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Court

Original: **English** | No.**: ICC-01/11-01/25**
Date: **22 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 EL HISHRI

Public

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-01/11-01/25-142)'"

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CONTENTS

INTRODUCTION

1. Pursuant to the fourteenth warrant to be issued publicly in the *Situation in Libya*, Mr El Hishri was surrendered to the Court on 1 December 2025. He is charged with numerous article 5 crimes committed over a period of more than six years, harming thousands of victims. His criminal responsibility centres on his personal conduct and significant authority in the running of Mitiga Prison in Tripoli, Libya, from 2014 to 2020. The prison was controlled by SDF/RADA, a group which assumed critical power and autonomy within Tripoli and other parts of western Libya as a consequence of the security vacuum and pervasive violence resulting from the overthrow of Muammar Gaddafi in 2011.

2. It was in this context that Mr El Hishri sought to challenge the Court's exercise of jurisdiction over his case. Specifically, before Pre-Trial Chamber I, he argued that the case falls beyond the scope of the *Situation in Libya* because in his view: (i) it exceeds the scope of the situation referred to the Court by the UN Security Council pursuant to UN Security Council Resolution 1970 ("UNSCR 1970"), also having regard to the principle of legality, and; (ii) Libya's further declaration accepting the jurisdiction of the Court *ad hoc* ("Article 12(3) Declaration") is invalid.

3. Mr El Hishri's jurisdictional challenge was rejected by Pre-Trial Chamber I. It affirmed that there is a "sufficient link between the alleged crimes committed by Mr El Hishri and the situation of crisis that triggered [UNSCR] 1970."[1] Judge Flores Liera appended a separate opinion, concurring in the result, but relying on the Article 12(3) Declaration rather than UNSCR 1970.[2] Subsequently, the Chamber unanimously confirmed the charges and committed Mr El Hishri for trial,[3] which will start on 4 May 2027.[4] This will be the first trial at the Court concerning the serious crimes which have allegedly been committed in Libya.

SUBMISSIONS

4. Mr El Hishri's appeal against the Chamber's decision affirming the Court's exercise of jurisdiction over this case should be dismissed.[5] Contrary to Mr El Hishri's claims, the majority of the Chamber ("Majority") correctly interpreted UNSCR 1970. Hence, it correctly found that the Court is properly exercising jurisdiction over this case within the scope of the *Situation in*

[1] *See* ICC-01/11-01/25-142 ("Decision"), *especially* paras. 22, 42, and Disposition.
[2] *See* ICC-01/11-01/25-142-OPI ("Separate Opinion").
[3] *See* ICC-01/11-01/25-143 ("Confirmation Decision").
[4] *See* ICC-01/11-01/25-183 ("Trial Date Decision").
[5] *Contra* ICC-01/11-01/25-175 OA2 ("Appeal"), para. 84 (the Prosecution notes that this is erroneously marked, on p. 35, as "81").

Libya. Likewise, the Chamber correctly applied the principle of legality to the crimes and forms of responsibility with which Mr El Hishri is charged. These are well established not only under the Statute but also under other applicable sources of law.

5. While the Article 12(3) Declaration represents a significant mark of Libya's support for the Court, and its exercise of jurisdiction, it was not legally required either for the purpose of this case or any other case already initiated in the situation. It was not the basis of the Majority's reasoning in the Decision, and none of the grounds of appeal advanced by Mr El Hishri relate to the Article 12(3) Declaration. Consequently, the Appeals Chamber should disregard the annexes to the Appeal, in which Mr El Hishri attaches a purported "recent decision of the Tripoli Court of Appeal concerning its view of the validity under Libyan law of the Article 12(3) Declaration.[6] This is irrelevant to the present appeal proceedings.

I. THE MAJORITY CORRECTLY REJECTED MR EL HISHRI'S 'A PRIORI' CLAIM THAT UN SECURITY COUNCIL RESOLUTIONS MUST BE INTERPRETED NARROWLY

6. In the Decision, all members of the Chamber sought to interpret UNSCR 1970 correctly. The Majority duly recalled that legally binding UN Security Council resolutions[7] are, in the words of the International Court of Justice ("ICJ"), "drafted through a very different process than that used for the conclusion of a treaty" and "the product of a voting process" among the members of the UN Security Council.[8]

7. Consequently, while the rules on treaty interpretation "may provide guidance" in interpreting UN Security Council resolutions, a "broader assessment" may be required taking account "not only of the resolution itself but also relevant statements made by UNSC members at the time of the adoption, other resolutions on the same issue, and the subsequent practice of relevant UN organs and affected States."[9]

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[6] *Contra* Appeal, para. 2 (fn. 1). *See* Annexes I-II. *See also* Separate Opinion, para. 15 (noting the "irrelevance of arguments premised on national law" concerning the Article 12(3) Declaration).

[7] Decision, paras. 24-25 (further recalling that, while States "can only be subjected to international legal obligations to which they have consented", consent to be bound by resolutions adopted under chapter VII of the UN Charter "is given by the State when it ratifies [the Charter]"). *See also* para. 26.

[8] Decision, para. 24 (quoting ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403 ("*Kosovo* Advisory Opinion"), para. 94). *See also* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16 ("*Namibia* Advisory Opinion"), para. 114.

[9] Decision, para. 30 (also quoting the ICJ: "the 'differences between [UNSC] resolutions and treaties mean that the interpretation of [the former] also require that other factors be taken into account": *Kosovo* Advisory Opinion, para. 94). *See also* para. 29 (quoting "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under article

8. The Majority acted according to these principles. Having set out the relevant operative paragraphs of UNSCR 1970,[10] it then considered the factual circumstances which had necessitated the action of the UN Security Council as set out in the preamble.[11] Thereafter, it considered: the practice of the UN Security Council and other relevant UN organs since the adoption of UNSCR 1970,[12] the practice of the Court itself,[13] and reliable factual information showing that "a situation of turmoil has been ongoing" in Libya since UNSCR 1970.[14]

9. On this basis, the Majority concluded that the Court may exercise jurisdiction over "crimes […] other than those specifically committed in the context of the fall of the regime of Muammar […] Gaddafi"[15] because, "after its fall, the fighting and civil unrest continued in Libya".[16] The Majority further found that SDF/RADA "emerged as a result of the 2011 crisis" which triggered UNSCR 1970, and its aftermath.[17] In this context, the Majority was "satisfied that the crimes allegedly committed by Mr El Hishri […] fall within the scope of [UNSCR 1970]."[18] It correctly rejected the Defence assertion that such an interpretation of UNSCR 1970 created any "risk of 'perpetual jurisdiction'" by the Court. This was because "the scope of a situation is defined by objective parameters which are discerned from the referral" and, in the present case (in the words of the Majority), there is at least a "sufficient link between the alleged crimes […] and the situation of crisis that triggered [UNSCR] 1970."[19]

25 of the UN Charter, the question whether they have in fact been exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution": *Namibia* Advisory Opinion, para. 114).
[10] *See* Decision, para. 27.
[11] *See* Decision, para. 31.
[12] *See* Decision, para. 33. *See also* para. 35 (rejecting the Defence claim that such practice has "'no relevance' to the question of the Court's jurisdiction", and reiterating that "these numerous statements, reports and resolutions constitute yet another indication" supporting the Majority's conclusion).
[13] *See* Decision, paras. 34, 38. The Majority specifically referred to its own previous findings (*see e.g.* ICC-01/11-152-Anx ("Arrest Warrant for Osama Elmasry / Almasri Njeem"), paras. 5-6), which were in turn consistent with the approach of other former benches of the Chamber: *see e.g.* ICC-01/11-141-Anx1 ("Arrest Warrant for Abdulrahem Elshgagi a.k.a. Al Kani"), para. 7; ICC-01/11-141-Anx2 ("Arrest Warrant for Makhlouf Douma"), para. 7; ICC-01/11-141-Anx3 ("Arrest Warrant for Nasser Al Lahsa"), para. 7; ICC-01/11-141-Anx4 ("Arrest Warrant for Mohamed Salheen"), para. 7; ICC-01/11-141-Anx5 ("Arrest Warrant for Abdelbari Al Shaqaqi"), para. 7; ICC-01/11-141-Anx6 ("Arrest Warrant for Fathi Al Zinkal"), para. 7; ICC-01/11-01/20-26-Anx ("Arrest Warrant for Saif Suleiman Sneidel"), para. 4; ICC-01/11-01/17-13 ("Second Arrest Warrant for Mahmoud Al Werfalli"), para. 20; ICC-01/11-01/17-2 ("First Arrest Warrant for Mahmoud Al-Werfalli"), para. 23.
[14] *See* Decision, para. 34 (referring, for example, to reports of UMSMIL and the Independent Fact-Finding Mission in Libya).
[15] Decision, para. 35.
[16] Decision, para. 38 (further observing, in particular, that the intense violence which developed between "the 'Libyan National Army'" under Khalifa Haftar, based in Benghazi, and the "'Government of National Accord'", based in Tripoli, "'amplified the existing proxy conflict that took shape after 2011").
[17] Decision, para. 39.
[18] Decision, para. 40.
[19] Decision, para. 42. *See further below* paras. 51-52.

10. Judge Flores Liera, in her Separate Opinion, respectfully disagreed with the Majority on the outcome of the interpretive exercise concerning UNSCR 1970. Instead, she would have affirmed the Court's jurisdiction pursuant to the Article 12(3) Declaration.[20] While the Decision acknowledges that "the analysis contained in paragraphs 23 to 42 […] reflect the views of the Majority only and not Judge Flores Liera's views",[21] she did not apparently dissent from the core interpretive principles set out by the Chamber (such as those stated by the ICJ in the *Kosovo* and *Namibia* Advisory Opinions). Rather, Judge Flores Liera reached a different *conclusion* from those principles. She concluded that, "[b]ased on the applicable legal framework, the wording of [UNSCR 1970] and the context in which it was issued, […] the events underlying the allegations are 'not related to those that triggered the referral by the Security Council'."[22] The key difference between Judge Flores Liera and the Majority thus appears to lie in the relative weight given to the various relevant considerations, and especially the significance of the subsequent practice before the UN Security Council.[23]

11. In his first ground of appeal, Mr El Hishri primarily addresses the *methodological* question of whether the Court must adopt, *a priori*, a "narrow interpretation of UNSC referral resolutions" based on the principle of State consent and the principle of legality.[24] He claims that the Majority misunderstood or mischaracterised his arguments.[25] Mr El Hishri also alleges the whole Chamber erred by rejecting his claims concerning the application of the principle of legality to the mode of liability of indirect co-perpetration and certain charged crimes.[26]

12. The first ground of appeal should be dismissed in its entirety. As set out further below, the Majority correctly interpreted UNSCR 1970 in accordance with international law. This does

[20] *See* Separate Opinion, paras. 5 (concluding that the Article 12(3) Declaration "removed" any "jurisdictional obstacle"), 8-20 (rejecting as "not persuasive" the Defence arguments that "the Article 12(3) Declaration would be invalid because of formal and substantive defects").
[21] Decision, para. 22.
[22] Separate Opinion, para. 2 (citing ICC-01/11-152-Anx ("Arrest Warrant for Osama Elmasry / Almasri Njeem"), Dissenting Opinion, paras. 5-6). *See also* para. 3 ("In the same Dissenting Opinion, I had also indicated that it might have been 'factually correct that a situation of turmoil ha[d] been ongoing since [UNSCR 1970]', while clarifying that this factual continuity 'did not automatically establish a sufficient link between the criminal allegations put forward by the Prosecutor and the situation as it was originally referred'"). *See further* Arrest Warrant for Osama Elmasry / Almasri Njeem, Dissenting Opinion, paras. 5-6 (explaining Judge Flores Liera's interpretation of UNSCR 1970 as referring to the Court only a situation defined by "the actions by the Gaddafi regime against its own civilian population; acts that may have amounted to crimes against humanity"). Furthermore, Judge Flores Liera expressly joined with the Majority "concerning the application of the principle of legality": *see* Decision, para. 43 (fn. 66).
[23] *See e.g.* Separate Opinion, para. 2 ("The fact that the UNSC continues to recall [UNSCR 1970] does not affect the scope of the jurisdiction of the Court under Resolution 1970, neither does it imply a modification of its terms"). *See further* Arrest Warrant for Osama Elmasry / Almasri Njeem, Dissenting Opinion, paras. 14-15.
[24] Appeal, paras. 18, 33.
[25] *See* Appeal, paras. 5, 19-27, 33-36, 38-39. *See further below* paras. 13-31.
[26] *See* Appeal, paras. 5, 28-32, 37-39. *See further below* paras. 32-47.

not impose any *a priori* rule that UN Security Council resolutions must be interpreted "narrowly". Rather, the proper object of the exercise is simply to discern the view of the UN Security Council as a body.[27] This need not always equate to the *narrowest* possible interpretation. This would mistake the nature of UN Security Council resolutions, which are of an "essentially political nature" and thus unlike a national criminal law or even a treaty.[28] It would also mistake the object and purpose of such resolutions, which is to ensure that Member States take the measures required in the interest of international peace and security. This does not violate the principle of State consent, since (as recalled in the Decision) UN Member States directly consented to the UN Security Council's "'specific but powerful role'" in this regard.[29]

I.A. The Majority properly addressed the Defence arguments concerning the validity of UNSCR 1970 and the principle of legality

13. In seeking to show that the Chamber should have adopted *a priori* a "narrow" interpretation of UNSCR 1970, Mr El Hishri first argues that the Majority misunderstood or mischaracterised his arguments in two respects: concerning the principle of State consent and concerning the principle of legality.[30] Mr El Hishri shows no error materially affecting the Decision in either respect.[31]

I.A.1. The principle of State consent does not oblige a narrow reading of UNSCR 1970

14. Mr El Hishri had argued before the Pre-Trial Chamber that a resolution of the UN Security Council under chapter VII of the UN Charter "must fall within the scope of what the State

[27] *See* Decision, para. 34 (quoting *Kosovo* Advisory Opinion, para. 94: "the final text of such resolutions represents the view of the Security Council as a body").
[28] M. Wood, 'The interpretation of Security Council resolutions, revisited,' [2017] 20(1) *Max Planck Yearbook of United Nations Law* 1 ("Wood"), p. 5 (observing that, consequently, and in general, "less importance should attach to the minutiae of language" when interpreting UN Security Council resolutions). *See further* pp. 11-13 ("There is no equivalent, within the United Nations, of the legislative draftsmen to be found in national systems; nor is there any legal-linguistic review such as happens within the institutions of the European Union. Lawyers from the United Nations Secretariat are rarely involved in the drafting. Legal input is left to the members of the Council, in particular those with lawyers on their delegations, to do the best they can, often under severe time and political pressure. Security Council resolutions may be drafted in a matter of hours, without going through lengthy scrutiny like most treaties and national legislation. And on those occasions when they are subject to detailed consideration (and that can last weeks or even months), this may lead to the ambiguities inherent in political compromise and consensus, not to clarity. […] The drafting of Security Council resolutions is often a highly politicized process, with a desire for consensus being more important than legal precision"), 34-35 ("Given the way they emerge […] one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty"). *See also* pp. 4, 10-11 (noting with caution the potential difficulty of seeking to determine "a single approach to interpretation for all Security Council resolutions, given their variety").
[29] Decision, para. 25. *See also* para. 26.
[30] *See* Appeal, paras. 5, 18-19, 21-22, 33-36.
[31] *See also* ICC-02/05-01/20-503 OA8 ("*Abd-Al-Rahman* Jurisdiction Appeal Judgment"), paras. 71-72 (in the context of an alleged error of fact, noting "in principle" that "the failure to correctly paraphrase the Defence's arguments cannot without more constitute an error").

consented to when ratifying the Charter."[32] On this basis, Mr El Hishri asserted that "UNSC referrals to the ICC" cannot be "broad" or "open-ended […] with no detailed factual specification on the situation" because this would "essentially place[] any affected State that is a non-State Party to the ICC" under "the permanent jurisdiction of the Court."[33] Accordingly, in his view, it is necessary to interpret UN Security Council referrals "narrow[ly]" so that an affected State is not "placed in a position where it is under the control of other States and no longer treated as equal" to them.[34]

15. In the Decision, the Majority expressly rejected these arguments in two respects.

- First, the Majority noted that Mr El Hishri's observation that "a Resolution must be within the power of the UNSC as delineated in the [UN] Charter, and not be *ultra vires*" might be taken "to question the validity of [UNSCR] 1970 on the basis of State consent". Accordingly, the Majority affirmed that it could identify no "issues with the validity" of UNSCR 1970.[35]

- Second, the Majority noted that the effect of a UN Security Council referral is not to place Libya "under the 'perpetual' jurisdiction of the Court" and that this concern is "misplaced".[36] Rather, the Majority explained that UNSCR 1970 remains "in full force", and that "the scope of a situation is discerned by objective parameters which are discerned from the referral". Consequently, "[t]he question […] whether the Court would continue to have jurisdiction over other potential cases […] on the basis of [UNSCR] 1970 will depend on the specific facts and circumstances of each case."[37]

16. On appeal, Mr El Hishri now clarifies that he did not intend to "call into question either the binding nature of [UNSCR] 1970 or its validity".[38] Yet he fails to show that the Majority misunderstood or mischaracterised his overall argument (*i.e.*, the principle of State consent requires a "narrow" interpretation of UNSCR 1970) or otherwise erred in law in any way

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[32] *See* ICC-01/11-01/25-108-Corr ("Challenge"), paras. 41-43.
[33] *See* Challenge, paras. 44, 46. While Mr El Hishri also referred to the separate opinion of Judge Sidhwa in *Tadić*, the Prosecution had noted that this passage was taken out of context: *compare e.g.* Challenge, para. 45, *with* ICC-01/11-01/25-132-Red ("Prosecution Response"), para. 15. *See also below* fn. 43.
[34] *See* Challenge, para. 53. *See also* para. 46. While Mr El Hishri further sought to frame the past practice of the Court in this lens, this was inapposite: *compare e.g.* Challenge, paras. 47-52, *with* Prosecution Response, para. 17. *See further below* para. 19.
[35] Decision, para. 28 (further noting that Mr El Hishri nonetheless did not "specifically call[] into question" the "binding nature" of UNSCR 1970, which the UN Security Council had issued "under Chapter VII of the UN Charter, and in the exercise of its discretionary powers," and further noting that "Libya has been actively engaging with the Court since [UNSCR] 1970").
[36] Decision, para. 42. *See also* para. 41 (recalling Mr El Hishri's argument).
[37] Decision, para. 42.
[38] Appeal, paras. 19-20.

materially affecting the Decision.[39] To the contrary, the Majority rejected the premise on which Mr El Hishri's argument was based. This is not altered by the fact that it also rejected the related premise he now disclaims. The Majority could perhaps have stated the *relevance* of rejecting these arguments more clearly in its reasoning (*i.e.*, stating expressly that, consequently, it rejected Mr El Hishri's claim of an *a priori* rule of "narrow" construction). However, this conclusion was nevertheless apparent from a contextual reading of the Decision as a whole, especially in light of the parties' arguments.[40]

17. In any event, even if the Majority had in some way erred in presenting the parties' arguments or its reasoning, the Majority was substantively correct in rejecting Mr El Hishri's claim that UN Security Council resolutions must *a priori* be interpreted narrowly. This is for the following three reasons.[41] Any error in summarising Mr El Hishri's argument was thus harmless, because the Decision reached the only legally correct result.

18. First, the Majority correctly directed itself as to the proper approach to the interpretation of UN Security Council resolutions under applicable principles and rules of general international law.[42] There is no reference either in the jurisprudence of the ICJ, or any relevant academic commentary, to an abstract principle that all such resolutions must be interpreted "narrowly".[43] On appeal, Mr El Hishri shows no error in the Majority's summary of the correct

[39] *Contra* Appeal, paras. 20-21 (asserting that the Majority's supposed "misunderstanding and/or mischaracterisation" of the Defence argument that the principle of State consent requires a narrow interpretation of UNSCR 1970 "led it to fail to properly assess the Defence's argument about the role of State consent and State sovereignty in the interpretation of UNSC resolutions" and that, "[g]iven the primacy of State consent in public international law, this was not a minor error or a minor failure to consider an argument'), 33-35.
[40] *See e.g.* Decision, paras. 22-23, 28, 30-35, 41-42. *See also* paras. 43, 45 (referring to Mr El Hishri's claim for a rule of "narrow" construction in the context of his arguments on the principle of legality, addressed below). *See also e.g.* Challenge, paras. 41-53 (sub-titled "Resolution 1970 must be read narrowly on the basis of State consent and the protection of State sovereignty"); Prosecution Response, paras. 11-17 (sub-titled "There is no *a priori* obligation to interpret referrals narrowly"). These and other arguments were referred to or cited in the Decision: *see e.g.* Decision, paras. 6-8, 22 (fn. 25), 25 (fn. 27), 28 (fns. 34-35), 35 (fn. 48), 36, 40 (fn. 59), 41 (fn. 60), 42, 43 (fns. 67-70), 45 (fn. 73), 49 (fn. 82), 50 (fn. 83), 51 (fn. 84), *especially* paras. 28, 41.
[41] *Contra* Appeal, paras. 20-21, 33-35, *especially* para. 34 ("Because the PTC misunderstood and/or mischaracterised the Defence arguments, it failed to properly analyse these arguments and come to a correct conclusion").
[42] *See* Statute, art. 21(1)(b). *See further above* paras. 6-10.
[43] *See e.g.* *Kosovo* Advisory Opinion, para. 94; *Namibia* Advisory Opinion, para. 114; Wood. Additional citations made by Mr El Hishri appear to relate to academic debate concerning the possibility of the exercise of wholly *open-ended* and *legislative* powers of the Security Council, which do not arise in the present context (since the effect of UNSCR 1970 is neither open-ended nor legislative: *see below* paras. 22, 29): *contra* Appeal, para. 35 (fn. 25); Challenge, para. 41 (fn. 55). For the jurisprudence and commentary in this regard specifically cited by Mr El Hishri, *see further e.g.* ICTY, *Prosecutor v. Tadić*, IT-94-1, Separate Opinion of Judge Sidhwa on the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 63; L. Hinojosa Martínez, 'The legislative role of the Security Council in its fight against terrorism: legal, political, and practical limits,' [2008] 57(2) *International and Comparative Law Quarterly* 333, pp. 339, 354. The Prosecution further notes that Mr El Hishri also refers vaguely to whole chapters or the entirety of several scholarly works, without citing any specific page or range of pages: *see e.g.* Appeal, para. 35 (fn. 25: citing *inter alia* J. Crawford, *Brownlie's*

interpretive principles, nor even concretely addresses them.[44] Furthermore, the Majority's interpretive approach is well-suited both to the political nature of the UN Security Council as a body, and its purpose under the UN Charter—to which all UN Member States, including Libya, have expressly consented.[45] Mr El Hishri likewise shows no error in claiming that UNSCR 1970 must be interpreted to "respond to [the] identified threat" to international peace and security.[46] Even if this were correct,[47] the Majority was clear that the "turmoil" in Libya continued at all times material to this case[48]—and therefore the interpretation of UNSCR 1970 (and hence the scope of the situation) remains perfectly consistent with that threat.

19. Second, nothing in the Court's wider practice in interpreting the scope of a situation (and the scope of a referral) is inconsistent with the Majority's approach.[49] Notably, despite raising

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Principles of Public International Law, 9th Ed. (OUP: 2019) ("Crawford"), "chapter 20"; A.S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill: 2018) ("Galand"); G. Lentner, *The UN Security Council and the International Criminal Court: the Referral Mechanism in Theory and Practice* (Elgar: 2018) ("Lentner")); Challenge, paras. 41 (fn. 55), 43 (fn. 59). The Prosecution notes that neither it, nor the Pre-Trial Chamber nor the Appeals Chamber, should be expected to address vague citations encompassing hundreds of pages, and that such undeveloped submissions should be summarily dismissed. Nevertheless, and in any event, the Prosecution draws attention to the following. In chapter 20 of his work, Crawford merely addresses in general terms the "Sovereignty and equality of States", and offers no support for any *a priori* principle of "narrow" interpretation of UN Security Council resolutions: *cf.* Crawford, pp. 436-437. Indeed, in contexts such as the interpretation of treaties, he notes a strong trend *away* from a "doctrine of restrictive interpretation in favour of sovereignty: *see e.g.* Crawford, p. 435. Likewise, any notion of a "reserved domain" of domestic jurisdiction of States, under article 2(7) of the UN Charter, is expressly subject to "the application of enforcement measures under Chapter VII": *see e.g.* Crawford, p. 437-438. For his part, while noting the debate about legislative powers of the UN Security Council, Galand appears to suggest similar principles to those set out by the Majority in the Decision concerning the proper approach to the interpretation of UN Security Council resolutions: *see e.g.* Galand, pp. 81-86; *see also e.g.* pp. 162-167 (applying an interpretation of UN Security Council resolutions according to the principle of effectiveness). Likewise, Lentner appears to refer only to the debate concerning legislative powers of the UN Security Council: *see e.g.* Lentner, pp. 89-95, 102-103.

[44] *See* Appeal, paras. 19-21, 33-35. Nor does Mr El Hishri contradict the Majority's view that, in at least *some* respects, he *agrees* with the interpretive approach: *see* Decision, para. 30.

[45] *See above* para. 12.

[46] *Cf.* Appeal, para. 35.

[47] *But see* Decision, paras. 25-26.

[48] *See* Decision, paras. 31-35.

[49] *See* Decision, para. 37 (citing ICC-01/04-01/10-1 ("*Mbarushimana* Article 58 Decision"), para. 6; ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), para. 41; ICC-01/04-01/12-1-Red ("*Mudacumura* Article 58 Decision"), para. 14; ICC-02/05-01/20-391 ("*Abd-Al-Rahman* Jurisdiction Decision"), para. 25). While the Majority adopted the "situation of crisis" terminology used in these decisions, the Prosecution had noted that "this term of art does not imply that the Court's jurisdiction is limited to a narrow set of historical events, and the Appeals Chamber has implicitly cautioned against misreading the significance of this term in the *Mbarushimana* decision": Prosecution Response, para. 18 (citing ICC-01/18-481 OA3 ("*Palestine* Article 18(1) Appeal Judgment"), para. 83: rejecting the assertion that "the *Mbarushimana* Jurisdiction Decision" supported the appellant's narrow view of the scope of the situation). As the Appeals Chamber has consistently affirmed, the scope of a situation is defined by objective parameters which are discerned from the referral in the context of the underlying facts, and the Court may exercise jurisdiction over all cases falling within those parameters or otherwise sufficiently linked to them: Prosecution Response, para. 19 (citing Palestine Article 18(1) Appeal Judgment, paras. 58, 74, 76, 82, 127, 134-135; ICC-02/18-89 OA ("*Venezuela* Article 18(2) Appeal Judgment"), paras. 114, 218, 227-228, 230; ICC-01/21-77 OA ("*Philippines* Article 18(2) Appeal Judgment"), paras. 106-108; ICC-02/17-218 OA5 ("*Afghanistan* Article 18(2) Appeal Judgment"), paras. 57-60; *Abd-Al-Rahman* Jurisdiction Appeal Judgment, paras. 25-27; ICC-02/17-138 OA4 ("*Afghanistan* Article 15(4) Appeal Judgment"), paras. 57-64; ICC-

this issue at first instance, Mr El Hishri makes no further reference to it on appeal. He apparently takes no issue with the Decision in this respect.[50] As the Prosecution reminded Mr El Hishri, the Appeals Chamber has consistently recalled that the concept of a "situation" under the Statute is typically used "loosely, specifically with a view to extending enough flexibility to the Prosecutor to investigate independently and impartially".[51] Put another way, the Prosecutor must be able to investigate "the situation as a whole".[52] These principles are inconsistent with Mr El Hishri's claim that the referral in this situation should be interpreted narrowly. Moreover, as the Majority further explained, this does not mean that the parameters of the *Situation in Libya* are open-ended in the way that Mr El Hishri claims. Specifically, the "objective parameters" defining the situation preclude his concern of "perpetual jurisdiction".[53] Mr El Hishri neither addresses this point on appeal, nor shows error in it.[54]

20. Third, Mr El Hishri's analogy to the hypothetical scenario in which a State Party chooses to withdraw from the Statute is inapposite and misconceived. Even if maintained on appeal, it would show no error.[55] At first instance, Mr El Hishri had claimed that a UN Security Council referral must be interpreted in such a way that it does not disadvantage the State concerned relative to a State Party, which may "terminate their acceptance of the Court's jurisdiction by withdrawing from the Statute".[56] However, this does not correctly reflect the position of a State

01/15-12 ("*Georgia* Article 15(4) Decision"), paras. 62-64; *Mudacumura* Article 58 Decision, para. 14; *Mbarushimana* Jurisdiction Decision, paras. 21, 41; *Mbarushimana* Article 58 Decision, para. 6).

[50] *Compare e.g.* Appeal, paras. 19-21, 33-35, *with* Challenge, paras. 47-52. *See further* Prosecution Response, para. 17 (correcting Mr El Hishri's misapprehensions about the practice in the *CAR II*, *Venezuela II*, and *DRC II* situations). *Contra e.g.* Arrest Warrant for Osama Elmasry / Almasri Njeem, Dissenting Opinion, paras. 11-13. It is not correct that UN Security Council referrals are treated differently than State Party referrals: rather, in both instances, the same principles are applied to determine the objective parameters of the situation in question, and whether a relevant case or set of allegations falls within the scope of those parameters or is otherwise sufficiently linked to them: *see above* fn. 49.

[51] *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 25; *Palestine* Article 18(1) Appeal Judgment, para. 82. *See also above* fn. 34.

[52] *Afghanistan* Article 15(4) Appeal Judgment, para. 60.

[53] *See* Decision, para. 42 (recalling that "the scope of a situation is defined by objective parameters which are discerned from the referral" and that, "[a]s such, there is simply no risk of 'perpetual jurisdiction'"). *See also* para. 38 (recalling the Chamber's previous consideration of "the jurisdictional parameters in the Libya Situation"). *See further above* fn. 49.

[54] *See* Appeal, paras. 19-21, 33-35.

[55] Again, it is unclear whether Mr El Hishri seeks to maintain this point, which is not mentioned expressly: *see* Appeal, paras. 19-21, 33-35. However, the Prosecution notes that, in one paragraph and in two footnotes, Mr El Hishri alludes generally to his arguments "in detail in the Jurisdiction Challenge", citing paragraphs "41-53": Appeal, paras. 20 (fn. 14), 35 (fn. 25).

[56] *See* Challenge, para. 52 (further referring to "sovereign rights to end jurisdiction"). *See also* para. 46 ("Without the ability to terminate its acceptance of the ICC's jurisdiction by withdrawing from the Court, the targeted State is in effect subject to the permanent jurisdiction of the Court", citing Arrest Warrant for Osama Elmasry / Almasri Njeem, Dissenting Opinion, para. 13).

Party. Mr El Hishri not only overlooks the unique and distinct consequences of status as a State Party but also the effect of article 127(2) of the Statute.

21. Specifically, as held by the Appeals Chamber in *Duterte*, once a State becomes a State Party to the Statute, the Court's "jurisdiction '*exists*' with respect to the relevant State until the acceptance is revoked by a State Party's withdrawal from the Statute". However, "according to the statutory framework, the existence of jurisdiction needs to be distinguished from the *'exercise'* of jurisdiction."[57] This has two relevant implications.

- First, the (open-ended) existence of the Court's jurisdiction resulting from status as a State Party means accepting that the Court may exercise its jurisdiction *whenever* the relevant statutory conditions are met. This is unlike the situation of a State addressed by a UN Security Council referral (where jurisdiction exists, and is exercised by the Court only in a *single* situation, defined by the subject-matter of the referral).

- Second, given the broad implications of a State Party's acceptance of the (open-ended) existence of the Court's jurisdiction, the Statute allows this state of affairs to be terminated by withdrawal from the Statute under article 127(1). This terminates the existence of the Court's jurisdiction, one year after notice of withdrawal is validly given. In turn, this precludes any *further* new exercise of the Court's jurisdiction. Importantly, however, article 127(2) expressly preserves the "*continued*" consideration (exercise of jurisdiction) of "any matter which was *already under consideration* by the Court prior to the date on which the withdrawal became effective".[58]

22. As such, the position of Libya (or any relevant State) pursuant to a UN Security Council referral is the same as a State Party. Neither State may unilaterally terminate the Court's *continued exercise* of jurisdiction in a situation which is *already* under investigation. This is a matter exclusively for the Court itself. On the other hand, it is also always true that the Court's exercise of jurisdiction *within* such a situation is not open-ended, but rather is defined by objective parameters. As such, the Court's exercise of jurisdiction is always eventually finite.

I.A.2. The principle of legality does not oblige a narrow reading of UNSCR 1970

23. Before the Pre-Trial Chamber, Mr El Hishri argued that "any UNSC referral" must be interpreted "narrowly" because "[p]otential suspects […] must be able to reasonably foresee

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[57] ICC-01/21-01/25-415 OA3 ("*Duterte* Jurisdiction Appeal Judgment"), para. 82 (emphasis added).
[58] *See* Statute, art. 127(2). *See also* *Duterte* Jurisdiction Appeal Judgment, paras. 85-86, 88, 113.

that the referral applies specifically to their actions".[59] In his view, "[o]nly by interpreting [UNSCR] 1970 in a narrow and non-expansive way can the PTC determine whether it was reasonably foreseeable that Mr El Hishri's conduct could come within the ICC's jurisdiction."[60]

24. Elsewhere in the Challenge, Mr El Hishri also purported to argue that, "*[r]egardless* of the interpretation of [UNSCR] 1970, the very imprecision of that Resolution creates conditions for a violation of *nullum crimen sine lege*". This is because, in his view, "[t]he uncertainty of the ambit of the Resolution makes its application 'unforeseeable' and "Mr El Hishri cannot reasonably be expected to foresee his prosecution under this allocation of jurisdiction."[61] In this regard, Mr El Hishri asserted that three of the crimes with which he is charged (other inhumane acts as a crime against humanity, and other forms of sexual violence as a crime against humanity and as a war crime) are "insufficiently precise" in their definition.[62] He also argued that the modes of liability of co-perpetration and indirect co-perpetration were "the least likely to be applicable to Mr El Hishri under domestic Libyan criminal law and customary international law."[63]

25. In the Decision, the Chamber expressly acknowledged *both* these facets of Mr El Hishri's argument concerning the principle of legality.[64] It found no "issue" in either respect,[65] even applying a somewhat higher standard than the principle of legality strictly requires.[66] The

[59] Challenge, para. 59.
[60] Challenge, para. 60. *See also* para. 58 (arguing that, in order for a "UNSC referral" to "put all nationals of the affected State on notice that the Rome Statute now applies to any Article 5 crimes committed within the context of the referred situation", "the parameters of the situation referred" must be "sufficiently clear to allow a reasonable person to know that their actions fall within the referred situation and are, therefore, subject to the entire applicability of the Rome Statute").
[61] Challenge, para. 85 (emphasis added).
[62] Challenge, para. 86. *See also* paras. 87-89.
[63] Challenge, para. 90. Concerning indirect co-perpetration, *see further* para. 91 ("This mode of liability is not part of any law that was applicable to Mr El Hishri at the time", including "customary international law", any "treaty in force in Libya at the relevant time", and "Libyan domestic law"). Concerning co-perpetration, *see further* para. 93 ("This mode of liability too was likely inapplicable to him at the time under customary international law, in any treaty in force in Libya at the relevant time, or under Libyan domestic law. Libyan law does contain a form of joint perpetration" […] [but] sufficiently dissimilar to co-perpetration under the Rome Statute, such that Mr El Hishri could not have foreseen that he could be prosecuted under it").
[64] Decision, para. 43.
[65] Decision, para. 44.
[66] *See e.g.* Decision, paras. 45, 52 ("it was reasonable for Mr El Hishri to foresee the criminality of his alleged conduct and prosecution"). The test is not whether *Mr El Hishri* as such could or did (subjectively) foresee the risk of criminal liability for his conduct, but rather (objectively) whether a reasonable person in Mr El Hishri's position could foresee such liability: *see e.g.* *Abd-Al-Rahman* Jurisdiction Appeal Judgment, para. 86 ("a chamber must […] satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged"). While the test was framed somewhat differently earlier in the Appeals Chamber's judgment (*see e.g.* para. 85: "a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution"), the balance of the Appeals Chamber's reasoning is consistent with the objective version: *see e.g.* paras. 85 (referring to reasonable foreseeability and accessibility as the relevant criteria), 86 (noting the purely objective nature of the analysis), 90-91 (considering what "Mr Abd-Al-Rahman was in a position

Chamber dedicated the bulk of its reasoning to rejecting Mr El Hishri's challenges to the charging of certain specific crimes and a mode of liability, as addressed further below.[67] Nonetheless, it also rejected Mr El Hishri's reliance on the principle of legality as relevant to its interpretation of UNSCR 1970.[68] It noted that "the foreseeability of criminal liability" should not be conflated with "the foreseeability of prosecution before a specific forum", as Mr El Hishri appeared to do.[69]

26. On appeal, Mr El Hishri asserts that the Chamber misunderstood or mischaracterised his argument. According to him, he "never argued that the principle of legality requires an alleged perpetrator to be able to foresee prosecution before a specific forum."[70] Nevertheless, he reiterates, he argued that: (i) the "only way" that the challenged modes of liability and charges could reasonably be foreseen would be if there were foresight of prosecution under the Statute, and; (ii) foresight of prosecution under the Statute could only reasonably be foreseen if UNSCR 1970 were interpreted narrowly.[71] As a consequence of its alleged error in characterising his argument, Mr El Hishri therefore claims that the Chamber "erroneously conclude[d] that the principle of legality did not require a narrow interpretation of [UNSCR] 1970", and interpreted it "in an overly broad manner" incompatible with the principle of legality.[72]

27. Mr El Hishri shows no error in this respect materially affecting the Decision. Notably, the Chamber did not mischaracterise or misunderstand his arguments. Rather, it correctly rejected them as unsubstantiated and erroneous. Mr El Hishri himself concedes that his arguments on the principle of legality are inter-related,[73] and the Chamber addressed both facets expressly.

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to know"). On the objective nature of the test, *see further e.g.* ICC-02/05-01/20-1240 ("*Abd-Al-Rahman* Trial Judgment"), para. 30; ECCC, *NUON Chea and KHIEU Samphân ("Case 002/01")*, 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016 ("*Case 002/01* Appeal Judgment"), para. 761 ("the requirements of foreseeability and accessibility must be determined through an objective analysis, namely that the crimes and modes of liability must be foreseeable and accessible in general").

[67] *See* Decision, paras. 46-51. *See further below* paras. 33-40 (indirect co-perpetration and the principle of legality), 41-47 (certain charged crimes and the principle of legality).

[68] Decision, para. 45 ("the issue at stake is not whether [UNSCR] 1970 is sufficiently 'precise' or must be read narrowly enough so as to allow Mr El Hishri to reasonably foresee that the Court would exercise a proper jurisdictional basis for the prosecution of his alleged conduct, but rather whether Mr El Hishri could reasonably foresee that his alleged conduct was criminal").

[69] Decision, para. 45.

[70] Appeal, paras. 22-23.

[71] *See* Appeal, paras. 24-26 (concluding that "as with the discussion about State consent, the Defence argues that [UNSCR] 1970 must be *interpreted* narrowly so that Mr El Hishri can reasonably foresee his prosecution in a forum whose applicable law will hold him liable for actions that were not criminal under any other source of domestic or international law applicable to him at the time. It is the *interpretation* that is at issue here, not the validity of the referral", emphasis supplied). *See also* paras. 36-37.

[72] Appeal, para. 27. *See also* paras. 38-39.

[73] *See e.g.* Appeal, para. 37 (arguing that the alleged "errors of law on the questions of the criminalisation [of certain modes of liability and charged crimes] in domestic and international law *additionally resulted* in the principal error of failing to find that [UNSCR] 1970 must be interpreted narrowly", emphasis added).

Specifically, it rejected his assertion that adhering to the principle of legality entailed interpreting UNSCR 1970 "in a narrow and non-expansive way",[74] *and* it rejected his assertion that the only way the principle of legality could be satisfied with respect to certain modes of liability and charged crimes would be on the basis of UNSCR 1970.[75]

28. The following three considerations show that the Chamber was correct in its approach.

29. First, Mr El Hishri's argument—and this sub-ground of appeal—depends on a flawed logical premise. Specifically, the Chamber rejected the first prong of Mr El Hishri's argument. It determined that the principle of legality could be satisfied with respect to the challenged modes of liability and charged crimes *irrespective of UNSCR 1970*, because they already existed in applicable international law.[76] Consequently, the Chamber did not need even to consider the second prong (whether a reasonable person could have foreseen from UNSCR 1970 that the Statute would apply to conduct in Libya not only in 2011 but subsequently).

30. Second, even if the Chamber had proceeded to the second prong of Mr El Hishri's argument, it is merely Mr El Hishri's own subjective opinion that a reasonable person could only foresee the risk of prosecution under the Statute if UNSCR 1970 were interpreted "narrowly"—that is, according to *his* preference. Yet the Majority had rightly found the contrary. Correctly interpretated, UNSCR 1970 did in fact give notice of the risk of prosecution under the Statute for relevant conduct in Libya long after 2011. Nothing in Mr El Hishri's circular and self-serving logic shows why a narrower interpretation was instead required.

31. Third, the Chamber correctly held that there was no legal reason for it to consider UNSCR 1970 through the lens of the principle of legality, nor any reason specific to this case. In particular, as the Chamber correctly concluded, the principle of legality does not require that a reasonable person must anticipate *which* forum may exercise jurisdiction over them. It suffices that they sufficiently anticipate the risk that their conduct entails liability for a serious crime.[77]

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[74] *See* Decision, paras. 43-45.
[75] *See* Decision, paras. 43-44, 46-51.
[76] *See* Decision, paras. 47-49. *See further below* paras. 32-47. In this regard, while the Chamber did take into account (as a factual matter) that UNSCR 1970 further underlined the risk of potential prosecution, this was not decisive in its analysis: *see* Decision, para. 50. It is clear that the Chamber did not rely on the domestic law of Libya: *see* Decision, para. 51.
[77] *See* Decision, para. 45. *See further e.g.* K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP: 2009) ("Gallant"), p. 394 ("The retrospective creation of jurisdictions to hear cases is not prohibited by customary international law […] so long as the acts were prohibited by some applicable criminal law at the time committed"). *See also* p. 339 ("there will be no *nullum crimen* problem" if a person is prosecuted for acts which are contrary to applicable law at the time they were committed, such as customary international law, even if a referral were not made until subsequently). While it is not entirely clear from the context, Mr El

I.B. The Chamber correctly dismissed the substantive Defence arguments that a charged mode of liability and certain crimes are precluded by the principle of legality

32. Closely related to the above arguments, Mr El Hishri specifically claims that one charged mode of liability, and three charged crimes, are precluded by the principle of legality. This is incorrect, for the reasons explained in the following paragraphs. In turn, this further demonstrates the flaw in his claim that UNSCR 1970 should have been interpreted narrowly for this reason.[78] The Prosecution also notes that Mr El Hishri has raised no principle of legality claim, either at first instance or before the Appeals Chamber, concerning the various *other* modes of liability and crimes with which he is charged.

I.B.1. Indirect co-perpetration satisfies the principle of legality

33. In affirming that charging Mr El Hishri as an indirect co-perpetrator satisfied the principle of legality, the Chamber took into account (at least) the following factors:

(i) the drafters' intention to define "the crimes under the Statute" (and, potentially also by implication, the modes of liability) in a manner "generally representative of the state of customary international law when the Statute was drafted";[79]

(ii) the role of the Statute in making "the law sufficiently clear and accessible" because it is a "public document that is generally reflective of customary international law";[80]

(iii) the "well established" doctrine "in international law" beyond the Statute that a person may be responsible "for the commission of crimes as a perpetrator individually or jointly with others",[81] and;

(iv) the fact that the situation was referred to the Court under UNSCR 1970 "years" before the alleged conduct, which could further put individuals on notice of the potential application of the Statute.[82]

Hishri may also expressly agree with this statement of the law: *see* Appeal, para. 38 (referring to a "question that is generally considered settled in public international law", citing generally Gallant).

[78] *See above* paras. 23-31.

[79] Decision, para. 47.

[80] Decision, para. 47.

[81] Decision, para. 47.

[82] Decision, para. 50. While the Chamber further referred to "the Defence's own acceptance" of the potential for a referral to provide notice relevant to the principle of legality, this may have been given relatively little weight since the Defence (and one judge of the Chamber) did not accept that the UNSCR 1970 on its face applied to conduct in Libya after 2011.

34. Mr El Hishri fails to show any error of law materially affecting the Chamber's conclusion that charging him as an indirect co-perpetrator is consistent with the principle of legality.[83]

35. First, concerning the Chamber's reliance on the fact that the concept of joint perpetration is well established in international law, it is irrelevant that (in Mr El Hishri's view) "the specific mode of liability of indirect co-perpetration as elaborated in ICC case law is controversial and falls very short of recognition under customary international law."[84] It is not required that a reasonable person has notice of the technical details of a *particular* legal doctrine, provided there is a *sufficient* showing that a reasonable person would still anticipate the risk that their alleged conduct entails liability for a serious crime.[85] On a technical level, it is certainly not required that indirect co-perpetration as applicable under article 25(3)(a) of the Statute *itself* is recognised as customary international law.

36. Moreover, and in any event, Mr El Hishri is wholly incorrect to assert that "the specific acts that fall under this mode of liability were not criminalised under any other form of international […] law applicable […] at the time".[86] In particular, he relies on the *Stakić* Appeal Judgment for the proposition that co-perpetration, "as defined and applied by the Trial Chamber" in that case (and in a manner very similar to that applied at this Court), "does not have support in customary international law".[87]

[83] *Contra* Appeal, paras. 28-30.
[84] *Contra* Appeal, para. 29.
[85] *See e.g.* *Case 002/01* Appeal Judgment, paras. 761 (referring to "sufficient" foreseeability and accessibility), 765 ("it is sufficient that the accused was able to 'appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision'. Thus, what is required is not an analysis of the technical terms of the definition of the crimes, but whether it was generally foreseeable that the conduct in question could entail criminal responsibility"), 777 ("The essence of this analysis is not whether particular terms were used […] nor whether there was a differentiated system of modes of criminal liability under customary international law […] but whether conduct of the type with which the accused were charged could give rise to criminal liability. To expect uniform terminology and clear and consistent distinctions […] is unrealistic"); ECCC, *KAING Guek Eav alias 'Duch' ("Case 001")*, 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012 ("*Case 001* Appeal Judgment"), para. 96 (referring to "sufficient" foreseeability and accessibility); ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović* Jurisdiction Appeal Judgment") paras. 37-38 (referring to "sufficient" foreseeability and accessibility); *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002, para. 201 (*mutatis mutandis*, "the Trial Chamber must satisfy itself that [the] offence with which the accused is charged was defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible").
[86] *Contra* Appeal, para. 29.
[87] *See* Appeal, para. 29 (fn. 22). Strictly speaking, while Mr El Hishri suggests that the ICTY Appeals Chamber in *Stakić* referred expressly to "[i]ndirect co-perpetration", in fact it only referred to "co-perpetratorship"—specifically, based on joint control over the crime, without reference to the possible means by which the suspect made their contribution (through their own conduct or through their use of others): *see* ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006 ("*Stakić* Appeal Judgment") paras. 58, 62; ICTY, *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, paras. 468, 490.

37. Yet Mr El Hishri overlooks that, in its judgment, the ICTY Appeals Chamber went on to confirm that the *same conduct* which the *Stakić* Trial Chamber found to establish "co-perpetratorship" would *also* satisfy the requirements of joint criminal enterprise ("JCE"). This is a customary international law doctrine which likewise imposes criminal responsibility as a principal.[88] It is well settled that the JCE or "common purpose" doctrine has satisfied the principle of legality for decades.[89] Furthermore, while not directly arising on the facts of *Stakić*, it is equally clear that the JCE doctrine in customary international law encompasses liability for conduct where an accused makes their contribution not only directly but also indirectly by means of "using" other persons, known as "principal perpetrators" or "tools".[90]

38. While co-perpetration under the Statute (including indirect co-perpetration) is not identical to the doctrine of JCE (because it is arguably *more demanding* in its requirements),[91] this is irrelevant for the purpose of principle of legality. A reasonable person would anticipate the risk of liability for conduct entailing criminal responsibility under customary international law (JCE), even if it might not meet the more stringent requirements of article 25(3)(a) of the Statute. In other words, if the risk of JCE liability is sufficiently foreseeable and accessible to satisfy the principle of legality, then it must follow that the risk of indirect co-perpetration liability under article 25(3)(a) of the Statute—an arguably higher standard—is also sufficiently foreseeable and accessible.

39. Second, concerning the other factors relied upon by the Chamber, Mr El Hishri incorrectly assumes that they are only relevant if UNSCR 1970 is "interpreted narrowly". Otherwise, in his view, it would not be possible for a reasonable person to appreciate that the Statute applied.[92] Yet there is no basis for this assumption.[93] To the contrary, as the Majority concluded, UNSCR 1970 gives more than sufficient notice of the potential application of the Statute to conduct in Libya from 2011 onwards.[94]

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[88] *See* *Stakić* Appeal Judgment, paras. 64-104.
[89] *See e.g.* *Milutinović* Jurisdiction Appeal Judgment, paras. 36, 43; *Case 002/01* Appeal Judgment, paras. 773-810.
[90] *See e.g.* ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, 17 March 2009, paras. 225-226, 235-236, 283; *Prosecutor v. Martić*, IT-95-11-A, Judgment, 8 October 2009, para. 168; *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgment, 27 September 2007, para. 120; *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, 3 April 2007, paras. 412-413, 430.
[91] *See e.g.* ICC-01/04-01/06-2842 ("*Lubanga* Trial Judgment, Separate Opinion of Judge Fulford"), paras. 16, 21 (observing that "[t]he alternative approach which I have described above"—which is very similar to JCE—"arguably involves applying a 'lesser' test").
[92] *Contra* Appeal, para. 30.
[93] *See also above* paras. 30-31.
[94] *See above* paras. 6-9, 13-22.

40. Accordingly, having regard to all these considerations—including the cumulative effect of the various factors, which is not addressed by Mr El Hishri—there can be no doubt that criminal responsibility as an indirect co-perpetrator under article 25(3)(a) is consistent with the principle of legality.

I.B.2. Other inhumane acts and other forms of sexual violence satisfy the principle of legality

41. Likewise, in affirming that charging Mr El Hishri with other inhumane acts and other forms of sexual violence satisfied the principle of legality, the Chamber took into account the following factors:

(i) the drafters' intention to define "the crimes under the Statute" in a manner "generally representative of the state of customary international law when the Statute was drafted";[95]

(ii) the role of the Statute in making "the law sufficiently clear and accessible" because it is a "public document that is generally reflective of customary international law";[96]

(iii) the ratification by Libya of "several international instruments defining the prohibited conduct under international humanitarian law as well as other severe violations under international human rights law";[97]

(iv) the "flagrantly unlawful" nature of the relevant conduct,[98] and;

(v) the fact that the situation was referred to the Court under UNSCR 1970 "years" before the alleged conduct, which could further put individuals on notice of the potential application of the Statute.[99]

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95 Decision, para. 47.
96 Decision, para. 47.
97 Decision, para. 48. These included the Geneva Conventions (*e.g.* Geneva Convention IV), the International Covenant on Civil and Political Rights ("ICCPR") and the Convention against Torture ("CAT"). Relevantly, for example, these instruments prohibit: Geneva Convention IV, arts. 3 ("violence to life and person, in particular […] cruel treatment […]; outrages upon personal dignity, in particular humiliating and degrading treatment"), 27 ("any form of indecent assault"); 147 ("inhuman treatment […] wilfully causing great suffering or serious injury"); ICCPR, art. 7 ("cruel, inhuman or degrading treatment"); CAT, art. 16 (1) ("cruel, inhuman or degrading treatment").
98 Decision, para. 49.
99 Decision, para. 50. While the Chamber further referred to "the Defence's own acceptance" of the potential for a referral to provide notice relevant to the principle of legality, this may have been given relatively little weight since the Defence (and one judge of the Chamber) did not accept that the UNSCR 1970 on its face applied to conduct in Libya after 2011.

42. The Chamber also correctly and reasonably rejected the relevance of Mr El Hishri's assertion that he had "no formal military service or training in international humanitarian law" as "not a determinative factor in this instance".[100]

43. Mr El Hishri fails to show any error of law materially affecting the Chamber's conclusion that charging him with other inhumane acts and other acts of sexual violence is consistent with the principle of legality.[101]

44. First, Mr El Hishri incorrectly asserts that the Chamber's "description of the definition of these crimes renders uncertain what specific acts would be covered by them".[102] To the contrary, the Chamber defined the crimes consistently with their elements.[103] These elements do contain requirements as to their "similar gravity" or "similar character" (having regard to the "nature and gravity" of the act), which is to be assessed relative to other crimes under the Statute. However, such elements *increase* rather than decrease the specificity of the crimes, thus *limiting* the conduct which may fall within them. As such, these elements are much less pertinent to assessing compliance with the principle of legality than the core conduct elements of the crimes, which provide the notice critical to assessing what is sufficiently foreseeable and accessible. Namely, for the crimes in question, that the perpetrator "inflicted great suffering, or serious injury to body or to mental or physical health"[104] or "committed an act of a sexual nature […] or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion".[105] It cannot seriously be doubted that a reasonable person would sufficiently foresee that such conduct risks liability for a serious crime.[106] Indeed, as the Chamber noted, such conduct is "flagrantly unlawful".[107] Mr El Hishri shows no error in this conclusion.

45. Second, Mr El Hishri is incorrect to assert that these crimes were "not criminalised in any other source of domestic or international law applicable" to him at the material times.[108] To the

[100] Decision, para. 49. *See also* Prosecution Response, para. 52.
[101] *Contra* Appeal, paras. 31-32.
[102] *Contra* Appeal, para. 32.
[103] *Compare, e.g.* Decision, para. 49, *with* Elements of Crimes, arts. 7(1)(g)-6, 7(1)(k), 8(2)(e)(vi)-6.
[104] *See e.g.* Elements of Crimes, art. 7(1)(k), element 1.
[105] *See* Elements of Crimes, art. 7(1)(g)-6, element 1; art. 8(2)(e)(vi)-6, element 1.
[106] *See also above* fn. 85.
[107] Decision, para. 49. *See also* ECtHR, *Kononov v. Latvia*, Judgment, 36376/04, 17 May 2010, para. 238; *K.-H. W. v. Germany*, 37201/97, Judgment (Grand Chamber), 22 March 2001, para. 104; *Milanković v. Croatia*, 33351/20, Judgment, 20 January 2022, para. 64; *Šimšic v. Bosnia and Herzegovina*, Admissibility Decision, 51552/10, 10 April 2012, para. 24; *Milutinović* Jurisdiction Appeal Judgment, para. 42.
[108] *Contra* Appeal, paras. 31-32.

contrary, it is well established that the relevant conduct was not only criminalised under the Statute but also under customary international law at the material times. For example:

- The crime against humanity of other inhumane acts as such has been recognised in international law since at least 1945, when it was included in the charters of the International Military Tribunal and the International Military Tribunal for the Far East.[109] The UN General Assembly unanimously considered these instruments to reflect general principles of international law.[110] Furthermore, not only were convictions for this crime entered by the Nuremberg Military Tribunal, but also by the ECCC and the ICTY expressly on the basis that it constituted customary international law.[111] Perhaps most saliently of all, the Appeals Chamber of this Court has already and expressly affirmed that this crime satisfies the principle of legality.[112]

- The conduct which has now come to be discretely prohibited as the crime against humanity and war crime of other forms of sexual violence has been plainly contrary to international law since at least 1949, especially in universally ratified treaties such as the Fourth Geneva Convention.[113] Since at least the 1990s, such conduct has been prosecuted within the scope of international crimes such as the war crime of outrages upon personal dignity and the crime against humanity of other inhumane acts, notably by the ICTY and the ICTR.[114] From 1996 onwards, various international instruments have progressively recognised that other forms of sexual violence also amounts to an international crime in its own right.[115]

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[109] *See* IMT Charter, art. 6(c) ("other inhumane acts"); IMTFE Charter, art. 5(c) ("other inhumane acts").
[110] *See* UNGA Res. 95(I) (1946); ILC, Nuremberg Principles (1950), principle VI(c) ("other inhuman acts"). *See also* *Case 001* Appeal Judgment, paras. 109-112.
[111] *See e.g.* NMT, *United States of America v. von Weizsaecker et al. ("Ministries" case)*, Judgment, 14 April 1949, pp. 467-468; *United States of America v. Brandt et al. ("Medical" case)*, Judgment, 20 August 1947, p. 198; *Case 002/01* Appeal Judgment, paras. 576, 578-586, Disposition; *Stakić* Appeal Judgment, para. 315.
[112] ICC-02/04-01/15-2022-Red A ("*Ongwen* Appeal Judgment"), paras. 1019-1020.
[113] Geneva Convention IV, art. 27(2) ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"). *See also* Additional Protocol I, art. 76 ("Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault").
[114] *See e.g.* ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, paras. 728-729, 749, 766-774; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, paras. 10A, 417, 449, 693-695.
[115] *See e.g.* Draft Code of Crimes against the Peace and Security of Mankind (1996), art. 18(j) ("other forms of sexual abuse"); Statute of the Special Court for Sierra Leone (2000), art. 2(g) ("any other form of sexual violence"); United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (2000), ss. 5.1(g) ("any other form of sexual violence of comparable gravity"), 6.1(b)(xxii) ("any other form of sexual violence also constituting a grave breach of the Geneva Conventions"), 6.1(e)(vi) ("any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions"); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (2014), Annex I, arts. 28C(1)(g)

46. Third, concerning the other factors relied upon by the Chamber, Mr El Hishri again incorrectly assumes that they are only relevant if UNSCR 1970 is interpreted "narrow[ly]". Otherwise, in his view, it would not be possible for a reasonable person to appreciate that the Statute applied.[116] As noted above, there is no basis for this assumption.[117] To the contrary, as the Majority concluded, UNSCR 1970 gives more than sufficient notice of the potential application of the Statute to conduct in Libya from 2011 onwards.[118]

47. Accordingly, having regard to all these considerations—including the cumulative effect of the various factors, which is not addressed by Mr El Hishri—there can be no doubt that the charges of other inhumane acts and other forms of sexual violence are consistent with the principle of legality.

II. The Majority correctly affirmed the Court's jurisdiction over the case against Mr El Hishri within the *Situation in Libya* referred by UNSCR 1970

48. In his second ground of appeal, Mr El Hishri challenges the Majority's conclusion that his case is "sufficiently linked" to the *Situation in Libya* referred to the Court in UNSCR 1970.[119] He claims that the Majority erred by "declining to consider evidence of whether such a link existed",[120] and misinterpreting the subsequent practice of States at the UN Security Council.[121]

49. The second ground of appeal should be dismissed in its entirety. As set out further below, the Majority correctly determined that the case against Mr El Hishri falls within the objective parameters of the situation, or is otherwise sufficiently linked to them. In doing so, it properly

("any other form of sexual violence of comparably gravity"), 28D(b)(xxii) ("any other form of sexual violence also constituting a grave breach of the Geneva Conventions"), 28D(e)(vi) ("any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions"); Republic of Kosovo, Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's office (2015), arts. 13(1)(g) ("any other form of sexual violence"), 14(1)(b)(xxii) ("any other form of sexual violence also constituting a grave breach of the Geneva Conventions"), 14(1)(d)(vi) ("any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions"). Previously, *see also* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704, para. 48 ("Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population […] such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution").

[116] *Contra* Appeal, para. 31.
[117] *See above* para. 39.
[118] *See above* paras. 6-9, 13-22.
[119] *See* Appeal, para. 40.
[120] *See* Appeal, paras. 40-51, 76-77. *See further below* paras. 50-67.
[121] *See* Appeal, paras. 52-76, 78. *See further below* paras. 68-77.

addressed the factual arguments raised by Mr El Hishri. It correctly declined (for the purpose of its jurisdictional decision) to enter unduly into questions of the probative value of the evidence presented by the Prosecution in support of the charges more generally. Likewise, when interpreting UNSCR 1970, the Majority was both correct and reasonable in assessing the subsequent practice of States. In circumstances where UNSCR 1970 expressly *requires* the Prosecution to report regularly to the UN Security Council on the conduct of its investigation pursuant to the referral, it would have been erroneous—and contrary to common sense—*not* to consider and give due weight to the clear mutual understanding that the crimes alleged in the present case formed part of the situation.

II.A. The Majority correctly determined that the case against Mr El Hishi falls within the objective parameters of the situation, or is otherwise sufficiently linked to them

50. Mr El Hishri fails to show that the Majority erred in concluding that the Court properly exercises jurisdiction over this case, because it "erroneously failed to consider the nature and sufficiency of the evidence of the link" to the situation.[122] Mr El Hishri's arguments must fail for the following reasons. First, he fails to engage with the Majority's judicial notice of a fact of common knowledge supporting its jurisdictional determination. Second, he incorrectly suggests that the Majority declined to consider his submissions, when in fact it did expressly consider them but merely addressed them according to the law. Third, he misinterprets the Majority's assessment in reaching its jurisdictional determination, and incorrectly suggests that it was required to answer each and every submission made by him on particular pieces of evidence.

51. As a preliminary matter, the Prosecution recalls that Mr El Hishri consistently frames the legal question informing the Majority's jurisdictional assessment as to whether there was a "sufficient link" between the alleged crimes and the "situation of crisis" referred by the UN Security Council.[123] While the "situation of crisis" terminology is not incorrect, insofar as it continues to be used in some of the Court's caselaw and was also used by the Majority,[124] the Prosecution notes that the caselaw of the Appeals Chamber also emphasises the definition of a

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[122] *Contra* Appeal, para. 41.
[123] *See e.g.* Appeal, paras. 4, 6, 40-42, 46-47, 76-78.
[124] *See e.g.* Decision, paras. 23, 35-37, 42. *But see also* paras. 28, 37-38, 42 (referring to parameters). *See also e.g.* *Palestine* Article 18(1) Appeal Judgment, para. 82 ("referrals typically involve 'the referral of a situation of crisis or armed conflict', enabling the Prosecutor to select potential cases, rather than limiting the Prosecutor's future investigations to crimes or cases described in the referral"); *Mbarushimana* Jurisdiction Decision, para. 41; *Mbarushimana* Article 58 Decision, para. 6.

situation by more specific reference to objective parameters.[125] In the Prosecution's respectful submission, these nuances in terminology illuminate two important points.[126]

- By emphasising the concept of "parameters", the Appeals Chamber has recognised the different ways in which a situation might be defined.[127] This avoids any misconception—which may potentially arise from the phrase "situation of crisis" taken in isolation—that a situation (or a referral) must *necessarily* be confined to any discrete historical event.[128] As applied to the present situation, for example, there is no *a priori* reason to assume that the UN Security Council intended only to refer the specific events of 2011, when UNSCR 1970 on its face sets broader parameters. Furthermore, this parameter-based approach also facilitates the Court's role in ensuring that the parameters of a situation are defined in a way compatible with the Statute.[129]

- Recognising the parameter-based approach alongside the concept of a "sufficient link" also highlights the different ways in which a case may fall within the scope of a situation. One typical means is simply where the case falls within the objective parameters by which the situation is defined. Another means is where, even if the case may technically fall *outside* the parameters, the circumstances are such that it remains sufficiently linked to them.[130] Critically, however, these are *alternate* possibilities—in the sense that, if a case falls within the objective parameters of the situation, there is no further requirement to assess the "sufficiency" of the link.[131] A more holistic, fact-sensitive assessment of the "sufficiency"

[125] *See above* fn. 49.
[126] *See also* Prosecution Response, para. 9.
[127] For example, while such parameters may be geographic, temporal, personal, or material, none of these parameters is a *sine qua non*. *See* *Palestine* Article 18(1) Appeal Judgment, para. 127; *Philippines* Article 18(2) Appeal Judgment, para. 106.
[128] For example, as various chambers have affirmed, a referral may also encompass ongoing and future crimes: *see e.g.* *Palestine* Article 18(1) Appeal Judgment, paras. 134-135; *Venezuela* Article 18(2) Appeal Judgment, para. 230; *Afghanistan* Article 18(2) Appeal Judgment, paras. 57-59; *Mudacumura* Article 58 Decision, para. 14; *Mbarushimana* Jurisdiction Decision, paras. 21, 41.
[129] *See e.g.* *Abd-Al-Rahman* Jurisdiction Appeal Judgment, paras. 45-46; *Mbarushimana* Jurisdiction Decision, para. 27. Not all inconsistencies with the Statute would necessarily invalidate a referral. *See also* ICC-02/05-01/09-397-Corr OA2 ("*Bashir* Jordan Referral Appeal Judgment"), para. 135.
[130] *See e.g.* *Georgia* Article 15(4) Decision, para. 64 (noting that an investigation "is only limited by the parameters of the situation" and that "in principle" events which "did not occur in […] the parameters of the situation" would not form part of the investigation "unless […] sufficiently linked thereto" and falling within the Court's territorial or personal jurisdiction). For example, if a situation with geographic and material parameters is referred to the Court concerning the alleged crimes of a particular armed group in State A, but one notorious criminal incident occurred across the border in State B (which was also an ICC State Party), the Court may still exercise jurisdiction over this event if it is shown that the incident in State B is sufficiently linked to the parameters of the situation in State A.
[131] By analogy, *see e.g.* *Afghanistan* Article 15(4) Appeal Judgment, paras. 57-64.

of the link is appropriate only where a case technically exceeds the objective parameters of the situation.

52. Accordingly, in the present case, it was legally sufficient to determine *either* that the case against Mr El Hishri fell within the objective parameters of the situation *or* that the case against Mr El Hishri was otherwise sufficiently linked to those parameters. While the Majority described this case as "sufficiently linked" to the "situation of crisis", overall the Decision is still best understood as establishing that the case falls within the objective parameters of the situation. Consistent both with the Majority's interpretation of UNSCR 1970 and previous caselaw, these parameters require that the relevant events were carried out: on the territory of Libya; after 2011; by Libyan nationals; and were "associated" with the serious armed violence which commenced in Libya in 2011.[132] Yet even if those parameters were narrower, it could still be sufficiently linked to those parameters in light of all the circumstances.

II.A.1. The Majority was entitled to take judicial notice of a fact of common knowledge

53. In the Decision, and with reference to at least seven of its previous decisions to similar effect, the Majority found that "it is a fact of common knowledge that violence erupted in Libya in February 2011 in the context of an uprising against the Gaddafi regime and that, after its fall, the fighting and civil unrest continued in Libya".[133] Within this context, the Majority further recalled, violence between the GNA and the LNA "'amplified the existing conflict that took shape after 2011'".[134] The group known as SDF/RADA likewise "emerged as a result of the

[132] *See further* Prosecution Response, paras. 21-24 (recalling that UNSCR 1970 is silent about any material parameter in addition to the geographic, temporal, and personal parameters expressly set out, but that in a line of cases beginning with *Al Werfalli* the Pre-Trial Chamber has affirmed that cases will fall within the parameters of the situation, or at least be sufficiently linked to those parameters, if "associated" with the "conflict" which began in 2011, and submitting that it is the factual connection to the conflict which may be relevant in this sense). This is consistent with the Majority's approach irrespective of terminology: *see* Decision, paras. 28 (referring to "objective jurisdictional parameters"), 34 ("a situation of turmoil has been ongoing since [UNSCR] 1970"), 38 (recalling that "this Chamber has already had the opportunity to discuss the jurisdictional parameters in the Libya Situation"), 42.

[133] Decision, para. 38. For previous findings expressly to this effect, *see e.g.* Arrest Warrant for Osama Elmasry / Almasri Njeem, para. 5; Arrest Warrant for Abdulrahem Elshgagi a.k.a. Al Kani, para. 7; Arrest Warrant for Makhlouf Douma, para. 7; Arrest Warrant for Nasser Al Lahsa, para. 7; Arrest Warrant for Mohamed Salheen, para. 7; Arrest Warrant for Abdelbari Al Shaqaqi, para. 7; Arrest Warrant for Fathi Al Zinkal, para. 7. For similar findings, but in the context of a group known as the Al-Saiqa Brigade operating in 2016 and 2017, and not on the basis of judicial notice, *see also* Arrest Warrant for Saif Suleiman Sneidel, para. 4 (referring to the "ongoing armed conflict" in Libya in 2016 and 2017, and the involvement of the Al-Saiqa Brigade "in this non-international armed conflict ever since the days of the revolution against Gaddafi"); Second Arrest Warrant for Mahmoud Al Werfalli, para. 20; First Arrest Warrant for Mahmoud Al-Werfalli, para. 23.

[134] Decision, para. 38. *See also e.g.* Arrest Warrant for Osama Elmasry / Almasri Njeem, para. 5 (referring to the evidence presented to the Chamber).

2011 crisis that triggered [UNSCR] 1970, and the aftermath of the crisis" and subsequently "was affiliated to the GNA".[135]

54. The Majority was fully entitled to take judicial notice of the continued serious armed violence in Libya since 2011. Article 69(6) of the Statute expressly provides that a Chamber "shall not require proof of facts of common knowledge but may take judicial notice of them."[136] This typically relates to matters "which are capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned".[137]

55. As the Appeals Chamber has recalled, "[t]he purpose of article 69(6) of the Statute is to avoid the need to introduce evidence going to the proof of facts that are already notorious", which "requires that the facts at issue are well known to, at least, the Chamber applying article 69(6) of the Statute."[138] This remains distinct from the concept of judicial notice of adjudicated facts as provided by rule 69*bis*. Where appropriate, well-rehearsed and background circumstances attendant to a case may properly qualify as a fact of common knowledge if a chamber correctly considers them beyond "reasonable dispute".[139] This can include "notorious historical events and phenomena"[140] such as the facts underpinning "the existence of a state of war, despite the fact that a description has a legal meaning."[141]

56. Despite his grudging reference to the "supposed" fact of common knowledge, Mr El Hishri does not challenge the correctness of the Majority's judicial notice, which he must be

[135] Decision, para. 39. SDF/RADA is relevant to the case because "Mr El Hishri is alleged to have acted with, *inter alia*, Mr Njeem and other members of the leadership of SDF/RADA in the commission of the alleged crimes at the Mitiga Prison": Decision, para. 40. Furthermore, at least some of the persons detained at Mitiga Prison "were detained for reasons related to the fighting or tensions between different groups involved in the ongoing situation of crisis": Decision, para. 39.
[136] *See* Statute, art. 69(6).
[137] ICC-01/14-01/18-2193 ("*Yekatom and Ngaïssona* Judicial Notice Decision"), para. 6.
[138] ICC-01/05-01/13-2159 A A2 A3 A4 A5 ("*Bemba et al.* Judicial Notice Decision"), para. 8.
[139] *See e.g.* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Judicial Notice Appeal Judgment"), paras. 22, 29-30, 35-37. *See also* D. Piragoff and P. Clarke, 'Article 69: evidence,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022), p. 2081 (mn. 78: "established historical data"); K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, 1st Ed. (OUP: 2016), pp. 503-504.
[140] *Karemera* Judicial Notice Appeal Judgment, para. 30 (continuing: "such as, for instance, the Nazi Holocaust, the South African system of apartheid, wars, and the rise of terrorism").
[141] *See* F. Gaynor, 'Judicial notice and agreed facts,' in G. Sluiter et al., *International Criminal Procedure: Principles and Rules* (OUP: 2013), pp. 1110-1111 (discussing *Karemera*). *See further* pp. 1125-1126 (cautioning against "stretch[ing]" this approach "too far", especially in circumstances where the right of the accused to confront the evidence against them is engaged). *Cf.* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, 1 December 2006, para. 16 ("There is a significant difference between the taking of judicial notice of the fact of genocide and the determination that an accused is individually criminal responsible for the crime of genocide").

understood to accept.[142] This significantly undermines his claim that the Majority erred in law or fact in its factual findings overall.

57. Specifically, in light of the Majority's judicial notice, Mr El Hishri is incorrect to assert that the Majority's factual findings were based only on "two sources": its "previous findings" when issuing arrest warrants (which was done on an *ex parte* basis) and "the submissions of the Prosecution" for the purpose of the confirmation of charges.[143] Since facts of common knowledge are by definition notorious and beyond reasonable dispute, there was no requirement for the Majority to rehearse the parties' own views of the matter when taking judicial notice in the Decision. Nor did Judge Flores Liera demur from this factual state of affairs in her own Separate Opinion, even though she gave no significance to this fact in the context of her own interpretation of UNSCR 1970.[144]

58. Taking judicial notice of the continuing violence in Libya since 2011 (encompassing the times material to the charges) itself sufficed as a basis to find that the case against Mr El Hishri falls within the objective parameters of the situation or is otherwise sufficiently linked to them.[145] There is no requirement for a chamber to "fully state *[all]* the facts of the case" in order to affirm jurisdiction, since this would fruitlessly (and impractically) create a trial before a trial.[146] Rather, it was only necessary for the Majority to make sufficient findings to affirm that the case falls within the objective parameters of the situation, or is otherwise sufficiently linked to those parameters.

59. Nevertheless, the Majority did choose to supplement its judicial notice of the continuing serious armed violence with a further finding that SDF/RADA had also emerged "as a result of the 2011 crisis" and its "aftermath". This factual finding was not based on judicial notice, but rather on the evidence presented in this case (which was also consistent with the evidence and findings in previous cases).[147] It was correct and reasonable for the Majority to reach this finding concerning SDF/RADA, having heard both parties on the matter.[148]

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[142] *See* Appeal, para. 42.
[143] Appeal, para. 43.
[144] *See e.g.* Separate Opinion, para. 3 (recalling that it might be "'factually correct that a situation of turmoil ha[d] been ongoing since the 2011 Revolution'" and terming it a "factual continuity"). *See also* para. 6 (noting that the Article 12(3) Declaration by Libya refers *inter alia* to "escalating and persisting" crimes in the period from 2011 to the present).
[145] *See above* para. 52.
[146] *Contra* Appeal, para. 50.
[147] *See* ICC-01/11-01/25-132-Conf ("Prosecution Response (Confidential Version)"), paras. 25-32. *See also e.g.* Arrest Warrant for Osama Elmasry / Almasri Njeem, paras 7-9 (referring to the evidence presented to the chamber).
[148] *Contra* Appeal, para. 43

60. Both Mr El Hishri and the Prosecution had made all the evidentiary submissions that they considered relevant to the jurisdictional challenge and these were before the Chamber.[149] In such circumstances, the Chamber was not obliged to address each and every argument, or to spell out its view of the details of the evidence.[150] And in any event, even if it had erred, any such error was harmless because the Majority's finding of the origins of SDF/RADA was not essential to its overall affirmation of the Court's exercise of jurisdiction in this case.

II.A.2. The Majority did not decline to consider Mr El Hishri's submissions

61. Mr El Hishri incorrectly claims that the Majority "relied on the Prosecution's submissions and explicitly stated that it would *not* consider the Defence's [submissions]". He contends this was "both unfair and legally erroneous."[151] But this is not what the Majority stated, or what it did. Rather, as explained in the Decision:

> "*In addition*, the Majority *takes note* of the Defence's submissions on the apparently inconsistent nature of the evidence cited by the Prosecution concerning the potential connections between groups that existed and were active during the 2011 revolution against the Gaddafi regime and the group that Mr El Hishri is allegedly tied to between 2014 and 2020. However, the Majority considers that *any issue pertaining to the probative value of the Prosecution's evidence underpinning the charges* ought to be addressed, if necessary, in the context of the Chamber's decision on the confirmation of charges. Indeed, whether the allegations underpinning the charges as presented by the Prosecution are established to the required threshold is not, and cannot be, the subject of this decision. *For present purposes, as reasoned in this decision, the Majority is satisfied* that the crimes allegedly committed by Mr El Hishri as per the case put forward by the Prosecution fall within the scope of [UNSCR] 1970."[152]

62. Several passages in this excerpt are salient.

- First, the Majority began with the words "In addition". This signalled that the Majority was proceeding to address a new issue (*i.e.*, Mr El Hishri's submissions concerning the evidence of the *merits* of the charges). This was distinct from its conclusion in the previous sentence

[149] *Compare e.g.* Challenge, paras. 72-84, *with* Prosecution Response, paras. 25-32.
[150] *See e.g.* ICC-01/14-01/21-111-Red OA ("*Said* Contact Restrictions Appeal Judgment"), paras. 42-45 (recalling that chambers must set out their reasoning with sufficient clarity, but this depends on the circumstances of the case, and that it does not necessarily require reciting each and every factor before the chamber to be individually set out).
[151] *Contra* Appeal, para. 43 (emphasis added). *See also* para. 50 ("refusing to consider Defence arguments"), 76 ("declining to consider evidence").
[152] Decision, para. 40 (emphasis added).

that "its previous findings" relevant to jurisdiction (the fact of common knowledge, and the emergence of SDF/RADA) "equally apply in the present instance". In other words, the Majority had already made the evidentiary finding concerning the origins of SDF/RADA, based on all the submissions before it (including those of Mr El Hishri), before then addressing a related but separate point.

- Second, the Majority did not decline to consider Mr El Hishri's further evidentiary submissions but rather expressly took "note" of them, and then provided reasons for how those submissions should be addressed (*i.e.*, considering them "if necessary" when deciding on the merits of the charges).
- Third, the Majority then concluded by reiterating that, for the "present purposes" of the Decision, it remained "satisfied" of the correct exercise of jurisdiction (*i.e.*, by necessary implication, notwithstanding Mr El Hishri's submissions).

63. Mr El Hishri's arguments on appeal do not demonstrate that the Majority failed to "consider" his submissions, or that the Majority acted improperly in the manner in which it dealt with them.[153] Plainly, the Majority was entitled to distinguish between arguments which were relevant to its jurisdictional determination and arguments which were not relevant for that purpose (for example, arguments going to the merits of the charges). Nor did the Majority err in reasonably making this distinction, as the following paragraphs explain.

II.A.3. The Majority properly distinguished between arguments relevant to its jurisdictional determination and arguments relevant to the merits of the charges

64. Mr El Hishri shows no error in the Majority's appreciation of which arguments were relevant to its jurisdictional determination and which were relevant to the merits of the charges. Importantly, he concedes that a chamber may properly defer evidentiary matters raised in the context of a jurisdictional challenge to the merits proceedings if they are "directly related to 'the contours or elements of crimes or modes of liability', which are better considered at confirmation of charges and trial."[154] He simply disputes that the Majority in this case was correct or reasonable in appreciating the significance of the evidentiary matters that he raised and therefore failing to address it in the Decision. However, Mr El Hishri's argument fails in two respects.

[153] *Contra* Appeal, paras. 43, 50.
[154] Appeal, para. 44 (citing ICC-01/09-02/11-425 OA4 ("*Muthaura and Kenyatta* Confirmation Appeal Judgment"), para. 37; ICC-01/09-01/11-414 OA3 OA4 ("*Ruto and Sang* Confirmation Appeal Judgment"), paras. 32-33).

65. First, as noted above, Mr El Hishri misinterprets the Decision. The Majority did not decline to consider evidence of the origins of SDF/RADA, but rather manifestly made its factual finding with the benefit of all the parties' submissions.[155] While the Majority did not provide reasoning with regard to all the particular arguments raised by Mr El Hishri, it was not required to do so.[156] For all the reasons expressed elsewhere in this Response, the Decision is more than adequate in "verifying" that the Court's exercise of jurisdiction is "sound in law" and that "the facts on which it is based are supported by convincing evidence".[157] Notably, Mr El Hishri does not demonstrate, or even squarely assert, that the Majority's ultimate conclusion on the origins of SDF/RADA was unreasonable as such. Rather, he merely criticises the manner in which it articulated its reasoning. Moreover, the close proximity between the particular evidentiary matters which Mr El Hishri challenged and the merits to be addressed in the subsequently issued Confirmation Decision justified the Majority's approach to this issue.[158]

66. In this context, the only basis for Mr El Hishri's view that the Majority did not even consider his evidentiary submissions concerning the origins of SDF/RADA is its statement that "*any issue pertaining to the probative value of the Prosecution's evidence underpinning the charges* ought to be addressed, if necessary, in the context of the Chamber's decision on the confirmation of charges".[159] However, this statement is self-evidently correct and consistent with the law.[160] Importantly, it does not state or suggest that any of Mr El Hishri's evidentiary submissions which *were* relevant to the jurisdictional challenge were *not* considered.[161] It merely says how the Majority would treat those submissions which were not relevant.

67. Second, Mr El Hishri fails to show that no reasonable chamber could have determined the jurisdictional challenge without making any more detailed findings on "the evidence contested by the Defence"—that is, his view of inconsistencies affecting the probative value of some of that evidence.[162] Since this is not the same as considering more broadly and as a whole

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[155] Decision, para. 39. *See also above* paras. 53, 59. *Contra* Appeal, para. 50.
[156] *See above* fn. 150.
[157] *Contra* Appeal, para. 48.
[158] *Contra* Appeal, para. 47 ("the evidence challenged does not directly relate to the contextual and specific elements of crimes against humanity and war crimes or to modes of liability. It instead relates *solely* to the jurisdictional question", emphasis added). To the contrary, evidence concerning SDF/RADA may also be relevant at trial to matters such as the contextual elements of the charged crimes. Furthermore, this is not undermined by the fact that the Chamber ultimately decided that it was unnecessary to address the probative value of the Prosecution evidence in the Confirmation Decision, given its limited purpose. If such a weighing were necessary or appropriate in that context, it could have done so: *cf.* Appeal, para. 49.
[159] Decision, para. 40 (emphasis added).
[160] *See above* fn. 154.
[161] *See above* paras. 61-63.
[162] Appeal, para. 46. *See also* para. 47 ("evidence challenged").

"evidence […] whether the acts alleged against the accused fell within the […] situation", his comparison with *Mbarushimana* is inapposite.[163] For example, in that case, in the passages cited, the Pre-Trial Chamber analysed "the relevant facts and documents" concerning the circumstances of the DRC's referral in order "to address the arguments brought by the parties and participants in support of their respective views".[164] But in this case Mr El Hishri complains merely that the Majority should have entered into a detailed weighing of alleged "inconsistencies within expert reports about security and governance in post-revolutionary Libya, as well as witness statements, insofar as they refer to the origins and background of SDF/RADA".[165] This is far from "exactly the type of evidence" considered in *Mbarushimana*.[166] The Majority correctly and reasonably considered that it need not enter into such matters of detail. Nor was it obliged to do so simply because, in principle, "jurisdiction 'may be challenged only once'".[167]

II.B. The Majority correctly considered the subsequent practice of States at the UN Security Council

68. Mr El Hishri alleges that the Majority, when interpreting UNSCR 1970, erred in two respects in its consideration of the subsequent practice of States. He argues that the Majority erred in law in its general approach to considering subsequent practice of this kind.[168] He also argues that the Chamber erred in relying on (what he terms as) "the failure of the [UN Security Council] to state affirmatively that [UNSCR] 1970 does not apply to Mr El Hishri's case".[169] In the interest of a clear response to these two issues, the Prosecution will address the more general argument first, and then the more specific one.

II.B.1. The Majority adopted the correct approach to interpreting such practice

69. As recalled above, the Majority directed itself that the correct interpretation of UN Security Council resolutions may *inter alia* require assessment of "the subsequent practice of relevant UN organs and affected States."[170] While Mr El Hishri purports to challenge several

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163 *Contra* Appeal, para. 45.
164 *Mbarushimana* Jurisdiction Decision, para. 22. *See further* paras. 20-39 (cited in Appeal, para. 45 (fn. 40)).
165 Appeal, para. 46. The Prosecution notes that Mr El Hishri's reference to "expert reports" does not mean expert evidence *stricto sensu* but rather open source academic and other commentary.
166 *Contra* Appeal, para. 46.
167 *Contra* Appeal, paras. 49, 51.
168 *See* Appeal, paras. 56-75, 78 ("foundational errors in its understanding of the interpretive method for [UN Security Council] resolutions and its understanding of the UN practice that it cited").
169 *See* Appeal, paras. 52-55 (and sub-title), 78 ("misinterpreting [UN Security Council] silence in response to ICC Prosecutor briefings").
170 Decision, para. 30. *See further above* paras. 6-8.

aspects of this approach, he fails to show that the Majority erred in law materially affecting the decision.[171]

70. First, Mr El Hishri asserts that the UN Security Council "is the only body that can provide an authoritative interpretation" of a UN Security Council resolution, "unless it has specifically authorised another body to do so".[172] He derives this principle from a 1923 advisory opinion of the Permanent Court of Justice, long pre-dating the existence of the UN Security Council, or the more recent guidance of the ICJ in the *Kosovo* and *Namibia* advisory opinions.[173] Yet even if this principle were correct, it is beside the point. The Majority did not consider the practice of any other body for the purpose of accepting it as an "authoritative interpretation" of UNSCR 1970—that is, as a wholly determinative expression of the UN Security Council's meaning.[174] Rather, it considered subsequent practice pursuant to UNSCR 1970, and especially that of States at the UN Security Council itself, as evidence of their collective understanding of the UN Security Council's intention. This is wholly consistent with the guidance of the ICJ in the *Kosovo* and *Namibia* advisory opinions,[175] as Mr El Hishri seems to concede.[176]

71. Second, Mr El Hishri contradicts himself when he first asserts that "subsequent practice of UN organs is neither necessary for the interpretation of [UN Security Council] resolutions nor always relevant", but then immediately acknowledges that "[a]cademic writings help to clarify when such subsequent practice *is* necessary or relevant".[177] In particular, he acknowledges Wood's view that "such subsequent practice is 'highly persuasive' when the UN organs 'need to interpret particular [Resolutions] in carrying out their functions'".[178] Accordingly, Mr El Hishri must be understood to concede that in principle the Majority *was* entitled to interpret UNSCR 1970 with reference to relevant subsequent practice.

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[171] *Contra* Appeal, para. 75.
[172] Appeal, para. 57.
[173] *See* Appeal, paras. 57 (fn. 57: citing PCIJ, *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, p. 37 ("it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it"); M. Wood, 'The interpretation of Security Council resolutions,' [1998] 2 *Max Planck Yearbook of United Nations Law* 73 ("Wood (1998)"), pp. 82-83 (referring to "an authentic interpretation in the true sense"), 75.
[174] This is the sense meant by Wood, when also referring to the dictum of the PCIJ in *Jaworzina*: *see* Wood (1998), pp. 82-83.
[175] *See above* para. 7 (quoting Decision, para. 30 (referring to *Kosovo* Advisory Opinion, para. 94): a "broader assessment" may be required taking account "not only of the resolution itself but also relevant statements made by UNSC members at the time of the adoption, other resolutions on the same issue, and the subsequent practice of relevant UN organs and affected States").
[176] Appeal, para. 58.
[177] *Compare* Appeal, para. 58, *with* para. 59. *See also* para. 62 ("To the extent that the subsequent practice of UN organs is still relevant as a less persuasive form of supplementary sources of interpretation"). *Cf.* Decision, para. 35 (addressing Mr El Hishri's arguments at first instance).
[178] Appeal, para. 59 (quoting Wood (1998), p. 84).

72. Third, Mr El Hishri claims that only the subsequent practice of bodies which are part of the "institutional architecture" for the implementation of the UN Security Council resolution may be considered.[179] Even if this were true as a categorical principle (which is doubted), Mr El Hishri is incorrect in claiming that there is no relevant organ whose practice could relevantly be considered as "part of what could be called the UNSC's ICC referral machinery".[180] In particular, the subsequent practice of States at the UN Security Council itself, when receiving reports from the Prosecution pursuant to the referral in UNSCR 1970, is plainly part of that machinery. The Majority correctly considered such practice, as well as broader context showing that the threat to international peace and security which had required UN Security Council action in UNSCR 1970 remains ongoing.[181]

73. Fourth, Mr El Hishri shows no "deficiencies" in the subsequent practice considered by the Majority which "diminish" its persuasive value, materially affecting the Decision.[182] Rather, he overstates the significance of certain materials in the Majority's reasoning, and then criticises those materials for failing to justify such significance. In particular:

- Mr El Hishri claims that certain reports of the UN Secretary-General "barely reference" UNSCR 1970, "and simply constitute regular situation updates to ensure that the [UN Security Council] is aware of all current information."[183] Yet this shows no error materially affecting the Decision. The Majority did not rely on these reports alone, but also together with other sources which Mr El Hishri does not address, including "statements by members of the [UN Security Council], as well as reports and resolutions from the UN Human Rights Council". Moreover, the Majority only relied on these materials to show that since 2011 UN and other bodies were reporting on matters such as the mistreatment of Mitiga Prison detainees, "clashes between SDF/RADA and other actors" and "SDF/RADA activities impacting on civilians".[184] In turn, this was one part of the Majority's reasoning supporting its conclusion that the circumstances in Libya threatening international peace and security, which had triggered UNSCR 1970 in 2011, had remained "ongoing ever since".[185]

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[179] Appeal, para. 60 (citing Report of ILA Study Group, van den Herik et al., *The Design and Interpretation of UN Security Council Sanction Resolutions*, 2019, p. 9). In this regard, Mr El Hishri appears to overstate the cited conclusions of the ILA Study Group, which merely states that the "institutional architecture" is "relevant" and that reference "may" be had to "the practice of the subsidiary bodies that have administrative and supportive roles and are as such part of the sanctions machinery".
[180] *Contra* Appeal, para. 61. *See also* para. 75.
[181] *See* Decision, paras. 33-35.
[182] *Contra* Appeal, para. 62.
[183] Appeal, para. 75. *See further* paras. 63-67.
[184] Decision, para. 33.
[185] *See* Decision, para. 33.

- Mr El Hishri likewise claims that the subsequent UN Security Council resolutions cited in the Decision "barely reference the ICC referral" and that the only time they do so is in an operative paragraph related "to a case that falls squarely therein, being that of Saif Al-Islam Gaddafi".[186] Again, this shows no error materially affecting the Decision. The Majority did not rely on these resolutions as providing, in themselves, an "authoritative interpretation" of UNSCR 1970.[187] Rather, the Majority relied on them simply as evidence for the fact that subsequent resolutions continued to "contain references" to UNSCR 1970 "and address, *inter alia*, the alleged mistreatment of detainees, the continuous threat to peace, stability and security; and the need to disarm armed groups."[188] This was another part of the Majority's reasoning for its conclusion that the circumstances in Libya threatening international peace and security, which had triggered UNSCR 1970 in 2011, had remained "ongoing ever since".[189]

74. Finally, and fatally for this sub-ground of appeal, Mr El Hishri also fails to engage with other aspects of relevant subsequent practice which were at the heart of the Majority's reasoning, and which were highly relevant.[190] Notably, the Majority noted that States at the UN Security Council not only received progress reports from the Prosecution concerning the investigation in this situation (which made abundantly clear how the Prosecution understood the scope of the referral),[191] but also referred to specific statements by such States acknowledging and welcoming the scope of the investigation.[192]

II.B.2. The Majority correctly and reasonably interpreted the reaction of States at the UN Security Council to Prosecution reports on the investigation in the situation

75. Mr El Hishri only cursorily addresses the Majority's reference to the reaction of States at the UN Security Council to Prosecution reports on the investigation in the situation.[193] He claims that "it is the [UN Security Council's] *silence* in response to the Prosecution's reporting that is determinative of the interpretation of [UNSCR 1970]".[194] He contends that this approach

[186] Appeal, para. 75. *See further* paras. 68-74.
[187] *Contra* Appeal, para. 68.
[188] Decision, para. 33.
[189] *See* Decision, para. 33. *See also* para. 42 (referring to UNSCR 2819, issued in April of this year, "'[d]etermining that the situation in Libya continues to constitute a threat to international peace and security', and specifically referring to [UNSCR] 1970").
[190] *But see* Appeal, paras 52-55. On this argument, *see further below* paras. 75-77.
[191] Decision, para. 34.
[192] Decision, para. 33 (fn. 43: referring, by way of example, to statements by Japan, Slovenia, France, and the Republic of Korea in just one such UN Security Council meeting).
[193] Appeal, para. 52.
[194] Appeal, para. 54 (emphasis added). *See also* para. 53 (discarding as "absurd" an alternative interpretation of the Decision).

cannot be "valid" because the UN Security Council is "a diplomatic and political body, rather than a legal or judicial body", and a "diplomatic and political body cannot be expected to respond with one voice" to a jurisdictional question.[195]

76. In this respect, Mr El Hishri shows no error materially affecting the Decision because he misunderstands the actual matters which were taken into account by the Majority, and therefore raises an irrelevant concern.[196] The Majority in fact took account of *two* aspects of the proceedings at the UN Security Council. First, it noted statements by States at the UN Security Council referring to ongoing crimes in Libya since 2011 and welcoming their inclusion within the Court's investigation pursuant to UNSCR 1970. Second, it noted that "no objection" was made to the Prosecution's ongoing reporting of its investigations including with regard to the present matter.[197] Consequently, Mr El Hishri is wrong to suggest that it was only the "silence" of States at the UN Security Council which was taken into account in interpreting UNSCR 1970. Rather, the Majority also drew upon relevant *positive* statements which were consistent with its interpretation.

77. Furthermore, in remarking upon the absence of any objection to the Prosecution's reporting on the progress of its investigation, nothing in the Decision suggests that the Majority anticipates that the UN Security Council would necessarily provide a formal corporate response to that reporting, much less respond in 'one voice'. Rather, in the same way that the Majority could identify the favourable observations of a number of specific States, it merely noted that it had not identified evidence of observations from specific States to the contrary. At no point has it been suggested that the UN Security Council was expected to respond in the manner of a legal or judicial body addressing a jurisdictional question, nor was any inference drawn by the Majority from the fact that it had not done so.

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[195] Appeal, paras. 54-55.
[196] *Contra* Appeal, paras. 54-55, 76.
[197] Decision, paras. 33 (fn. 43), 34.

CONCLUSION

78. For all the reasons above, the Appeal should be dismissed in its entirety.

79. In this context, while the Prosecution does not consider an oral hearing to be necessary for the purpose of deciding the Appeal, the Prosecution defers to the assessment of the Appeals Chamber.[198]

Mame Mandiaye Niang
Acting Prosecutor

Dated this 22nd day of September 2026

At The Hague, the Netherlands

[198] *Cf.* Appeal, paras. 7, 84 (the Prosecution notes that this is erroneously marked, on p. 35, as "81"). Mr El Hishri's right to a public hearing of his appeal does not necessarily presuppose an oral hearing: *contra* Appeal, paras. 79-83. Both the Appeal and this response are filed publicly, and the Appeals Chamber's resulting judgment will be made public. Nor is the nature of the legal issues arising from these proceedings such that an oral hearing is *necessarily* the most appropriate means either: (a) to ventilate the legal discussion for the benefit of the Appeals Chamber, or; (b) to inform the public of those issues. The Prosecution further notes the interest of all parties in proceedings which are not only fair but expeditious: *see* Statute, art. 67(1)(c).