Annex I

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Date: **28 April 2026**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF THE PROSECUTOR v.OSAMA ELMASRY/ALMASRI NJEEM

Public Document
With Public Annexes A,B,C,D,E, &F and Annex G, Ex parte only available to Defence

Admissibility Challenge by Mr. Osama Elmasry/ Almasri Njeem Pursuant to Article 17 (1) (a) and Article 19 of the Rome Statute

Source: The Applicant, Mr. Osama Elmasry/ Almasri Njeem

Represented by Prof. Githu Muigai, SC

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

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PART ONE: PRELIMINARY

1. The present Application is brought pursuant to Article 19(2) (a) of the Rome Statute to challenge the admissibility of the case against Mr. Osama Elmasry/Al-Masri Njeem (*"the Applicant"* or *"Mr. Njeem"*) before the Court, pursuant to the Warrants of Arrest issued against him on 18th January 2026, and the Court's Decision on Article 58.

2. Pursuant to Regulation 23 and 23 *bis* of the Regulations of the Court, the Application and Annexes A to F are classified as "**Public**". Annex G is classified as *"Ex-Parte"*, available only to the Defence. Annex G is subject to advocate-client privilege as it is correspondence between instructed counsel and the Client. It is provided pursuant to the request of the Chamber and solely for the Court to ascertain the representation of the Applicant in the proceedings. The Prosecution, and any Victim representatives or third parties, would suffer no prejudice from being unable to access the annex as it contains no information of material relevance to the instant Application (or potential future proceedings) and its restricted classification occasions no prejudice to the Prosecution or any other party in the proceedings.

3. Given that Annex G has no prejudicial value to the Prosecutor and its nature as an advocate-client privileged communication, the Defence proposes that the document should not be made publicly available, even in redacted form. As such, the Defence seeks leave of the Court not to avail any redacted version of the document.

PART TWO: THE APPLICATION

I. OVERVIEW

4. The International Criminal Court ('*the Court*') is not a court of first recourse. The Court was established not as a mechanism for displacing the jurisdiction of national criminal justice systems, but to operate alongside them. The Court does not exist to circumvent the basic tenets of criminal law; that an accused person should not be compelled to defend themselves from multiple proceedings over essentially the same conduct. Rather, it is a complementary judicial mechanism fashioned to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished.

5. The Preamble to the Rome Statute of the International Criminal Court affirms that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes. The State is always the primary duty holder. The Court's jurisdiction is expressly designed to be subsidiary to that duty, and as such, the authority to step in is only engaged once a State is unwilling or unable to genuinely discharge it. Looking into the drafting of the Rome Statute, this design was deliberate. Complementarity was a critical compromise that facilitated the Rome Statute's adoption by states. It remains the central governing principle governing the admissibility of cases before the Court.

6. It is precisely for this reason that where domestic judicial mechanisms become properly seized of proceedings, in relation to crimes against humanity covering the same person and substantially the same conduct as alleged before the Court, the principle of complementarity demands deference to that national

jurisdiction. Accordingly, the Court has to cede jurisdiction to the domestic courts. The instant application engages this principle.

7. The present Application is brought pursuant to Article 19(2) (a) of the Rome Statute to challenge the admissibility of the case against Mr. Osama Elmasry/Al-Masri Njeem (*"**the Applicant**"* or *"**Mr. Njeem**"*) before the Court, pursuant to the Warrants of Arrest issued against him on 18th January 2026[1], and the Court's Decision on Article 58.[2] The Defence herein submits that this is precisely the kind of case in which the Court must yield to the domestic jurisdiction, given that there are ongoing judicial proceedings against him in the State of Libya in respect of the same conduct, comparable alleged offences, and informed by the same factual matrix that formed the basis of the Court's Arrest Warrant against him.

8. The Defence invites the Court to make a finding that there exist ongoing proceedings in the State of Libya that are ***substantially similar*** to the Court's proceedings, over the same subject matter, and implicating the same accused person. Those proceedings are genuine, and the State of Libya is neither unable nor unwilling to see them through to the rightful conclusion. Settled jurisprudence requires that once the Court makes such a finding, it must then defer to the Libyan proceedings in accordance with Article 17(1)(a) of the Statute.

9. The State of Libya has taken active and demonstrable steps to advance domestic criminal proceedings against Mr. Njeem based on several complaints made against him by various individuals in connection with his tenure as the Director

[1] 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.

[2] Decision issuing a corrected version of the 'Warrant of Arrest for M r Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC-01/11-149-US-Exp) and appending the dissenting opinion of Judge Flores Liera.

of the Tripoli Main Reform and Rehabilitation Institution for substantially the same conduct and factual matrix as referred to in the Warrant of Arrest against him. The Attorney General for the State of Libya has confirmed that the criminal proceedings were initiated based on reports received by the Public Prosecution alleging cruel, inhuman and degrading treatment which substantially correlate to the Arrest Warrant, covering the period 2015 to and 2025, and are pursued with a clear intention to prosecute Mr. Njeem to the full extent of national law in accordance with the Libyan Penal Code[3] and Law No. (10) of 2013.[4]

10. Informed by the chain of events, this Application advances two distinct and independent challenges to the jurisdiction of the Court and the admissibility of these proceedings under Article 19(2) (a) of the Rome Statute. Firstly, the Defence submits that there is no sufficient nexus between the case as advanced by the Prosecutor against him and the Situation in Libya as referred to the Court by United Nations Security Council Resolution 1970 (2011)[5] ***(Ground a).*** Secondly, that the admissibility of the case against him is impugned under Article 17(1)(a) as read with Article 19(2)(a) of the Rome Statute and Rule 58 of the Rules of Procedure and Evidence, by the existence of the ongoing investigations and proceedings against him in the State of Libya, covering conduct that is materially indistinguishable from that alleged before the Court ***(Ground b).***

11. The Applicant's submission is that the State of Libya has satisfied the requirements of Article 17 of the Rome Statute. The domestic proceedings

[3] **Annex-A:** 1953 Penal Code of Libya (EN).

[4] **Annex-B:** General National Congress – Libya, Law No. (10) of 2013 On the Criminalization of Torture, Forced Disappearance and Discrimination (EN)

[5] **Annex-C:** S/RES/1970 (2011) Security Council

against him over similar facts and for similar offences as contained in the Arrest Warrant and the State of Libya has shown it is neither unwilling nor unable to genuinely conduct the proceedings in line with Article 17(2) and 17(3) of the Rome Statute. Accordingly, the case must be declared inadmissible.

12. The Defence further notes that in issuing the Warrants of Arrest, the majority of the Chamber declined, at paragraph 12, to assess the admissibility of the case against him "***as there is no ostensible cause or self-evident factor which impels it to exercise its discretion pursuant***."[6] Since then, the Defence submits that the material and substantive developments that have occurred in the matter now provide such basis. The Court is invited to reconsider the issue afresh in light of those developments and to decline admissibility in favour of the domestic proceedings.

13. The Application is filed within the sixty (60) page limit prescribed under Regulation 38(2)(c) of the Regulations of the Court.

[6]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.

II. THE TIMING OF THE APPLICATION

14. Article 19(4) of the Rome Statute provides that the admissibility of a case or the jurisdiction of the Court may only be challenged once by a person in respect for whom an Arrest Warrant has been issued by the Court. Such a challenge, the Defence notes, may be filed either before or at the commencement of the trial. Accordingly, the Defence asserts that the instant challenge on admissibility of the Case has been filed within the period contemplated under Article 19(4).[7]

15. The Court has previously interpreted the commencement of the trial in the context of Article 19(4) of the Rome Statute to *"mean the point in time when the Trial Chamber is constituted ..."*[8] In the instant matter, the Trial Chamber is yet to be constituted, and as such, the application has been filed within the period contemplated under the second part of Article 19(4) of the Rome Statute that provides the *"challenge shall* ***take place prior*** *to or at the commencement of the Trial"*.

16. In the ordinary course of proceedings, the Defence would have refrained from filing the Application until the Prosecutor had filed the Document Containing the Charges ("DCC") to ensure certainty regarding the contested charges and the factual basis underpinning them.

17. However, the circumstances of the present case necessitate the filing of this Application at this stage. The prejudices and jeopardy faced by Mr. Njeem is self-evident and substantial. The Court has issued a Warrant of Arrest against

[7]https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf

[8] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, paragraph 28

him, yet he is unable to comply with it as he remains in pre-trial detention in the custody of the State of Libya.

18. Article 19(6) of the Rome Statute contemplates that challenges to the admissibility of a case may be raised prior to confirmation of charges. Once such a challenge is brought the Pre-Trial Chamber is clothed with the jurisdiction to hear and determine the Application.

19. Consequently, the Applicant's right to adequate time and facilities to prepare his defence under Article 67(1)(b) of the Rome Statute is prejudiced and would be fatally undermined were he to face parallel proceedings before the domestic courts in Libya and this Court. This prejudice is further exacerbated by his current status as a detainee held in pre-trial detention by Libyan Authorities.

20. The Applicant is therefore constrained to file the present Application at this stage in order to protect his fundamental rights under the Rome Statute while striving to avoid the jeopardy inherent in his being subjected to two distinctive and parallel proceedings over substantially similar allegations, based on the same facts and potentially to be prosecuted contemporaneously.

21. In the unlikely event that the Prosecutor were to formulate or otherwise pursue new or materially different charges in the DCC that would affect or override the present admissibility objection, such circumstances would fall within the exceptional circumstances contemplated under Article 19(4) of the Rome Statute. In that event, the Defence will seek leave of the Chamber to file a new challenge limited to those new developments as may be contained in the DCC. The Defence does not reasonably anticipate such a development at the time of filing this Application.

III. APPLICATION'S FACTUAL BACKGROUND

22. The Socialist People's Libyan Arab Jamahiriya was established on 2nd March 1977 by the General People's Congress and subsisted over the territory of modern-day State of Libya until the Libyan Revolution of 2011. Following the collapse of His Excellency Muammar Gaddafi's regime in February 2011, widespread fighting and civil unrest ensued across the territory of Libya as various domestic actors sought to stabilise and secure the territory of Libya.

23. On 26th February 2011, the United Nations Security Council ('the Security Council') passed Resolution 1970(2011), which, *inter alias* referred the situation in Libya to the prosecutor for investigations.[9] The Resolution, in part, reads: -

"The Security Council ...

ICC referral

4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State

[9] **Annex-C**: S/RES/1970 (2011) Security Council

for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7. Invites the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;"

24. On 2nd October 2024, the Office of the Prosecutor ('the Prosecutor') applied under seal to the Pre-Trial Chamber for a Warrant of Arrest against the Applicant. The Prosecutor alleges that Mr. Njeem committed crimes against humanity and war crimes between February 2015 and at least 2nd October 2024. The twelve (12) charges brought by the Prosecutor against him relate to Article 7 & 8 of the Rome Statute and entail: -

a) imprisonment as a crime against humanity (article 7(1)(e) of the Statute);

b) outrages upon personal dignity as a war crime (article 8(2)(c)(ii) of the Statute);

c) cruel treatment as a war crime (article 8(2)(c)(i) of the Statute);

d) torture as a war crime and as a crime against humanity (article 8(2)(c)(i) and 7(1)(f) of the Statute);

e) other inhumane acts as a crime against humanity (article 7(1)(k) of the Statute);

f) sexual violence as a war crime and as a crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute);

g) rape as a war crime and as a crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute);

h) murder and attempted murder as a war crime and as a crime against humanity (articles 8(2)(c)(i) and 7(1)(a) of the Statute);

i) passing of sentences without previous judgment pronounced by a regularly constituted court as a war crime (article 8(2)(c)(iv) of the Statute);

j) enslavement as a crime against humanity (article 7(1)(c) of the Statute);

k) sexual slavery as a war crime and a as crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute); and

l) persecution as a crime against humanity (article 7(1)(h) of the Statute)

25. By a majority decision, Pre-Trial Chamber I issued Warrants of Arrest against Mr. Njeem on 18th January 2025 on the twelve counts sought by the Prosecutor.[10] The issuance of the Warrants marked a significant step in the Court's exercise of its jurisdiction over the alleged crimes.

[10] 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.

26. Acting on the Court's request, the Italian Police detained Mr. Njeem on 19th January 2025 in Turin. However, he was subsequently released on 21st January 2025 pursuant to Article 13(1) of Law No. 286/1998 of the Italian Republic.

27. On 12th May 2025, the State of Libya, acting pursuant to Article 12(3) of the Rome Statute lodged with the Court's Registry a declaration accepting the jurisdiction of this Court with respect to alleged crimes in the Territory of Libya from 2011 to the end of 2027.

28. On 12th June 2025[11], the Attorney General of the State of Libya issued a public statement, *to wit*, that: -

   a. Mr. Njeem was the subject of criminal investigations by the State of Libya;

   b. Pursuant to its national criminal jurisdiction, investigations had been commenced for offences under the Libyan Penal Code whose elements substantially correspond to those set out in the Warrant of Arrest issued by the Pre-Trial Chamber of the International Criminal Court;

   c. Mr. Njeem had appeared for an initial interrogation session on 28th April 2025; and

   d. The procedural immunity related to Mr. Njeem status as a police officer had been lifted to allow for the criminal investigations to proceed.

29. Subsequently, on 10th February 2026[12], the Solicitor General of the State of Libya wrote to Mr. Njeem's Counsel informing them that: -

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[11] **Annex-D** Statement by the Attorney General of Libya dated 12th June 2025

[12] **Annex-E**: Letter from the Solicitor General, State of Libya to Mohamed Muigai LLP dated 10th February 2026

e. Criminal proceedings had been formally initiated against Mr. Njeem for acts classified as offences under the Libyan Penal Code and the provisions of Law No. 10 of 2013 regarding the Criminalization of Torture, Forced Disappearance, and Discrimination; and

f. Mr. Njeem was being held in pre-trial detention, and the case had been officially referred to the trial Court for hearing, wherein the Prosecution would seek a conviction for violations punishable under the Libyan Penal Code and Law No. 10 of 2013 regarding the Criminalization of Torture, Forced Disappearance, and Discrimination.

30. At the time of this Application, Mr. Njeem is held in pre-trial detention in the State of Libya to stand trial for allegations related to the criminal complaints under Law No. 10 of 2013, which are also investigated in connexion with the Arrest Warrant issued by this Court. Accordingly, under Article 17(1)(a) of the Rome Statute, the proceedings instituted by the Prosecutor are inadmissible and the Court ought to afford the proceedings in the State of Libya due regard and allow them to follow their due course as provide by the Libyan Law.

31. It is acknowledged that under Article 19(10), the Prosecutor retains the discretion to apply to the Court for a Review of the decision on inadmissibility if there were to be any significant changes in the prevailing circumstances. Depending on the Prosecutor's view of the ability, willingness or conduct of the Libyan proceedings, they would be entitled to seek revival of the proceedings or institute fresh proceedings, ensuring the object and purpose of the Rome Statute is upheld.

PART THREE: SUBMISSIONS ON ADMISSIBILITY

I. Overview

32. In challenging the admissibility of these proceedings, the Defence advances two distinct and independent grounds, each of which, in and of itself, is sufficient to warrant a finding that the instant proceedings are inadmissible before the Court:

g. First, the Defence submits that there is no sufficient nexus between the proceedings instituted against Mr. Njeem and the Situation in Libya as referred to the Court by United Nations Security Council Resolution 1970 (2011). In the absence of such a nexus, the proceedings fall outside the scope of the referral under Article 13(b) of the Rome Statute and are therefore beyond the jurisdictional mandate conferred upon the Court; and

h. Second, the Defence submits that there exist ongoing investigations and criminal proceedings in the State of Libya concerning the same person and substantially the same conduct as that alleged before the Court. These proceedings directly engage the admissibility regime under Article 17(1)(a) of the Statute and render the case inadmissible by operation of the principle of complementarity.

33. The Defence emphasizes that these two distinct grounds will independently strike at the core of legality and lawfulness of the present proceedings and therefore compel a finding of inadmissibility. Each ground operates independently, and each is capable of disposing of the proceedings in *limine*.

II. Submissions on the Scope of the Referral

a. Introduction

34. The Defence submits that there is no sufficient nexus between the proceedings initiated against Mr. Njeem and the Situation in Libya referred to the Court by the United Nations Security Council pursuant to Resolution 1970 (2011). In the absence of such a nexus, the Court lacks the proper jurisdictional foundation for the present case, and the proceedings are likewise inadmissible.

b. The Scope of Resolution 1970 (2011)

35. As the Court acknowledged in its decision issuing the Warrant of Arrest decision of 18th January 2025, United Nations Security Council Resolution 1970(2011) constitutes the legal foundational for the Court's jurisdiction over the Situation in Libya as it existed or around 2011. However, that jurisdiction is not unlimited. It is the Applicant's submission that a referral under Article 13(b) of the Rome Statute is confined to a specific situation and does not confer upon the Prosecutor an open-ended invitation to pursue and investigate any and all proceedings against Libyan Nationals in perpetuity, regardless of the connection to the situation that prompted the referral.

36. The situational limits of a Security Council referral are a matter of both principle and necessity. Were it otherwise, a single referral resolution could serve as a permanent and indefinite grant of jurisdiction over an entire country, unconstrained by the events, context, or concerns that gave rise to it. That cannot have been the intention of the Security Council, nor is it consistent with the requirements of Article 13(b) read together with the principle that the Court's

jurisdiction must be exercised within defined situational boundaries. As observed by the Court in Mbarushimana, *"the offending criminal activity alleged on the part of individuals who were not identifiable at the time of the Referral has, as a matter of logic, to be linked to the original activity which prompted the referral."*[13]

37. However, in the instant proceedings, no such linkage exists between the original activity which prompted the referral by the United Nations Security Referral and the alleged criminal activity attributed to Mr. Njeem. To that end, the Defence submits that whilst Resolution 1970 (2011) confers upon the Court jurisdiction over the Situation in Libya by virtue of the Security Council's referral under Article 13(b) of the Rome Statute, the proceedings instituted by the Prosecutor against Mr. Njeem falls outside the scope of that referral.

c. The Situational Context of Resolution 1970 (2011)

38. A proper construction of Resolution 1970(2011) demonstrates that the Referral was directed and confined to a specific and identifiable situation: the crisis as it subsisted in Libya beginning in February 2011, carried out by the State apparatus under the Gaddafi Regime at the time of referral or as the situation in Libya evolved in relation to activities that were already in motion in 2011. It is not and cannot properly be read as a *carte blanche* to prosecute conduct that bears no meaningful relationship to the circumstances that gave rise to the referral.

39. This is evident in the text of the Resolution itself. The scope of the Situation in Libya, as the Security Council understood and intended it, is delimited at paragraph 2 of the preamble to Resolution 1970 (2011) as *"the gross and systematic*

[13] Pre Trial Chamber I, Situation in the Democratic Republic of Congo, In the Case of The Prosecutor vs. Callixte Mbarushimana, para. 50

violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government...." The Defence submits that this language is neither incidental nor merely suggestive, rather it defines the character and contours of the situation the Security Council was moved to address.

40. At the time the UN Security Council deliberated and proceeded to vote on the Resolution, the concern was and remained the overriding need to ensure the respect of the right of Libyans to peacefully protest by the government of H.E. Muammar Gaddafi (hereinafter "***the Gaddafi Regime***"). The referral to the Court was intended to address any violations in connexion with that specific and defined context.

41. The Defence submits that the apparent flexibility in the temporal language of the Resolution was not intended to create an open ended jurisdiction for the Court, but to support and ensure there existed a mechanism capable of addressing any gross human rights violations that would be uncovered in the course of the contemplated investigations by the Human Rights Council's commission of inquiry.

42. This submission finds basis at paragraph 5 of the Preamble to the Resolution, wherein the UN Security Council welcomes the "*the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya,* ***to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible***."

43. Hence, the UN Security Council Resolution 1970(2011) contemplated that the Human Rights Council Resolution A/HRC/RES/S-15/1 of 25th February 2011 would send an independent international commission to ***establish facts and circumstances of violations of international human rights law, determine the crimes perpetrated and, where possible, identify those responsible*** for the commission or sanctioning of the violations.

44. Upon ascertainment of the facts, identification of circumstances resulting in any violations of international human rights law and, where possible, identifying the perpetrators, the Prosecutor would then be seized of the matter to ensure that such violations were punished as per the Rome Statute.

45. Such a position reflects that by its very nature; a UN Security Council referral does not operate in isolation but rather in tandem with the Rome Statute. Every UN Security Council referral contains the territorial and temporal scope of the situation referred to the prosecutor, and by extension, to the Court.

46. The temporal parameters of Resolution 1970(2011) are determined by reference to the adoption date of the Resolution, the operative Paragraphs of the Resolution, the Review mandate and Reporting Period for the Prosecutor and the implicit timelines under the Resolution.

47. Resolution 1970(2011), adopted on 26th February 2011, provides the starting point for determining the temporal parameters of the Resolution. In its wording, the Operative Paragraph 4 notes that the referral relates to the period since 15th February 2011. It is therefore apparent that the earliest date for which the Prosecutor could review any events happening in Libya was February 2011 or in close proximity to and predating the referral.

48. Whilst the Resolution itself contains no sunset clause to ascertain the duration for which it would remain in effect, the same is, however, ascertainable by the fact that the Security Council invited the Prosecutor to address the Council within two (2) months of the adoption of the Resolution and every six (6) months thereafter on actions taken pursuant to the Resolution. With an address required from the Prosecutor within two (2) months of the resolution, it is arguable that the Security Council sought immediacy and responsiveness in effecting the Resolution. It can only indicate that the Security Council referral concerned events, operations, or engagements that were ongoing in Libya contemporaneously at the time, rather than an open-ended jurisdictional grant extending indefinitely into the future.

d. The Absence of Nexus in the Present Case

49. The alleged conduct attributed to Mr. Njeem is said to have occurred from 2015 onwards, several years after the events that triggered the referral, in a materially distinct context and in circumstances wholly divorced from and unconnected to the Gaddafi regime. By the time it is alleged that events, occasions, violations and/or offences were committed or attributable to Mr. Njeem occurred, the Prosecutor had addressed the Security Council on at least eight (8) occasions taken pursuant to the Resolution.

50. At the time of the adoption of Resolution 1970 (2011), Mr. Njeem neither held a position of authority within the Libyan State nor is he alleged to have played any instrumental role in the events that formed the basis of the referral. It is therefore inconceivable that the Security Council would have intended for the Prosecutor to have had an interaction with Mr. Njeem, who in 2011 neither held

a position of influence nor was any position whatsoever to have had a role in the situation as it existed at the time of referral. The institutional framework within which his alleged conduct is said to have occurred did not exist at the time of the referral and cannot be characterised as forming part of the same situation.

51. The Defence submits that the Prosecution has not demonstrated any factual connection between the alleged conduct of Mr. Njeem and the core concerns that prompted the Security Council to act. The only connection asserted between the current situation in Libya and the original referral is, at best, a broad geographic and national argument that falls well short of the nexus required by Article 13(b).

52. As appreciated in the Dissenting Opinion of Judge Socorro Flores Liera, it is evident that "*the situation in Libya was referred to the Court as a result of the actions by the Gaddafi regime against its own civilian population...... While it may be correct that after the death of Muammar Mohammed Abu Minyar Gaddafi on 20th October 2011, the fighting and civil unrest continued in Libya, these events are not related to those that triggered the referral by the Security Council.*"[14]

53. The Defence submits that the Dissenting opinion accurately appreciates the need for sufficient linkage between the case as referred by the Security Council and the case as advanced by the Prosecutor in the instant proceedings, for the Court to have jurisdiction over the instant proceedings.

54. Such a view is further buttressed by the Decision on the Confirmation of Charges in *Mbarushimana* where Pre-Trial Chamber I in evaluating the scope of the *Situation in the Democratic Republic of Congo*, at paragraph 27, holds:

[14] 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.

"Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; ***as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated****. In the case at hand, as the situation of crisis referred was ongoing at the time of the Referral {"situation qui se déroule dans mon pays), the boundaries of the Court's jurisdiction can only be delimited by the situation of crisis itself."*

55. Consequently, the Applicant's challenge against the admissibility of the matter turns on the test set out in *Mbarushimana*, i.e., the "context of the situation of crisis that triggered the jurisdiction of the Court". Since the context of the situation of crisis that triggered the jurisdiction of the Court in the Situation in Libya is temporally discrete and event-specific, the proceedings against Mr. Njeem can only be admitted if they occurred or arose from the context of the situation that triggered the Libyan Referral in 2011.

56. That temporal specificity of the situation is ascertainable from the subsequent issuance of ICC warrants against H. E. Muammar Gaddafi, Mr. Sail al-Islam and Mr. Abdullah Senussi in June 2011. The wording of the warrants and the etymology deployed speak to the specificity of the Situation in Libya.

57. In the Warrant of Arrest for Mr. Abdullah Al-Senussi, the Court opined that *"CONSIDERING that the Chamber finds that there are reasonable grounds to believe that* ***following the events in Tunisia and Egypt which led to the departure of their respective Presidents in the early months of 2011, a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring and quelling****, by any means, including by the use of lethal force, the demonstrations of*

civilians against the regime of Muammar Mohammed Abu Minyar Gaddafi ("Gaddafi's regime") which started in February 2011." [15]

58. A mirror image of the same consideration is set out by the Court in the Arrest Warrant for Mr. Saif Al Islam Gaddafi[16] and Mr. Muammar Mohammed Abu Minyar Gaddafi[17]. Noting that these were the initial Warrants of Arrest issued by the Court and are closely linked in time to the issuance of Security Council Resolution 1970(2011), the Defence asserts these preliminary steps taken in the immediate aftermath of the Security Council Resolution are the proper basis for contextualizing what Situation in Libya was referred to the Court by the Security Council in 2011.

59. The Situation in Libya is therefore ascertainable to be the ***events which led to the departure of the President in the early months of 2011*** and the Court intervention in the matter as a ***tool for holding responsible the persons who formulated, deployed, implemented or consented to the application of state policy designed at the highest level to deter and quell by any means the demonstration of civilians against the regime of Mr. Muammar Gaddafi***.

60. The etymological choice by the Court denotes that the scope of the temporal jurisdiction donated to the Court under Security Council Resolution 1970(2011) was ***limited to events leading to the departure of the President, state policy of deterrence and quelling civilian demonstrations by any means in the month of February 2011.*** These are the four corners of the Situation in Libya and cannot

[15] Warrant of Arrest for Abdullah Al Senussi, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_08507.PDF

[16] Warrant of Arrest for Saif Al Islam Gaddafi, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_08353.PDF

[17] Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_08351.PDF

extend to the case set out by the Prosecutor in its application for Warrants of Arrest to be issued against Mr. Njeem. In the Court's Decision issuing a Warrant of Arrest against Mr. Njeem, the Prosecutor's case is summarised at paragraph 2, 7 to 10, 20 to 98 of the Decision.[18]

61. The Defence therefore submits that the critical issue for the Court to determine is ***the context of the situation of crisis that triggered the jurisdiction of the Court.*** On the context of the situation in Libya, the Defence asserts that it is possible for the context to be appreciated by reference to the preamble to the Resolution 1970(2011).

62. The Preamble to the Referral identifies specificities on areas of concern by the Council: -

a. Expressing grave concern ..... and condemning the ***violence and use of force against civilians***;

b. Deploring ***gross and systematic violation of human rights***, including the ***repression of peaceful demonstrators...***

c. Welcoming the condemnation by .... of ***the serious violation of human rights and international humanitarian law that are being committed***

d. Considering that the ***widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya***

e. Underlining the need ***to respect the freedoms of peaceful assembly and of expression***

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[18] 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.

f. Stressing the ***need to hold to account those responsible***

g. Acting under Chapter VII of the Charter of the United Nations and taking measures under Article 41, "1. ***Demands an immediate end to the violence...***"

63. The entirety of the wording and the ascertainable intention of the Resolution was to address the deteriorating security situation in Libya by holding to account the remnants of the security forces of the Libyan Jamahiriya and Gaddafi's regime that were repressing the demonstrations and popular uprising against the regime. It referred to the response to the uprising, violence against demonstrators and demanded an immediate end to the violence. Such wording speaks to immediate and ongoing state of affairs; it contemplated the Prosecutor investigating the circumstances and determining any violation or breach of Rome Statute that may have occurred.

64. The inevitable conclusion is that Resolution 1970(2011) was limited to the ongoing activities in Libya and any ancillary actions that may have arisen in conjunction with that context. It could not have been intended to extend perpetually to all subsequent state agencies and actors in Libya who were not linked to the original repression of peaceful demonstrations and violation of human rights that prompted the referral.

65. In the instant proceedings, no linkage exists between the referral by the Security Council to the case advanced by the Prosecutor since Mr. Njeem was never and has not been alleged to have been at any material time part of His Excellency Gaddafi's regime or official acting under the machinery of the State of Libya that existed in 2011.

66. The alleged institution that Mr. Njeem headed and gave rise to the allegations contained in the Arrest Warrant was not in existence at the time of the 2011 Resolution. As such, it could not have conceivably been anticipated by the Security Council that it would be formed and would thereafter engage in violations of the Rome Statute.

e. The Consequences of the Absence of Nexus

67. The upshot is that no linkage exists between the situation referred by the Security Council to the Court to the instant proceedings commenced by the Prosecutor. By acting beyond the scope of referral, the Prosecutor has exceeded the jurisdictional mandate conferred by the UN Security Council under Article 13(b) of the Rome Statute, with the consequence that the present proceedings lack the temporal jurisdiction vested by Resolution 1970 (2011).

68. Consequently, the Defence submits that the proceedings against him are inadmissible for want of temporal jurisdiction and invites the Pre-Trial Chamber to so find. A finding to that effect would be sufficient to dispose of the present Application. The Court is nevertheless invited to consider the complementarity ground addressed in Part III below, which provides an independent and alternative basis for the same relief.

PART FOUR: SUBMISSIONS ON COMPLEMENTARITY

I. Introduction

69. Separately, and independently of the submissions on the scope of referral under Resolution 1970(2011), the Defence submits that the case against him is inadmissible before this Court by reason of the ongoing genuine domestic proceedings in the State of Libya covering the same person and substantially the same conduct as alleged in the Arrest Warrant. Mr. Njeem is exercising his right as the subject of an Arrest Warrant pursuant to Article 19(2) (b) of the Rome Statute to challenge the admissibility of the case against him under Article 17(1)(a) of the Statute.

70. Until February 2011, the Libyan Arab Jamahiriya enjoyed and exercised control over the territory of Libya. The criminal justice system provided a comprehensive statutory regime that proscribed various offences, authorised the arrest, detention, trial, conviction, and sentencing of Libyan citizens and persons within the territory of Libya for any criminal acts committed in Libya.

71. The Government of National Unity for the State of Libya was established on 10th March 2021, to unify the competing administrations i.e., the Government of National Accord and the Second Al-Thani Cabinet, that had previously divided the effective governance of Libya pursuant to a resolution of the Libyan House of Representatives. Following its formation, the appointment of a Minister of Justice on 15th March 2021 marked the resumption of effective administration of justice under a unified governmental framework.

72. The legitimacy of the Government of National Unity is not in dispute before this Court. On 12th May 2025, the Court, through the Registrar, accepted the formal

Declaration issued by the State of Libya in accordance with Article 12(3) of the Rome Statute. Upon the Office of the Registrar's request for an additional document, the additional document was made available the same day. The additional document was signed by the Prime Minister of the Government of National Unity, and the Court's apparent satisfaction with that state of affairs *prima facie* precludes any demur or objection to the legitimacy and legality of the Government of National Unity.[19]

73. While issuing the Warrant of Arrest, the majority of the Pre-Trial Chamber at paragraph 12 of the decision expressly declined to exercise its discretion *proprio motu* to determine the admissibility of the case, finding no ostensible cause or self-evident factor to do so at that stage. The admissibility of these proceedings is therefore entirely open and has never been determined. The present challenge is the first occasion on which the issue has been canvassed before the Court.

74. The Defence submits that the admissibility challenge is ripe for determination. Since the issuance of the Arrest Warrant, material and substantive developments have occurred in Libya that directly engage the complementarity framework under Article 17. The Court is invited to assess admissibility on the basis of the facts as they exist at the time of this determination, in accordance with the principle confirmed in *The Prosecutor v. Abdullah Al-Senussi* that admissibility must be assessed by reference to the circumstances prevailing at the time the decision is made.[20]

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[19] https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180d2e7e8.pdf

[20] The Prosecutor vs Al-Senussi, Pre-Trial Chamber I, ICC-01/11-01/11-466-Red, 11 October 2013 (upheld on appeal, ICC-01/11-01/11-565, 24 July 2014).

II. The Basis of Complementarity

75. In determining whether the case against Mr. Njeem is admissible before this court, due regard must be given to the foundational provisions of the Rome Statute which establish the relationship between the Court and national jurisdictions. These provisions not only provide the context, but they also delineate the farmwork within which every admissibility determination must be made.

76. Accordingly, in seeking to commence proceedings against the Applicant, this Chamber and by extension the Court, has to give due regard to the provisions of the preamble and Article 1 of the Rome Statute.

77. By its Preamble, the Rome Statute expressly recognizes two propositions that stand in tension, and must be read together: that first, that the aim of the Rome Statute and the International Criminal Court is to ensure that "the most serious crimes of concern to the international community as a whole **must not go unpunished."** Second, in the same breath, the Preamble recognizes and reiterates that it is the **duty of every State to exercise its criminal jurisdiction** over those responsible for international crimes.

78. Article 1 of the Rome Statute gives institutional expression to this hierarchy by expressly recognizing that the International Criminal Court ("the Court") **shall be complementary to national jurisdictions.** The word "complementary" was chosen with care and deliberation during the drafting process. As the drafting history confirms, complementarity was the foundational compromise that made the Court's creation politically possible; without it, State sovereignty concerns would have rendered the Statute unacceptable to the preponderance of negotiating States.

79. The practical consequence of the complementarity principle, as translated into the admissibility framework under Article 17, is that the Court's jurisdiction is subsidiary to that of national courts. Where a State with jurisdiction over a case has commenced genuine proceedings covering the same person and substantially the same conduct, the Court must defer. The complementarity framework does not invite the Court to assess whether it could conduct a better or more efficient prosecution than the national system. Rather, it only asks whether the national system is genuinely seized of the matter. If it is, and absent a demonstration of unwillingness or inability, the case is inadmissible.

80. The Defence submits that these foundational principles must guide the Court's assessment of admissibility in the present case. The State of Libya has jurisdiction over Mr. Njeem. As the subsequent paragraphs will show, the State of Libya has commenced and is actively pursuing domestic proceedings against him. The question for this Court is not whether it is capable of prosecuting Mr. Njeem, but whether Libya's proceedings are genuine. For the reasons set out in the sections that follow, the Defence submits that the Libyan proceedings are genuine.

III. The Applicable Legal Framework

81. Under Article 17(1) (a) of the Rome Statute, a case is inadmissible before the Court where it is being investigated or prosecuted by a state which has jurisdiction over it, unless that State is unwilling or unable to genuinely carry out the investigation or prosecution. Accordingly, the Defence asserts that the Pre-Trial Chamber, and by extension the Court, may only exercise jurisdiction

over the Situation in Libya where the legal system of the State of Libya has failed to act, or in acting the state has failed to proceed in a genuine manner.

82. As affirmed by the Appeals Chamber in *The Prosecutor v Germain Katanga*, the complementarity assessment under Article 17 proceeds in two stages: Firstly, the Court is required to determine whether there exist domestic proceedings relating to the same case i.e., covering the same person and substantially the same conduct as that alleged before the Court.[21] It is only when this threshold is met that the court proceeds to the second stage, i.e., an assessment of whether those proceedings are vitiated by either unwillingness or inability within the meanings ascribed under Articles 17(2) and (3) of the Statute. This was set out as follows:

> *"Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse."*[22]

83. With respect to the first stage, this Chamber has previously set out the legal framework to be applied in arriving at a determination of whether the domestic

[21] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case.

[22] Ibid. ¶78.

proceedings are substantially similar to the contemplated proceedings before the Court by considering: -

84. The Court has to be satisfied that: first, the "subject" of the domestic proceedings is the same person against whom the proceedings before the Court are being conducted, and the conduct of the national investigations is substantially the same conduct as alleged in proceedings before the Court.[23]

85. That the expression "the case is being investigated" must be understood as requiring "the taking of concrete and progressive investigative steps" to ascertain whether the persons is responsible for the conduct alleged against him before the Court.[24]

86. The parameters of the "conduct" alleged in the proceedings before Court are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of proceedings in question.[25]

[23] Pre-Trial Chamber I, The Prosecutor v. Thomas Lubanga Dyilo, "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo", 24 February 2006, ICC-01/04-01/06-8-Corr, para. 31. The test was subsequently adopted and reiterated by the Court in The Prosecutor v. Kony et al, "Decision on the Admissibility of the Case under Article 19(1) of the Statute", 10 March 2009, ICC-02/04-01/05-377, paras 17-18; The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-01/11-101, para. 54; The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-02/11-96, para. 48.

[24] The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274, paras 1 and 40

[25] The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC- 01/09-02/11-274, paras 38 to 40.

87. The assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation.

88. A decision on admissibility of the case must be based on the circumstances prevailing at the time of issuance of the decision. The state should discharge its burden of proof that currently there is no situation of "inaction" at the national level.[26]

89. Mere assurance of ongoing national investigation covering the same offences is not sufficient, the Court must be provided with a sufficient degree of specificity and probative value that demonstrates the investigations being undertaken in the case.[27]

90. The Chamber is not called to determine whether the evidence is strong enough to establish a person's criminal responsibility, but to make a finding that domestic authorities are taking steps to investigate the accused responsibility in relation to the same case as the one before the Court;

91. The evidence required of the state is not only on the merits of the national case but extends to all materials capable of proving that an investigation is ongoing.[28]

92. As for stage 2 of the assessment, Articles 17(2) and 17(3) clarify set out the exhaustive criteria by which the Court must assess whether domestic

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[26] Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, para. 14.

[27] The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274, paras 2 and 61.

[28] Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, paras 10 and 11.

proceedings are vitiated by unwillingness or inability. The criteria under both provisions are exhaustive and demand proof of a high threshold, confirming that the complementarity framework was designed to defer to national proceedings in all but the most manifest cases of failure.

93. To that end, beyond establishing that the State with jurisdiction is conducting an investigation or prosecution of a materially similar case, the Defence is not then required to prove a negative, by establishing that such proceedings have not been vitiated by unwillingness or inability or that the proceedings meet the criteria of genuineness. Rather, provided the Chamber is satisfied that there has been no situation of inactivity,[29]the Defence submits that the burden of demonstrating unwillingness or inability will lies with the party asserting it, and not with the person challenging admissibility.

IV. Stage One: The Same Person and Substantially the Same Conduct

94. Under Article 17(1)(a) of the Rome Statute, a case is inadmissible before the Court where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the relevant vitiating elements are proven. The structure of the provision is significant: inadmissibility is the rule where domestic proceedings exist, and the Court's intervention is the exception. The complementarity principle strikes a balance between safeguarding the primacy of domestic proceedings and the Rome Statute's goal of ending impunity, and the Court may only exercise jurisdiction where States fail to act.

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[29] The Prosecutor v. Abdullah Al-Senussi, Pre-Trial Chamber I, ICC-01/11-01/11-466-Red, 11 October 2013; paragraph 202.

95. The Defence invites the Court to have regard for its decision in ***The Prosecutor vs Abdullah Al-Senussi,*** as an instructive and directly relevant precedent. That case arose in materially similar circumstances, concerning Resolution 1970(2011), a Libyan national and the State of Libya's arguments on its own willingness and ability to prosecute violations of the Rome Statute within its jurisdiction. The *Al-Senussi* decision is therefore the apposite starting point for the Court's assessment in the present case, both as a matter of legal framework and as evidence of the capacity and willingness of the State of Libya to pursue genuine accountability for serious violations of international law within its territory.[30]

96. The first stage of the complementarity assessment is satisfied in the present case. It is the Applicant's position that there exist ongoing national investigations and prosecution in the State of Libya which take primacy and supersede the intended prosecution at the Court under a proper appreciation of the Rome Statute.

97. The factual matrix establishes the methodological approach adopted by the Public Prosecution Authority in investigating Mr. Njeem over the same allegations and based on the same factual matrix as the charges disclosed in the Arrest Warrant issued by the Pre-Trial Chamber.

98. Under the same persons/same conduct test set out in *The Prosecutor v. Abdullah Al-Senussi*, the Defence asserts that the Libyan proceedings against Mr. Njeem vis-à-vis the Prosecutor's case against Mr. Njeem fully satisfy the same person/same conduct test.[31]

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[30] Ibid.

[31] The Prosecutor v. Abdullah Al-Senussi, Pre-Trial Chamber I, ICC-01/11-01/11-466-Red, 11 October 2013; paragraph 218 to 311

99. At the outset, a review of the Corrected Version of the Warrant of Arrest is necessary to determine the substratum of the ongoing proceedings before the Court. The relevant conduct that is the subject of this Court's proceedings, is as set out under the Warrant of Arrest issued by the Pre-Trial Chamber against Mr. Njeem on 18th January 2025 as follows:[32]

100. At paragraph 2, the relevant period covered by the allegations contained in the Warrant of Arrest relate to crimes against humanity and war crimes committed in Libya from around February 2015 to at least 2nd October 2024;

101. In summary, the charges pertain to imprisonment, outrage upon personal dignity, torture, inhumane acts, sexual violence, rape, murder and attempted murder, passing of sentences without previous judgment, enslavement, sexual slavery and persecution.

102. On the **first element** that the "**subject**" of the proceedings before the Court be similar to the "**subject**" of the proceedings before the State of Libya, the Defence asserts that the Court has to undertake a comparative test to identify the conduct of Mr. Njeem that is the subject of the proceedings before the Court vis-à-vis the conduct of Mr. Njeem that is allegedly subject to the State of Libya national proceedings as evidence by the material placed before the Court.

103. As for the assessment of the conduct in issue, the Libyan Penal Code provides for the criminalization of various acts, omissions or inactions by Libyan citizens or other persons within the territory of Libya. Amongst the offences set out in

[32] Corrected Version of the Warrant of Arrest for Mr. Osama Elmasry/Alamasri Njeem dated 18th January 2025

the Penal Code are; Article 368 on intentional homicide with premeditation, Article 407 on sexual intercourse by force, and Article 435 on torture of prisoners.

104. Law No. (10) of 2013 for the State of Libya is on the Criminalization of Torture, Forced Disappearance and Discrimination contains seven Articles that criminalize (i) forced disappearance, (ii) torture, and (iv) discrimination based on class, group, region or entity of belonging.[33]

105. It is therefore clear that the substance of the charges against Mr. Njeem as disclosed in the Warrant of Arrest are covered, provided for, or contemplated by the State of Libya criminal justice system as offences for which various sentences and punishment is provided for by the applicable legal regime.

106. At a *prima facie* level, the documentation availed by the Attorney General of the State of Libya explicitly and expressly set out: -

107. In the Statement by the Attorney General's office dated 12th June 2025, the statement expressly provides that "*Preliminary investigations have examined the elements of the crimes mentioned in the Arrest Warrant issued by the First Trial Chamber of the International Criminal Court.*"[34]

108. In the Statement by the Attorney General's office dated 14th July 2025, the statement sets out that "*As part of the ongoing investigations by the Attorney General Office concerning the alleged acts committed by Mr. Osema Alamasri Habish Najeem as detailed in the arrest warrant issued against him by the International Criminal Court...*"[35]

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[33] **Annex B**- General National Congress – Libya, Law No. (10) of 2013 On the Criminalization of Torture, Forced Disappearance and Discrimination (EN)

[34] **Annex D**- Statement by the Attorney General of Libya dated 12th June 2025

[35] **Annex F:** The Statement the Attorney General For Libya dated 14th July 2025.

109. The correspondence by the Solicitor General of the State of Libya to Mr. Njeem's counsel on 10th February 2026 expressly states that the Public Prosecution Authority has *"reviewed and tracked all reports filed against Mr. Osama Najeem covering the period from 2013 through 2025. Criminal proceedings have been formally initiated against Mr. Njeem for acts classified as offences under the Libyan Penal Code and the provisions of Law No. 10 of 2013 regarding the Criminalization of Torture, Forced Disappearance and Discrimination..."* [36]

110. These documents establish, with the degree of specificity and probative value required by the Court's jurisprudence, that the domestic proceedings cover the same person and substantially the same conduct as the proceedings before this Court. The first step under this stage of the complementarity assessment is satisfied.

111. On the **second element,** the Defence further submits that the domestic proceedings satisfy the requirement of "concrete and progressive investigative steps." As the Appeal Chamber has previously affirmed, such steps may include "interviewing witnesses or suspects, collecting documentary evidence or carrying out of forensic analyses."[37]

112. The preponderance of evidence availed to the Defence indicates definitive investigatory steps are currently ongoing. Since the unsealing of the Warrant against Mr. Njeem on 24th January 2025, the State of Libya has progressed the investigations against Mr. Njeem and placed him into Pre-Trial detention.

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[36] **Annex E**- Letter from the Solicitor General, State of Libya to Mohamed Muigai LLP dated 10th February 2026

[37] The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274, paras 1 and 40

113. As part of the investigations, Mr. Njeem invoked immunity over the intended prosecution as at the material time he was a member of the Judicial Police. The Attorney General of the State of Libya therefore proceeded to write to various state officers seeking to ascertain Mr. Njeem's level of affiliation with the Judicial Police Department.

114. An initial interrogation session for Mr. Njeem by the Public Prosecution Authority was held on 28th April 2025, wherein he was informed of the allegations against him, his rights as an accused person and offered an opportunity to present his defence.

115. It is notable that the initial interrogation of Mr. Njeem was on 28th April 2025; merely three months after the Court had unsealed the Warrants of Arrest against him. Further, the interrogation and all subsequent actions by the Attorney general and the Public Prosecution Authority was undertaken expressly predicated on the complaints received against Mr. Njeem whose allegations are substantially similar and mirror, those contained in the Arrest Warrant.

116. On the basis of the available information, it is therefore clear that the State of Libya has commenced investigations against the same subject person and for the same conduct as the instant proceedings before the Court. Accordingly, there is need for the Court to defer to the Libyan proceedings under the doctrine of complementarity.

V. Stage Two: Willingness and Ability.

117. The Defence submits that Libya is neither unwilling nor unable to carry out the domestic proceedings genuinely. In the alternative, the burden of demonstrating that unwillingness or inability will lie with the party asserting it.

118. Article 17(2) of the Rome Statute defines unwillingness as actions "*motivated by the desire to obstruct the course of justice*" while the Appeals Chamber in the Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trail Chamber II of 12th June 2009 on the Admissibility of the Case found there exists a second form of "unwillingness" that although not expressly defined in Article 17(2) that seeks to ensure that persons are brought to justice but not before the national courts.[38]

119. At the outset, the available material points to the State of Libya's manifest intention to prosecute Mr. Njeem for any violations or offences pertaining to the Warrant of Arrest issued by the Court against him. *Prima facie,* there is no motivation or desire to obstruct the course of justice.

120. In exercise of its criminal justice system, the State of Libya has investigated the complaints lodged against Mr. Njeem, has waived any immunities that may have attached to Mr. Njeem on the basis of his official duties as a member of the Judicial Police, and has since November 2025 held Mr. Njeem in Pre-Trial Detention. For all intents and purposes, the first form of unwillingness cannot be claimed to exist in these proceedings.

121. On the second form of unwillingness, being the attempt to obstruct the course of justice, the evidence available to the Court cannot be reasonably construed to amount in any form whatsoever to obstruction.

[38] Reasons at paragraph 77

122. The Defence maintains that the Court has to be guided by settled international law jurisprudence on three considerations[39]:-

a) Whether the national proceedings were or are being undertaken for the purpose of shielding the persons concerned from the criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

b) Whether there has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or

c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which is inconsistent with an intent to bring the persons concerned to justice.

None of these grounds is made out on the available material.

123. The Defence asserts that the conduct of the State of Libya in the instant matter demonstrates clear willingness to ensure he is brought to justice. The following evidence is indicative of such a position: -

a) The national proceedings are being conducted in a manner that does not shield him from criminal responsibility given the revocation of immunity he previously enjoyed as a public official in the Judicial Police and his continued pre-trial detention during the course of the investigations;

[39] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, paragraph 74

b) There has been no delay exhibited by the State of Libya in commencing investigations against him and subsequently apprehending him to pave way for further investigations. By June 2025 (within five months), he had been subjected to interrogation and pre-trial detention as the national judicial authorities of the State of Libya seek to investigate the complaints by the Public Prosecution Authority, the substance of which materially mirror, those contained in the Arrest Warrant.

c) The instant proceedings against him are being undertaken by the Public Prosecution Authority and the Office of the Attorney General of the State of Libya. Such agencies are separate and distinct from the Judicial Police under which he was domiciled and their conduct to date evidence a fair, impartial and objective investigation. By pursuing and getting revocation of his immunity, the national authorities have shown that they intend to ensure no internal political influences affect their investigation and subsequent actions. They have further shown the support and government facilitation of their work will ensure unhindered investigation and prosecution in line with the criminal justice system in the State of Libya.

124. The Defence submits that by stripping Mr. Njeem of his immunity, the State of Libya has exhibited the political goodwill and evidenced the functional capacity of its criminal justice system to undertake an impartial investigation to hold him accountable for any charges that may be proven against him.

125. Previously, the prosecutor has reiterated that *"as a general rule, the Policy of the Office of the prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State concerned. "*[40]

126. While there may have been failure to act by the State of Libya between February 2011 and 2021; the Government of National Unity has proven its capable and enjoys the political goodwill to undertake investigations and hold Mr. Njeem to account.

127. The Court has previously held that admissibility of any proceedings must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.[41] In such a setting, the question of admissibility of the instant proceedings has to be determined by the status quo, not status quo ante.

128. Even if the Pre Trial Chamber had held at the issuance of Warrants stage that the case was admissible, such a position would be without prejudice to the instant challenge to admissibility.[42] This owing to the significant and material developments enumerated below: -

a) The Court's acceptance of the Declaration by the State of Libya under Article 12(3) in May 2025 on the jurisdiction of the Court is a conclusive

[40] Paper on some policy issues before the Office of the Prosecutor, September 2003, page 2: https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf

[41] Prosecutor vs. Katanga and Chui, Appeal Chamber, Judgment on the Appeal of Katanga against the Oral Decision of Trial Chamber II of 12th June 2009 on the Admissibility of the Case, ICC-01/04-01/08-1497, 25th September 2009, paragraph 78-80.

[42] Prosecutor vs Kony et al., Decision on admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05, 10th March 2009, paragraph 18, 25-29.

acknowledgement by the Court of the existence of competent Libyan authorities having control over the territory of Libya;

b) The issuance of the Article 12(3) Declaration by the State of Libya is *prima facie* evidence of the State of Libya determination to support and to the extent required under the Rome Statute to facilitate the proceedings and interventions ongoing at the Court. As such, the initiation of criminal proceedings by the State of Libya are neither intended nor aimed at protecting Mr. Njeem or otherwise insulating him from the intended prosecution at the Court. They are, however, clear manifestation of the political and judicial goodwill to restore the rule of law, ensure access to justice and promote the rule of law in a nascent governance regime;

c) The Subsequent arrest, revocation of immunity, initiation of investigations and the continued pre-trial detention of Mr. Njeem is evidence of an effective, responsive and capable criminal judicial system that intends to ensure that the allegations against him are thoroughly investigated and appropriate judicial action taken; and

d) The State of Libya's revocation of the Applicant's immunity previously held and the Attorney General's correspondence on the matter is adequate evidence of the existence of goodwill and political support for the fair and transparent investigations and prosecution if sufficient evidence is provided to the competent judicial authorities.

129. The Defence therefore submits that the issue of admissibility of the instant case against him has not been previously determined and call upon the Court, with reference to the prevailing *status quo* to arrive at a determination on the inadmissibility of the matter.

PART FIVE: CONCLUSION

130. On the basis of facts that exist presently, the case against Mr. Njeem is inadmissible under Article 17(1)(a) and 19(2)(a) of the Rome Statute. The State of Libya has commenced investigations over substantially the same charges as contained in the Warrant of Arrest covering the same period and based on the same allegations as before this Court.

131. There has been a demonstrable willingness by the State of Libya to investigate Mr. Njeem for the allegations levelled against him, with an express undertaking to charge him for all offences that the investigation may find him culpable of commission, omission, ordering others to commit or suffering their commission by persons under his control or authority.

132. The Defence, therefore, respectfully requests that the Chamber:-

(i) Declares the case against Mr. Njeem inadmissible under Article 17(1)(a) of the Rome Statute;

(ii) Suspends the proceedings pending the determination of this challenge pursuant to Article 19(7) of the Rome Statute;

(iii) In the alternative, afford the State of Libya an opportunity to make submissions before the Pre-Trial Chamber in accordance with Article 19(3) of the Rome Statute before any adverse finding is made against Mr. Njeem; and

(iv) In the further alternative, convene a full admissibility hearing with disclosure of all relevant materials held by the Prosecution to the Defence, pursuant to Article 19(6) of the Rome Statute and Rule 58 of the Rules of Procedure and Evidence.

Respectfully submitted.

PROF. GITHU MUIGAI, SC
on behalf of
Mr. Osama Elmasry/ Almasri Njeem[43]

Dated this 28 April 2026

At Nairobi, Kenya

[43] *Ex parte* to Defence Annex G – Privileged Note dated 6th March 2025

PART SIX: SCHEDULE OF ANNEXES

Annex	Description	Classification
A.	1953 Penal Code of Libya (EN).	Public
B.	General National Congress – Libya, Law No. (10) of 2013 On the Criminalization of Torture, Forced Disappearance and Discrimination (EN)	Public
C.	S/RES/1970 (2011) Security Council	Public
D.	Statement by the Attorney General of Libya dated 12th June 2025	Public
E.	Letter from the Solicitor General, State of Libya to Mohamed Muigai LLP dated 10th February 2026	Public
F.	The Statement of the Attorney General for Libya dated 14th July 2025.	Public
G.	Priviliged Note dated 6th March 2025	*Ex-parte* to Defence