

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/11**
Date: **1 August 2025**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

Under seal, *ex parte*, only available to the Prosecution and the Registry

**Prosecution Appeal Brief concerning the
“Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri”
(ICC-01/11-188)**

Source: Office of the Prosecutor

Pursuant to the Appeals Chamber's Order ICC-01/11-2000, dated 1-08-2025, this document is reclassified as "Public"

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

☒ **The Office of the Prosecutor**

☐ **Counsel for the Defence**

☐ **Legal Representatives of the Victims**

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants
(Participation/Reparation)**

☐ **The Office of Public Counsel for
Victims**

☐ **The Office of Public Counsel for the
Defence**

☐ **States Representatives**

☐ **Amicus Curiae**

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

CONTENTS

CONTENTS.....	3
INTRODUCTION.....	4
CONFIDENTIALITY	5
SUBMISSIONS	5
A. This appeal remains admissible notwithstanding execution of the Warrant	5
B. The Warrant incorrectly interpreted the scope of article 8 (war crimes).....	7
B.1. The Chamber erred in interpreting the article 8 nexus requirement	8
B.1.a. The article 8 nexus delimits war crimes from other forms of criminality	8
B.1.b. The article 8 nexus is fact sensitive and multi-factored	9
B.1.c. Detention for “reasons related to the conflict” is not dispositive of the article 8 nexus	10
B.2. The Chamber erred, alternatively, in imposing the threshold condition that persons were detained “for reasons related to the armed conflict”	11
B.2.a. The Chamber’s threshold condition is inconsistent with the chapeau of article 8(2)(c)	12
B.2.b. The Chamber’s threshold condition is inconsistent with the chapeau of article 8(2)(e)	13
B.3. The Chamber’s error materially affected the Warrant	14
C. The Warrant incorrectly interpreted the scope of article 7 (crimes against humanity) ..	15
C.1. The Chamber erred in interpreting the article 7 nexus requirement	16
C.1.a. The article 7 nexus delimits crimes against humanity from other forms of criminality	16
C.1.b. The article 7 nexus test is fact sensitive and multi-factored	18
C.1.c. Membership of the civilian population which is the object of the widespread or systematic attack is not dispositive of the article 7 nexus	20
C.2. The Chamber’s error materially affected the Warrant	21
CONCLUSION	21

INTRODUCTION

1. The Pre-Trial Chamber issued a warrant of arrest for Mr EL HISHRI because it found reasonable grounds to believe that he is responsible for numerous crimes against humanity and war crimes committed against detainees at Mitiga Prison in Libya.¹ Mr EL HISHRI has since been detained by national authorities in execution of the Warrant, and presently awaits surrender to the Court.² In due course, after his initial appearance, proceedings to confirm the charges against Mr EL HISHRI will commence.

2. Although the positive findings in the Warrant concerning Mr EL HISHRI's alleged crimes were themselves correct and reasonable, they were too narrow in their scope. Notably, the Pre-Trial Chamber made two discrete legal errors limiting the scope of the Court's jurisdiction *ratione materiae*. These concerned the scope of application of article 8 (war crimes) and of article 7 (crimes against humanity). As a result, a significant number of victims of otherwise criminal conduct were incorrectly excluded from the positive findings in the Warrant. In doing so, the Chamber departed without explanation from the caselaw of this Court, including several judgments of the Appeals Chamber.

3. Accordingly, this appeal is brought against the Warrant *only in part* to address the incorrect *exclusion* of a significant number of victims from the scope of the Warrant.³ It has no adverse impact—and is not intended to have any adverse impact—upon the validity or effect of the Warrant as a whole. This is because, in any event, the basis for the Pre-Trial Chamber's existing finding of reasonable grounds to believe that Mr EL HISHRI is responsible for crimes against humanity and war crimes remains correct and reasonable.

4. If this appeal is successful, the Prosecution requests the Appeals Chamber to articulate the law correctly, and affirm that the jurisdiction *ratione materiae* of the Court is not limited in the manner suggested in the Warrant. Applying this law, in the Prosecution's respectful submission, there are reasonable grounds to believe that *additional* victims of crimes against humanity and war crimes were established on the basis of the existing findings in the Warrant.

¹ See [ICC-01/11-188](#) ("Warrant").

² See e.g. [ICC, 'Situation in Libya: Khaled Mohamed Ali El Hishri arrested for alleged crimes against humanity and war crimes,' 18 July 2025.](#)

³ See e.g. [ICC-01/11-191-US-Exp](#) ("Notice of Appeal"), paras. 1 (giving notice of its "appeal in part" and "without prejudice to the remainder of the Warrant"), 3 (referring to "two aspects of the Pre-Trial Chamber's findings in the Warrant"), 4 (noting that the alleged "errors materially affected the scope of victimisation"), 15 (requesting reversal only of "erroneous" findings in relevant paragraphs). See further [ICC RPE](#), rule 154; [Regulations of the Court](#), reg. 64(1); [ICC-02/17-218 OA5](#) ("Afghanistan Article 18(2) Appeal Judgment"), paras. 51-53.

5. To the Prosecution's knowledge, the Appeals Chamber has not yet had occasion to correct an arrest warrant after it has been executed. However, as further explained below, this is appropriate in this case given the jurisdictional nature of the legal errors identified. Providing clear guidance on these points will promote procedural economy, and ensure that the case proceeds on a sound legal basis.

CONFIDENTIALITY

6. This brief is filed under seal, and *ex parte* (Prosecution and Registry only), in accordance with regulation 23*bis*(2), consistent with the original classification of the Warrant and Notice of Appeal.⁴ Given the Pre-Trial Chamber's re-classification of the Warrant as public,⁵ the Appeals Chamber may now re-classify this brief and the Notice of Appeal accordingly.

SUBMISSIONS

7. The Appeals Chamber should affirm the continued admissibility of this appeal, notwithstanding the recent execution of the Warrant, and correct the two discrete jurisdictional errors contained within it.

8. As the Appeals Chamber has previously reiterated, the war crimes jurisdiction of this Court is properly delimited by the existence of a nexus between relevant conduct of a perpetrator and an armed conflict. Assessment of that nexus is fact-sensitive and multi-factored. In this regard, it was erroneous to exclude relevant victims categorically because they were not detained for reasons related to the armed conflict.

9. Likewise, the crimes against humanity jurisdiction of this Court is properly delimited by the existence of a nexus between relevant conduct of a perpetrator and a widespread or systematic attack on any civilian population. Assessment of that nexus is, again, fact-sensitive and multi-factored. In this regard, it was erroneous to exclude relevant victims categorically because they were not members of the same civilian population that was the object of the attack.

A. This appeal remains admissible notwithstanding execution of the Warrant

10. In the Notice of Appeal, the Prosecution explained that the Warrant amounts to a jurisdictional ruling, because it adopted two interpretations of the Statute which had the effect of eliminating the legal basis of crimes against alleged victims, under articles 8 and 7 of the

⁴ See Notice of Appeal.

⁵ By order of the Pre-Trial Chamber, the Warrant was reclassified as public on 31 July 2025.

Statute, respectively.⁶ These legal interpretations directly affected the operative part of the Warrant, insofar as they led to positive findings concerning a *smaller* pool of victims than would otherwise have been the case.⁷ These legal interpretations did not, however, materially affect the positive findings that *were* made, and so this appeal is only brought against the Warrant in part.⁸

11. Since the Prosecution filed its Notice of Appeal,⁹ the Warrant has been executed and Mr EL HISHRI is now in the custody of national authorities. Yet these appeal proceedings continue to be admissible because the Warrant—and the course of the proceedings in the case more broadly—continue to be materially affected by the errors raised in the appeal.

12. First, the Warrant continues to have legal effect after it has been executed. Until the charges in the case are confirmed under article 61, the Warrant remains the sole foundational document for the Court's pre-trial proceedings concerning Mr EL HISHRI. This includes his pre-trial detention, consistent with articles 58(1) and 60(2) of the Statute. Even if the Pre-Trial Chamber were to grant interim release to Mr EL HISHRI, the Warrant remains the basis upon which the Chamber is seised of pre-confirmation proceedings.

13. Second, although it is not the charging instrument for Mr EL HISHRI's future trial (which will be the document containing the charges), the content of the Warrant remains significant. In particular, a purported ruling on the scope of the Court's jurisdiction *ratione materiae* is likely to affect the future course of pre-confirmation proceedings. As a consequence, if timely appealed (as in this case), jurisdictional errors in the Warrant should be corrected.¹⁰ This will provide advance notice¹¹ to all concerned—including Mr EL HISHRI—as to the correct jurisdictional framework and promotes procedural economy. It gives effect to the statutory interest in prompt resolution of jurisdictional questions to ensure that a case

⁶ See e.g. [Notice of Appeal](#), paras. 1-7. See also [ICC-01/18-422 OA2](#) ("Palestine Jurisdiction Appeal Judgment"), para. 34; [ICC-01/11-01/11-74 OA](#) ("Gaddafi Rule 103 Appeal Judgment"), para. 10; [ICC-01/09-78 OA](#) ("Kenya Article 93 Appeal Judgment"), para. 15; [ICC-01/04-02/06-1225 OA2](#) ("Ntaganda First Jurisdiction Appeal Judgment"), para. 39.

⁷ See e.g. [Afghanistan Article 18\(2\) Appeal Judgment](#), paras. 51-53.

⁸ See above para. 3.

⁹ See [Notice of Appeal](#).

¹⁰ See also e.g. [ICC-02/17-218 OA5](#) ("Afghanistan Article 18(2) Appeal Judgment"), para. 53 ("the Appeals Chamber considers that an appeal can indeed be directed against part of a decision, provided that the challenged part impacts the clarity or understanding of the decision and, in particular, its operative part. In this respect, the Appeals Chamber stresses the importance of coherence and certainty in a judicial decision [...] [A]lthough a question may arise as to the admissibility of an appeal when it is directed against one sentence or paragraph of the impugned decision, the appeal must be considered admissible when the impugned passage, read together with the operative part of the decision, raises doubts as to its understanding").

¹¹ Cf. [Chambers Practice Manual](#), 8th Ed. (2024), paras. 31-34.

proceeds on a sound legal basis.¹² Such clarification may also be relevant to other aspects of pre-confirmation procedure, including the admission of alleged victims to participate in the proceedings.¹³

14. The Appeals Chamber is competent to determine any adjustments to the conduct of these proceedings which may be necessary or appropriate given the execution of the Warrant.¹⁴

B. The Warrant incorrectly interpreted the scope of article 8 (war crimes)

15. For the purpose of article 8 of the Statute (war crimes), the Pre-Trial Chamber found that:

“[T]he key question is whether [alleged victims] were protected by IHL at the relevant time, and, in case of alleged violations of Common Article 3 of the 1949 Convention, that the alleged victims fell within the scope of this provision. Whilst all the war crimes alleged [...] require that the victims were in the power or the hands of the opponent at the time of the relevant conduct, and being detained would qualify as such, the key question is why these persons were detained. Even if an armed conflict is ongoing, not every detained person falls within the scope of IHL, especially when it concerns a government prison (or prison run by an organisation affiliated with the government). A common criminal, who is detained for having committed a regular crime, is not, without more, protected under Common Article 3 or IHL as such.

It must therefore be shown that a (non-international) armed conflict existed at the relevant time the persons were arrested or otherwise detained, and that the liberty of these persons was restricted for reasons related to the conflict, as a result of which they were protected under IHL during their detention.”¹⁵

16. From this reasoning, it is apparent that the Pre-Trial Chamber considered the Court's war crimes jurisdiction to be delimited by the question whether detainees had been detained “for reasons related to the conflict”. This was an error of law, either with regard to: (i) the

¹² In a different context, see e.g. [ICC-01/18-143](#) (“Palestine Article 19(3) Decision”), paras. 78 (*mutatis mutandis*, noting the interest in ensuring “that an investigation proceeds on a sound jurisdictional basis as early as possible”), 80 (referring to the potential “importance of an early judicial assessment of the Court's jurisdiction” in appropriate circumstances). This is without prejudice to the right of a suspect under article 19(2): see e.g. [Palestine Article 19\(3\) Decision](#), para. 77. See also e.g. [Statute](#), arts. 19(4) (requiring jurisdictional challenges to take place “prior to or at the commencement of the trial”, except in “exceptional circumstances”), 19(5) (requiring States to challenge matters of jurisdiction or admissibility “at the earliest opportunity”).

¹³ See [Chambers Practice Manual](#), 8th Ed. (2024), para. 34.

¹⁴ See *mutatis mutandis* [Statute](#), arts. 64(6)(f), 83(1). See further e.g. [Chambers Practice Manual](#), 8th Ed. (2024), para. 15 (“At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*”).

¹⁵ [Warrant](#), paras. 14-15 (emphasis added). Applying this requirement, see further paras. 17-18, 38-40, 44-45, 49, 54-55, 61-62, 69-70, 75-76, 85-86.

interpretation of the established requirement for a nexus between the alleged conduct of the perpetrator and an armed conflict, or alternatively; (ii) the imposition of a novel threshold condition for the exercise of the Court's war crimes jurisdiction. The Chamber's error materially affected its findings, since they caused it to exclude a significant number of detainees as victims of war crimes, even though it found that they were subject to prohibited conduct.

B.1. The Chamber erred in interpreting the article 8 nexus requirement

17. For each war crime under the Statute, the Elements of Crimes require that the alleged conduct of the perpetrator "took place in the context of and was associated with" a relevant armed conflict, and that the perpetrator was "aware of factual circumstances" establishing the existence of such a conflict. This is the article 8 nexus, which delimits war crimes from other forms of criminality. The existence of the nexus is fact sensitive, and draws on a multitude of factors. Yet, by requiring that victims were detained "for reasons related to the conflict", the Pre-Trial Chamber incorrectly limited its assessment to a single criterion, excluding all others. It therefore misinterpreted and misapplied this test.¹⁶

B.1.a. The article 8 nexus delimits war crimes from other forms of criminality

18. The Appeals Chamber has stressed the importance of the article 8 nexus on several occasions, consistent with the long established position in customary international law. Thus, in *Ntaganda*, it recalled that "it is the nexus requirement [...] that sufficiently and appropriately delineates war crimes from ordinary crimes", and that "any undue expansion of the reach of the law of war crimes can be effectively prevented by a rigorous application of the nexus requirement".¹⁷ In *Afghanistan*, it further echoed that "[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed".¹⁸

19. In this context, the Pre-Trial Chamber was correct that, "[e]ven if an armed conflict is ongoing", not all violent conduct amounts to a war crime.¹⁹ However, this was not a new insight, but merely an uncontroversial reflection of the need to establish the article 8 nexus. Even if the Chamber's reference to the "scope of IHL" or protection "under IHL" is properly

¹⁶ See [Warrant](#), para. 17-18 ("the Chamber finds reasonable grounds to believe that at least some of the detainees were captured for reasons related to an armed conflict [...] Based on the foregoing, the Chamber considers that [...] there are reasonable grounds to believe that IHL was applicable to at least part of the conduct underlying the alleged crimes, and that these crimes thus, at least in part, took place in the context of, and were associated with, a non-international armed conflict").

¹⁷ [ICC-01/04-02/06-1962 OA5](#) ("*Ntaganda* Second Jurisdiction Appeal Judgment"), para. 68.

¹⁸ [ICC-02/17-138 OA4](#) ("*Afghanistan* Article 15(4) Appeal Judgment"), para. 69 (quoting [ICTY, Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002](#) ("*Kunarac* Appeal Judgment"), paras. 58-60).

¹⁹ [Warrant](#), para. 14.

understood in this sense,²⁰ as it may be,²¹ this did not require the Chamber to apply a new test. Rather, it should have led the Chamber to identify and apply the fact sensitive and multi-factored test established in the Court's case law. Yet it set out this law only partially, and failed to apply its essential requirements.²²

B.1.b. The article 8 nexus is fact sensitive and multi-factored

20. Consistent with the broader context of the passages from *Ongwen* and *Ntaganda* to which the Pre-Trial Chamber alluded,²³ the Appeals Chamber has stressed that the article 8 nexus is a fact sensitive and multi-factored test. Even if it is to be applied "rigorous[ly]",²⁴ it cannot be reduced to a single arbitrary dimension, but rather requires a holistic assessment. The Pre-Trial Chamber did not acknowledge this in the Warrant.

21. In particular, the Appeals Chamber has quoted with approval the reasoning of the ICTY Appeals Chamber in *Kunarac* and held that, in assessing the article 8 nexus:

"[T]he [...] Chamber may have regard, *inter alia*, to 'the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.'"²⁵

22. Similarly, and again with reference to *Kunarac*, the Appeals Chamber has also reiterated:

"The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the

²⁰ See e.g. [Warrant](#), paras. 14-15.

²¹ Cf. [ICC-01/12-01/18-2594-Red](#) ("*Al Hassan* Trial Judgment"), para. 1254 ("What the Chamber effectively must assess for the nexus requirement to be established is whether the alleged conduct was governed by the relevant rules of [IHL] that are alleged to have been violated").

²² See [Warrant](#), para. 16 (recalling that, "so long as IHL applied to the conduct in question, the perpetrator's conduct need not have taken place as part of hostilities" and that "the alleged acts may have been temporally or geographically removed from the actual fighting, so long as the victims were protected under IHL at the relevant time", citing [ICC-02/04-01/15-1762-Red](#) ("*Ongwen* Trial Judgment"), para. 2689; [ICC-01/04-02/06-2359](#) ("*Ntaganda* Trial Judgment"), para. 731).

²³ See [Ongwen Trial Judgment](#), para. 2689 ("What is required is a sufficiently close link to the hostilities—the Chamber may take into account, amongst other factors, the status of the perpetrator and the victim, whether the act may be said to serve the ultimate goal of a military campaign and whether the crime is committed as part of, or in the context of, the perpetrator's official duties"); [Ntaganda Trial Judgment](#), para. 731 ("The perpetrator's conduct [...] must have been closely linked to the hostilities or be related to the control carried out over a certain part of the territory by the relevant party to the conflict. The existence of an armed conflict must have, at a minimum, played a substantial part in the perpetrator's ability to commit the crime, the decision to commit it, the purpose of the commission, or the manner in which the crime was committed").

²⁴ [Ntaganda Second Jurisdiction Appeal Judgment](#), para. 68.

²⁵ [Ntaganda Second Jurisdiction Appeal Judgment](#), para. 68 (quoting [Kunarac Appeal Judgment](#), para. 59).

perpetrator's ability to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict [...]."²⁶

23. The approach of the Appeals Chamber (applying the Statute) and the ICTY Appeals Chamber (applying customary international law)²⁷ is also similar to the approach in general IHL. For example, as the ICRC recently recalled, citing *Kunarac*, "[t]he applicability of humanitarian law to a specific act therefore requires *a certain nexus* between that act and the [...] conflict. Acts that have *no such connection* to the conflict generally remain regulated exclusively by domestic criminal and law enforcement regimes".²⁸

24. In the Warrant, the Pre-Trial Chamber failed to apply the fact sensitive, multi-factored approach to the nexus requirement consistently approved by the Appeals Chamber. At no point did it consider, for example, relevant factors such as: whether the alleged perpetrator of the relevant conduct was a fighter or member of a non-State organised armed group; whether the victim was not a fighter; whether the alleged perpetrator committed the relevant conduct in the context of their official functions; or whether the conflict played a substantial part in the alleged perpetrator's ability to carry out the relevant conduct, the manner in which it was committed, or the purpose for which it was committed. Rather, and incorrectly, the Chamber purported to determine that the victims were not protected by IHL solely on the basis that they were not detained for "reasons related to the conflict".²⁹ Such reliance on a mere single criterion was the wrong approach as a matter of principle. It was neither explained or justified by reference to authority, nor could it have been, since this approach is incompatible with the correct test.³⁰

B.1.c. Detention for "reasons related to the conflict" is not dispositive of the article 8 nexus

25. Two aspects of the Pre-Trial Chamber's emphasis on the reason for the victims' detention further demonstrate that this was erroneous as an application of the article 8 nexus.

26. First, by considering exclusively the ostensible motivation for (what it considered to be) the relevant conduct (the "reasons" for the detention), the Pre-Trial Chamber reduced the nexus

²⁶ [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 69 (quoting [Kunarac Appeal Judgment](#), paras. 58-60).

²⁷ This has also been consistently followed and applied by other tribunals applying customary international law: see e.g. [ICTR, Rutaganda v. the Prosecutor, ICTR-96-3-A, Judgment, 26 May 2003](#) ("*Rutaganda Appeal Judgment*"), paras. 569-570.

²⁸ [ICRC, Convention \(III\) relative to the Treatment of Prisoners of War: Commentary of 2020](#), para. 494 (emphasis added, citing *inter alia* [Kunarac Appeal Judgment](#), paras. 59-60).

²⁹ For this or similar terms, see [Warrant](#), paras. 17-18, 38-40, 44-45, 49, 54-55, 61-62, 69-70, 75-76, 85-86.

³⁰ See [Warrant](#), paras. 14-15.

requirement to a single purposive dimension—*why* the alleged perpetrator may have acted as they did. Yet this is incompatible with the correct approach to the article 8 nexus, which is not a motive requirement. To the contrary, while the “purpose for which [a crime] was committed” *might* be a relevant consideration (depending on the facts), it is no less relevant in principle to consider whether the conflict played a substantial part in the “perpetrator’s *ability* to commit it” or “the *manner* in which it was committed”.³¹ Consequently, excluding the article 8 nexus based solely on the perpetrator’s ostensible motivation was erroneous. Such an approach could radically circumscribe the scope of the Court’s war crimes jurisdiction, without justification.

27. Second, and in any event, the Pre-Trial Chamber did not even assess the reason why the alleged *war crimes* (*i.e.*, the relevant conduct of the perpetrator(s)) were committed. Rather, by considering only the reason for the victims’ detention, the Pre-Trial Chamber incorrectly applied the nexus requirement to an ancillary circumstance. Notably, for the purpose of the war crimes so far alleged, the relevant conduct of the perpetrator did not depend on the illegality of the victims’ detention but related instead to their mistreatment *once they had been detained*.³² As such, the circumstances of the victims’ detention (and the reason for it) did not necessarily explain or characterise the alleged crimes—and it was this latter conduct for which the nexus had to be established. The Chamber did not apparently consider at all whether there was a nexus between the conflict and the *specific* war crimes actually alleged in the case. Again, such an approach was erroneous.

B.2. The Chamber erred, alternatively, in imposing the threshold condition that persons were detained “for reasons related to the armed conflict”

28. Alternatively, if the Pre-Trial Chamber’s requirement (that war crimes victims were detained for “reasons related to the conflict”) were not to be understood as its interpretation of the article 8 nexus requirement, it erred by applying this as a novel and additional threshold condition for the application of IHL. Such a requirement is unsupported by, and incompatible with, the chapeau of article 8(2)(c) (applying to most of the alleged war crimes in this case: murder, torture, cruel treatment, and outrages upon personal dignity) and of article 8(2)(e) (applying to the war crimes of rape, other sexual violence, and sexual slavery).

³¹ See *above* para. 22.

³² See *e.g.* [Warrant](#), paras. 38-40 (torture), 44-45 (cruel treatment), 49 (outrages upon personal dignity), 54-55 (rape), 61-62 (sexual violence), 69-70 (murder). See *also* paras. 75-76 (summary punishments), 85-86 (sexual slavery). While imprisonment was alleged as a crime against humanity (see [Warrant](#), paras. 29-31), article 8(2)(c) does not on its face provide for a direct equivalent (applicable in non-international armed conflict) to the war crime of unlawful confinement under article 8(2)(a)(vii) (applicable in international armed conflict).

B.2.a. The Chamber's threshold condition is inconsistent with the chapeau of article 8(2)(c)

29. Article 8(2)(c) of the Statute—which expressly aims to address “serious violations of article 3 common to the four Geneva Conventions” (“CA3”)—provides that relevant war crimes under this provision encompass those “committed against *persons taking no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause” (emphasis added). This provision is materially identical to CA3. As the ICJ has recalled, CA3 constitutes a “minimum yardstick”, reflecting “rules which, in the Court’s opinion, reflect [...] ‘elementary considerations of humanity’”.³³

30. On its face, nothing in the chapeau of article 8(2)(c) limits its scope of application only to persons detained “for reasons related to the armed conflict”. Rather, the core criterion is that victims are merely “taking no active part in the hostilities”—the categories of person then listed are mere illustrative examples, as demonstrated by the word “including”. This is also supported by the open-ended category of reasons for which even a member of armed forces may become *hors de combat*. As such, there is no requirement in article 8(2)(c) that a victim is necessarily a detainee at all—let alone a restriction on the *reasons* for their detention—provided they are in the power of the alleged perpetrator. Such an interpretation would substantially restrict and undermine the protective scope of CA3.

31. In its authoritative commentary, the ICRC has reaffirmed the broad scope of CA3. It stated that persons “taking no active part in the hostilities” include “first and foremost the civilian population”,³⁴ without qualification. Moreover, CA3 “contains no limitation requiring a person [...] to be in the power of the *enemy* in order to be protected”.³⁵ This broad approach is hard to reconcile with any notion that the application of CA3 is contingent upon establishing the specific reason for a person to have fallen into the power of the perpetrator (such as detention “for reasons related to the conflict”). To the contrary, the ICRC has stressed the role

³³ [ICJ, Case concerning Military and Paramilitary Activities In and Against Nicaragua, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14](#), para. 218 (quoting [ICJ, The Corfu Channel Case, Merits, Judgment of 9 April 1949, ICJ Reports 1949, p. 4](#), p. 22).

³⁴ [ICRC, Convention \(III\) relative to the Treatment of Prisoners of War: Commentary of 2020](#), para. 555.

³⁵ [ICRC, Convention \(III\) relative to the Treatment of Prisoners of War: Commentary of 2020](#), para. 579 (emphasis supplied). See also para. 580 (noting that such a limitation would be “difficult to reconcile with the protective purpose of [CA3]” and that including persons affiliated to the same party to the conflict is “logical” since it may often be difficult “to determine whether members of the general population not actively participating in hostilities are affiliated with one or other Party to the conflict”).

of the *nexus* in delimiting the correct application of CA3, rather than reading any limitation into CA3 itself.³⁶

32. The Appeals Chamber has taken a similar approach. Thus, in *Afghanistan*, it found that the Pre-Trial Chamber's limitation on the territorial scope of CA3 was erroneous. It emphasised that the "minimum provisions" of CA3 require that "those falling under its protection 'shall *in all circumstances* be treated humanely'" and that proscribed inhumane treatment "'shall remain prohibited at any time and in any place whatsoever'". In its view, attempts to limit the scope of CA3 would "be contrary to [its] purpose [...], which is to provide minimum guarantees in relation to armed conflicts."³⁷ Instead, "a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus"—and, in that respect, "[t]he place of capture of the alleged victim may be a relevant factor [...], but it does not settle the matter."³⁸

33. Although relying on the reason for detention rather than the place of capture, the Warrant thus seems to contain a very similar error to that made by the *Afghanistan* Pre-Trial Chamber.

B.2.b. The Chamber's threshold condition is inconsistent with the chapeau of article 8(2)(e)

34. Article 8(2)(e) of the Statute is addressed to "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law". On its face, again, this contains no express limitation to persons detained "for reasons related to the conflict".

35. As the Appeals Chamber has previously explained, the chapeau of article 8(2)(e) means that the scope of application of each war crime to which it applies must be assessed individually, in the context of the "established framework of international law"—which means, in the absence of a relevant applicable treaty, customary IHL.³⁹

36. The relevant war crimes in this case are all listed under article 8(2)(e)(vi), which applies *inter alia* to "rape", "other sexual violence", and "sexual slavery". While the IHL prohibition of this conduct is not drawn expressly from CA3, it is nonetheless closely linked to CA3. This

³⁶ [ICRC, Convention \(III\) relative to the Treatment of Prisoners of War: Commentary of 2020](#), para. 583 ("insofar as a specific situation has a nexus to a non-international armed conflict [...] all Parties to the conflict should, as a minimum, grant humane treatment [...] based on [CA3]", emphasis added). See also para. 581 (suggesting that a person could be protected by CA3 if subjected to inhumane treatment when tried for "ordinary crimes in the context of the armed conflict").

³⁷ [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 74.

³⁸ [Afghanistan Article 15\(4\) Appeal Judgment](#), paras. 76-77.

³⁹ [Ntaganda Second Jurisdiction Appeal Judgment](#), paras. 53-55.

is demonstrated by the specific proviso that it is a war crime under this head to commit “any other form of sexual violence *also constituting a serious violation of [CA3]*” (emphasis added). As explained above, full effect is to be given to the broad scope of application of CA3, with the correct delimitation of the Court’s war crimes jurisdiction addressed by means of the nexus requirement.⁴⁰

37. Furthermore, with specific regard to the scope of application of the war crimes in article 8(2)(e)(vi), the Appeals Chamber has stressed that “there is no conceivable reason” to conclude that “[IHL] suggests any limits on who may be victims” of conduct such as rape and sexual slavery, for which the “prohibitions [...] in armed conflict are without a doubt well established”.⁴¹ The Warrant does not purport to find any legal basis to the contrary.

B.3. The Chamber’s error materially affected the Warrant

38. The Pre-Trial Chamber’s legal error materially affected its conclusions concerning the scope of victimisation under article 8 of the Statute, which was substantially narrower than under article 7 of the Statute.⁴² If it had applied the law properly, it would not have halted its article 8 analysis merely because of its view that certain victims were not detained “for reasons related to the conflict”.⁴³ Instead, consistent with the broad scope of CA3 for the purpose of article 8(2)(c) and the established framework of international law for the purpose of article 8(2)(e)(vi), it would have considered holistically whether the alleged conduct of the perpetrator “took place in the context of and was associated with” a relevant armed conflict, applying the established fact sensitive, multi-factored test.

39. By contrast, for those persons which the Pre-Trial Chamber *did* consider to be victims of war crimes, the Chamber’s legal error was harmless. While it was incorrect to treat its view

⁴⁰ See *above* paras. 29-33.

⁴¹ [Ntaganda Second Jurisdiction Appeal Judgment](#), paras. 64-66.

⁴² See e.g. [Warrant](#), Disposition (finding that: “a significant number” of persons were victims of torture as a crime against humanity, but only that “at least, a few persons” were victims of torture, cruel treatment, and/or outrages upon personal dignity as war crimes; that “at least five” and “several” persons respectively were victims of rape and other sexual violence as crimes against humanity, but only that “two” and “at least, two” persons respectively were victims of rape and other sexual violence as war crimes; that “a significant number” of persons were victims of murder as a crime against humanity, but only that “a number” of persons were victims of murder as a war crime). See also paras. 75-76 (considering the sufficiency of the evidence for the war crime of summary punishment only with regard to “two persons” regarded as “protected by [CA3]”, and not any of the other 14 persons alleged by the Prosecution to have been subjected to this conduct, but then excluding the “two persons” for reasons unrelated to this appeal), 85-86 (considering the sufficiency of the evidence for the war crime of sexual slavery only with regard to “two detainees” found to have been subject to rape as a war crime, and not any of the other 3 persons alleged to be subject to this conduct, but then excluding the “two detainees” for reasons unrelated to this appeal). With regard to torture as a war crime, the Pre-Trial Chamber only considered those detainees where it was satisfied on the evidence that the requisite prohibited purpose was established: para. 38.

⁴³ See [Warrant](#), paras. 17-18, 38-40, 44-45, 49, 54-55, 61-62, 69-70, 75-76, 85-86.

that such persons had been detained “for reasons related to the conflict” as dispositive of the article 8 nexus (*i.e.*, as the *only* factor which could be considered), it was nonetheless permissible and reasonable to rely on this factor as one possible basis (among others) to establish the nexus. In other words, if the Chamber had applied the fact sensitive, multi-factored nexus test as legally required, it would still properly have made positive findings with regard to those victims already acknowledged in the Warrant—while also, in the Prosecution’s submission, making *additional* positive findings for the wider pool of victims.

C. The Warrant incorrectly interpreted the scope of article 7 (crimes against humanity)

40. For the purpose of article 7 of the Statute (crimes against humanity), the Pre-Trial Chamber found that there were reasonable grounds to believe that “the conduct directed against the persons detained in the Mitiga Prison, who were—at least in part—perceived to be opposed to the GNA or SDF/RADA, constituted a widespread and/or systematic attack against a civilian population”.⁴⁴

41. With regard to the alleged enslavement of a group of detainees at Mitiga known as the “sub-Saharan African detainees”—who had allegedly been “detained due to their irregular situation” in Libya⁴⁵—the Pre-Trial Chamber further determined that:

“[T]here are *indicia* that show that powers attaching to the right of ownership over the sub-Saharan African and foreign detainees were exercised by the guards of Mitiga Prison. However, the Chamber also notes that the Prosecution defines the civilian population targeted by this crime as ‘segments of the population in Libya perceived to be opposing SDF/RADA or its ideology’. The material provided indicates that the Sub-Saharan detainees were detained for reasons unrelated to opposing SDF/RADA or its ideology, *and therefore cannot be considered part of the same civilian population that was being attacked*. [...] Based on these considerations, the Chamber will not further examine the alleged crime against with humanity with respect to [...] Sub-Saharan African [...] detainees.”⁴⁶

42. It is apparent in this reasoning that the Pre-Trial Chamber considered article 7 of the Statute to require that victims of crimes against humanity are “part of the same civilian

⁴⁴ [Warrant](#), para. 24. *See also* para. 21 (recalling that the Prosecution had submitted that “the civilian population against which an attack within the meaning of article 7(1) of the Statute was directed” was “comprised of ‘segments of the population in Libya perceived to be opposing SDF/RADA or its ideology’”). *See further* [ICC-01/11-152-Anx](#) (“*Njeem* Arrest Warrant”), para. 24.

⁴⁵ [Warrant](#), para. 79.

⁴⁶ [Warrant](#), para. 81 (emphasis added).

population” determined to be the object of the widespread or systematic attack. This was an error of law.⁴⁷ Specifically, the Chamber misinterpreted the requirement under article 7 for a sufficient “nexus” between the conduct alleged to amount to a crime against humanity and the widespread or systematic attack against a civilian population which forms its context.

C.1. The Chamber erred in interpreting the article 7 nexus requirement

43. Article 7(1) of the Statute provides that, “[f]or the purposes of this Statute, ‘crimes against humanity’ means any of the following acts *when committed as part of* a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (emphasis added). This is further reinforced by the relevant Elements of Crimes, which provide that:

“2. The *conduct was committed as part of* a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was *part of* or intended the conduct to be *part of* a widespread or systematic attack directed against a civilian population.”⁴⁸

44. This is the article 7 nexus, which delimits crimes against humanity from other forms of criminality. Yet without reference either to the precise wording of this requirement, or to the relevant caselaw, the Pre-Trial Chamber simply assumed that the identity of the victims was dispositive—at least to the extent that, in its view, relevant conduct could not be committed as “part” of a widespread or systematic attack if the victims were not themselves members of the relevant civilian population.⁴⁹ This was incorrect.

C.1.a. The article 7 nexus delimits crimes against humanity from other forms of criminality

45. Under the Statute, crimes against humanity are primarily defined in two critical ways. First, by a contextual element—that there exists a “widespread or systematic attack directed against any civilian population”⁵⁰ which is carried out “pursuant to or in furtherance of a State or organizational policy to commit such attack”.⁵¹ Second, by the existence of a sufficient

⁴⁷ This is without prejudice to the factual questions—not subject to appeal in these proceedings—concerning the Pre-Trial Chamber’s conclusions (at the article 58 standard of proof) with regard to (i) the definition of the civilian population that was the object of the widespread or systematic attack, and; (ii) whether the sub-Saharan African detainees fell within the civilian population as correctly defined. Such matters remain to be determined on the basis of the charges as presented for confirmation by the Chamber under article 61 of the Statute.

⁴⁸ See [ICC Elements of Crimes](#), art. 7(1)(c), elements 2 and 3 (emphasis added).

⁴⁹ See *above* paras. 41-42.

⁵⁰ [Statute](#), art. 7(1).

⁵¹ [Statute](#), art. 7(2)(a). See further e.g. [Ongwen Trial Judgment](#), paras. 2678-267 (“the policy requirement ensures that the multiple acts forming the course of conduct are linked” and “ensures that acts which are unrelated or

link—a “nexus”—between the “attack” which must be established as a contextual element, and the particular underlying acts which are carried out by the perpetrator(s). In this way, the scheme for crimes against humanity is not dissimilar to the scheme for war crimes, which likewise requires the existence of a contextual element (in that case, an armed conflict) and a nexus.⁵²

46. The nexus requirement for crimes against humanity concerns both objective and subjective elements—that the conduct of the perpetrator forms “part” of the widespread or systematic attack, and that the perpetrator knows or intends that their conduct will form “part” of such an attack.⁵³ It is “this *connection* to a widespread or systematic attack” which characterises and delimits crimes against humanity from other forms of criminality.⁵⁴

47. In the Warrant, the Pre-Trial Chamber did not provide specific reasoning concerning the article 7 nexus, but appeared to find that it was established where the victims of the alleged crimes against humanity were themselves part of the civilian population that was the object of the widespread or systematic attack.⁵⁵ Since the Chamber did not direct itself expressly to the framing of the article 7 nexus (requiring only that the relevant “conduct” of the perpetrator was “part” of the widespread or systematic attack), however, it erred by excluding victims whom it did *not* consider to be part of the civilian population that was the object of the widespread or systematic attack. In this manner, it conflated the requirements for the contextual element itself (the widespread or systematic attack) with the article 7 nexus requirement—which is fact sensitive and multi-factored.

perpetrated by individuals acting randomly on their own are excluded”; it need not “consist of a pre-established design or plan”, but may “crystallise and develop only as actions are undertaken”). See also D. Robinson, ‘The elements of crimes against humanity,’ in R.S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: 2001) (“Robinson”), p. 63 (characterising the threshold condition as a “high-threshold but disjunctive test (widespread or systematic) coupled with a low-threshold but conjunctive test (multiple [acts] and policy)” such that “[a]n attack need not necessarily be ‘widespread’ (understood as requiring large-scale activity involving a great number of victims), but it must at least have *some* scale, affecting multiple victims” and, *vice versa*, “need not necessarily be ‘systematic’ (understood as requiring methodical organization or orchestration), but it must at least be pursuant to or in furtherance of some sort of plan or policy”). Indeed, the perpetrator need not necessarily even be aware of the precise details of the policy: Robinson, p. 73.

⁵² See above paras. 17-23.

⁵³ While some commentators emphasise the subjective aspect, it is apparent that both dimensions must be established: *c.f.* ILC, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, A/74/10, 2019, art. 2 (definition of crimes against humanity), Commentary, paras. 34-36.

⁵⁴ See Robinson, p. 57 (emphasis added).

⁵⁵ See Warrant, para. 24. See further *e.g.* paras. 28-31 (imprisonment), 33-36 (torture), 51-53, 55 (rape), 57, 59, 62 (other sexual violence), 64, 66-68 (murder), 88-91 (persecution).

C.1.b. The article 7 nexus test is fact sensitive and multi-factored

48. The Court has consistently recalled the need to “determine the existence of the requisite nexus between the widespread or systematic attack” and the “act within the ambit of [a]rticle 7(1)” (*i.e.*, the alleged conduct of the perpetrator). This requires consideration, on the one hand, of “the nature of the act at issue, the aims it pursues and the consequences it occasions”, and on the other, “the widespread or systematic attack, considered as a whole, and in respect of [its] various components [...] (including the policy, the patterns of crimes, or the type of victims).”⁵⁶ As observed in the *Katanga* Trial Judgment, “[i]solated acts that clearly differ in their nature, aims and consequences from other acts that form part of an attack” do not satisfy the article 7 nexus.⁵⁷

49. Applying customary international law,⁵⁸ other tribunals have taken a similar approach.⁵⁹ Thus, in *Mrkšić*, the ICTY Appeals Chamber summarised:

“[O]nce the requirement of a widespread or systematic attack against a civilian population is fulfilled, there must be a nexus between the acts of the accused and the attack itself. The Appeals Chamber considers that [...] *the requirement that the acts of an accused must be part of the ‘attack’ against the civilian population does not, however, require that they be committed in the midst of that attack: a crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack.* [...]”

Thus, to convict an accused of crimes against humanity, it must be proven that his acts were *related* to a widespread or systematic attack against a civilian population and that he knew his acts were so related. *Such an assessment will be made on a case-by-case basis.* For example, having considered the *context and circumstances* in which an act was

⁵⁶ *Al Hassan Trial Judgment*, paras. 1115-1116 (citing also [ICC-01/04-01/07-3436-tENG](#) (“*Katanga* Trial Judgment”), para. 1124; [Ongwen Trial Judgment](#), para. 2688). See also [ICC-01/14-01/18-2784-Red](#) (“*Yekatom and Ngaïssona* Trial Judgment”), para. 3781.

⁵⁷ *Katanga Trial Judgment*, para. 1124.

⁵⁸ See e.g. [ICTY, Prosecutor v. Popović et al., IT-05-88-A, Judgment, 30 January 2015](#) (“*Popović* Appeal Judgment”), para. 570 (requiring the act of the perpetrator, “by its nature or consequences”, to be “objectively part of the attack”, in combination with the requisite knowledge of the perpetrator).

⁵⁹ See e.g. *Katanga Trial Judgment*, para. 1124 (citing *inter alia* [Kunarac Appeal Judgment](#)). See further [Kunarac Appeal Judgment](#), paras. 99-100 (“The acts of the accused must be part of the ‘attack’ against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime must not, however, be an isolated act. A crime would be regarded as an ‘isolated act’ when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of that attack”).

committed, an act may be so far removed from the attack that no nexus can be established (so called 'isolated act') and hence cannot qualify as a crime against humanity."⁶⁰

50. Like the article 8 nexus, the article 7 nexus therefore requires a fact sensitive and multi-factored assessment. Broad conceptual similarity between the article 7 nexus and the article 8 nexus is unsurprising, since both serve similar functions and seek to achieve similar goals. Just as the perpetrator of a war crime need not be responsible for the armed conflict to which their conduct may have a nexus,⁶¹ the perpetrator of a crime against humanity need not be responsible for the widespread or systematic attack upon a civilian population yet their conduct may still have the requisite nexus.⁶²

51. Notably, the article 7 nexus does not require that the perpetrator's own conduct itself forms part of the course of conduct comprising the attack, nor is it required to be widespread, systematic, or carried out pursuant to a State or organizational policy⁶³—even if, in practice, this may frequently be the case. Rather, as a matter of law, it is only required that: (i) the *attack* satisfies those requirements, and; (ii) there is a *sufficient* connection between the perpetrator's conduct and the attack to justify characterising the relevant conduct as a crime against humanity, taking all the relevant circumstances into account. This is consistent with the purpose of crimes against humanity, which aims to ensure broad protection to civilians from the serious harms represented by the prohibited acts,⁶⁴ which are fundamental in nature,⁶⁵ once the threshold condition (a widespread or systematic attack) is established.

52. The correctness of this conclusion is further demonstrated by the acknowledged line of case law—also recognised at this Court—that a perpetrator can still be responsible for crimes

⁶⁰ [ICTY, Prosecutor v. Mrkšić and Šljivančanin, IT-95-13/1-A, Judgment, 5 May 2009](#) (“Mrkšić Appeal Judgment”), para. 41 (emphasis added, citing *inter alia* [Kunarac Appeal Judgment](#), paras. 99-100).

⁶¹ Indeed, the person responsible for a war crime need not even be a combatant or themselves affiliated to a party to the armed conflict: see e.g. [ICTR, Prosecutor v. Akayesu, ICTR-96-4-A, Judgment, 1 June 2001](#), para. 444 (rejecting any requirement for a perpetrator to have a “special relationship with one party to the conflict”). See also [Rutaganda Appeal Judgment](#), para. 570 (referring to war crimes committed by a “non-combatant”).

⁶² See below fn. 63.

⁶³ See K. Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (OUP: 2014) (“Ambos”), pp. 75-76.

⁶⁴ The intent to afford broad protection is illustrated, for example, by the reference to “any” civilian population: see e.g. [Statute](#), art. 7(1).

⁶⁵ See Ambos, p. 48 (crimes against humanity ultimately protect “human dignity”, by providing “penal protection against the transgression of the most basic laws protecting our individuality [...] and our social entity”). See also K. Ambos, ‘Article 7: crimes against humanity,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022), p. 146 (mn. 3).

against humanity even if their victims are not members of the civilian population which is the object of the attack.⁶⁶

C.1.c. Membership of the civilian population which is the object of the widespread or systematic attack is not dispositive of the article 7 nexus

53. In the Warrant, the Pre-Trial Chamber considered that the enslavement of sub-Saharan African detainees could not be characterised as a crime against humanity because these detainees were not part of the same civilian population found to be the object of the attack.⁶⁷ Yet this conclusion, which was unsupported by any reasoning or reference to authority, is squarely contradicted by the principle recognised in cases such as *Al Hassan* and *Ongwen* that individual victims “need only be ‘persons’ under the Elements of Crimes” and need not even be “civilians” at all.⁶⁸ The ICTY Appeals Chamber has likewise consistently endorsed the same approach.⁶⁹ What matters is that there is “a sufficient nexus to an attack against a ‘civilian’ population.”⁷⁰

54. In the present case, the erroneous nature of the Pre-Trial Chamber’s conflation of the article 7 nexus requirement with the requirement for the existence of a widespread or systematic attack against a civilian population is well illustrated by two factors.

55. First, on the facts in the Warrant, there was no doubt that the sub-Saharan African detainees *were* civilians—but merely, as a consequence of the Pre-Trial Chamber’s reasoning, the wrong ‘*kind*’ of civilians. Given the overall protective purpose of the crimes against humanity regime, this apparently arbitrary distinction warns of fault in the logic leading to such a conclusion. If it is correct as set out above that even persons who are *not* civilians may still be victims of crimes against humanity,⁷¹ then necessarily persons who *are* civilians (even if not of the same ‘population’ as that which is the object of the widespread or systematic attack) must also potentially be regarded as victims of crimes against humanity. In both cases, the fact that the victims are not members of the relevant civilian population cannot preclude the finding that the article 7 nexus is satisfied.

⁶⁶ See *Ambos*, p. 76 (“the victim of the individual act of a crime against humanity need not necessarily be a member of a specifically targeted group”).

⁶⁷ *Warrant*, para. 81.

⁶⁸ See *Al Hassan Trial Judgment*, para. 1106; *Ongwen Trial Judgment*, para. 2675; *Ntaganda Trial Judgment*, para. 669; *ICC-01/05-01/08-3343* (“*Bemba Trial Judgment*”), para. 156.

⁶⁹ See e.g. *Popović Appeal Judgment*, para. 569; *Mrkšić Appeal Judgment*, para. 36; *ICTY, Prosecutor v. Martić, IT-95-11-A, Judgment, 8 October 2008*, paras. 305-314.

⁷⁰ *Ongwen Trial Judgment*, para. 2675.

⁷¹ See *above* para. 53.

56. Second, even the facts acknowledged by the Pre-Trial Chamber demonstrate how—applying a fact sensitive, multi-factored analysis—the article 7 nexus might still be very clearly established even when the persons victimised are not part of the same civilian population which was the object of the widespread or systematic attack. As the Chamber found: the sub-Saharan African detainees were subject to conduct prohibited by article 7(1) by the same alleged perpetrators as victims who were part of the civilian population which was the object of the attack, in the same prison facility, and at the same time.⁷² In this sense, the relevant conduct actually *was* in the “midst” of the attack, in the terms of some of the ICTY authorities.⁷³ This alone may suffice to satisfy the article 7 nexus. Yet furthermore, the Chamber continued to find that the sub-Saharan African detainees were forced to facilitate and assist in the commission of crimes against detainees who *did* form part of the relevant civilian population.⁷⁴ In other words, in this case, the enslavement of the sub-Saharan African detainees was directly instrumental to the victimisation of the civilian population which *was* the object of the attack. These circumstances would seem to have far surpassed the requirements of the article 7 nexus.

C.2. The Chamber's error materially affected the Warrant

57. The Chamber's legal error materially affected its conclusion concerning the allegation that the sub-Saharan African detainees were victims of the crime against humanity of enslavement.⁷⁵ If it had applied the law on the article 7 nexus correctly, it would not have halted its analysis merely on the basis of its view that these detainees did not form part of the civilian population which was the object of the widespread or systematic attack. Instead, it would have considered holistically whether the alleged “conduct” against these detainees formed “part” of the attack, applying the established fact sensitive, multi-factored test.

CONCLUSION

58. For all the reasons above, the Appeals Chamber should articulate the law correctly and affirm that:

- With regard to war crimes, the detention of a victim “for reasons related to the conflict” is neither a condition precedent for the application of IHL, either under article 8(2)(c) or 8(2)(e)(vi) of the Statute, nor dispositive of the article 8 nexus

⁷² See [Warrant](#), para. 79.

⁷³ See *above* para. 49.

⁷⁴ See [Warrant](#), para. 79 (“these detainees were forced to search the bodies of newly arrested individuals, and to prepare other detainees for torture by transporting them from their cells to the torture site, blindfolding them, or handcuffing them” and to “participate[] in the mistreatment of other detainees”).

⁷⁵ See [Warrant](#), paras. 21-22, 24, 81.

requirement, which is fact sensitive and multi-factored consistent with the established jurisprudence of the Appeals Chamber in its *Afghanistan* and *Ntaganda* decisions.

- With regard to crimes against humanity, the identity of a victim (whether they are a member of the civilian population which is the object of attack) is not dispositive of the article 7 nexus requirement, which is likewise fact sensitive and multi factored.

59. On this basis, the Appeals Chamber should reverse *only* the erroneous legal findings in the Warrant,⁷⁶ concerning the scope of application of article 8⁷⁷ and article 7,⁷⁸ and affirm that this additional victimisation may properly be charged against Mr EL HISHRI within the scope of the Court's jurisdiction *ratione materiae*.

60. Since the Warrant has now been executed, rather than remanding the matter back to the Pre-Trial Chamber for a further decision in these limited respects,⁷⁹ the Appeals Chamber may consider it more expeditious simply to amend the Warrant directly.⁸⁰ The Pre-Trial Chamber will in any event determine as necessary whether any further procedural steps are required for the purpose of pre-confirmation proceedings, in light of the Appeals Chamber's judgment and directions.



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 1st day of August 2025

At The Hague, the Netherlands

⁷⁶ See above para. 3.

⁷⁷ See [Warrant](#), paras. 14-18, 38-40, 44-45, 49, 54-55, 61-62, 69-70, 75-76, 85-86.

⁷⁸ See [Warrant](#), para. 81.

⁷⁹ For comparison, see e.g. [ICC-02/05-01/09-94](#) ("Bashir Second Arrest Warrant Decision").

⁸⁰ See [Statute](#), art. 83(2). Cf. [Notice of Appeal](#), para. 15.