

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/11-01/25
Date: 18 September 2026

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding Judge
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

Observations on behalf of Victims on the Defence “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)” (No. ICC-01/11-01/25-175 OA2)

Source: Office of Public Counsel for Victims

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I. INTRODUCTION

1. In accordance with regulation 64(4) of the Regulations of the Court (the “Regulations”), Counsel of the Office of Public Counsel for Victims, appointed to represent participating and potential victims (the “Common Legal Representatives”),¹ hereby file their response to the Defence “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)” (the “Appeal”,² and the “Impugned Decision”,³ respectively).

2. The Common Legal Representatives submit that the Appeal should be rejected in its entirety since the Defence has failed to identify any error of law or fact in the Impugned Decision. Rather, its arguments mischaracterise the reasoning of Pre-Trial Chamber I’s (the “Chamber”), and merely express disagreements with the Chamber’s conclusions.

II. PROCEDURAL BACKGROUND

3. On 26 February 2011, the United Nations Security Council (the “UN”, and the “UNSC”, respectively), acting under Chapter VII of the UN Charter, referred the situation in the Libyan Arab Jamahiriya (“Libya”) since 15 February 2011 to the Court, in accordance with article 13(b) of the Statute (“Resolution 1970”).⁴

4. On 3 April 2025, the Prosecution filed, under seal and *ex parte*, an application for a warrant of arrest for Mr Khaled Mohamed Ali El Hishri (“Mr El Hishri”) in

¹ See the “Order on the organisation of the legal representation of victims” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-47](#), 23 December 2025, para. 5; the “Decision on the legal representation of victims” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-84](#), 12 March 2026, para. 13; and the “Decision on victims’ participation and legal representation” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-117](#), 11 May 2026, para. 16.

² See the “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)”, [No. ICC-01/11-01/25-175 O A2](#), 28 August 2026 (the “Appeal”).

³ See the “Decision on the Defence’s challenge to the jurisdiction of the Court pursuant to article 19 of the Statute” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-142](#), 15 July 2026 (the “Impugned Decision”).

⁴ See Resolution 1970 (2011) adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc. [S/RES/1970 \(2011\)](#) (the “Resolution 1970”).

respect of crimes against humanity and war crimes within the jurisdiction of the Court, committed in Libya between around February 2015 and at least early 2020.⁵

5. On 12 May 2025, Libya notified the Registrar of the Court of its acceptance of the Court's jurisdiction over its territory for the period from 2011 to the end of 2027 ("Libya's Article 12(3) Declaration", or the "Declaration").⁶

6. On 10 July 2025, the Chamber issued the warrant of arrest for Mr El Hishri.⁷

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

8. On 1 December 2025, Mr El Hishri was surrendered to the Court and arrived at the Detention Centre that same day. His initial appearance hearing was held on 3 December 2025.

9. On 26 March 2026, the Prosecution filed the Document Containing the Charges, charging Mr El Hishri with crimes against humanity and war crimes within the Court's jurisdiction, committed in Libya between 1 May 2014 and 30 June 2020.⁸

10. On 30 April 2026, the Defence filed a challenge to the Court's jurisdiction (the "Challenge"), which it corrected on 6 May 2026.⁹

11. On 15 July 2026, the Chamber issued the Impugned Decision.¹⁰

⁵ See the "Prosecution's application under article 58 for a warrant of arrest against Khaled Mohamed Ali El Hishri ("Khaled AL HISHRI")", No. ICC-01/11-172-US-Exp and [No. ICC-01/11-01/25-4-Red](#), 3 April 2025.

⁶ See the "Transmission of Article 12(3) Declaration by the State of Libya", No. ICC-01/11-180-Conf-Exp and [No. ICC-01/11-01/25-6-Corr-Red](#), 20 May 2025, with the declaration pursuant to article 12(3) of the Statute annexed as Annex I and an English translation thereof as Annex II.

⁷ See the "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" (Pre-Trial Chamber I), [No. ICC-01/11-01/25-7](#), 10 July 2025.

⁸ See the "Document Containing the Charges", [No. ICC-01/11-01/25-92](#), 26 March 2026.

⁹ See the "Corrected Version of 'Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute' (ICC-01/11-01/25-108-Conf)", [No. ICC-01/11-01/25-108-Conf-Corr](#) and [No. ICC-01/11-01/25-108-Corr-Red](#), 6 May 2026 (the "Challenge").

¹⁰ See the Impugned Decision, *supra* note 3.

12. On 16 July 2026, the Chamber issued the Decision on confirmation of the charges,¹¹ in which it decided to confirm all the charges brought against Mr El Hishri, committing him to trial on the basis of those charges.

13. On 17 July 2026, the Defence filed its Notice of Appeal against the Impugned Decision.¹²

14. On 22 July 2026, the Defence filed a request for the suspension of the time limit contained in regulation 64(2) of the Regulations in light of the judicial recess.¹³

15. On 24 July 2026, the Appeals Chamber granted the requested suspension of the time limit, finding good cause to extend the time limit for filing of the appeal brief on 28 August 2026.¹⁴

16. On 20 August 2026, the Defence filed a request for an extension of the page limit for its appeal brief to 35 pages.¹⁵

17. On 24 August 2026, following submissions from the CLRV¹⁶ and the Prosecution,¹⁷ the Appeals Chamber granted the requested extension of the page limit to both parties and the participants.¹⁸

18. On 28 August 2026, the Defence filed its Appeal.¹⁹

¹¹ See the “Decision on confirmation of the charges against Mr Khaled Mohamed Ali El Hishri” (Pre-Trial Chamber I), [No. ICC-01/11-01/25-143](#), 16 July 2026.

¹² See the “Notice of Appeal 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)”, [No. ICC-01/11-01/25-145 OA2](#), 17 July 2026.

¹³ See the “Defence request for suspension of regulation 64(2) time limit”, [No. ICC-01/11-01/25-151 OA2](#), 22 July 2026.

¹⁴ See the “Decision on ‘Defence request for suspension of regulation 64(2) time limit’ (ICC-01/11-01/25-151)” (Appeals Chamber, Single Judge), [No. ICC-01/11-01/25-155 OA2](#), 24 July 2026.

¹⁵ See the “Defence request for an extension of the page limit for the appeal brief”, [No. ICC-01/11-01/25-163 OA2](#), 20 August 2026.

¹⁶ See the “Victims’ response to the ‘Defence request for an extension of the page limit for the appeal brief’ (No. ICC-01/11-01/25-163)”, [No. ICC-01/11-01/25-165 OA2](#), 21 August 2026.

¹⁷ See the “Prosecution response to the Defence request for an extension of the page limit for the appeal brief (ICC-01/11-01/25-163)”, [No. ICC-01/11-01/25-166 OA2](#), 21 August 2026.

¹⁸ See the “Decision on the ‘Defence request for an extension of the page limit for the appeal brief’ (Appeals Chamber, Single Judge), [No. ICC-01/11-01/25-168 OA2](#), 24 August 2026.

¹⁹ See the Appeal, *supra* note 2.

III. OBSERVATIONS ON BEHALF OF VICTIMS

19. The Defence advances two main grounds of appeal. First, it submits that the Chamber erred in law by finding that UNSC referrals need not be interpreted narrowly on the basis of both the principle of legality and state consent.²⁰ Second, it argues that the Chamber erred in fact and law by finding that there was a sufficient nexus between the crimes alleged against Mr El Hishri and the situation referred by the UNSC in Resolution 1970.²¹ Under each ground, the Defence further advances a number of sub-grounds, which it characterises as “*subsidiary errors of fact and/or law*” said to compound these “*two overarching errors*”.²²

20. Before addressing the two grounds of appeal and their respective sub-grounds, the Common Legal Representatives note the Defence’s submissions regarding Libya’s Article 12(3) Declaration, as well as its inclusion, by way of an annex, of a recent judgment by the Tripoli Court of Appeal.²³ In light of the scope of the Appeal as framed by the Defence itself, which expressly acknowledges that the Majority of the Chamber made no finding on the Declaration and states that the Appeal concerns jurisdiction arising solely from Resolution 1970,²⁴ the Common Legal Representatives submit that there is no need for the Appeals Chamber to determine the validity or effect of Libya’s Article 12(3) Declaration in the present appeal.

21. Should the Appeals Chamber nevertheless conclude that Resolution 1970 does not provide a jurisdictional basis in the present case, such finding would not be dispositive of the question of the Court’s jurisdiction. Libya’s Article 12(3) Declaration would remain an alternative basis for jurisdiction, the validity and effect of which have not been determined by the Chamber. The Defence’s reliance on the judgment of the Tripoli Court of Appeal is therefore misplaced for the purposes of the present appeal. Said judgment concerns the validity of the Declaration under Libyan domestic law and

²⁰ *Idem*, paras. 18-39.

²¹ *Idem*, paras. 40-78.

²² *Idem*, para. 5.

²³ *Idem*, para. 2, and Annexes I and II.

²⁴ *Idem*, para. 2.

does not alter/affect that conclusion. In any event, a domestic judgment cannot, without further analysis, resolve the distinct question of the Declaration's validity and effect under international law.

1. The Chamber correctly interpreted the scope of UNSC referrals in light of the principles of legality and State consent

22. Under Ground A, the Defence submits that, although the Chamber correctly identified the principles of State consent and legality applicable to its analysis, it erred in concluding that neither principle requires UNSC referral resolutions to be interpreted narrowly.²⁵ According to the Defence, that conclusion results from a series of errors in the Chamber's treatment of its submissions and of the applicable law.²⁶

23. The Common Legal Representatives disagree. As demonstrated *infra*, the Chamber correctly addressed the Defence's arguments concerning State consent and the principle of legality and committed none of the errors alleged. The Chamber's conclusion that those principles do not require the restrictive interpretation of Resolution 1970 advanced by the Defence should therefore be upheld.

a) *The Chamber correctly considered the role of State consent in interpreting Resolution 1970*

24. The Defence submits that the Chamber misunderstood or mischaracterised its argument by treating it as a challenge to the validity of Resolution 1970, whereas it merely argued that the principle of State consent requires the Resolution to be interpreted narrowly.²⁷ It further contends that this alleged mischaracterisation led the Chamber to fail to properly assess its submissions concerning the role of State consent and State sovereignty in the interpretation of UNSC resolutions.²⁸

25. The Common Legal Representatives submit that the Defence's contention is misplaced. First, the Defence quotes the Chamber selectively. In observing that the

²⁵ *Idem*, para. 18.

²⁶ *Ibid.*

²⁷ *Idem*, paras. 19-20.

²⁸ *Idem*, para. 21.

Defence “appears to question the validity of Resolution 1970 on the basis of State consent”, the Chamber expressly referred to the Defence’s submission that “a Resolution must be within the power of the UNSC as delineated in the Charter, and not be ultra vires”.²⁹ The Chamber thus did not conflate the Defence’s position with a challenge to the binding nature of Resolution 1970. Rather, it distinguished between, on the one hand, the binding nature of the Resolution – which, as the Chamber correctly noted, the Defence had not specifically challenged³⁰ – and, on the other hand, the Defence’s contention that the principle of State consent limits the scope within which the Security Council could validly exercise its powers.³¹

26. In any event, the alleged mischaracterisation could not have affected the Chamber’s ultimate conclusion. The Chamber expressly addressed the role of State consent and State sovereignty in the context of Chapter VII resolutions. It recalled that, although States are equally sovereign and may only be subjected to international legal obligations to which they have consented, in the context of Chapter VII resolutions, said consent derives from a State’s ratification of the UN Charter and its acceptance of the UNSC’s authority under article 39 of the Charter.³² The Chamber further recalled article 25 of the Charter, pursuant to which UN Member States agree to accept and carry out the decisions of the UNSC, as well as the primacy accorded to those obligations under article 103.³³ The Chamber therefore applied the correct legal framework to the very considerations of State consent and sovereignty on which the Defence relies.

27. The alleged mischaracterisation therefore cannot establish an error of law or fact warranting appellate intervention. The Chamber expressly considered the relevance of State consent to the interpretation and legal effect of Resolution 1970 and correctly concluded that the UNSC, acting under Chapter VII and within the powers

²⁹ See the Impugned Decision, *supra* note 3, para. 28.

³⁰ *Ibid.*

³¹ See the Challenge, *supra* note 9, paras. 43-45, and 53.

³² See the Impugned Decision, *supra* note 3, para. 25.

³³ *Idem*, para. 26.

conferred upon it by the UN Charter, identified the Situation in Libya and referred it to the Court, while setting objective jurisdictional parameters.³⁴

b) The Chamber correctly distinguished between the foreseeability of criminal liability and the foreseeability of prosecution before a specific forum

28. The Defence's contentions under this sub-ground are likewise unfounded. Contrary to its submission,³⁵ the Chamber did not mischaracterise the Defence's argument. The Defence itself submitted that "[p]otential suspects such as Mr El Hishri must be able to reasonably foresee that the referral applies specifically to their actions",³⁶ and that the Chamber must "determine whether it was reasonably foreseeable that Mr El Hishri's conduct could come within the ICC's jurisdiction".³⁷ The Chamber was therefore correct to observe that the Defence appeared to conflate the foreseeability of criminal liability with the foreseeability of prosecution before a specific forum.³⁸

29. The Common Legal Representatives note that the Defence's submissions on appeal confirm, rather than dispel, this conflation. In particular, the Defence continues to argue that, because certain crimes and modes of liability applicable before the Court were allegedly not criminalised under other sources of law, "the only way" for Mr El Hishri to foresee prosecution for such conduct was to foresee prosecution before the Court, and that such foreseeability requires a narrow interpretation of the instrument conferring jurisdiction.³⁹ The Defence thus continues to treat the scope of the Court's jurisdiction – and the foreseeability of prosecution before the Court – as the relevant question under the principle of legality.

30. That, however, is not the question arising for determination in the present jurisdictional challenge. As the Chamber correctly observed, the issue was not whether Resolution 1970 was sufficiently 'precise' or ought to be interpreted narrowly enough

³⁴ *Idem*, paras. 27-28.

³⁵ See the Appeal, *supra* note 2, paras. 22-23.

³⁶ See the Challenge, *supra* note 9, para. 59.

³⁷ *Idem*, para. 60.

³⁸ See the Impugned Decision, *supra* note 3, para. 45.

³⁹ See the Appeal, *supra* note 2, para. 24.

to enable Mr El Hishri to foresee that the Court would exercise jurisdiction over his alleged conduct.⁴⁰ Rather, the question was whether he could reasonably have foreseen that his alleged conduct was criminal.⁴¹

31. The Chamber subsequently applied the foreseeability test by considering the crimes with which Mr El Hishri is charged,⁴² and by relying on several concrete factors weighing in favour of foreseeability, namely: (i) the generally customary character of the crimes codified in the Statute and the accessibility of the Statute as a public document;⁴³ (ii) Libya's adherence, by the relevant period, to several international instruments prohibiting the conduct in question under international humanitarian and human rights law;⁴⁴ (iii) the flagrantly unlawful nature of the material conduct alleged, such that its criminal character was foreseeable even absent specialised legal or military knowledge;⁴⁵ and (iv) the fact that Resolution 1970, itself a public document, had been adopted several years before the conduct alleged against Mr El Hishri.⁴⁶ On this basis, the Chamber concluded that it was reasonable for Mr El Hishri to foresee the criminality of his alleged conduct and its prosecution.⁴⁷

32. The Defence therefore fails to identify any error in the Chamber's approach or conclusion. Its disagreement with the Chamber's assessment, and its attempt to make the foreseeability of the Court's jurisdictional basis determinative of the legality analysis, does not establish an error of law or fact.

c) The Chamber correctly assessed the foreseeability of liability for conduct committed jointly with others

33. The Defence's third sub-ground rests, in part, on a mischaracterisation of the Impugned Decision. Contrary to its submission,⁴⁸ the Chamber did not find that the

⁴⁰ See the Impugned Decision, *supra* note 3, para. 45.

⁴¹ *Ibid.*

⁴² *Idem*, para. 46.

⁴³ *Idem*, para. 47.

⁴⁴ *Idem*, para. 48.

⁴⁵ *Idem*, para. 49.

⁴⁶ *Idem*, para. 50.

⁴⁷ *Idem*, para. 52.

⁴⁸ See the Appeal, *supra* note 2, para. 29.

specific mode of liability of indirect co-perpetration, as developed in the Court's jurisprudence, forms part of customary international law. Rather, the Chamber observed 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*".⁴⁹ The Defence thus attributes to the Chamber a finding that it did not make.

34. More fundamentally, the Defence's argument reproduces the same premise underlying its preceding sub-ground: that, unless the specific mode of liability charged against Mr El Hishri was independently established under Libyan law or customary international law, he could only have foreseen criminal prosecution if he could have anticipated that the Court would exercise jurisdiction over him.⁵⁰ This premise is fundamentally misplaced. The principle of legality does not require a suspect or an accused to have foreseen the precise legal provision or mode of liability through which responsibility for their conduct might subsequently be established. Rather, a suspect or an accused must be able to appreciate that the concrete conduct in question is criminal in the generally understood sense, without reference to any specific provision;⁵¹ where the wrongful nature of that conduct is such that it could not reasonably have been ignored, its criminal character is reasonably foreseeable for the purposes of the principle of legality.⁵²

35. As demonstrated *supra*,⁵³ the Chamber applied that standard to the crimes charged against Mr El Hishri and the nature of the alleged conduct, and identified several factors supporting the reasonable foreseeability of criminal prosecution. The Defence's reliance on the allegedly controversial customary status of indirect co-perpetration, as specifically developed in the Court's jurisprudence,⁵⁴ does not detract

⁴⁹ See the Impugned Decision, *supra* note 3, para. 47.

⁵⁰ See the Appeal, *supra* note 2, para. 30.

⁵¹ See ICTY, *The Prosecutor v. Hadžihasanović et al.*, "[Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility](#)" (Appeals Chamber), Case No. IT-01-47-AR72, 16 July 2003, para. 34.

⁵² See SCHABAS (W. A.), *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 74.

⁵³ See *supra* para. 31.

⁵⁴ See the Appeal, *supra* note 2, para. 29.

from that conclusion. Nor does it establish that Resolution 1970 must, as a consequence, be interpreted restrictively.

d) The Chamber correctly assessed the foreseeability of the residual crimes charged against Mr El Hishri

36. The Defence's fourth sub-ground rests on the same flawed premise addressed *supra*, this time in relation to the crimes against humanity of other inhumane acts and other forms of sexual violence, and the war crime of other forms of sexual violence. According to the Defence, because these specific crimes were allegedly not criminalised under any other source of domestic or international law applicable at the relevant time, Mr El Hishri could only have foreseen prosecution for the acts/conduct underlying these crimes if he could reasonably have foreseen that the Court would exercise jurisdiction over him.⁵⁵

37. This argument must likewise be rejected. As developed *supra*, the Defence's premise misconceives the applicable foreseeability test.⁵⁶ As correctly held by the Chamber, the relevant question is whether Mr El Hishri could reasonably have foreseen the criminal nature of the alleged conduct, not whether he could have foreseen prosecution before the Court.⁵⁷ Accordingly, the alleged absence of an independent domestic or international source criminalising the specific offences charged does not, in itself, require a restrictive interpretation of Resolution 1970.

38. In any event, the Chamber specifically addressed the residual crimes challenged by the Defence. It considered the nature and gravity of the alleged conduct and recalled that other inhumane acts under article 7(1)(k) of the Statute must be of a character similar to the enumerated acts and intentionally cause great suffering or serious injury, while other forms of sexual violence under article 7(1)(g) of the Statute must be comparable in gravity to forms of sexual violence expressly listed in the

⁵⁵ *Idem*, para. 32.

⁵⁶ See *supra* paras. 29-30, and 34.

⁵⁷ See the Impugned Decision, *supra* note 3, para. 45.

Statute.⁵⁸ Against this background, the Chamber found that the “*flagrantly unlawful nature of the alleged material conduct*” weighed, in itself, in favour of the reasonable foreseeability of criminal prosecution, and concluded that the crimes in question were ascertainable under the applicable law at the relevant time.⁵⁹

39. The Defence’s reliance on the alleged uncertainty surrounding the precise contours of these residual crimes therefore fails to establish any error in the Chamber’s legality analysis, still less to demonstrate that Resolution 1970 must be interpreted restrictively.

e) Conclusion on Ground of Appeal A

40. The Defence’s conclusion on Ground A rests entirely on the alleged errors advanced in the preceding sub-grounds.⁶⁰ For the reasons set out *supra*, none of those errors has been established. The Chamber neither misunderstood nor mischaracterised the Defence’s submissions on State consent or the principle of legality. Rather, it addressed those arguments within the applicable legal framework and correctly rejected the proposition that either principle requires Resolution 1970 to be interpreted restrictively.

41. Moreover, the Defence’s conclusion largely reiterates the submissions advanced in its Challenge – as the Defence itself recognises⁶¹ – and amounts to a mere disagreement with the Chamber’s reasoning and conclusions. Such disagreement is insufficient to establish an error of law or fact. In particular, the Defence has failed to demonstrate that the Chamber erred in its treatment of State consent, applied an incorrect foreseeability standard, or otherwise erred in concluding that the principle of legality does not require the restrictive interpretation advocated by the Defence. The Common Legal Representatives therefore submit that Ground of Appeal A should be dismissed.

⁵⁸ *Idem*, para. 49.

⁵⁹ *Ibid.*

⁶⁰ See the Appeal, *supra* note 2, paras. 33-34.

⁶¹ *Idem*, paras. 35, and 39.

2. The Chamber correctly found that the crimes alleged against Mr El Hishri are sufficiently linked to the situation referred by the UNSC in Resolution 1970

42. Under Ground B, the Defence submits that the Chamber erred in finding that a sufficient link existed between the crimes alleged against Mr El Hishri and the situation referred by the UNSC in Resolution 1970. According to the Defence, that finding follows, in part, from the Chamber's alleged failure under Ground A to interpret Resolution 1970 narrowly.⁶² As demonstrated *supra*,⁶³ however, no such error has been established. To that extent, the premise upon which the Defence seeks to connect Grounds A and B cannot be sustained.

43. The Defence nevertheless advances three further alleged errors concerning the Chamber's assessment of the sufficient link: (i) its evaluation of the evidence relevant to that determination;⁶⁴ (ii) the significance attributed to the Prosecution's reporting to, and the absence of objections from, the UNSC;⁶⁵ and (iii) its consideration of the subsequent practice of the UNSC and other UN organs.⁶⁶ The Common Legal Representatives submit that none of these sub-grounds establishes an error of law or fact.⁶⁷ As addressed in turn *infra*, the Defence identifies no basis for disturbing the Chamber's conclusion that a sufficient link exists between the crimes alleged against Mr El Hishri and the situation referred in Resolution 1970.

a) The Chamber considered the factual basis for the sufficient link and was not required to resolve every evidentiary dispute identified by the Defence

44. The Defence submits that the Chamber erred in law by declining to consider whether there was adequate evidence of a sufficient link between the crimes alleged

⁶² *Idem*, para. 40.

⁶³ See under title 1. The Chamber correctly interpreted the scope of UNSC referrals in light of the principles of legality and State consent.

⁶⁴ See the Appeal, *supra* note 2, paras. 41-51.

⁶⁵ *Idem*, paras. 52-55.

⁶⁶ *Idem*, paras. 56-75.

⁶⁷ The Common Legal Representatives note that the Defence characterises Ground B as an error of law and fact, whereas all three sub-grounds are characterised solely as errors of law.

against Mr El Hishri and the situation referred by Resolution 1970.⁶⁸ This submission mischaracterises the Impugned Decision. Indeed, the Chamber did not decline to consider whether the requisite link was supported by the evidence. Rather, having recalled and applied its previous findings concerning the continuing situation of crisis in Libya, the emergence and development of SDF/RADA, its connection to the GNA and Mitiga Prison, and the detention of persons for reasons related to the ongoing fighting and tensions, the Chamber concluded that those findings equally applied in the present case.⁶⁹ It reached that conclusion in light of the allegation that Mr El Hishri acted together with, *inter alia*, Mr Njeem and other members of the SDF/RADA leadership in the commission of crimes at Mitiga Prison.⁷⁰ Only thereafter did the Chamber decline to undertake a further assessment of the probative value of the specific items of evidence which the Defence characterised as inconsistent.⁷¹

45. Nor is the Defence correct to suggest that the Chamber's finding merely rested on untested Prosecution submissions. The findings recalled in the Impugned Decision had previously been made in the *Njeem* proceedings on the basis of a substantial evidentiary record (the "*Njeem* Arrest Warrant").⁷² In particular, the Chamber relied on information contained in reports of the UN Support Mission in Libya and the Independent Fact-Finding Mission on Libya concluding that the situation of turmoil originating in 2011 had continued until at least October 2024.⁷³ It also considered evidence concerning the origins of SDF/RADA, its participation in events at Mitiga airbase, the subsequent establishment of detention facilities there, its affiliation with, and recognition by, the GNA, and the status of Mitiga Prison.⁷⁴ Further, the Chamber relied on evidence indicating that at least some persons detained at Mitiga were held for reasons related to fighting or tensions between groups involved in the ongoing

⁶⁸ See the Appeal, *supra* note 2, para. 41.

⁶⁹ See the Impugned Decision, *supra* note 3, paras. 38-40.

⁷⁰ *Idem*, para. 40.

⁷¹ *Ibid.*

⁷² See the "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" (Pre-Trial Chamber I), [No. ICC-01/11-152-Anx](#), 18 January 2025 (the "*Njeem* Arrest Warrant").

⁷³ *Idem*, para. 6.

⁷⁴ *Idem*, paras. 7-8.

situation of crisis.⁷⁵ These were therefore judicial findings reached on the basis of evidentiary material before the Chamber. The fact that the underlying material was submitted by the Prosecution in the context of article 58 proceedings does not render these findings mere untested Prosecution submissions.

46. The fact that the *Njeem* proceedings were conducted without adversarial Defence submissions⁷⁶ does not alter the existence or nature of the evidentiary material on which those findings were based. Nor did it require the Chamber, in the present jurisdictional challenge, to disregard those findings and revisit the underlying factual record *de novo*. The Common Legal Representatives do not, however, suggest that the findings in *Njeem* were binding upon Mr El Hishri or immune from challenge. To the contrary, the *Njeem* Arrest Warrant expressly stated that its jurisdictional findings were without prejudice to any future challenge under article 19 of the Statute.⁷⁷ The relevant question is therefore not whether those findings were open to challenge, but whether the alleged inconsistencies identified by the Defence in certain items of evidence concerning the historical relationship between SDF/RADA and groups active during the 2011 revolution⁷⁸ required the Chamber, as a matter of law, to undertake the comprehensive evidentiary reassessment now advocated on appeal.

47. In the view of the Common Legal Representatives, the Defence has not established such a requirement. Its reliance on the *Mbarushimana* findings⁷⁹ demonstrates, at most, that a chamber may examine evidence where factual questions are relevant to determining the scope of the situation referred to the Court. It does not establish that every jurisdictional challenge requires a chamber to resolve every contested evidentiary proposition advanced by the challenging party. As the Defence itself acknowledges, the Chamber in *Mbarushimana* examined contemporaneous and subsequent communications in order to determine the territorial scope and intended

⁷⁵ *Idem*, para. 9.

⁷⁶ See the Appeal, *supra* note 2, para. 43.

⁷⁷ See the *Njeem* Arrest Warrant, *supra* note 72, para. 13.

⁷⁸ See the Challenge, *supra* note 9, paras. 73-80.

⁷⁹ See the Appeal, *supra* note 2, para. 45.

effect of an article 12(3) declaration.⁸⁰ The fact that, in those distinct circumstances, the relevant chamber undertook a more extensive factual examination does not establish that the Chamber in the present case erred in law by relying on existing, evidence-based, findings concerning the same Libyan situation and the same organisational and institutional context.

48. In any event, the Defence places undue weight on the disputed question of SDF/RADA's precise organisational lineage.⁸¹ The Chamber's finding of a sufficient link did not depend exclusively on establishing that SDF/RADA was the direct organisational continuation of a particular armed group active against the Gaddafi regime in 2011.⁸² Rather, the Chamber relied on a broader set of factors, including the continuation and evolution of the Libyan crisis after 2011, SDF/RADA's emergence in its aftermath, its subsequent affiliation with, and recognition by, the GNA, the institutional development of Mitiga Prison, and the detention there of persons for reasons connected with the fighting and tensions between groups involved in that continuing crisis.⁸³ Significantly, the Defence itself acknowledged in its Challenge that, even if a direct organisational connection to groups active during the revolution could not be established, "*other factors [could] tie [the alleged crimes] to the situation of crisis*".⁸⁴

49. Against this broader factual background, the Chamber was entitled to conclude that its previous findings in the *Njeem* Arrest Warrant applied to the case against Mr El Hishri. The present case concerns alleged crimes committed at the same detention facility, within the same organisational structure, during an overlapping period, and allegedly together with Mr Njeem and other members of the SDF/RADA leadership.⁸⁵ The Chamber therefore did not, as the Defence contends, decline to consider whether the requisite link was adequately supported by the evidence. It considered the factual

⁸⁰ *Ibid.*

⁸¹ *Idem*, paras. 43, 46, and 50-51.

⁸² See the Impugned Decision, *supra* note 3, para. 39; and the *Njeem* Arrest Warrant, *supra* note 72, para. 7.

⁸³ See the Impugned Decision, *supra* note 3, paras. 38-40; and the *Njeem* Arrest Warrant, *supra* note 72, paras. 5-9.

⁸⁴ See the Challenge, *supra* note 9, para. 80.

⁸⁵ See the Impugned Decision, *supra* note 3, para. 40.

basis for said link and declined only to determine, in the Impugned Decision, the probative value of specific evidence which the Defence alleged to be inconsistent.⁸⁶ The Common Legal Representatives therefore submit that the Defence has failed to demonstrate either that the Chamber's approach constituted an error of law, or that the resolution of the particular evidentiary issues it identifies could have altered the Chamber's conclusion that the alleged crimes fall within the scope of Resolution 1970.

b) The Chamber correctly considered the practice of the UNSC and other UN organs in interpreting and applying Resolution 1970

50. Given that the Defence's second and third sub-grounds challenge closely related aspects of the Chamber's consideration of the practice subsequent to the adoption of Resolution 1970, the Common Legal Representatives address them together. The Defence submits, first, that the Chamber treated either the Prosecution's continued reporting to the UNSC or the absence of objections by the UNSC as determinative of the Court's jurisdiction,⁸⁷ and, second, that it attributed undue interpretative weight to the subsequent practice of the UNSC and other UN organs.⁸⁸ Both arguments mischaracterise the Chamber's reasoning and overstate the significance which the Chamber attached to these considerations.

51. Contrary to the Defence's reading of paragraph 34 of the Impugned Decision,⁸⁹ the Chamber did not find that the Prosecution could establish the Court's jurisdiction through its own reporting, nor that the UNSC's failure to object constituted an authoritative or determinative interpretation of Resolution 1970. Rather, the Chamber expressly described the Prosecution's continued reporting, and the absence of objections thereto, merely as "*another indication*" of the Court's ongoing jurisdiction over crimes committed in the context of the ongoing crisis in Libya.⁹⁰ Likewise, in considering the broader body of subsequent practice, the Chamber characterised the

⁸⁶ *Ibid.*

⁸⁷ See the Appeal, *supra* note 2, paras. 52-55.

⁸⁸ *Idem*, paras. 56-75.

⁸⁹ *Idem*, paras. 53-55.

⁹⁰ See the Impugned Decision, *supra* note 3, para. 34.

numerous statements, reports and resolutions as “*yet another indication*” supporting its finding that crimes other than those committed specifically in the context of the fall of the Gaddafi regime may nevertheless be sufficiently linked to the situation of crisis that triggered Resolution 1970.⁹¹ The Defence therefore seeks to ascribe determinative significance to matters which the Chamber expressly treated only as supporting indications.

52. In particular, the Chamber did not treat the Prosecution’s reporting as capable of determining the Court’s jurisdiction. Rather, its relevance lay in the *continuous* practice, across successive reporting cycles pursuant to Resolution 1970, of informing the UNSC of investigations and proceedings concerning later phases of the Libyan crisis.⁹² Most recently, the Prosecution reported to the UNSC on its investigations concerning crimes committed in Libya between 2014 and 2020 and on the progress of the proceedings against Mr El Hishri.⁹³ The Chamber referred to this continuing practice, together with the absence of objections from the UNSC, only as an additional indication supporting its assessment.⁹⁴ It did not regard either the Prosecution’s reporting or the Council’s silence as independently capable of establishing or expanding the Court’s jurisdiction.

53. The Defence’s arguments concerning the interpretative value of subsequent practice likewise overstate the weight the Chamber attributed to such practice. Although the Defence contends that only the UNSC can provide an authoritative interpretation of Resolution 1970 and that the practice of other UN organs has, at most, limited interpretative value,⁹⁵ the Chamber did not treat the practice before it as authoritative. Rather, it considered this practice as relevant material supporting its interpretation and assessment of the continuing application of Resolution 1970.⁹⁶

⁹¹ *Idem*, para. 35.

⁹² *Idem*, para. 34.

⁹³ See the “[Statement of Deputy Prosecutor Nazhat Shameem Khan to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 \(2011\)](#)”, 22 May 2026.

⁹⁴ See the Impugned Decision, *supra* note 3, para. 34.

⁹⁵ See the Appeal, *supra* note 2, paras. 57-62, and 75.

⁹⁶ See the Impugned Decision, *supra* note 3, paras. 33-35.

Significantly, the Defence itself accepts that the subsequent practice of relevant UN organs may, depending on the circumstances, assist in the interpretation of a UNSC resolution and, at a minimum, may constitute a supplementary source of interpretation.⁹⁷ Said concession substantially undermines the Defence's challenge: its objection is ultimately not to the Chamber's consideration of subsequent practice as such, but to the weight assigned to this practice in the circumstances of the present case. Said disagreement, without more, does not establish an error of law.

54. Nor does the Defence's reliance on isolated references in particular reports of the UN Secretary General⁹⁸ undermine the Chamber's reasoning. The Chamber did not rely upon those references in isolation. Rather, it assessed a broader body of material comprising not only such reports, but also successive UNSC resolutions, statements by members of the UNSC, and reports and resolutions of the Human Rights Council, referring, *inter alia*, to the continuing instability and armed conflict in Libya, the activities of armed groups, the treatment of detainees, including at Mitiga Prison, and activities of SDF/RADA affecting civilians.⁹⁹ Considered cumulatively, this material support the Chamber's conclusion that the situation of crisis which gave rise to Resolution 1970 continued beyond the fall of the Gaddafi regime and that the crimes alleged against Mr El Hishri are sufficiently linked to that situation.¹⁰⁰ The Defence's selective focus on individual references therefore does not undermine the Chamber's assessment of the evidentiary record as a whole.

55. Similarly, the Defence's submissions concerning the UNSC's subsequent practice misconstrue the significance attributed to said practice by the Chamber.¹⁰¹ Again, the Chamber considered that practice as one element within a broader body of material supporting its conclusion.¹⁰² It did not treat it as constituting an authoritative interpretation of Resolution 1970. Accordingly, the Defence's contention that such an

⁹⁷ See the Appeal, *supra* note 2, paras. 58-59, and 62.

⁹⁸ *Idem*, paras. 63-67.

⁹⁹ See the Impugned Decision, *supra* note 3, para. 33.

¹⁰⁰ *Idem*, paras. 33-35, and 37-40.

¹⁰¹ See the Appeal, *supra* note 2, paras. 68-70.

¹⁰² See the Impugned Decision, *supra* note 3, para. 33.

interpretation would require relevant references in the operative provisions of subsequent UNSC resolutions¹⁰³ proceeds from a premise the Chamber did not adopt. It therefore fails to establish the error alleged.

56. Equally unpersuasive is the Defence's argument that the Chamber conflated the UNSC's use of the word 'situation' in Resolution 2819 with the term 'situation' under the Statute.¹⁰⁴ The Chamber relied on Resolution 2819 solely as confirmation that Resolution 1970 remains in force. It did not rely upon Resolution 2819 to define the jurisdictional parameters of the situation referred to the Court.¹⁰⁵ These parameters, and whether the present case falls within them, were addressed separately by the Chamber on the basis of Resolution 1970 and the applicable legal framework.¹⁰⁶

57. Hence, the Defence has failed to demonstrate that the Chamber attributed undue significance to the Prosecution's reporting, the absence of objections by the UNSC, or the subsequent practice of the UNSC and other UN organs. The Chamber considered these matters in its cumulative assessment and treated them as supporting indications corroborating its conclusion. The Defence's disagreement with the relevance or weight attributed to these considerations does not establish any error of law.

c) Conclusion on Ground of Appeal B

58. In its conclusion, the Defence reiterates the alleged errors advanced under its three sub-grounds and submits that, absent those errors, the Chamber could only have found that the crimes alleged against Mr El Hishri are insufficiently linked to the situation referred by Resolution 1970.¹⁰⁷ As demonstrated *supra*, the Defence has established none of those errors. Nor has it substantiated the premise underlying its conclusion, namely that the situation of crisis referred by Resolution 1970 was confined

¹⁰³ See the Appeal, *supra* note 2, para. 68.

¹⁰⁴ *Idem*, paras. 71-74.

¹⁰⁵ See the Impugned Decision, *supra* note 3, para. 42.

¹⁰⁶ *Idem*, paras. 37-40, and 42.

¹⁰⁷ See the Appeal, *supra* note 2, paras. 76-77.

to the events surrounding the fall of the Gaddafi regime.¹⁰⁸ The Defence's disagreement with the Chamber's assessment of the sufficient link, and with the relevance and weight of the material supporting that evaluation, does not establish an error of law. The Common Legal Representatives therefore submit that Ground of Appeal B should be dismissed.

3. The Defence's request for an oral hearing

59. Finally, the Common Legal Representatives oppose the Defence's request for an oral hearing.¹⁰⁹ Pursuant to rule 156(3) of the Rules of Procedure and Evidence, "*appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing*".¹¹⁰ The Appeals Chamber has held that the decision whether to convene a hearing falls within its discretion and requires the parties to provide "*cogent reasons*" justifying such a departure from the ordinary written procedure.¹¹¹

60. The Defence has failed to identify such cogent reasons. It was granted leave to extend its Appeal from 20 to 35 pages and has had therefore ample opportunity to present its arguments in writing.¹¹² In comparable circumstances, the Appeals Chamber has considered extensive written submissions sufficient for its determination, notwithstanding the novelty and complexity of the issues raised.¹¹³ Nor does the Defence's reliance on the principles of public and transparent administration of justice warrant a different conclusion.¹¹⁴ The submissions of the parties and participants are public, thereby ensuring that the issues before the Appeals Chamber are addressed through transparent proceedings. The Defence has not demonstrated

¹⁰⁸ *Idem*, para. 78.

¹⁰⁹ *Idem*, paras. 79-83.

¹¹⁰ See rule 156(3) of the [Rules of Procedure and Evidence](#).

¹¹¹ See the "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'" (Appeals Chamber), [No. ICC-01/09-01/11-2024 OA10](#), 12 February 2016, para. 16.

¹¹² See *supra* para. 17.

¹¹³ See the "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", *supra* note 111, para. 17.

¹¹⁴ See the Appeal, *supra* note 2, paras. 79, and 82-83.

any compelling basis for departing from the default written procedure prescribed by rule 156(3) of the Rules. The Common Legal Representatives therefore ask that the Defence's request for an oral hearing be rejected.

IV. CONCLUSION

61. In light of the foregoing, the Common Legal Representatives respectfully request the Appeals Chamber to reject the Defence's request for an oral hearing, dismiss the Appeal in its entirety, and confirm the Impugned Decision.



Sarah Pellet



Paolina Massidda

Dated this 18th day of September 2026

At The Hague, The Netherlands