

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/25

Date: 24 September 2026

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

PUBLIC

Defence consolidated request for leave to reply to (1) 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-01/11-01/25-186) and (2) Prosecution response to “Appeal Brief against ‘Decision on the Defence’s challenge to the jurisdiction of the Court pursuant to Article 19 of the Statute’” (ICC-01/11-01/25-188)

Source: Defence for Mr Khaled Mohamed Ali El Hishri

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☒ States' Representatives

The State of Libya

☐ Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. Pursuant to Regulations 24 and 34 of the Regulations of the Court ("RoC"), the Defence for Mr El Hishri ("Defence" and "Appellant", respectively) files this consolidated request for leave to reply to the *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'"* ("Victims' Observations")¹ and the *Prosecution response to "Appeal Brief against 'Decision on the Defence's challenge to the jurisdiction of the Court pursuant to Article 19 of the Statute'"* ("Prosecution Response").²

II. PROCEDURAL HISTORY

2. On 26 February 2011, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, by Resolution 1970 referred the situation in Libya since 15 February 2011 to the Court, in accordance with article 13(b) of the Statute.³

3. On 30 April 2026, the Defence submitted its *Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute* ("Jurisdiction Challenge").⁴

4. On 15 July 2026, Pre-Trial Chamber I ("PTC") issued its *Decision on the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute* ("Impugned Decision"), along with Judge Maria del Socorro Flores Liera's concurrent Separate Opinion by which she did not find that the Court had jurisdiction on the basis of the Security Council referral.⁵

5. On 28 August 2026, the Defence filed its *Appeal Brief against "Decision on the Defence's*

¹ ICC-01/11-01/25-186

² ICC-01/11-01/25-188

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

⁴ Defence Challenge to Jurisdiction of the International Criminal Court Pursuant to Article 19 of the Rome Statute, ICC-01/11-01/25-108-Conf-Cor, 6 May 2026

⁵ Decision on the Defence's challenge to the jurisdiction of the Court pursuant to article 19 of the Statute, ICC-01/11-01/25-142, 15 July 2026

challenge to the jurisdiction of the Court pursuant to article 19 of the Statute ("Appeal").⁶

6. On 18 September 2026, the Common Legal Representatives of Victims ("CLRV") filed the Victims' Observations.⁷

7. On 22 September 2026, the Prosecution filed the Prosecution Response.⁸

III. APPLICABLE LAW

8. Pursuant to Regulation 24(5) of the RoC, "[p]articipants may only reply to a response with the leave of the Chamber." Such a reply must, "[u]nless otherwise permitted by the Chamber, [...] be limited to new issues raised in the response which the replying participant could not reasonably have anticipated."⁹

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

IV. SUBMISSIONS

10. Firstly, in response to the Defence's challenges to the interpretation and interpretive value of subsequent practice of the UN as relied upon by the PTC in the Impugned Decision to interpret Resolution 1970,¹⁰ both the CLRV and the Prosecution argue that the PTC did not, in fact, rely (or at least not solely) on UN practice.¹¹ This unanticipated reading of the Impugned Decision raises the novel question of which materials the PTC *did* in fact rely upon for its interpretation if not the UN practice that it cited and that the Defence has challenged. This question is not only novel and unanticipated but also a key element of the Impugned Decision. If the PTC relied wholly or even partly on

⁶ ICC-01/11-01/25-175.

⁷ ICC-01/11-01/25-186.

⁸ ICC-01/11-01/25-188.

⁹ Regulations of the Court, regulation 24(5).

¹⁰ This includes UNSC Resolutions, UN Secretary-General Reports, and UNSC silence in response to Prosecution reporting.

¹¹ ICC-01/11-01/25-186, paras 51, 55; ICC-01/11-01/25-188, para. 73.

materials that do not stand up to scrutiny in terms of the interpretation and interpretative value accorded them, its ultimate interpretation of Resolution 1970 cannot itself survive scrutiny. The Defence seeks leave to reply to the Prosecution's unanticipated arguments, which go to the heart of the jurisdiction challenge.

11. Secondly, in paragraphs 20 to 22 of its Response, the Prosecution for the first time makes an argument based on the Jurisdiction Appeals Decision in *Duterte* that a State Party and a State whose situation is referred by the Security Council are in the same situation as regards the ability to withdraw their consent to jurisdiction. If granted leave, the Defence will advance arguments – for the first time – on this novel interpretation of the Jurisdiction Appeals Decision in *Duterte* and the argument that continued jurisdiction for acts that occurred when an erstwhile State Party was a State Party is functionally equivalent to jurisdiction over a non-State Party for acts referred by the Security Council with no clear connection to the initial situation that triggered jurisdiction by way of the referral. This question is key to the essential role of State consent in the establishment of international jurisdiction and, therefore, the appropriate interpretation of international instruments establishing such jurisdiction such as Resolution 1970.

12. Thirdly, in paragraph 52 of their Response, the Prosecution appears to import a novel “objective parameters” test of Resolution 1970 that was not included in the Impugned Decision. The Prosecution states that, in addition to geographic, temporal, and personal parameters of the situation referred in Resolution 1970, another “objective parameter” is that the “relevant events [...] were ‘associated’ with the serious armed conflict that commenced in Libya in 2011.”¹² Contrary to the statements made in footnote 132 of the Response, this specific parameter is not “consistent with the Majority’s approach” and is instead an entirely different interpretation of Resolution 1970 to that given in the Impugned Decision and, therefore, could not reasonably have

¹² ICC-01/11-01/25-188, para. 52.

been anticipated by the Defence.

13. It is also not a minor or irrelevant divergence. The interpretation of Resolution 1970 is key to the question of jurisdiction and the standard that the alleged crimes “were ‘associated’ with the serious armed conflict that commenced in Libya in 2011” is a lower standard than the standard of “sufficiently linked to the situation of crisis that triggered the jurisdiction of the Court” that has been established in the Court’s consistent jurisprudence.¹³ If granted leave to reply, the Defence will make submissions on why the standard unilaterally introduced by the Prosecution is improper and how the Prosecution’s need to introduce it indicates the inadequacy and erroneous nature of the Impugned Decision.

V. CONCLUSION

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

¹³ *Njeem*, Corrected version of the ‘Warrant of Arrest’, ICC-01/11-152-Anx, 18 January 2025, para. 4; *Al Lahsa*, Warrant of Arrest, ICC-01/11-141-Anx3, 6 April 2023, para. 13; *Al Shaqaqi*, Warrant of Arrest, ICC-01/11-141-Anx5, 18 July 2023, para. 13; *Al Zinkal*, Warrant of Arrest, ICC-01/11-141-Anx6, 18 July 2023, para. 13; *Doumah*, Warrant of Arrest, ICC-01/11-141-Anx2, 6 April 2023, para. 13; *Salheen*, Warrant of Arrest, ICC-01/11-141-Anx4, 6 April 2023, para. 13; *Al Kani*, Warrant of Arrest, ICC-01/11-141-Anx1, 6 April 2023, para. 13; *Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/10-1, 28 September 2010, para. 6.

Respectfully submitted,

A handwritten signature in black ink, reading "Yasser Hassan". The signature is fluid and cursive, with the first name "Yasser" and last name "Hassan" clearly distinguishable. It is positioned above a horizontal line.

Yasser Hassan

Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 24 September 2026

at The Hague, The Netherlands