Cour Pénale Internationale

International Criminal Court

Original: English **No: ICC-01/11 OA**
Date: 7 November 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

Public document

Decision finding the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" inadmissible

Decision 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**
International Criminal Court Bar Association

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" of 10 July 2025 (ICC-01/11-188),

After deliberation,

Renders unanimously the following

DECISION

The Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" is not admissible.

The requests to make submissions by the Office of Public Counsel for the Defence, the Office of Public Counsel for Victims, and the International Criminal Court Bar Association are dismissed as moot.

I. INTRODUCTION

1. The Appeals Chamber's decision concerns an appeal brought by the Prosecutor against the decision of Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") entitled "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" (hereinafter: "Mr El Hishri"), issued on 10 July 2025 in the situation in Libya (hereinafter: "Warrant of Arrest" or "Impugned Decision").[1] The Pre-Trial Chamber found reasonable grounds to believe that Mr El Hishri is criminally responsible, pursuant to articles 25(3)(a) and 25(3)(b) of the Statute, for crimes within the jurisdiction of the Court committed in Libya, in or near Mitiga Prison, from around February 2015 to, at least, early 2020, characterised as war crimes committed in the context of an armed conflict not of an international character and crimes against humanity.[2] With respect to war crimes, the Warrant of Arrest was issued in relation to conduct affecting persons protected by

[1] Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-188. This document was originally filed under seal, *ex parte*, only available to the Prosecutor and Registry, and was reclassified as public pursuant to the Pre-Trial Chamber's 'Order to the Registry to reclassify the warrant of arrest for Mr Khaled Mohamed Ali El Hishri', 31 July 2025, ICC-01/11-198.
[2] Warrant of Arrest, pp. 39-40.

Common Article 3 to the 1949 Geneva Conventions or otherwise under international humanitarian law (hereinafter: "IHL").[3] In relation to crimes against humanity, the Warrant of Arrest was issued for crimes committed as part of a widespread or systematic attack against segments of the civilian population in Libya perceived to be opposing the Special Deterrence Forces also known as RADA (hereinafter: "SDF/RADA") or its ideology.[4]

2. The Prosecutor argues that the Pre-Trial Chamber made two discrete legal errors which limited the scope of the Court's jurisdiction *ratione materiae*. The errors concern the scope of application of war crimes under article 8 of the Statute and crimes against humanity under article 7 of the Statute. The Prosecutor submits that, as a result, a significant number of victims of otherwise criminal conduct were incorrectly excluded from the positive findings in the Warrant of Arrest.[5]

3. In relation to the admissibility of the appeal, the Prosecutor contends that article 82(1)(a) of the Statute is applicable, arguing that the Warrant of Arrest "amounts to a jurisdictional ruling".[6]

II. PROCEDURAL HISTORY

4. On 3 April 2025, the Prosecutor filed an application before the Pre-Trial Chamber requesting a warrant of arrest for Mr El Hishri (hereinafter: "Application").[7]

5. On 10 July 2025, the Pre-Trial Chamber issued the Warrant of Arrest for Mr El Hishri.[8]

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[3] Warrant of Arrest, pp. 39-40.
[4] Warrant of Arrest, p. 40.
[5] Prosecution Appeal Brief concerning the "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" (ICC-01/11-188), ICC-01/11-199 (hereinafter: "Appeal Brief"), para. 2. This document was originally filed under seal, *ex parte*, only available to the Prosecutor and the Registry, but was reclassified pursuant to the Appeals Chamber's 'Order on reclassification of documents', 1 August 2025, ICC-01/11-200.
[6] Appeal Brief, para. 10.
[7] Prosecution's application under article 58 for a warrant of arrest against Khaled Mohamed Ali EL HISHRI ("Khaled AL HISHRI"), ICC-01/11-172-US-Exp; a public redacted version was registered on 30 July 2025 (ICC-01/11-172-Red).
[8] Warrant of Arrest, ICC-01/11-188.

6. On 15 July 2025, the Prosecutor filed a Notice of Appeal of the Warrant of Arrest.[9]

7. On 18 July 2025, a press release issued by the Court indicated that Mr El Hishri was arrested by the authorities of the Federal Republic of Germany in execution of the Warrant of Arrest and will remain in the custody of the German authorities pending the completion of the national proceedings, as foreseen in article 59 of the Statute.[10]

8. On 31 July and 1 August 2025, the Pre-Trial Chamber and the Appeals Chamber, respectively, issued orders related to the reclassification of documents as public.[11]

9. On 1 August 2025, the Prosecutor filed his Appeal Brief.[12]

10. On 8 August 2025, the Office of Public Counsel for the Defence (hereinafter: "OPCD") filed a request for leave to make submissions on Mr El Hishri's rights at this stage and, in particular, his right to have a counsel appointed to represent him.[13] It submits that, given that a Warrant of Arrest has already been issued, the suspect's participatory rights have been triggered and he has the right to lodge – and, therefore, respond to – challenges on jurisdiction, as provided for in article 19(2) of the Statute. The OPCD further states that the suspect's right to make observations under rule 58(3) of the Rules of Procedure and Evidence (hereinafter: "Rules") cannot be contingent on his transfer to the Court.[14]

11. On 27 August 2025, the Office of Public Counsel for Victims (hereinafter: "OPCV") requested leave to appear before the Chamber, pursuant to regulation 81(4) of the Regulations of the Court (hereinafter: "Regulations") to address "[w]hether Pre-Trial Chamber I has limited its *ratione materiae* jurisdiction by misinterpreting the requirement enshrined in articles 7 and 8 of the Statute […] a fundamental question that

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[9] Prosecution Notice of Appeal of the "Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri" (ICC-01/11-188-US-Exp), ICC-01/11-191 (hereinafter: "Notice of Appeal"). This document was originally filed under seal, *ex parte*, only available to the Prosecutor and the Registry, and was reclassified pursuant to the Appeals Chamber's 'Order on reclassification of documents', 1 August 2025, ICC-01/11-200.
[10] ICC press release, "Situation in Libya: Khaled Mohamed Ali El Hishri arrested for alleged crimes against humanity and war crimes".
[11] Order to the Registry to reclassify the warrant of arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-198; Order on reclassification of documents, ICC-01/11-200.
[12] Appeal Brief, ICC-01/11-199.
[13] Request for Leave to Make Submissions on Mr El Hishri's Right To Be Heard through Counsel, ICC-01/11-203 (hereinafter: "OPCD Request"), paras 1, 11-12.
[14] OPCD Request, para. 11.

has a direct bearing on many Victims – since the Arrest Warrant as it stands narrows the scope of potential victims of the alleged crimes".[15]

12. On 30 September 2025, the International Criminal Court Bar Association (hereinafter: "ICCBA") filed a request for leave to "file observations on the undesirability of the Appeals Chamber delivering its judgment on the Prosecution's appeal […] before receiving legal arguments on Mr El Hishri's behalf".[16]

III. ADMISSIBLITY OF THE APPEAL

A. Relevant parts of the Impugned Decision

13. In relation to the contextual elements of war crimes, the Pre-Trial Chamber established that

> [w]ar crimes pursuant to article 8(2)(c) and (e), which are alleged by the Prosecution in the Application, can only be committed if [IHL] applicable to non-international armed conflicts applied to the conduct in question at the relevant time. Additionally, the contextual elements of article 8(2)(c) and (e) require that: (i) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (ii) the perpetrator was aware of factual circumstances that established the existence of the armed conflict. […][17]
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> The Chamber recalls that for the purposes of the type of war crimes alleged, which all concern violations of IHL committed against persons deprived of their liberty, the key question is whether they 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 in the Application 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.[18]
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> It must therefore be shown that a (non-international) armed conflict existed at the time the persons were arrested or otherwise detained, and that the liberty of these

[15] OPCV's request to appear before the Chamber pursuant to regulation 81(4) of the Regulations of the Court, ICC-01/11-204, para. 14.
[16] Annex to the Registry Transmission of "ICCBA Request for leave to file submissions under Rule 103 of the Rules of Procedure and Evidence", ICC-01/11-208-Anx, para. 1. *See also* paras 15-20.
[17] Warrant of Arrest, para. 10 (footnotes omitted).
[18] Warrant of Arrest, para. 14.

persons was restricted for reasons related to the conflict, as a result of which they were protected under IHL during their detention.[19]

14. The Pre-Trial Chamber therefore concluded that

> […] the Prosecution has not made any submissions on the status of individual detainees alleged to have been victims of a war crime, i.e. a serious violation of IHL. On the basis of the material provided, the Chamber finds reasonable grounds to believe that at least some of the detainees were captured for reasons related to an armed conflict, *inter alia*, because they were suspected of being members of ISIS or belonging to General Haftar's forces. For the persons for whom the Chamber has made such findings below, the Prosecution would have to show that IHL was indeed applicable by providing evidence that, at the time of the arrest, an armed conflict existed.[20]
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> Based on the foregoing, the Chamber considers that, for the purposes of the present application, 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.[21]

15. In relation to the contextual elements of crimes against humanity, the Pre-Trial Chamber found that

> [d]uring the relevant time period, i.e. between February 2015 and early 2020, there were several thousand detained persons held at this facility. The conduct discussed below thus affected a very large number of persons.[22]
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> The Prosecution submits 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'.[23]
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> To the extent that those arrested were deprived of their liberty for reasons related to an armed conflict, the persons detained either qualified as civilians under IHL or as civilians directly participating in hostilities at the time of their arrest or capture. Even if there were some fighters among the detainees, this does not affect the civilian character of the population that was being [attacked] in terms of article 7(1) of the Statute. Therefore, the civilian population for the alleged crimes against humanity is formed by those detained for reasons related to an armed conflict and the persons who were detained for reasons unrelated to an armed conflict.[24]

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[19] Warrant of Arrest, para. 15.
[20] Warrant of Arrest, para. 17 (footnotes omitted).
[21] Warrant of Arrest, para. 18.
[22] Warrant of Arrest, para. 20 (footnotes omitted).
[23] Warrant of Arrest, para. 21 (footnotes omitted).
[24] Warrant of Arrest, para. 22.

> As discussed in more detail below, these crimes were further committed in a systematic manner, and frequently followed a specific pattern or *modus operandi*.[25]

16. The Pre-Trial Chamber therefore concluded as follows:

> In light of the above, the Chamber finds reasonable grounds to believe that between at least February 2015 and at least the start of 2020, 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. This attack consisted of multiple acts under article 7(1) of the Statute, and took place over a period over several years. For these reasons, the Chamber finds reasonable grounds to believe that it was carried out pursuant to or in furtherance of an organisational policy of the SDF/RADA.[26]

17. The Pre-Trial Chamber stressed that the findings as regards the crimes are based solely on the concrete information referred to in the Application, even if these "may be examples of [a] potentially larger pattern of criminal conduct".[27]

18. With regard to the war crime of torture, the Pre-Trial Chamber found that a subset of the relevant group of victims had the required protected status under Common Article 3 of the 1949 Geneva Conventions "because they were detained on suspicion of being associated with Haftar or a member of ISIS and posing a threat".[28] The Pre-Trial Chamber made these findings "on the basis of the material presently provided by the Prosecution and its submissions based thereon".[29]

19. Concerning the war crime of cruel treatment, the Pre-Trial Chamber found that it must be shown that the alleged victims were protected by IHL at the time of the alleged cruel treatment. In particular, it stated that it had "already found that a significant part

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[25] Warrant of Arrest, para. 23 (footnotes omitted).
[26] Warrant of Arrest, para. 24 (footnotes omitted).
[27] Warrant of Arrest, para. 25 (footnotes omitted).
[28] Warrant of Arrest, para. 38 which states "[a]s regards the two elements of the war crime that concern the status of the alleged victims, namely that the victims were *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities, and that the perpetrator was aware of the circumstances establishing this status, the Chamber recalls that protected status under Common Article 3 of the 1949 Geneva Conventions can be established by showing that the alleged victims were detained for reasons related to the armed conflict. Accordingly, for the war crime of torture, it needs to be established that (1) the victims who were tortured had protected status, and (2) that they were tortured for a specific purpose. The Chamber has established the second element in relation to some of the detainees; in relation to a subset of this group, it has also been established that the victims had the required protected status because they were detained on suspicion of being associated with Haftar or a member of ISIS and posing a threat".
[29] Warrant of Arrest, para. 40. *See also* para. 17.

of the detainees who provided statements to the Prosecution do not appear to have been detained for reasons related to the armed conflict".[30] Nevertheless, "based on its analysis of the material before it, and given that virtually all detainees were subjected to the same treatment, as well as the above finding that at least some detainees were detained for reasons related to the conflict", the Pre-Trial Chamber was satisfied that "there is a reasonable basis to believe that some of the detainees who were subjected to cruel treatment were protected under Common Article 3 at the time of the relevant conduct".[31] The Pre-Trial Chamber stated that the findings apply "[a]t a minimum" to certain persons addressed in a number of documents it reviewed.[32]

20. With respect to outrages upon personal dignity as a war crime, the Pre-Trial Chamber concluded that "at least some of the individuals detained fell within the protective scope of Common Article 3".[33] In so doing, it indicated that "in its allegations on the facts related to the counts 1 to 6 [the Prosecution] generally refers to detainees being mistreated and being held in inadequate conditions. It does not in any way explain how, in its view, the elements of this war crime are met".[34]

21. In relation to rape as a war crime, the Pre-Trial Chamber concluded that at least five detainees were raped by guards or other detainees in the Mitiga Prison.[35] Of these five victims, two were detained for their alleged affiliation with ISIS or for being suspected of being affiliated with Haftar's armed forces and, therefore, "on the basis of the material provided at this stage", the Pre-Trial Chamber concluded that IHL applied to the alleged conduct.[36] The Pre-Trial Chamber found that, "[f]or the other alleged victims of rape, the Chamber cannot at the present stage make such a determination";[37] namely whether IHL applied to the alleged conduct.

22. In relation to imprisonment as a crime against humanity, the Pre-Trial Chamber found in light of the material before it that the SDF/RADA imprisoned people "for religious reasons […]; for their perceived contraventions to SDF/RADA's religious

[30] Warrant of Arrest, para. 44.
[31] Warrant of Arrest, para. 44.
[32] Warrant of Arrest, fn. 80.
[33] Warrant of Arrest, para. 49.
[34] Warrant of Arrest, para. 47 (footnotes omitted).
[35] Warrant of Arrest, para. 53.
[36] Warrant of Arrest, para. 54.
[37] Warrant of Arrest, para. 54.

ideology […]; for their alleged support or affiliation to the LNA or ISIS; or for the purpose of coercing others, such as family members, including for them to pay to have the detained persons released".[38]

23. With respect to enslavement as a crime against humanity, the Pre-Trial Chamber found that it was committed against a group of detainees at Mitiga Prison, known as the "Sub-Saharan African detainees", who were allegedly "detained due to their irregular situation in the country, at the airport, or if they had problems with their employers".[39] The Pre-Trial Chamber considered that, regarding the Sub-Saharan African detainees, "there 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".[40] However, the Pre-Trial Chamber also noted 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. Regarding the other detainees, the Chamber considers that the Prosecution has failed to show that the alleged perpetrators exercised powers attaching to the right of ownership over them. Based on these considerations, the Chamber will not further examine the alleged crime against humanity with respect to both Sub-Saharan African and Libyan detainees.[41]

B. Summary of the submissions

24. The Prosecutor submits that the "appeal is admissible under article 82(1)(a) of the Statute because the Warrant is a decision with respect to jurisdiction",[42] and the errors contained therein affect the Impugned Decision because it led to the Pre-Trial Chamber's conclusion that a group of detainees were not victims of war crimes or crimes against humanity, thereby limiting the jurisdiction *ratione materiae* of the Court.[43] In relation to the admissibility of the appeal, the Prosecutor states 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 Statute,

[38] Warrant of Arrest, para. 29 (footnotes omitted).
[39] Warrant of Arrest, para. 79 (footnotes omitted).
[40] Warrant of Arrest, para. 81.
[41] Warrant of Arrest, para. 81 (footnotes omitted).
[42] Notice of Appeal, para. 4.
[43] Notice of Appeal, paras 4-7.

respectively. 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. 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.[44]

25. According to the Prosecutor, the Pre-Trial Chamber committed an error of law, in that it limited the scope of war crimes to acts committed against persons detained for "reasons related to the conflict", as a result of: (i) a narrow interpretation of the nexus requirement between the alleged conduct of the perpetrator and an armed conflict; or (ii) the imposition of a novel threshold condition for the exercise of the Court's war crimes jurisdiction.[45] It was incorrect, in the submission of the Prosecutor, to conclude that IHL only protects victims of war crimes under articles 8(2)(c) and (e) of the Statute in so far as they have been detained for reasons related to the conflict.[46] The Prosecutor argues that this error caused the Pre-Trial Chamber to exclude a significant number of detainees as victims of war crimes, even though it found that they were subjected to prohibited conduct.[47]

26. The Prosecutor submits that the legal interpretation, alleged to be erroneous, was applied in paragraphs 17-18, 38-40, 44-45, 49, 54-55, 61-62, 69-70, 75-76 and 85-86 of the Warrant of Arrest.[48]

27. In relation to crimes against humanity, the Prosecutor acknowledges that the Pre-Trial 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)".[49] Nonetheless, the Prosecutor claims that the Pre-Trial Chamber "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" and as a result it "conflated the requirements for the contextual element […] with the article 7 nexus".[50]

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[44] Appeal Brief, para. 10 (emphasis in original, footnotes omitted).
[45] Appeal Brief, paras 16, 24, 28.
[46] Appeal Brief, paras 19, 24, 26, 30, 34.
[47] Appeal Brief, para. 16.
[48] Appeal Brief, fn. 15.
[49] Appeal Brief, para. 47.
[50] Appeal Brief, para. 47 (emphasis in original).

28. The Prosecutor submits that the legal interpretation of the nexus requirement for crimes against humanity, alleged to be erroneous, was applied in paragraphs 28-31, 33-36, 51-53, 55, 57, 59, 62, 64, 66-68 and 88-91 of the Warrant of Arrest.[51]

29. In conclusion, the Prosecutor requests the Appeals Chamber to articulate the law correctly and find that

> [w]ith 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 requirement, which is fact sensitive and multi-factored consistent with the established jurisprudence of the Appeals Chamber in its *Afghanistan* and *Ntaganda* decisions.
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> 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.[52]

C. Determination by the Appeals Chamber

30. The Appeals Chamber notes that the Prosecutor's appeal is filed pursuant to article 82(1)(a) of the Statute, rule 154(1) of the Rules and regulation 64(1) of the Regulations.[53]

31. Article 82 of the Statute, in its relevant parts, provides as follows:

> 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
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> (a) A decision with respect to jurisdiction or admissibility;
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> […]

32. Accordingly, the first question the Appeals Chamber needs to address is whether, in the circumstances of this appeal, the Pre-Trial Chamber's interpretation and application of articles 7 and 8 of the Statute renders the Impugned Decision "[a] decision with respect to jurisdiction" pursuant to article 82(1)(a) of the Statute.

[51] Appeal Brief, fn. 55.
[52] Appeal Brief, para. 58.
[53] Notice of Appeal, para. 1.

33. The issue of what constitutes "[a] decision with respect to jurisdiction or admissibility" within the meaning of article 82(1)(a) of the Statute has been addressed in the jurisprudence of the Appeals Chamber. In the Situation in the Republic of Kenya, the Appeals Chamber stated that

> [t]he Appeals Chamber understands from the phrase "decision with respect to" that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. […][54]

34. The Appeals Chamber moreover indicated that

> In the view of the Appeals Chamber […] the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case.[55]
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> […] It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a "decision with respect to [...] admissibility" under article 82 (1) (a).[56]

35. Accordingly, in determining the scope of "decision[s] with respect to jurisdiction or admissibility", the impugned decision must be assessed in its context.[57] While generally the operative part of the decision must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case,[58] there may be circumstances in which, even though the operative part of the appealed decision does not rule specifically on the jurisdiction of the Court, it can nonetheless unequivocally be considered as one concerning jurisdiction. In contrast, an indirect or tangential link between the underlying decision and a question of jurisdiction is insufficient. As recalled above, it

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[54] *Situation in the Republic of Kenya*, Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'", 10 August 2011, ICC-01/09-78 (OA) (hereinafter: "*Kenya* OA Decision"), para. 15 (footnotes omitted). *See also Situation in the State of Palestine*, Decision on the admissibility of the appeal of the State of Israel against Pre-Trial Chamber I's "Decision on Israel's request for an order to the Prosecution to give an Article 18(1) notice", 24 April 2025, ICC-01/18-423 (OA) (hereinafter: "*Palestine* OA Decision"), para. 30, fn. 41.
[55] *Kenya* OA Decision, para. 16.
[56] *Kenya* OA Decision, para. 17 (footnotes omitted). *See also* para. 30, fn. 41.
[57] *Palestine* OA Decision, para. 31.
[58] *Palestine* OA Decision, para. 31, *referring to* *Kenya* OA Decision, para. 15.

is the nature and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute.[59]

36. The Appeals Chamber further recalls that in the case of *The Prosecutor v. Bosco Ntaganda*, the Appeals Chamber emphasised that the issue in question was jurisdictional as it essentially required a purely legal determination, as opposed to one involving both legal and factual issues, or requiring additional factual or evidentiary determinations.[60] Nonetheless, it further noted that, in certain circumstances, the question of whether the facts alleged correspond to the crime charged may also acquire a jurisdictional dimension.[61] Further, challenges which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges.[62]

37. By comparison, the Appeals Chamber recalls that in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, it was confronted with an appeal brought under article 82(1)(a) of the Statute concerning the question of whether "the interpretation and existence of an 'organizational policy' are matters related to subject-matter jurisdiction and are therefore appropriately before the Appeals Chamber".[63] The Appeals Chamber considered that "the question as to whether the Prosecutor has been able to establish, both in law and by producing sufficient evidence, that an 'organizational policy' existed was a question pertaining to the merits of the case" – relevant for the Pre-Trial Chamber's assessment of whether or not to confirm the charges against the suspects.[64] It therefore noted that the "arguments […] made in the Joint Defence Challenge to Jurisdiction could be made as part of [the suspects']

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[59] *Kenya* OA Decision, para. 17.
[60] *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 22 March 2016, ICC-01/04-02/06-1225 (OA2) (hereinafter: "*Ntaganda* OA2 Judgment"), paras 35-37.
[61] *Ntaganda* OA2 Judgment, para. 39.
[62] *Ntaganda* OA2 Judgment, para. 39.
[63] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, ICC-01/09-01/11-414 (hereinafter: "*Ruto et al.* OA3 OA4 Judgment"), para. 25.
[64] *Ruto et al.* OA3 OA4 Judgment, para. 27.

case during the confirmation proceedings"[65] and that rule 58(2) of the Rules provides for the procedure applicable to challenges to jurisdiction.[66]

38. For the reasons discussed below, the Appeals Chamber finds that the present appeal is inadmissible. First, the Appeals Chamber notes that the Impugned Decision is a warrant of arrest, which does not rule specifically on the jurisdiction of the Court in its operative part, or elsewhere in the decision. The Appeals Chamber further considers that the Impugned Decision is not "by nature"[67] a "decision with respect to jurisdiction" within the meaning of article 82(1)(a) of the Statute. In this regard, it finds that the resolution of the issues on appeal does not involve exclusively legal determinations and rather comprises determinations of both law and fact.[68]

39. Indeed, while relying on legal interpretations of the Statute related to the scope of the alleged war crimes[69] and crimes against humanity,[70] the Pre-Trial Chamber, in conducting its analysis of the specific crimes alleged, primarily assessed whether the Prosecutor had properly articulated and presented sufficient evidence to substantiate his allegations that war crimes[71] and crimes against humanity were committed against certain victims.[72] Accordingly, the Pre-Trial Chamber's findings cannot be regarded as unequivocally arising from its interpretation of the legal elements of the relevant war crimes and crimes against humanity. Rather, they emphasise whether the Prosecutor has been able to substantiate, by producing sufficient evidence, his allegations in the Application.

40. The Appeals Chamber therefore considers that the Pre-Trial Chamber's findings that are being challenged are neither findings on jurisdiction as such nor do they, by

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[65] *Ruto et al.* OA3 OA4 Judgment, para. 27.
[66] *Ruto et al.* OA3 OA4 Judgment, para. 28. Pursuant to rule 58(2) of the Rules, "[w]hen a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first".
[67] *See* *Kenya* OA Decision, paras 15-17.
[68] *See* *Ntaganda* OA2 Judgment, paras 35-37.
[69] *See for example* Warrant of Arrest, paras 14-18.
[70] *See for example* Warrant of Arrest, paras 19-24.
[71] *See for example* Warrant of Arrest, paras 39-40, 43-45, 47-49, 54-55, 59-62, 66-67, 69-70, 75-76, 85-86, fn. 80.
[72] *See for example* Warrant of Arrest, paras 29-31, 35-36, 53, 55, 59, 62, 66-68, 79-81, 85-86, 89-91.

their nature, involve a jurisdictional assessment, and that the questions raised by the Prosecutor in the appeal pertain to the merits of the case.

41. As recalled above, the Warrant of Arrest has been executed, and the suspect will remain in the custody of the German authorities pending the completion of the national proceedings, as foreseen in article 59 of the Statute. Nothing in the Impugned Decision prevents the Prosecutor, once Mr El Hishri is transferred to the Court, from making further submissions, including on the applicable law pertaining to article 7 and 8 of the Statute, and presenting additional evidence for the Pre-Trial Chamber to decide upon during the proceedings related to the confirmation of charges. Any such decisions may be subject to appeal pursuant to the legal framework of the Court.

42. Accordingly, the Appeals Chamber considers that the Impugned Decision is not a "decision with respect to jurisdiction" under article 82(1)(a) of the Statute and therefore the Prosecutor's appeal is not admissible.

43. In view of the above, the Appeals Chamber dismisses the OPCD,[73] OPCV[74] and ICCBA[75] requests to make submissions as moot.

Done in both English and French, the English version being authoritative.

Judge Erdenebalsuren Damdin
Presiding

赤根智子

Judge Tomoko Akane

Judge Luz del Carmen Ibáñez Carranza

[73] *See supra* para. 10.
[74] *See supra* para. 11.
[75] *See supra* para. 12.

Judge Solomy Balungi Bossa

Judge Gocha Lordkipanidze

Dated this 7th day of November 2025

At The Hague, The Netherlands