugned Decision, the PTC correctly notes both that "because all States are equally sovereign, they can only be subjected to international legal obligations to which

[7] Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute, ICC-01/11-01/25-108-Conf-Cor, 6 May 2026.
[8] Decision on the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute, ICC-01/11-01/25-142, 15 July 2026.
[9] *E.g.*, *Duterte*, Judgment on the appeal of Mr Rodrigo Roa Duterte against Pre-Trial Chamber's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025, ICC-01/21-01/25 OA3, 22 April 2026, para. 32.
[10] *Ibid.*, para. 34.

they have consented"[11] and that "the Court may exercise its jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law."[12] However, its application of these two principles to the instant case, and its eventual conclusion that they do not require a narrow interpretation of UNSC referral resolutions is flawed. It results from the following specific errors.

(1) The PTC erred in fact and law by mischaracterising the Defence's argument as "question[ing] the validity of Resolution 1970 on the basis of State consent"

19. The PTC's erroneous conclusion on the narrowness of the interpretation required for a UNSC referral resolution is founded on a fundamental misunderstanding or mischaracterisation of the Defence's arguments in its Jurisdiction Challenge. In the Impugned Decision, the PTC incorrectly "notes that the Defence appears to question the validity of Resolution 1970 on the basis of State consent" despite correctly stating that "the binding nature of Resolution 1970 has not been specifically called into question by the Defence".[13]

20. Indeed, the Defence did not, and does not, call into question either the binding nature of Resolution 1970 or its validity. The Defence simply asserts that the fundamental principle of State consent necessitates a narrow interpretation of Resolution 1970. An overly broad interpretation would be invalid.[14]

21. The PTC's misunderstanding and/or mischaracterisation of this Defence argument led it to fail to properly assess the Defence's argument about the role of State consent and State sovereignty in the interpretation of UNSC resolutions. Given the primacy of State consent in public international law, this was not a minor error or a minor failure to consider an argument.

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[11] Impugned Decision, para. 25.
[12] *Ibid.*, para. 44.
[13] *Ibid.*, para. 28.
[14] Jurisdiction Challenge, paras. 41-53.

(2) *The PTC erred in fact and law by mischaracterising the Defence's argument as "conflat[ing] the foreseeability of criminal liability with the foreseeability of prosecution before a specific forum"*

22. The PTC also fundamentally misunderstands and/or mischaracterises the Defence's arguments in relation to the role that the principle of legality plays in the interpretation of Resolution 1970. In the Impugned Decision, the PTC erred in stating that "the Defence appears to conflate the foreseeability of criminal liability with the foreseeability of prosecution before a specific forum."[15]

23. The Defence never argued that the principle of legality requires an alleged perpetrator to be able to foresee prosecution before a specific forum. In line with existing ICC and human rights jurisprudence, the Defence submitted before the PTC that an alleged perpetrator must "have reasonably expected to face prosecution under national or international law."[16] As argued in the Jurisdiction Challenge, this requires that the alleged criminal acts were "prohibited by a source of international or domestic law that was applicable to the acts at the time they were committed."[17]

24. The question of the specific forum is relevant if the law governing that specific forum includes either substantive crimes or modes of liability that criminalise actions that would not be criminal under any other "source of international or domestic law that was applicable to the acts at the time they were committed."[18] In the case of the ICC as the specific forum, the Defence contended - and continues to contend - that what may be described as the residual crimes of the crimes of the crime against humanity of "other inhumane acts" (article 7(k)), the war crime of "other forms of sexual violence" (article 8(e)(6)), and the crime against humanity of "other forms of sexual violence" (article 7(g)) and the modes of liability of co-perpetration and indirect co-perpetration with which

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[15] Impugned Decision, para. 45.
[16] *Abd-al-Rahman,* Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20-503, 1 November 2021, para. 85. ("*Abd-Al- Rahman* Judgement"). *See* Jurisdiction Challenge, para. 55.
[17] Jurisdiction Challenge, para. 55.
[18] *Abd-al-Rahman* Judgement para. 85

Mr El Hishri is charged are not criminalised under pre-existing, independent sources of domestic or international law. Therefore, the only way that Mr El Hishri could foresee his prosecution for the actions are caught by these residual crimes and modes of liability is if he could foresee that he would be prosecuted before the ICC. Such foreseeability is only possible if the instrument conferring jurisdiction is interpreted narrowly.

25. This argument must be carefully distinguished from the argument that the PTC erroneously understood the Defence to have made. The Defence is simply restating the law as established by the Appeals Chamber in the *Abd-Al-Rahman* case, which found that the principle of legality requires an alleged perpetrator to be able to foresee criminal prosecution for his or her actions.[19]

26. Additionally, the Defence does not argue, as the PTC appears to imply, that Mr El Hishri's prosecution before the ICC under Resolution 1970 would be barred by application of the principle of legality. Instead, as with the discussion about State consent, the Defence argues that Resolution 1970 must be *interpreted* narrowly so that Mr El Hishri can reasonably foresee his prosecution in a forum whose applicable law will hold him liable for actions that were not criminal under any other source of domestic or international law applicable to him at the time. It is the *interpretation* that is at issue here, not the validity of the referral.[20]

27. The PTC's misunderstanding and/or mischaracterisation of the Defence's argument led it to erroneously conclude that the principle of legality did not require a narrow interpretation of Resolution 1970 and, therefore, interpret the Resolution in an overly-broad manner that does not align with the human right embodied in the principle of legality.

[19] *Ibid.*
[20] Jurisdiction Challenge, paras 59-60.

(3) The PTC erred in law by finding that indirect co-perpetration exists in customary international law

28. A key element of the submission that a broad interpretation of Resolution 1970 would result in the Appellant being criminally prosecuted for acts that were not reasonably foreseeably criminal at the time they were allegedly committed is the question of whether the modes of liability with which Mr El Hishri is charged were criminalised under any domestic or international law applicable to him at the time. The principle of legality requires that Mr El Hishri must have been able to reasonably foresee that his *actions* were susceptible to criminal prosecution.[21] This includes otherwise-innocent actions that could constitute involvement in a "common plan" under ICC case law on indirect co-perpetration.

29. In paragraph 47 of the Impugned Decision, the PTC states that "it is 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." Although it may be true that the general concepts of commission "as a perpetrator individually or jointly with others" have been applied in other international criminal tribunals and in domestic criminal courts, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") as well as academic work make it clear that the specific mode of liability of indirect co-perpetration as elaborated in ICC case law is controversial and falls very far short of recognition under customary international law.[22] Therefore, the

[21] International Covenant on Civil and Political Rights ("ICCPR"), UN Doc. 993 U.N.T.S. 171 (16 December 1966, entered into force 23 March 1976), art. 15. *See Milutinović et al*., Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, para. 10; K. Ambos, "Article 25: Individual criminal responsibility", in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., C.H. Beck (2021), para. 2697.

[22] *Stakić*, Appeals Judgment, IT-97-24-A, 22 March 2006, para 62 (Indirect co-perpetration, "as defined and applied by the Trial Chamber, does not have support in customary international law"); *Milutinović et al*, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, IT-05-87-PT, 22 March 2006, 2006, para. 39 ("such evidence would not support a conclusion that there is state practice and *opinio juris* demonstrating the existence of the *Stakic* definition [of indirect co-perpetration] in customary international law"); *Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12, 18 December 2012, paras 52, 55, 57; Y. Tan, *The Rome Statute as Evidence of Customary International Law* (Brill | Nijhoff 2021).

specific acts that fall under this mode of liability were not criminalised under any other form of international or domestic law applicable to the appellant at the time.

30. The lack of inclusion of this mode of liability in other forms of international or domestic law reinforces the need for Resolution 1970 to be interpreted narrowly so that Mr El Hishri could reasonably foresee that his alleged acts that fall under this mode of liability would be susceptible to criminal prosecution. Without ICC jurisdiction, these acts under this mode of liability would not be criminalised. To be able to reasonably foresee criminal prosecution for acts that are criminalised under the Rome Statute, but not in Libyan criminal law or international law, Mr El Hishri must be able to reasonably foresee that the ICC could have jurisdiction. Such reasonable foreseeability requires a narrow interpretation of the instrument granting the Court jurisdiction in this case so that a reasonable person could foresee such jurisdiction and, therefore, criminal prosecution for acts that would not otherwise be criminalised.

(4) The PTC erred in law by finding that the exact contours of residual crimes in the Rome Statute are reasonably foreseeable

31. Another key element of the Defence's argument that a broad interpretation of Resolution 1970 would result in a violation of the principle of legality is the question of whether the material elements of every crime with which the Appellant is charged were criminalised under a source of domestic or international law other than the Rome Statute at the time they were allegedly committed. The Appellant could not have reasonably foreseen his prosecution for criminal offences that were not criminalised under another source of international law unless the interpretation of the instrument granting the ICC jurisdiction is narrow and, therefore, its application to Mr El Hishri reasonably foreseeable.

32. In paragraph 49 of the Impugned Decision, the PTC erroneously finds that the crime against humanity of "other inhumane acts", the war crime of "other forms of sexual violence", and the crime against humanity of "other forms of sexual violence" "were

ascertainable at the relevant time under the applicable law." Even the PTC's description of the definition of these crimes renders uncertain what specific acts would be covered by them. It is unclear what exactly would be considered to be "of a similar character [to other crimes against humanity/war crimes and] intentionally causing great suffering, or serious injury to body or to mental or physical health."[23] As these specific crimes are not criminalised in any other source of domestic or international law applicable to the Appellant at the time,[24] the only possibility for him to foresee his prosecution for the acts that constitute these crimes is if he could reasonably foresee being prosecuted before the ICC.

(5) Conclusion on Ground of Appeal A

33. The PTC's failure to conclude that the fundamental principles of State consent and legality require a narrow interpretation of Resolution 1970 is the result of its errors in misunderstanding and/or mischaracterising central aspects of the Defence's argument and in finding that the modes of liability and crimes with which Mr El Hishri is charged were criminalised under other existing sources of domestic or international law.

34. Because the PTC misunderstood and/or mischaracterised the Defence's arguments, it failed to properly analyse these arguments and come to a correct conclusion. The question of whether State consent calls into question the validity of Resolution 1970 is very different from the question of whether State consent and State sovereignty require a narrow interpretation of Resolution 1970. The misunderstanding and/or mischaracterisation of this argument has resulted in the PTC erroneously failing to engage with the question of the roles that the principles of State consent and State sovereignty play in the interpretation of UNSC resolutions.

35. As argued in detail in the Jurisdiction Challenge, binding UNSC resolutions result

[23] Impugned Decision, para. 49.
[24] J. Nicholson, "Strengthening the Effectiveness of International Criminal Law through the Principle of Legality", 17 International Criminal Law Review (2017) 656, at 671.

from the UNSC's specific power under article 39 of the UN Charter to act only in response to a "threat to the peace, breach of the peace, or act of aggression." The UNSC does not have a general power to compel States to act without their consent. Any UNSC resolution must be interpreted in light of this restriction on the UNSC's powers and ensure that it does not result in binding obligations on a State that are not in response to such a "threat to the peace, breach of the peace, or act of aggression." The interpretation must, therefore, be narrow and encompass solely actions that respond to that identified threat to the peace, breach of the peace, or act of aggression.[25]

36. Similarly, the PTC's misunderstanding and/or mischaracterisation of the Defence's argument in relation to the application of the principle of legality to Resolution 1970 resulted in it ultimately failing to address the question actually posed by the Jurisdiction Challenge. In this case, the question of whether the principle of legality requires an accused to reasonably foresee prosecution in a specific forum is very different from the question of whether the specific crimes and modes of liability with which the Appellant is charged were criminalised under another source of international or domestic law, thus allowing Mr El Hishri to foresee his prosecution for those acts, even without the ICC's jurisdiction being reasonably foreseeable.

37. For this reason, the PTC's errors in law on the questions of the criminalisation by indirect co-perpetration, the crime against humanity of "other inhumane acts", the war crime of "other forms of sexual violence", and the crime against humanity of "other forms of sexual violence" in domestic and international law additionally resulted in the principal error of failing to find that Resolution 1970 must be interpreted narrowly. If

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[25] Jurisdiction Challenge, paras 41-53. *See also* J. Crawford, *Brownlie's Principles of Public International Law*, OUP (9th edition, 2019), chapter 20; L.M. Hinojosa Martínez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits", 57(2) International and Comparative Law Quarterly (2008) 333, pp. 339, 354; *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 44; A.S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Brill Nijhoff (2018); *Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Sidhwa, 2 October 1995, para. 63; G. Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*, Elgar International Law (2018).

this mode of liability and these residual crimes with which the Appellant is charged were not criminalised outside of the Rome Statute, then Mr El Hishri must have been able to reasonably foresee prosecution at the ICC to be able to foresee his prosecution for the acts that underlie them. Otherwise, it could not have been reasonably foreseeable that the alleged acts attracted criminal sanction.

38. Instead of addressing this question that is vital for the protection of Mr El Hishri's basic rights as a criminal defendant, the PTC erroneously addressed an unrelated question that is generally considered settled in public international law.[26] This error not only resulted in a failure to arrive at a fully-considered decision on the appropriate interpretive methodology for Resolution 1970 but also in a failure to comprehensively ensure the protection of Mr El Hishri's rights under the principle of legality.

39. Due to the above-mentioned errors, the PTC failed properly to engage with the Defence's arguments on the necessity of a narrow interpretation of Resolution 1970. This error contributed to its ultimate erroneous finding that the correct interpretation of Resolution 1970 leads to the conclusion that the Appellant's alleged actions are caught by that Resolution. As argued in the Jurisdiction Challenge, a narrow interpretation of Resolution 1970, bearing in mind legitimate concerns about legality and State consent, could only result in a finding that Mr El Hishri's alleged actions do not fall within that Resolution.[27]

B. The PTC erred in fact and law by finding that there was a sufficient link between the crimes alleged against Mr El Hishri and the situation referred by the UNSC in Resolution 1970

40. The result of the error in Ground of Appeal A in failing to properly adopt a narrow interpretation of Resolution 1970 directly lead to and was at the heart of the PTC's ultimate erroneous finding, detailed in the following paragraphs, that there was a

[26] *See generally* K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law,* CUP (2009).
[27] *See* Jurisdiction Challenge, paras 41-84.

sufficient link between the crimes alleged against the Appellant and the situation referred by the UNSC in Resolution 1970.

(1) The PTC erred in law by declining to consider whether there was adequate evidence of a sufficient link between the crimes allegedly committed by Mr El Hishri and the situation referred by the UNSC

41. In paragraph 40 of the Impugned Decision, the PTC erroneously failed to consider the nature and sufficiency of the evidence of the link between the crimes allegedly committed by Mr El Hishri and the situation of crisis referred by the UNSC in Resolution 1970. Unlike previous challenges at the ICC, the Jurisdiction Challenge in this case raises questions of fact that are integral to the determination of jurisdiction and demand a proper analysis of the underlying evidence. The questions of fact at issue in the Jurisdiction Challenge are solely related to the question of jurisdiction and, therefore, were not decided in the Confirmation of Charges decision and will not be decided at trial.

42. As noted by the PTC, the question of whether the alleged crimes are sufficiently linked to the referral involves factual determinations including whether "there has been an ongoing situation of crisis in Libya since 2011",[28] the supposed "fact of common knowledge that violence erupted in Libya in February 2011 in the context of an uprising against the Gaddafi regime and that, after its fall, the fighting and civil unrest continued in Libya",[29] the finding that "the violence between the organisation referred to by the Prosecution as the 'Libyan National Army' […] and the Government of National Accord […] 'amplified the existing proxy conflict that took shape after 2011'",[30] and the key finding that "SDF/RADA emerged as a result of the 2011 crisis that triggered Resolution 1970, and the aftermath of the crisis."[31] That final key finding was purportedly supported by factual findings that SDF/RADA "originated as a revolutionary military

[28] Impugned Decision, para. 38.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*, para. 39.

group from the Tripoli district of Souk al Juma that was fighting Gaddafi forces"[32] and "was affiliated to the GNA".[33]

43. The PTC based these undoubtedly key and undoubtedly factual findings on two sources: 1) its previous findings in relation to arrest warrants in the Situation in Libya that were founded solely on submissions of the Prosecution and without the benefit of contradictory Defence submissions; and 2) the submissions of the Prosecution itself in its Document Containing the Charges ("DCC"), again without the benefit of contradictory Defence submissions.[34] The PTC's reliance solely on the Prosecution's submissions and explicit refusal to consider the Defence's submissions raises questions of impartiality and of the ultimate fairness and correctness of the Impugned Decision. The PTC, may, of course, disagree with the arguments of one party and agree with the arguments of the other. But that is not what it did in this case. It relied on the Prosecution's submissions and explicitly stated that it would not consider the Defence's.[35] That was both unfair and legally erroneous.

44. These concerns make clear the distinction between this case and previous decisions on jurisdiction at this Court that declined to consider evidence. Previous Chambers of this Court have declined to consider evidence in jurisdiction decisions in two general scenarios. First, when the jurisdiction challenge raised purely legal rather than factual issues and so consideration of evidence was unnecessary.[36] Second, when the factual

[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*, fns 54-57.
[35] Impugned Decision, para. 40 ("the Majority takes note of the Defence's submissions on the apparently inconsistent nature of the evidence cited by the Prosecution concerning the potential connections between groups that existed and were active during the 2011 revolution against the Gaddafi regime and the group that Mr El Hishri is allegedly tied to between 2014 and 2020. However, the Majority considers that any issue pertaining to the probative value of the Prosecution's evidence underpinning the charges ought to be addressed, if necessary, in the context of the Chamber's decision on the confirmation of charges. Indeed, whether the allegations underpinning the charges as presented by the Prosecution are established to the required threshold is not, and cannot be, the subject of this decision.")
[36] *Duterte*, Judgment on the appeal of Mr Rodrigo Roa Duterte against Pre-Trial Chamber's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025, ICC-01/21-01/25-415, 22 April 2026; *Abd-al-Rahman,* Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's

issues raised by the challenge were directly related to "the contours or elements of crimes or modes of liability",[37] which are better considered at confirmation of charges and trial.[38]

45. The PTC's jurisdiction decision in *Mbarushimana* is an illustrative example of a PTC considering evidence when the question raised by the jurisdiction challenge was whether the facts alleged against the accused fell within the initial situation of crisis that led to the referral to the Court. In *Mbarushimana* , the referral was by way of an article 12(3) Declaration by the territorial State and the question raised by the Defence was whether it covered only alleged crimes committed in one particular province of the country or it could cover crimes committed in other provinces.[39] The Chamber carefully analysed evidence related to the State's intent upon issuing the Declaration, including contemporaneous and subsequent communications by the government and the ICC's Office of the Prosecutor.[40] The province in which the alleged crimes were committed was not in dispute by the parties so evidence in relation to the alleged crimes was not necessary.[41]

46. In the instant case, the evidence contested by the Defence in the Jurisdiction Challenge is exactly the type of evidence relating to the question of whether the facts alleged against the Appellant fell within the initial situation of crisis that led to the referral to the Court that was considered in the *Mbarushimana* Decision. Contrary to the

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"Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20-503, 1 November 2021, *Gbagbo*, Judgement on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, ICC-02/11-01/11-321, 12 December 2012.

[37] *Kenyatta et al.*, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-02/11-425, 24 May 2012, para. 37.

[38] *Ibid.*; *Ruto et al.*, Decision on the Appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-01/11-414, 24 May 2012, paras 32-33.

[39] *Mbarushimana,* Decision on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-451, 26 October 2011, para. 6.

[40] *Ibid.*, paras 20-39.

[41] *Ibid.*

PTC's finding in the Impugned Decision, the evidence is not, or not solely, "evidence underpinning the charges".[42] This becomes clear by examining the type and content of the evidence in question. The Defence pointed out inconsistencies within expert reports about security and governance in post-revolutionary Libya, as well as witness statements, insofar as they refer to the origins and background of SDF/RADA.[43] This evidence goes directly to the factual findings that the PTC made in the Impugned Decision on the link between the alleged crimes and the situation of crisis that triggered the jurisdiction of the Court in the first place, including whether SDF/RADA "originated as a revolutionary military group from the Tripoli district of Souk al Juma that was fighting Gaddafi forces" and "was affiliated to the GNA".

47. The PTC once again misunderstood and/or mischaracterised the Jurisdiction Challenge by failing to note that the Defence never questioned the probative value of this evidence to determine the merits of the charged offences. In contract to the jurisdiction challenges in *Kenyatta et al* and *Ruto et al*, the evidence challenged does not directly relate to the contextual and specific elements of crimes against humanity and war crimes or to modes of liability.[44] It instead relates solely to the jurisdictional question of whether the alleged crimes are sufficiently linked to the situation of crisis that triggered the jurisdiction of the Court in Resolution 1970.

48. The consideration of evidence in jurisdiction decisions is not unknown in

[42] Impugned Decision, para. 40.
[43] Jurisdiction Challenge, paras 72-80.
[44] *Kenyatta et al.*, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-02/11-425, 24 May 2012
Ruto et al., Decision on the Appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-01/11-414, 24 May 2012

international[45] or domestic law.[46] Ultimately, it is only reasonable that when the jurisdiction of a court depends on the existence of a collateral state of facts, the judges are tasked with arriving at a factual determination.[47] For instance, the International Court of Justice ("ICJ") has treated the existence of jurisdiction as "a matter of law to be resolved in the light of the relevant facts".[48] Furthermore, it has determined that the assessment of jurisdiction involves verifying that "the claim of the party appearing is sound in law and […] that the facts on which it is based are supported by convincing evidence".[49] In circumstances in which a "blanket jurisdiction" cannot be established, the European Court of Human Rights ("ECtHR") has deemed it necessary to determine exceptional circumstances justifying jurisdiction "with reference to the particular facts".[50]

49. Consideration of evidence is all the more necessary in Defence jurisdiction challenges at the ICC as article 19(4) of the Rome Statute makes clear that jurisdiction "may be challenged only once" and that this challenge must "take place prior to or at the commencement of the trial". Only in "exceptional circumstances" may the Court "grant leave for a challenge to be brought more than once or at a time later than the

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[45] ICJ, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* Judgement on the Jurisdiction of the Court and Admissibility of the Application, 20 December 1988, ICJ Reports 1988, para. 16; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgement on the Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, ICJ Reports 1986, para. 29; ECtHR, Grand Chamber, *Al-Skeini and others* v. the United Kingdom, Judgement, 7 July 2011, application no. 55721/07 para. 132.

[46] For instance, in Japan, according to Article 14 of the Code of Civil Procedure, the court may conduct an examination of evidence *sua sponte* with regard to matters that concern jurisdiction. In Peru, lack of jurisdiction is a procedural defence in which evidence is allowed, according to Articles 446 and 448 of the Code of Civil Procedure. In England, a defendant who wishes to dispute the court's jurisdiction must support such claim with evidence, in terms of Rule 11(4)(b) of the Civil Procedure Rules.

[47] United Kingdom, Cf. R. v City of London Rent Tribunal [1951] 1 K.B. 641.

[48] ICJ, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* Judgement on the Jurisdiction of the Court and Admissibility of the Application, 20 December 1988, ICJ Reports 1988, para. 16.

[49] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgement on the Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, ICJ Reports 1986, para. 29. *See* Michail Vagias & Janos Ferencz, "Burden and Standard of Proof in Defence Challenges to the Jurisdiction of the International Criminal Court" (2015) 28:1 LJIL 133, at 143.

[50] ECtHR, Grand Chamber, *Al-Skeini and others* v. the United Kingdom, Judgement, 7 July 2011, application no. 55721/07 para. 132.

commencement of the trial." PTC jurisdiction decisions such as the Impugned Decision are the sole opportunity for questions of jurisdiction to be considered and decided at first instance. If evidence (and its probative value) related to jurisdiction is not considered in these decisions, it never will be. This is made clear from the fact that, even though the PTC alluded in the Impugned Decision to the possibility of addressing "any issue pertaining to the probative value of the Prosecution's evidence" in the Confirmation Decision it did not in fact do so.[51] In the Defence's submission it was correct in not doing so because "by the very design of the pre-trial proceedings, the Pre-Trial Chamber is not in a position to conclusively determine issues relating to the probative value of evidence."[52]

50. Additionally, even though the PTC made selected factual findings with only the benefit of the Prosecution's submissions and refusing to consider Defence arguments, it did not fully state the facts of the case. In a case such as this one that relies heavily on factual questions, a decision that does not fully lay out the facts of the case is fatally deficient.

51. Decisions on Defence jurisdiction challenges are the sole forum for the evaluation of evidence related to jurisdiction. Therefore, in a case such as Mr El Hishri's where jurisdictional questions necessitate factual findings, these decisions must consider and evaluate evidence related to these very questions. The Defence submits that the only applicable remedy is for the Appeals Chamber to remit the question to the PTC.

[51] Decision on confirmation of the charges against Mr Khaled Mohamed Ali El Hishri, ICC-01/11-01/25-143, 16 July 2026, para. 30 (citing *Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514, paras 46, 48; *Duterte*, Decision on the confirmation of charges against Mr Rodrigo Roa Duterte, 23 April 2026, ICC-01/21-01/25-417-Red, para. 28).
[52] *Ibid.*

(2) The PTC erred in law by finding that the failure of the UNSC to state affirmatively that Resolution 1970 does not apply to Mr El Hishri's case indicates the UNSC's acceptance of its application

52. In paragraph 34 of the Impugned Decision, the PTC noted the fact "that the Prosecution submits periodical reports to the UNSC on actions taken pursuant to Resolution 1970, and the fact that the Prosecution continues reporting before the UNSC, including on contemporary matters, and no objection to these reports have been raised" and considered this as "another indication of the ongoing jurisdiction of the Court over alleged crimes committed in the context of the ongoing crisis in Libya".

53. There are two potential interpretations of this statement. One is that the Prosecution's own reporting to the UNSC somehow constitutes proof of the application of Resolution 1970 to the cases it is investigating and prosecuting. Such an argument would allow the Prosecution itself to determine the jurisdiction of the Court in UNSC referrals by the simple expedient of electing to report. This would be both absurd and render meaningless article 19(1) of the Rome Statute that establishes that the "***Court*** shall satisfy itself that it has jurisdiction".[53] It would violate the Defence's right to challenge jurisdiction. As with the PTC's refusal to consider the Defence's arguments on factual questions of jurisdiction while considering as established the Prosecution's arguments on those questions, such an argument would amount to relying solely on one party's submissions and explicitly refusing to consider the opposing party's submissions.

54. The second potential interpretation of this statement in the Impugned Decision is that it is the UNSC's silence in response to the Prosecution's reporting that is determinative of the interpretation of Resolution 1970 and its continued application to the Appellant's case. This interpretation cannot be valid given the nature of the UNSC as a diplomatic and political body, rather than a legal or judicial body.[54]

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[53] Emphasis added.
[54] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*,

55. A diplomatic and political body cannot be expected to respond with one voice to the presentation of an issue as complex and multi-faceted as the extension of the ICC's jurisdiction to Mr El Hishri's case. As the ICJ and academics have stated, the UNSC is likely to have many reasons not to refer to a particular issue or proposal presented in a UNSC meeting in any subsequent resolutions or presidential statements, and the lack of referral does not necessarily reflect the UNSC's collective view on that issue.[55] In the Namibia Advisory Opinion, the ICJ found that a lack of referral to a specific proposal of a member state in the ensuing UNSC resolution did not indicate that the UNSC had expressed that it completely disagreed with the proposal.[56] Following the same logic, the failure of the UNSC to refer to statements made by the ICC Prosecutor cannot indicate that the UNSC agrees with or unhesitatingly adopts what the ICC Prosecutor has said. Such a lack of reference is just as likely to indicate, if anything, a lack of consensus of the UNSC on the issue, not an implicit agreement with what was presented.

(3) The PTC erred in law in its interpretation of subsequent practice of the UNSC and other UN organs

56. In paragraph 33 of the Impugned Decision, the PTC relies heavily on the subsequent practice of the "UNSC and other organs of the UN" to attempt to demonstrate that "the situation of crisis that triggered the resolution has been ongoing ever since" and that it includes "the alleged mistreatment of detainees" at Mitiga Prison. The PTC includes references to subsequent UNSC resolutions, reports of the UN Secretary General on the UN Support Mission in Libya, statements by members of the UNSC, and reports and

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Advisory Opinion, 22 July 2010, ICJ Reports 2010, para. 46 ("Kosovo Advisory Opinion"); ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, para. 120 ("Namibia Advisory Opinion"); Michael C. Wood, "The Interpretation of Security Council Resolutions" (1998) 2 Max Planck YB UN L 73 at 77-79; Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16:1 Eur J Int'l L 59, at 60.

[55] Namibia Advisory Opinion, para. 69; Orakhelashvili, at 72-73; Wood, at 82.

[56] Namibia Advisory Opinion, para. 69; Orakhelashvili, at 73.

resolutions of the UN Human Rights Council.

57. Before delving into the specific sources cited by the PTC, it is necessary to discuss the weight of these types of sources in the interpretation of UNSC Resolutions. As the body that originated Resolution 1970 and with the power to "modify or supress it", the UNSC is the only body that can provide an authoritative interpretation of it – unless it has specifically authorised another body to do so.[57] It is clear from the text of Resolution 1970 that the UNSC did not authorise any body to authoritatively interpret it.

58. Sources also mention the potential role of "the subsequent practice of relevant United Nations organs",[58] but make clear that context is vital in determining the weight of that practice in an interpretation and that not all subsequent practice of UN organs is particularly persuasive or even relevant.[59] In the Kosovo Advisory Opinion, the ICJ opined that the interpretation of UNSC resolutions "may require the Court to analyse […] the subsequent practice of relevant United Nations organs" but it did not actually do so in its analysis in the case. This makes clear that subsequent practice of UN organs is neither necessary for the interpretation of UNSC resolutions nor always relevant.

59. Academic writings help to clarify when such subsequent practice is necessary or relevant. In his seminal text on UNSC Resolution interpretation that was also cited by the PTC, Sir Micheal Wood explains that such subsequent practice is "highly persuasive" when the UN organs "need to interpret particular [Resolutions] in carrying out their functions".[60] However, even in those cases "the circumstances are […] important" and relevant circumstantial factors include the reasoning given by the UN organ and the organ's decision-making process.[61]

[57] PCIJ, Jaworzina Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, 37. *See* Wood, at 82-83.
[58] Kosovo Advisory Opinion, para. 94.
[59] *Ibid.*; Wood, at 84-85; L. van den Herik et. al., "The Design and Interpretation of UN Security Council Sanction Resolutions", in ILA Study Group Report December 2019, at 9-10.
[60] Wood, at 84.
[61] *Ibid.*, at 84-85.

60. The International Law Association ("ILA") Study Group Report on the Design and Interpretation of UN Security Council Sanction Resolutions also cited by the PTC also emphasises the importance of circumstances and context in the reliance on the subsequent practice of other UN organs.[62] Although it found that subsequent practice of UN organs is particularly relevant in the interpretation of UNSC sanctions resolutions, it clarified that this was so because of the specific circumstances of UNSC sanctions resolutions, in particular the "institutional architecture surrounding UN sanctions programmes".[63] It found that it is only those UN organs that are "part of the sanctions machinery" whose subsequent practice is relevant.[64]

61. There is no UN organ that is part of what could be called the UNSC's ICC referral machinery or that, in the words of Sir Micheal Wood "need[s] to interpret particular [Resolutions] in carrying out [its] functions."[65] A UNSC referral to the ICC is simply the "legal authorisation of the (otherwise unlawful) exercise of jurisdiction of the ICC".[66] Once such authorisation is made, the ICC acts independently in accordance with the Rome Statute in exercising that jurisdiction. No UN organ acquires any obligations in relation to the ICC as a consequence of the referral.[67]

62. To the extent that the subsequent practice of UN organs is still relevant as a less persuasive form of supplementary sources of interpretation, the practice cited by the PTC in the Impugned Decision suffers from deficiencies that diminish even that minimal persuasive value.

63. Only two of the 14 UN Secretary-General reports cited by the PTC make any

[62] Van den Herik, at 9-10.
[63] *Ibid.*, at 9.
[64] *Ibid.*
[65] Wood, at 84.
[66] Gabriel M Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*, p. 51.
[67] UN Organs do have certain obligations in relation to the ICC that arise from the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, but the existence of a UNSC referral does not impact those obligations. *See generally* Negotiated Relationship Agreement between the International Criminal Court and the United Nations. *See also* Lentner.

reference at all to Resolution 1970's referral of the situation in Libya to the ICC.[68] The first of those reports, issued on 7 May 2018, generally references "violations and abuses in detention" in its paragraph "encourag[ing] Libyan authorities to fully cooperate with the International Criminal Court, in accordance with Security Council resolution 1970 (2011)".[69] However, its previous specific reference to alleged violations in Mitiga Prison is notably missing. Additionally, the UN Secretary-General does not claim at any point to be delivering any kind of an interpretation of Resolution 1970, which is logical given that he would not have the power to do so. It is notable that the PTC does not reference this particular paragraph of this Report. This Report has no interpretive force.[70]

64. The second of these reports, issued on 7 January 2019, appears to walk back any potential application of the ICC referral to alleged violations in detention centres. It refers to the ICC referral only once in a paragraph expressing concern "about the loss of civilian lives in Libya".[71] The paragraph goes on to urge the Libyan government to "intensify its efforts to ensure that those responsible for war crimes and other serious violations of international human rights law are brought to justice in proceedings that meet international fair trial standards" and to encourage it to "cooperate fully with the International Criminal Court, in accordance with Security Council resolution 1970 (2011)".[72]

65. The next paragraph of this Report, which is not cited by the PTC, expresses specific concern about "widespread human rights violations and abuses" allegedly committed in Mitiga Prison.[73] The solution the UN Secretary-General proposes to these alleged violations and abuses is not cooperation with the ICC as proposed for the loss of civilian lives but rather the imposition of "measures to ensure that all those detained are

[68] UNSG Report, 7 January 2019, S/2019/19; UNSG Report, 7 May 2018, S/2018/429. *See* Impugned Decision, fn. 42.
[69] UNSG Report, 7 May 2018, S/2018/429, para. 93.
[70] Impugned Decision, fn. 42.
[71] UNSG Report, 7 January 2019, S/2019/19, para. 78.
[72] *Ibid.*
[73] *Ibid.*, para. 79.

protected against torture and other ill-treatment and granted their right to due process" and that all detention centres are "under effective Government control and free of any influence or interference by armed groups."[74] If this Report says *anything* about the interpretation of the ICC referral in Resolution 1970, it is that this referral does *not* apply to Mitiga Prison.

66. Other UN Secretary-General reports cited by the PTC mention concerns about potential human rights violations committed at Mitiga Prison but do not refer to or assume jurisdiction of the ICC under the Resolution 1970 referral.[75] The 22 August 2017 Report is a particularly stark example of this.[76] In this report, the Secretary-General references the fact that the ICC Prosecutor had informed the UNSC that it was "carefully examining the feasibility of opening an investigation into migrant related crimes in Libya, should the jurisdictional requirements of the Court allow it."[77] There is no assumption or interpretation in this Report that the ICC would have jurisdiction over such alleged crimes in the absence of a fresh resolution. It is simply a report of what was said by the ICC Prosecutor at a UNSC meeting. The Secretary-General carefully avoids any interpretation of the referral in Resolution 1970.

67. The PTC's assumption that the simple references to Mitiga Prison or SDF/RADA in UN Secretary-General reports somehow places that conduct within the jurisdiction of the ICC under Resolution 1970 does not stand up to scrutiny.[78] Many of the references made are simply part of general descriptions of the security situation in Libya[79] and,

[74] *Ibid.*
[75] UNSG Report, 26 February 2015, S/2015/144, para. 58; UNSG Report, 25 February 2016, S/2016/182, paras 27, 43; UNSG Report, 16 May 2016, S/2016/452, para. 40; UNSG Report, 22 August 2017, S/2017/726, para. 32; UNSG Report, 12 February 2018, S/2018/140, paras 46, 53; UNSG Report, 24 August 2018, S/2018/780, paras 32, 39, 40, 42; UNSG Report, 7 January 2019, S/2019/19, para 39; UNSG Report, 15 January 2020, S/2020/41, para. 53; UNSG Report, 19 January 2021, S/2021/62, para. 63.
[76] UNSG Report, 22 August 2017, S/2017/726.
[77] *Ibid.*, para. 34.
[78] Impugned Decision, para. 33.
[79] UNSG Report, 12 February 2018, S/2018/140, paras 15, 17; UNSG Report, 7 May 2018, S/2018/429, paras 11, 18; UNSG Report, 8 August 2025, S/2025/509, paras 2, 23, 26, 32, 34; UNSG Report, 5 December 2025, S/2025/792, paras 8, 20, 22, 23.

even when concerns are expressed about potential human rights violations, there is no reference to the ICC referral or even Resolution 1970 generally.[80] The Secretary-General is simply reporting on the current situation in Libya to keep the UNSC apprised of the latest developments.

68. The subsequent practice of the UNSC cited by the PTC can only constitute an authoritative interpretation if its discussion of a given resolution is part of the operative paragraphs of any subsequent resolution. References in preambles, for example, would not be considered as binding, authoritative, or operative.[81] A thorough reading of this UNSC practice cited in the Impugned Decision indicates that this practice does not constitute such an authoritative interpretation and, in many cases, does not even demonstrate the PTC's contention that "the situation of crisis that triggered the resolution has been ongoing ever since."[82]

69. Of the six UNSC Resolutions cited, only four reference Resolution 1970 in the operative part of the resolution.[83] Three of these four resolutions refer specifically and solely to the arms embargo, travel ban, and asset freeze adopted in Resolution 1970.[84] The continued effect of these measures that are disconnected from the ICC referral does not impact the interpretation of the ICC referral, especially as the resolutions indicate that this continued effect is at least partly the result of "modifications" to those provisions of Resolution 1970 made in other resolutions.[85]

70. The only subsequent UNSC resolution cited by the PTC that makes any reference whatsoever to the ICC referral is UNSC Resolution 2238 from 2015. The most detailed

[80] UNSG Report, 26 February 2015, S/2015/144, para. 58; UNSG Report, 25 February 2016, S/2016/182, para. 43; UNSG Report, 16 May 2016, S/2016/452, para. 40; UNSG Report, 22 August 2017, S/2017/726, para. 32; UNSG Report, 12 February 2018, S/2018/140, para. 46; UNSG Report, 7 May 2018, S/2018/429, para. 39; UNSG Report, 24 August 2018, S/2018/780, paras 32, 39, 40, 42; UNSG Report, 15 January 2020, S/2020/41, para. 53; UNSG Report, 19 January 2021, S/2021/62, para. 63.
[81] Wood, p. 86-87.
[82] Impugned Decision, para. 33.
[83] S/RES/2238 (2015); S/RES/2701 (2023); S/RES/2796 (2025); S/RES/2819 (2026).
[84] S/RES/2701 (2023); S/RES/2796 (2025); S/RES/2819 (2026).
[85] S/RES/2819 (2026), para. 7; S/RES/2796 (2025), para. 11; S/RES/2701 (2023), para. 16.

reference to the ICC referral is in a preambular paragraph that specifically refers to the arrest warrant issued against Saif Al-Islam Gaddafi.[86] The Defence does not in any way contest the application of the ICC referral to Mr Gaddafi or the Gaddafi Regime. Resolution 2238 does refer to the need for accountability for "cases of torture and mistreatment, and deaths by torture, in detention centres in Libya", but specifically states such accountability should be obtained through "Libyan government efforts" and, in this context, "*underscores* the Libyan government's primary responsibility for promoting and protecting the human rights of all persons in Libya."[87] Despite other references to the ICC in Resolution 2238, the UNSC specifically decided not to reference the ICC in this context. The only other reference to the ICC in Resolution 2238 is a general call for "the Libyan government to cooperate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor" but only "as required by resolution 1970 (2011)".[88] This general call does not pre-suppose that all alleged crimes committed in Libya would fall under the ICC's mandate, but limits that mandate to what is "required by Resolution 1970 (2011)".

71. The PTC's assessment of UNSC Resolution 2819 is additionally flawed by the manner in which it assesses that Resolution's determination that "the situation in Libya continues to constitute a threat to international peace and security."[89] In relying on this language for this purpose, the Majority erroneously conflates two distinct legal concepts that share only a common word: "situation" as a term of art under the Statute, and "situation" as employed, undefined, in Security Council practice.

72. This conflation is not merely a question of semantics. It is submitted that the UNSC's use of "situation" carries no fixed legal content and cannot, without more, be read as a determination bearing on the scope or continuation of a referral under article 13(b) of

[86] S/RES/2238 (2015), p. 2.
[87] *Ibid.*, para. 8.
[88] *Ibid.*, para. 10.
[89] Impugned Decision, para. 42

the Statute.

73. As the ICJ observed in its Namibia Advisory Opinion, "situation" appears throughout the Charter without definition, distinguished from (yet sometimes coextensive with) the equally undefined notion of "dispute."[90] Scholarship on the definition of "situation" has notably fluctuated as seen in the UN Charter commentary in which different editions have taken different approaches with the definition. [91] It is also worth noting that UNSC Member States have also commonly disagreed on the definition of the word which led to debates about the distinction between a "situation" and a "dispute". As early as the 19th meeting in 1946 statements by Egypt, the Netherlands, France and the UK, to as recently as counter-memorials by the USA and the UK in the ICJ Lockerbie case, Member States have not agreed upon a unified definition for "situation".[92]

74. This is confirmed by the markedly different, and considerably more precise, meaning that "Situation" as a term of art carries before this Court. The Pre-Trial Chamber has stated that a "[situation] has its own precise meaning, which differs both from the one of 'case' and from the one of 'territory of a State' or 'State'", and that a situation is "generally defined in terms of temporal, territorial and in some cases personal parameters".[93] The Majority's reliance on Resolution 2819 accordingly imports the Security Council's political, yet legally imprecise use of the word "situation" into a

[90] Namibia Advisory Opinion, para. 25.
[91] Simma, B. et al. (2012) The Charter of the United Nations: a commentary: 2nd edition treated "situation" as just meaning the underlying factual circumstances, with disputes presupposing situations (i.e., nested, not mutually exclusive); the 3rd and 4th editions instead treat situation and dispute as mutually exclusive categories.
[92] Akira Kato, Revitalizing the obligatory abstention rule in the UN Security Council: an interpretation of the Proviso in Article 27 (3) of the UN Charter, *Journal of Conflict and Security Law*, Volume 30, Issue 1, Spring 2025, Pages 3–22; Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Counter-Memorial submitted by the United States of America 31 March 1999) 72–3.
[93] *Situation in the Democratic Republic of the Congo,* Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS3, VPRS 4, VPRS 5, and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65.

context that demands the very opposite: a precise, judicially reviewable determination of whether Mr El Hishri's alleged conduct falls within the parameters of the "Situation" established by Resolution 1970. The two are not interchangeable, and the Majority's treatment of them as such is an error of law.

75. In the Impugned Decision, the PTC misinterprets both the role of the subsequent practice of UN organs in interpreting UNSC resolutions and the subsequent practice of UN organs that it cites. The subsequent practice of other UN organs in a situation such as an ICC referral where no UN organ is tasked with implementing the resolution can only have the most limited interpretative value. Authoritative interpretations can only come from the UNSC itself in the operative provisions of subsequent UNSC resolutions or Presidential statements. The UN Secretary-General Reports cited by the PTC barely reference the referral and simply constitute regular situation updates to ensure that the UNSC is aware of all current information. The UNSC Resolutions cited in the Impugned Decision barely reference the ICC referral. The one time that they do reference it in an operative paragraph, it is related to a case that falls squarely therein, being that of Saif Al-Islam Gaddafi.[94]

(4) Conclusion on Ground of Appeal B

76. The PTC's erroneous finding that there was a sufficient link between the crimes alleged against Mr El Hishri and the situation referred by the UNSC in Resolution 1970 was underpinned by its errors in declining to consider evidence of whether such a link existed, misinterpreting UNSC silence in response to ICC Prosecutor briefings as acceptance, and misinterpreting the subsequent practice of the UNSC and other UN organs. In the first two sub-grounds of appeal, the PTC at least created the impression that it was accepting Prosecution submissions on the evidence of a sufficient link and of its own investigations presented before the UNSC as establishing facts without questioning the Prosecution's submissions or considering the Defence's. In the third

[94] S/RES/2238 (2015), p. 2 and para. 10.

sub-ground, the PTC committed foundational errors in its understanding of the interpretive method for UNSC resolutions and its understanding of the UN practice that it cited.

77. Without these errors, the PTC could only have concluded that the situation of crisis that triggered the referral to the ICC in Resolution 1970 is not sufficiently linked to the crimes alleged against Mr El Hishri and that the ICC, therefore, does not have jurisdiction over him. As argued extensively in the Jurisdiction Challenge, the evidence presented by the Prosecution to prove such a link is contradictory, circumstantial, and frequently does not even prove the points that the Prosecution attempt to make.[95] The UNSC's silence in response to the ICC Prosecutor's briefings cannot be read as acceptance by a political and diplomatic body of an issue as legally and factually complex as ICC jurisdiction.

78. A proper application of the appropriate interpretive methodology for UNSC Resolutions makes clear that the UNSC Resolution does not extend to Mr El Hishri's case. The text of the Resolution itself is the starting point for any interpretation and the text of Resolution 1970, especially its preamble, make clear that it was intended to combat the threat to peace created by Muammar Gaddafi's oppression of the Libyan people. The threat created by this specific situation cannot spiral endlessly into any and all actions taken on Libyan territory after the individual posing this threat has been removed, and his regime no longer exists, and the country has officially transitioned to at least three different governments. There is no authoritative subsequent practice to indicate that this was the intention of the UNSC in drafting Resolution 1970. The crimes alleged against the Appellant are simply insufficiently linked to the situation of crisis of Muammar Gaddafi's violent actions to his people that triggered the referral.

[95] Jurisdiction Challenge, paras 73-80.

V. REQUEST FOR ORAL HEARING

79. The International Covenant on Civil and Political Rights and all three regional human rights treaties recognise the human right, "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, [to have] a fair and *public hearing* by a competent, independent and impartial tribunal established by law."[96] The publicity of this hearing is a vital foundation of due process to ensure that all actors in the legal system are held accountable for the manner in which proceedings are conducted by allowing the public a transparent view of the proceedings.[97]

80. The UN's Human Rights Committee and the ECtHR have found that this right particularly applies to appellate hearings when no oral hearing was held at first instance unless specific exceptions are present. According to the ECtHR, these exceptions include "(a) where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the case file"; "(b) in cases raising purely legal issues of limited scope […], or points of law of no particular complexity"; and "(c) where the case concerns highly technical issues".[98]

81. This appeal relates both to a criminal charge against Mr El Hishri and to his other rights and obligations in law. The appeal is not an interlocutory appeal relating to a relatively minor procedural issue that could be responded to at a later date. It is the one

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[96] United Nations, General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, article 14(1) [emphasis added]; *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 United Nations Treaty Series, article 6(1); African Union, African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaty Series 26363, article 7; Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series, article 8(1); *Ntaganda,* Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the "Decision on various procedural issues", ICC-01/04-02/06-2708-Anx, 10 September 2021 ("Ntaganda Judge Ibáñez Carranza Dissenting Opinion").

[97] Ntaganda Judge Ibáñez Carranza Dissenting Opinion; Human Rights Committee, General Comment No. 22: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, para. 28; ECtHR, Grand Chamber, *Malhous v. the Czech Republic*, Judgement, 12 July 2001, Application no. 33071/96, paras 55-56.

[98] ECtHR, Grand Chamber, *Ramos Nunes de Carvalho e Sá v. Portugal*, Judgement, 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190. See Ntaganda Judge Ibáñez Carranza Dissenting Opinion, para. 15.

and only opportunity that Mr El Hishri has to challenge the determination that the International Criminal Court has jurisdiction over him. The result of this appeal will determine whether he continues to stand trial for a criminal charge against him, or he is released from detention and returned to his family without facing such a charge.

82. Additionally, the contested facts and points of law are complex and relate to the core of ICC jurisdiction by way of UNSC referral. The Appeals Chamber's decision on the proper interpretation of UNSC referral resolutions will have a profound impact on future cases brought to the Court in this manner as well as on the way UNSC resolutions are interpreted in other public international law contexts. The question of whether a Chamber should consider evidence in determining jurisdiction will similarly redound through future jurisdiction decisions and have a strong impact on how the Court thinks about jurisdiction challenges. The scope of the legal questions raised goes far beyond the Appellant's case. A public hearing on these questions is necessary to ensure that they are decided in a transparent manner.

83. The answers to these legal questions will also determine Mr El Hishri's fate and, therefore, must be heard in public to ensure accountability and the proper administration of justice on a right as vital as his right to liberty from his current pre-trial detention. If the Appeals Chamber determines that the ICC does not have jurisdiction over this case, the Appellant will be free to leave detention. In contrast, if the Appeals Chamber determine otherwise, the decision will be the very foundation for his detention. Therefore, Mr El Hishri must have the right to have his appeal pleaded in public on these issues that are core to his future liberty.

VI. RELIEF SOUGHT

81. The Defence respectfully requests that the Appeals Chamber: 1) order a public hearing on this appeal; and 2) reverse the Impugned Decision.

Respectfully submitted,

Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 28 August 2026
at The Hague, The Netherlands