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*No. ICC-01/11-01/25
Date: 28 April 2026*

PRE-TRIAL CHAMBER I

Before: Judge Iulia Antoanella Motoc, Presiding
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN LIBYA

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

CONFIDENTIAL

**Defence written notes and observations relating to factual and legal elements of the
Prosecution's case against Mr Khaled Mohamed Ali El Hishri**

Source: Defence for Mr Khaled Mohamed Ali El Hishri

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I. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri (“Defence”, “Mr El Hishri”) submits these written notes and observations relating to factual and legal elements of the Prosecution’s case against Mr El Hishri, including grounds for excluding criminal responsibility and/or raising the existence of an alibi, pursuant to the order of Pre-Trial Chamber I (“PTC”) at the first status conference in this case.¹

2. These observations address in broad terms five factual and legal aspects of the Prosecution’s case against Mr El Hishri: A. the test for confirmation; B. the prejudice caused by the vast extent of anonymous evidence; C. the defectiveness of the DCC for vagueness; D. the insufficiency of evidence of contextual elements of the charged crimes; and E. the significant expansion of the Warrant of Arrest in the DCC in terms of temporal scope and charged crimes. They should not be understood to amount to a comprehensive treatment of all the arguments the Defence intends to address at the forthcoming confirmation of charges hearing. Article 67(1)(g) of the Rome Statute enshrines the fundamental right of an Accused (and, by extension, Suspect) to remain silent, without such silence being a consideration in the determination of guilt or innocence. The Defence’s silence on any particular point raised in the document containing the charges (“DCC”)² or Pre-Confirmation Brief (“PCB”)³ or annexes thereto should not be taken to amount to any concession regarding the correctness of the Prosecution’s allegations about Mr El Hishri’s individual criminal responsibility. Rather, these observations are intended to provide the PTC with an overview of the principal observations of the Defence relating to the Prosecution’s case at this stage of proceedings.

3. These observations do not repeat, but should be read in conjunction with, the Defence’s submissions on the (lack of) jurisdiction and (in)admissibility of Mr El Hishri’s case before the Court under Article 19 of the Rome Statute, to be filed by 30 April 2026.

¹ ICC-01/11-01/25-T-002-CONF-ENG (“First Status Conference”), p. 15

² Document Containing the Charges, ICC-01/11-01/25-92, 26 March 2026

³ Pre-Confirmation Brief, ICC-01/11-01/25-94, 26 March 2026

II. CLASSIFICATION

4. These observations are classified as confidential pursuant to Regulation 23bis(2) of the Regulations of the Court ("RoC") because they refer to documents filed with the same classification. A public redacted version will be filed shortly.

III. SUBMISSIONS

A. The test for confirmation

5. It is worth recalling that, while the test for the issuance by a Pre-Trial Chamber of a warrant of arrest or summons to appear is very low (is there sufficient evidence or other information to satisfy the Chamber that "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court"?),⁴ the test for confirmation of charges is significantly higher: is there "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"?⁵

6. The "substantial grounds to believe" test has been interpreted to mean strong grounds for believing, such that the Prosecution "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations."⁶

7. This standard accords with the purpose of confirmation proceedings, which has been described as "limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought".⁷

B. The prejudice caused by the vast extent of anonymous evidence

8. These pre-trial proceedings have been marked by an extraordinary volume of anonymous evidence. The Prosecution rely on the evidence (whether by way of witness statements or summaries of witness statements) of 64 witnesses. The identities of 39 of these 64 witnesses, that is, 61% of the witnesses, have been withheld from the Defence. Furthermore, the Defence has

⁴ Rome Statute, Article 58(1)(a)

⁵ Rome Statute, Article 61(7)

⁶ *Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, para. 40 ("*Mbarushimana* Decision")

⁷ *Mbarushimana* Decision, para. 41

only seen carefully curated summaries of the statements of 13 witnesses, that is, 20% of the total number of witnesses.

9. These have become indistinguishable from secret proceedings.

10. Even if these confirmation proceedings are of limited scope, they are important. The purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges.⁸

11. The purpose of the confirmation hearing has also been described as limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought, and a means to ensure judicial economy by distinguishing those cases that should go to trial from those that should not.⁹

12. It has been described in other terms as being to determine whether the case as presented by the Prosecutor is sufficiently established to warrant a full trial. The Statute mandates that this is decided by answering the question whether there are substantial grounds to believe that the person committed the crimes charged. Therefore, the procedure of confirmation of charges protects the suspect from wrongful and unfounded accusations.¹⁰

13. Were one or more of the charges against Mr El Hishri to be confirmed, the matter will proceed to trial. However, if the PTC finds that there is insufficient evidence to establish substantial grounds to believe that he has committed each of the crimes charged, then Mr El Hishri will be entitled to be discharged, released from detention, and allowed to return home to his family. The real-life consequences of the confirmation proceedings should not be underestimated.

14. The confirmation hearing itself is not, of course, a mini-trial, but preparations for the hearing are not dissimilar to preparations for a trial. The Defence has carefully studied all witness statements and associated material, and analysed all exculpatory evidence. This process

⁸ *Katanga*, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 63

⁹ *Mbarushimana*, Decision, para. 41

¹⁰ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, para. 16

necessarily involves investigations into the matters included in witness statements, as well as the witnesses themselves.

15. Defence investigations can have an enormously important impact on whether cases proceed beyond the confirmation stage. But in Mr El Hishri's case, the Prosecution has succeeded in shielding from the Defence the identities of 61% of the witnesses upon whom it will seek to rely during the confirmation process. The Defence has been unable to investigate the vast majority of the Prosecution's witnesses. This has resulted in real prejudice. The Defence is simply not in a position to test the evidence of these secret witnesses in any meaningful way. It is unable to demonstrate weaknesses in their evidence or unreliability of their accounts. It matters not that redacted versions of some anonymised witnesses' statements have been disclosed since it is the witnesses themselves that cannot be investigated. The Defence has been hamstrung in terms of its ability to represent Mr El Hishri. The situation is profoundly unfair.

16. The nature of these secret proceedings is that the Defence is unable to properly meet the Prosecution's allegations, with a very real consequence being a flawed decision confirming the charges against Mr El Hishri, and his wrongfully languishing, potentially for many more years to come, in detention awaiting judgment.

C. The defectiveness of the DCC for vagueness

17. Regulation 52 of the RoC provides that:

[t]he document containing the charges referred to in article 61 shall include:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

18. The Appeals Chamber in the *Ongwen* case recalled that:

“the right of the accused person to be informed of the charges is firmly grounded in the Statute” and it has already highlighted “the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one's defence”.¹¹

¹¹ *Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15 OA4, para. 69

19. However, the DCC is replete with vague language that does not provide the precision required by Regulation 52, thereby violating Mr El Hishri's fundamental right to be informed in detail of the nature, cause and content of the charges he faces.

20. The vagueness of the language in the DCC is prejudicial to the rights of Mr El Hishri since it provides the means to the Prosecution to expand the scope of its case against him and mould its allegations depending on how the evidence comes out during trial. This falls afoul of long-standing and well-established international criminal jurisprudence:

the Prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.¹²

21. The impermissible vagueness in the DCC falls into two broad categories: (i) imprecision of descriptors; and (ii) imprecision of statements of facts, including the time and place of the alleged crimes.

(i) *Imprecision of descriptors*

22. The following is a non-exhaustive list of imprecisions found in the DCC that, it is submitted, must be either remedied or struck out:

(a) Para. 2 "...or was otherwise closely associated with..."

(b) Para. 3 "...some senior SDF/RADA members or close associates..."; "...membership of and/or association with SDF/RADA..."

(c) Para. 4 "...other relevant areas or buildings..."

(d) Para. 5 "**EL HISHRI** was at least a peer of NJEEM..."

(e) Para. 6 a. etc. "Mitiga Prison Leadership";

(f) Para. 6 b. etc. "Mitiga Perpetrators";

¹² ICTR, *Ndindiliyimana*, Case No. ICTR-00-56-A, Judgement, 11 February 2014, para. 172, referring to ICTR, *Ntawukulilyayo*, Case No. ICTR-05-82-A, Judgement, 14 December 2011, para. 202; ICTY, *Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 92; ICTR, *Muvunyi I*, Case No. ICTR-00-55A-A, Judgement, 29 August 2008, para. 18; ICTR *Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 27

- (g) Para. 6 c. etc. “SDF/RADA ‘members’”; “persons closely associated or affiliated with SDF/RADA”;
- (h) Para. 7 “...may both potentially include **EL HISHRI**, depending on the context of the allegation and/or evidence in question”;
- (i) Para. 8 “...in and around Tripoli...”; “...custody and/or control...” “...principally at Mitiga Prison...”;
- (j) Para. 10 “...at other locations in and around Tripoli...”; “...other locations in the course of their arrest...”; “...for purposes including acts of forced labour and participation in armed hostilities”;
- (k) Para. 12 “...which included SDF/RADA members, close associates, and other persons acting under the direction, control or tolerance...”;
- (l) Para. 13 “...significant resources”;
- (m) Para. 14 “...in a largely similar way...”;
- (n) Para. 18 “...an integral factual consequence...”; “...rival groups...”;
- (o) Para. 19 “...different non-State organised armed groups...”;
- (p) Para. 20 “...(and, in some instances, groups associated with them)...”;
- (q) Para. 22 “...including by (but not limited to)...”; “...military and security interests of the GNC/GNA”;
- (r) Para. 23 “...including in its control over Mitiga Prison...”;

(ii) *Imprecision of statements of facts, including the time and place of the alleged crimes*

23. The following is a non-exhaustive list of imprecisions of statements of facts, including the time and place of the alleged crimes that, it is submitted, must be either remedied or struck out:

- (a) Para. 6 a. etc. “Mitiga Prison Leadership”. The Prosecution should identify with precision, exhaustively, and by name who it means by this term;

- (b) Para. 6 b. etc. “Mitiga Perpetrators”. The Prosecution should identify with precision, exhaustively, and by name who it means by this term;
- (c) Para. 6 c. etc. “SDF/RADA ‘members’”; “persons closely associated or affiliated with SDF/RADA.” The Prosecution should identify with precision, exhaustively, and by name who it means by these terms;
- (d) Para. 25 etc. “...principally at Mitiga Prison.” The Prosecution should identify with precision and exhaustively all places where the alleged crimes were committed;
- (e) Para. 27 “...including, but not limited to...” The Prosecution should identify with precision and exhaustively the fundamental rights of which the detainees were allegedly deprived;
- (f) Para. 34 “...inappropriate and degrading conditions...including...” The Prosecution should identify with precision and exhaustively how it alleges the conditions were inappropriate and degrading, and why;
- (g) Para. 34 “During the charged period, the Mitiga Perpetrators raped at least 10 detainees in Mitiga Prison, and subjected at least 49 detainees to other forms of sexual violence.” The Prosecution should identify with precision which detainees were allegedly raped or subjected to other forms of sexual violence, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible;

“...societal gender norms...” The Prosecution should define with precision what it means by this term;
- (h) Para. 38 “Additionally, victims who were children were incapable of giving genuine consent.” The Prosecution should state with clarity its position regarding the age of consent applicable before the Court;
- (i) Para. 39 “During the charged period, the Mitiga Perpetrators murdered at least 88 detainees at Mitiga Prison.” The Prosecution should identify with precision which detainees were allegedly murdered, or were the subject of attempted murder, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible;

- (j) Para. 42 “During the charged period, the Mitiga Perpetrators enslaved at least 133 detainees...” The Prosecution should identify with precision which detainees were allegedly enslaved, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible;
- (k) Para. 43 “Relevant indicia of the exercise of powers of ownership over these victims included, as follows:...” The Prosecution should identify with precision and exhaustively the relevant indicia upon which it relies in Para. 43, and in its five sub-paragraphs a.-e.;
- (l) Para. 44 “...labour of several kinds, principally in Mitiga Prison, including:...” The Prosecution should identify with precision and exhaustively the categories of labour that detainees were allegedly forced to carry out upon which it relies in Para. 44, and in its six sub-paragraphs a.-f.;
- (m) Para. 46 “...on an intersectional basis of gender, age, race, nationality, ethnicity and migration status, with compounding effect.” The Prosecution should explain with precision what it means by this sentence;
- (n) Para. 47 “During the charged period, the Mitiga Perpetrators persecuted at least 138 detainees...” The Prosecution should identify with precision which detainees were allegedly persecuted, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible;
- (o) Para. 49 “...on political grounds, at least 17 detainees were severely deprived of fundamental rights including...” The Prosecution should identify with precision which detainees were allegedly persecuted on political grounds, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible. The Prosecution should also identify with precision and exhaustively the fundamental rights of which these detainees were allegedly deprived;
- (p) Para. 50 “...on religious grounds, at least 14 detainees were severely deprived of fundamental rights including...” The Prosecution should identify with precision which detainees were allegedly persecuted on religious grounds, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible. The Prosecution should also identify with precision and exhaustively the fundamental rights of which these detainees were allegedly deprived;

- (q) Para. 51 "...on grounds of nationality, race and/or ethnicity, at least 47 Black Migrants were severely deprived of fundamental rights including..." The Prosecution should identify with precision which detainees were allegedly persecuted on grounds of nationality, race and/or ethnicity, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible. The Prosecution should also identify with precision and exhaustively the fundamental rights of which the Black Migrants were allegedly deprived;
- (r) Para. 52 "...on gender grounds, at least 60 detainees were severely deprived of fundamental rights including..." The Prosecution should identify with precision which detainees were allegedly persecuted on gender grounds, and by which perpetrators, and with as detailed a time frame for the commission of the alleged crimes as possible. The Prosecution should also identify with precision and exhaustively the fundamental rights of which these detainees were allegedly deprived;
- "...the Perpetrators' expectations on sex and/or gender...gender roles, gender hierarchies...within the context of society." The Prosecution should define with precision what it means by this term and how it puts its case on what the "Perpetrators' expectations" were;
- (s) Para. 55 "...together with persons such as KARA, N'ZAM, and NJEEM." The Prosecution should identify with precision and exhaustively those together with whom Mr El Hishri was allegedly part of the Mitiga Prison Leadership. These details are not, or not adequately, provided in the PCB;
- (t) Para. 56 b. "...with other senior SDF/RADA and/or Mitiga Prison Leadership members, including KARA, N'ZAM, and NJEEM..." The Prosecution should identify with precision and exhaustively those with whom Mr El Hishri allegedly coordinated. These details are not, or not adequately, provided in the PCB;
- (u) Para. 57 a.-b. The Prosecution should identify with precision and exhaustively those whom Mr El Hishri is alleged to have ordered, prompted or encouraged to commit crimes, and with as detailed a time frame as possible. These details are not, or not adequately, provided in the PCB;

- (v) Para. 57 c. The Prosecution should identify with precision and exhaustively those Mitiga Prison detainees and persons otherwise in the custody or control of the Mitiga Perpetrators against whom Mr El Hishri is alleged to have personally committed crimes, and with as detailed a time frame as possible. These details are not, or not adequately, provided in the PCB;
- (w) Para. 57 d.-g. The Prosecution should state with precision and exhaustively the ways and manners in which Mr El Hishri is alleged to have imposed and/or enforced inhumane conditions of detention, and systematically opposed any attempt at improvement of detention, and contributed to a coercive atmosphere in Mitiga Prison, and created or maintained or contributed to the creation and/or maintenance of a culture of impunity among the Mitiga Perpetrators, and contributed to the continuing independent functioning of SDF/RADA and its control over Mitiga Prison, and with as detailed a time frame as possible;
- (x) Para. 58 "...including personally overseeing such access by..." The Prosecution should state with precision and exhaustively the ways and manners in which Mr El Hishri is alleged to have controlled access to the Women's Section;
- (y) Para. 59 "...including by overseeing the distribution..." The Prosecution should state with precision and exhaustively the ways and manners in which Mr El Hishri is alleged to have controlled the detention conditions in the Women's Section;
- (z) Para. 60 The Prosecution should identify with precision and exhaustively those held in the Women's Section whom Mr El Hishri is alleged to have personally beat and mistreated, and how he mistreated them, and those in whose interrogation and torture he is alleged to have participated, and with as detailed a time frame as possible. The confidential lesser redacted version of Annex 14 to the PCB references 159 "victims of direct perpetration", but 136 of these individuals are referred to in a way that makes identification impossible;¹³
- (aa) Para. 61 The Prosecution should identify with precision and exhaustively the "at least 159 detainees" against whom Mr El Hishri is alleged to have personally committed

¹³ For example, individuals whose first name is unknown (FNU), or last name is unknown (LNU), or both (FNU LNU), or whose name has been redacted, or for whom only a nickname has been provided

crimes, and with as detailed a time frame as possible. The confidential lesser redacted version of Annex 14 to the PCB references 159 “victims of direct perpetration”, but 136 of these individuals are referred to in a way that makes identification impossible;

(bb) Para. 63 The Prosecution should identify with precision and exhaustively the detainees against whom Mr El Hishri is alleged to have directly perpetrated the crimes charged in counts 1-17, and precisely where, and with as precise a date or time frame as possible. The confidential lesser redacted version of Annex 14 to the PCB references 159 “victims of direct perpetration”, but 136 of these individuals are referred to in a way that makes identification impossible;

(cc) Para. 66 The Prosecution should identify with precision and exhaustively the Mitiga Perpetrators allegedly used by Mr El Hishri to ensure that the crimes charged in counts 1-17 would be committed, and with as precise a date or dates, or time frame as possible;

(dd) Para. 68 The Prosecution should identify with precision and exhaustively the means by which Mr El Hishri ensured that the Mitiga Perpetrators would commit the relevant crimes, and with as precise a date or dates, or time frame as possible;

(ee) Para. 70 The Prosecution should identify with precision and exhaustively those co-perpetrators with whom Mr El Hishri is alleged to have worked to jointly carry out the crimes charged in counts 1-17, and with as precise a date or dates, or time frame as possible. These details are not, or not adequately, provided in the PCB;

(ff) Para. 72 The Prosecution should identify with precision SDF/RADA’s interests or views and/or those of its members in pursuit of which the “Common Plan” was carried out, as well as the identities of all other co-perpetrators who allegedly shared the Common Plan;

The Prosecution should explain what if any difference there is between the alleged Common Plan and the Common Purpose referred to in paragraph 82;

(gg) Para. 74 The Prosecution should detail with precision and exhaustively the ways and manners in which Mr El Hishri is alleged to have made an essential contribution to the commission of the Common Plan Crimes, and with as precise a date or dates, or time frame as possible;

- (hh) Para. 76 The Prosecution should identify with precision and exhaustively the Mitiga Perpetrators whom Mr El Hishri is alleged to have instructed, ordered or induced to commit the crimes charged in counts 1-17, and with as precise a date or dates, or time frame as possible. These details are not, or not adequately, provided in the PCB;
- (ii) Para. 77 The Prosecution should identify with precision and exhaustively the members of the Mitiga Leadership and/or Mitiga Perpetrators whom Mr El Hishri is alleged to have prompted to commit the crimes charged in counts 1-17, and with as precise a date or dates, or time frame as possible. These details are not, or not adequately, provided in the PCB;
- (jj) Para. 79 The Prosecution should identify with precision and exhaustively the members of the Mitiga Leadership and/or Mitiga Perpetrators whom Mr El Hishri is alleged to have aided, abetted or otherwise assisted to commit the crimes charged in counts 1-17, and with as precise a date or dates, or time frame as possible. These details are not, or not adequately, provided in the PCB;
- (kk) Para. 81 The Prosecution should identify with precision and exhaustively the members of the group that is alleged to have carried out the crimes charged in counts 1-17 acting with a common purpose, and with as precise a date or dates, or time frame as possible. These details are not, or not adequately, provided in the PCB;
- (ll) Para. 82 The Prosecution should identify with precision SDF/RADA's interests or views and/or those of its members in pursuit of which they acted with a "Common Purpose" as well as the identities of all other members of the group who allegedly acted with the Common Purpose. These details are not, or not adequately, provided in the PCB;

The Prosecution should explain what if any difference there is between the alleged Common Purpose and the Common Plan referred to in paragraph 72.

24. The Prosecution has been investigating the alleged crimes at Mitiga Prison for many years. Mr El Hishri was arrested over 9 months ago, on 16 July 2025. The Prosecution should by now have a perfect idea of the shape and parameters of its case. There is no excuse for the DCC to be so widely, imprecisely and ambiguously framed as the case approaches the confirmation hearing. It provides the Prosecution with an impermissibly wide margin to mould "the case against the accused in the course of the trial depending on how the evidence unfolds."

25. Not only does the DCC fail to comply with the strictures of Regulation 52(b) of the RoC, it also offends against the clear injunction of the Appeals Chamber in the *Bemba* case that a DCC should not be framed in a way that is “too broad to amount to a meaningful “description” of the charges against [an Accused] in terms of article 74 (2) of the Statute”:

Simply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute.¹⁴

26. As set out in paragraphs 22 and 23 above, the language employed by the Prosecution entirely fails to give the Defence proper notice of exactly whom Mr El Hishri is alleged to have victimized, or who precisely – where relevant – his alleged co-perpetrators are. The Prosecution has made no effort to identify any more than three members of the Mitiga Prison Leadership or (other) Mitiga Perpetrators in the DCC.

27. Further, no effort has been made by the Prosecution to give notice of the dates of specific criminal acts for which Mr El Hishri is alleged to be individually responsible. While the Defence acknowledges that the nature of some, and indeed many, of the allegations is such that it may not be realistic to be put on notice of precise dates, it is nevertheless necessary to point out that the Prosecution has done nothing more than throw all the alleged crimes charged in counts 1-17 into the widest possible temporal window of six years and two months, the Charged Period of 1 May 2014 to 30 June 2020. This creates significant prejudice for the Defence, not least because it precludes the Defence from investigating whether Mr El Hishri may have an alibi for any or all of the alleged criminal acts, or whether the detention of any individual complainant was truly related at that time to the non-international armed conflict (“NIAC”).

D. The insufficiency of evidence of contextual elements of the charged crimes

(i) Crimes against humanity

28. The Prosecution has failed to produce sufficient evidence of the existence of a widespread or systematic attack against the civilian population.

¹⁴ *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, para. 110 (“*Bemba Judgment*”)

(ii) *War crimes*

29. The Prosecution has failed to produce sufficient evidence of an armed conflict nexus to the charged crimes.

30. The requirement that an alleged war crime “took place in the context of and was associated with an armed conflict not of an international character” is vital to prevent “any undue expansion of the reach of the law of war crimes”.¹⁵ This requirement means that not every act that takes place on the territory of and at the same time as a NIAC is considered to be a war crime. ICC and *ad hoc* Tribunal jurisprudence indicate that the assessment of whether an alleged act has the required nexus to a NIAC should be an holistic one, and based on multiple factors that serve to demonstrate whether “the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”¹⁶

31. The Prosecution argues that “but for the conflict and the power vacuum and factionalism which had been created by it, the Mitiga Perpetrators could not have carried out the alleged crimes at all, or in any event in a similar institutionalised and sustained way.”¹⁷ However, the Prosecution points to no material in the PCB to support this sweeping assessment that the arrests and detention of persons for domestic criminal offences, and the alleged arrests and detention of persons for broader ideological reasons could not have been carried out in precisely the same manner in the absence of the NIAC. Actions of domestic law enforcement are generally found to fall outside of the conflict nexus.¹⁸

32. As this PTC rightly found in the Warrant of Arrest decision, “the key question is why [the alleged victims] 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”.¹⁹ The Defence underscores that SDF/RADA was formally established in 2013 at the latest by a decree of the

¹⁵ *Ntaganda*, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06 OA5, para. 68

¹⁶ *Afghanistan Situation*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, para. 69 (quoting ICTY, *Kunarac et al.*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, paras 58-60); *Ntaganda*, Judgment, ICC-01/04-02/06, para. 731

¹⁷ PCB, para. 40

¹⁸ E. Heffes, *Detention by Non-State Armed Groups under International Law*, Cambridge University Press; 2022, p. 91; W. Schabas, ‘Al Mahdi Has Been Convicted of a Crime He Did Not Commit’ (2017) 49 Case Western Reserve Journal of International Law 75, 94–95

¹⁹ Warrant of Arrest, para. 14

Libyan Cabinet²⁰ and subsequently operated in affiliation with the Interior Ministry pursuant to a decision of the Presidential Council of the Government of National Accord.²¹

33. One particularly vital element for determining the existence of an armed conflict nexus in a case involving alleged crimes committed in a detention facility is whether “the detainees were captured for reasons related to an armed conflict”.²² The detention and subsequent alleged mistreatment of detainees who were captured for reasons entirely unrelated to the NIAC has no connection to that armed conflict.

34. It is submitted that for the vast majority of Mitiga Prison detainees, the circumstances of their arrest and detention had absolutely nothing to do with any NIAC in Libya. The PTC should therefore decline to confirm all charges where the Prosecution has failed to adduce sufficient evidence that there are substantial grounds to believe that there is the requisite nexus with any armed conflict.

E. The significant expansion of the Warrant of Arrest in the DCC in terms of temporal scope and charged crimes

35. The Defence firstly notes that, whereas the Warrant of Arrest was sought and issued in respect of crimes allegedly committed during the period “from around February 2015 to, at least, early 2020”,²³ the DCC charges Mr El Hishri with crimes allegedly committed over a significantly extended period of time, that is, “between 1 May 2014 and 30 June 2020” (“Charged Period”).²⁴

36. The crimes charged in counts 1-17 in the DCC largely mirror those for which the Warrant of Arrest was sought and granted. Count 6 in the DCC (other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Rome Statute) was not included in the Warrant of Arrest. Of greatest relevance, however, is the inclusion in the DCC of count 13, enslavement as a crime against humanity pursuant to article 7(1)(c).

²⁰ LBY-OTP-00018672

²¹ LBY-OTP-0070-0005

²² Warrant of Arrest, para. 17

²³ Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-01/25-7, 10 July 2025 (“Warrant of Arrest”), para. 2 and p. 39

²⁴ DCC, para. 1

37. The Prosecution had attempted to persuade the PTC that there was sufficient evidence to enable it to find reasonable grounds to believe that the elements of enslavement had been met. In the Warrant of Arrest, however, the PTC having examined the evidence, declined to make that finding:

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. 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.²⁵

38. The Prosecution now attempts to resurrect enslavement as a crime against humanity, albeit at this stage of proceedings to the more onerous “substantial grounds to believe” standard. This attempt must fail.

39. Article 101(1) of the Rome Statute defines the rule of speciality: “A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.”

40. It was held in the *Mbarushimana* case that it is not impermissible, or a violation of the principle of speciality, to add charges prior to the confirmation hearing which were not contained in the arrest warrant if they are part of the course of conduct for which the suspect was arrested.²⁶ However, the instant case can be readily distinguished from *Mbarushimana*. In this case, the PTC ruled, to a lower standard, that the allegation previously included in the Prosecutor’s request for the Warrant of Arrest was not made out. The Prosecutor has not shown that that ruling was wrong. There is no basis to believe that the PTC should arrive at a finding that is any different to its prior plainly correct findings that: (i) the Sub-Saharan detainees/Black Migrants 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, and (ii) the Prosecution had failed to show that the alleged perpetrators exercised powers attaching to the right of ownership over the other (Libyan) detainees.

²⁵ Warrant of Arrest, para. 81.

²⁶ *Mbarushimana* Decision, para. 92

41. The PTC should therefore decline to confirm count 13, enslavement.

42. For identical reasons, the PTC should decline to confirm count 14 (persecution on political grounds) and count 16 (persecution on nationality, race and/or ethnicity grounds) insofar as they relate to Black Migrants.

F. Grounds for excluding criminal responsibility and/or raising the existence of an alibi

43. The PTC has ordered the Defence to set out any grounds for excluding criminal liability and/or for raising the existence of an alibi.

44. At this early stage of proceedings, the Defence advances no grounds for excluding criminal liability. This is without prejudice to the Defence's right to revisit this position before the Trial Chamber in the event the PTC confirms one or more of the charges.

45. For the reasons set out above, given the extraordinarily wide Charged Period and the general imprecision of dates on which Mr El Hishri is alleged to have committed the charged crimes, the Defence is simply not in a position at this juncture to raise the existence of an alibi. This is without prejudice to the Defence's right to revisit this position before the Trial Chamber in the event the PTC confirms one or more of the charges, and if and when it receives further and better particulars of the dates of any alleged crimes.

IV. CONCLUSION

46. For the foregoing reasons, which will be complemented and fully elaborated upon during the confirmation of charges hearing, the Defence will respectfully request that the PTC decline to confirm any of the charges in the DCC, and order Mr El Hishri's immediate release with prejudice.

Respectfully submitted,



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Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 28 April 2026
at The Hague, The Netherlands