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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

Prosecution response to “Defence written notes and observations relating to factual and legal elements of the Prosecution’s case”

Source: Office of the Prosecutor

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INTRODUCTION

1. The “written notes and observations” filed by the Defence—which it contends will “complement[]” its submissions in the forthcoming hearing on the confirmation of charges—should be dismissed.¹ The Prosecution files this response in the interest of clarity, on the same basis as the Defence Observations.² Nothing in the Defence Observations shows any legal or factual impediment to confirming the charges or committing Mr El Hishri to trial.

CONFIDENTIALITY

2. This response is filed confidentially, consistent with regulation 23*bis*(2), since it relates to documents of the same classification.³ The Prosecution requests reclassification of this response if the Defence request for reclassification is granted.⁴

SUBMISSIONS

3. The Defence raises five broad issues which it considers relevant to the pending confirmation proceedings.⁵ Since the Chamber is familiar with the proper standard and approach to the confirmation of charges under article 61 of the Statute, the Prosecution will make no further submission in this regard.⁶

4. The Prosecution will, however, address matters arising from the Defence Observations concerning: the disclosure of evidence, which occasions no prejudice to Mr El Hishri;⁷ the formulation of the charges;⁸ the contextual elements of the charged crimes;⁹ the scope of the charges and their conformity with articles 61 and 101,¹⁰ and; the Defence election not to provide notice of any alibi which will be raised by Mr El Hishri.¹¹

¹ *Contra* [ICC-01/11-01/25-107-Conf](#) (“Defence Observations”), paras. 1, 46. *See further* [ICC-01/11-01/25-66](#) (“Procedural Order”), para. 13 (referring to “any challenge to the DCC or any other matter arising from the DCC”).

² *See* [Defence Observations](#), para. 2 (stating that the Defence Observations “should not be understood to amount to a comprehensive treatment of all the arguments the Defence intends to address”, and that they “are intended to provide the PTC with an overview of the principal observations of the Defence [...] at this stage of proceedings”). The Prosecution further notes that the challenge brought by the Defence under article 19(2)(a) of the Statute will be considered on its own terms, and is therefore not addressed in this response: *cf.* [Defence Observations](#), para. 3 (“These observations do not repeat, but should be read in conjunction with, the Defence’s submissions on the (lack of) jurisdiction [...] of Mr El Hishri’s case before the Court”).

³ *See e.g.* [Defence Observations](#), para. 4.

⁴ *See* [ICC-01/11-01/25-113](#) (“Defence Request for Reclassification”).

⁵ *See e.g.* [Defence Observations](#), para. 2.

⁶ *Cf.* [Defence Observations](#), paras. 5-7. *See further e.g.* [ICC-01/21-01/25-417-Red](#) (“*Duterte* Confirmation Decision”), paras. 25-28, 30-35, 37, 49-50.

⁷ *See below* paras. 5-11. *Contra* [Defence Observations](#), paras. 8-16.

⁸ *See below* paras. 12-33. *Contra* [Defence Observations](#), paras. 17-27.

⁹ *See below* paras. 34-42. *Contra* [Defence Observations](#), paras. 28-34.

¹⁰ *See below* paras. 43-50. *Contra* [Defence Observations](#), paras. 35-42.

¹¹ *See below* paras. 51-52. *Contra* [Defence Observations](#), paras. 27, 43-45.

A. Evidence has been disclosed properly, occasioning no prejudice to Mr El Hishri

5. The Defence claims that the material disclosed for the purpose of confirmation proceedings in this case contains “an extraordinary volume of anonymous evidence”, such that in its view these proceedings “have become indistinguishable from secret proceedings.”¹² Consequently, in its submission, “the Defence is unable to properly meet the Prosecution’s allegations”.¹³ However, the Defence claims are overstated, and fail to show either that “real prejudice” has been occasioned to Mr El Hishri or any “unfair[ness]” at all.¹⁴ In particular, the Defence shows no error in the protective measures ordered by the Chamber, and its claims of prejudice and unfairness are based on a pervasive misconception concerning the distinct nature of confirmation and trial proceedings and the required preparation.

A.1. The Defence Observations show no error in the protective measures ordered by the Chamber

6. The Defence Observations fail to address—or even mention—the Chamber’s supervision of the disclosure process carried out by the Prosecution, and its case-by-case authorisation of the protective measures temporarily withholding from Mr El Hishri information which could identify the witnesses against him.¹⁵ Each of these reasoned decisions was reached with the benefit of submissions from the Defence, and on the basis of the powers expressly granted to the Chamber by articles 57(3)(c), 61(3), and 68(1) of the Statute, rule 81, and regulation 42.¹⁶ Repeated expressions of mere dissatisfaction with these decisions cannot show any error in them, nor do the Defence Observations develop any concrete argument to this effect.

7. Furthermore, for many of those witnesses whose identities have been temporarily withheld from Mr El Hishri, disclosure *was* nonetheless still made of substantial parts of those evidence through redacted witness statements.¹⁷ As the Defence notes, it received only summaries of the evidence of just “13 witnesses, that is, 20% of the total number”¹⁸—and, even so, the Defence overlooks that for the purpose of confirmation proceedings the Statute expressly provides that Prosecution may “rely on [...] summary evidence”.¹⁹ If summaries may be used

¹² [Defence Observations](#), paras. 8-9.

¹³ [Defence Observations](#), para. 16.

¹⁴ *Contra* [Defence Observations](#), para. 15.

¹⁵ See e.g. [Defence Observations](#), paras. 8-16.

¹⁶ See e.g. [ICC-01/11-01/25-69-Red](#) (“First Non-Disclosure Decision”), paras. 14-18 (also citing relevant caselaw); [ICC-01/11-01/25-101-Red](#) (“Second Non-Disclosure Decision”), paras. 6-8.

¹⁷ See e.g. [Second Non-Disclosure Decision](#), para. 27.

¹⁸ [Defence Observations](#), para. 8. Furthermore, the Prosecution notes that the information described as “summaries” was frequently composed of verbatim extracts of the relevant witnesses’ evidence, which was often corroborative or cumulative of other evidence disclosed. The majority of such summaries addressed the contextual elements of the charged crimes, as opposed to matters such as the acts and conduct of Mr El Hishri.

¹⁹ [Statute](#), art. 61(5).

as a basis to confirm the charges, necessarily it is sufficient if such evidence is disclosed to the Defence for the purpose of such proceedings.

A.2. The Defence Observations confuse preparation for confirmation proceedings with preparation for trial

8. The Defence contends that unfairness in the protective measures ordered by the Chamber arises from their impact on the ability of the Defence to “investigate the vast majority of the Prosecution’s witnesses”, “to test the evidence”, or “to demonstrate weaknesses in their evidence or unreliability of their accounts”.²⁰ Yet this confuses the nature of the preparation required for trial with the preparation required for confirmation proceedings.

9. Notwithstanding the procedural significance of the confirmation of charges, the Defence concedes that they are of “limited scope” and are not to be treated as “a mini-trial”.²¹ As this Chamber has recently reaffirmed, while it may in principle evaluate ambiguities or inconsistencies in the evidence presented for the limited purpose of confirming the charges,

[B]y the very design of the [confirmation] proceedings, [the Chamber] is not in a position to conclusively determine issues relating to the probative value of evidence, including with respect to the credibility of witnesses, whose declarations are, as a rule, brought before it only in written form. Indeed, as also indicated by the Appeals Chamber, ‘the Pre-Trial Chamber’s determinations will necessarily be presumptive’, and the Pre-Trial Chamber ‘should take great care in finding that a witness is or is not credible’, as the credibility of witnesses can only be properly addressed at trial.²²

10. It follows from this correct statement that the Defence need not undertake the same preparation at confirmation to test the credibility of evidence which may be appropriate for trial. Indeed, as the Chamber expressly reminded the Defence, “the scope of the confirmation proceedings is limited and [...] the Chamber is not required to systematically examine the credibility of each witness for the purpose of confirmation of charges.”²³

11. Accordingly, no prejudice or unfairness is occasioned by the delayed disclosure of witnesses identities to the Defence. To the contrary, article 67 guarantees Mr El Hishri “adequate time and facilities for the preparation of the defence” at trial, and he will receive timely additional disclosure concerning the witnesses subject to protective measures for that

²⁰ Defence Observations, para. 15.

²¹ Defence Observations, paras. 10, 14. *See also* paras. 11-13.

²² Duterte Confirmation Decision, para. 28. *See also* [ICC-02/04-01/05-633](#) (“Kony Confirmation Decision”), para. 38.

²³ *See* [Second Non-Disclosure Decision](#), para. 28 (and references therein).

purpose. Since the Defence does not require such disclosure for the purpose of confirmation proceedings, however, no unfairness can result from the Chamber's orders withholding certain identifying information.

B. The charges are properly formulated

12. The Defence incorrectly asserts that the charges are improperly formulated, because (in its view) “the DCC is replete with vague language that does not provide the protection required by Regulation 52”²⁴—especially with regard to certain “descriptors”,²⁵ and certain factual allegations “including the time and place of the alleged crimes”.²⁶ In particular, the Defence cannot fairly claim that it lacks “proper notice of exactly whom Mr El Hishri is alleged to have victimized, or who precisely—where relevant—his alleged co-perpetrators are” or that “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”.²⁷

13. As explained below, the Defence Observations show no defect in the charges in the DCC, nor any prejudice occasioned to Mr El Hishri.²⁸ The Defence Observations confuse the requirements for the formal validity of charges under article 74 of the Statute, and the provision of adequate notice to the Defence under article 67 of the Statute. The Defence not only mistakes the legal requirements for proper charging, but also misreads the charges as actually formulated in the DCC, taking them out of context. Further, where relevant, the Defence ignores the additional notice provided in documents such as the Pre-Confirmation Brief (“PCB”).

B.1. The Defence Observations confuse distinct matters under articles 67 and 74

14. As this Chamber has recently affirmed, applying well-established Appeals Chamber jurisprudence which was not addressed in the Defence Observations,²⁹ it is important not “to conflate the issue of prompt and sufficient notice of the charges to the suspect under article 67(1)(a) of the Statute with the issue of the proper delineation of the scope of the charges for the purposes of article 74(2) of the Statute.”³⁰ It continued:

²⁴ Defence Observations, para. 19. *See also* paras. 24-25.

²⁵ Defence Observations, paras. 21-22 (referring to [ICC-01/11-01/25-92](#) (“DCC”), paras. 2-8, 10, 12-14, 18-20, 22-23).

²⁶ Defence Observations, paras. 21, 23 (referring to [DCC](#), paras. 6, 25, 27, 34, 38-39, 42-44, 46-47, 49-52, 55-61, 63, 66, 68, 70, 72, 74, 76-77, 79, 81-82).

²⁷ *Contra* Defence Observations, paras. 26-27.

²⁸ *Contra* Defence Observations, para. 27. Concerning the claimed impact on “investigating whether Mr El Hishri may have an alibi”, *see especially below* paras. 51-52.

²⁹ *See* Defence Observations, paras. 18, 25 (citing [ICC-02/04-01/15-1562 OA4](#) (“*Ongwen* Confirmation Appeal Judgment”), para. 69; [ICC-01/05-01/08-3636-Red A](#) (“*Bemba* Appeal Judgment”), para. 110).

³⁰ [Duterte Confirmation Decision](#), para. 17.

In this regard, the Appeals Chamber's jurisprudence indicates that the question of sufficient notice under article 67(1)(a) of the Statute is distinct from the issue of the level of detail required in the formulation of the charges allowing for a meaningful application of article 74(2) of the Statute. [...]

With regard to the requirement that charges must be specific, the Appeals Chamber [...] clarified that:

'For the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able 'to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not.' It is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively. Depending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims. While in such a case the [DCC] may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them [...]. Whether such description of the charges is sufficient for purposes of article 74(2) of the Statute will depend, *inter alia*, on the scale of criminality and the mode of individual criminal responsibility alleged.'

[...]

In light of the above, a broader description of the charges defined through examples of relevant incidents is not necessarily incompatible with article 74(2) of the Statute. Depending, among other things, upon the scale of the criminality and the alleged modes of liability, charges may cover a significant time period and territory, as long as it is possible [...] to identify which historical events are covered by the charges and which are not. Indeed, given the type of criminality over which this Court has jurisdiction—which typically affects large numbers of victims—it may be necessary to allow for a broader description of the charges in circumstances in which it would otherwise be impossible or difficult to adequately capture the extent of the victimisation as well as the suspect's alleged responsibility therefor.

[...]

In situations in which charges have been broadly formulated, further specification of, for example, the number of victims or incidents neither impacts the temporal or geographical scope of the confirmed charges nor does it alter any other material facts other than the number of persons victimised. [...] As long as the temporal, geographical and other material factual parameters, as well as the charged contribution of the suspect, remain the

same, further specification of the charges will remain within the boundary of the charge as originally confirmed. Any developments in this regard must, however, not come as a surprise: as soon as information allowing further specification of the charges becomes available, the Defence must be adequately put on notice by appropriate means, such as a trial brief.³¹

15. Likewise, with further regard to the right to adequate notice “of the nature, cause and content” of the charges under article 67(1)(a), the Appeals Chamber has affirmed that “the accused person must receive ‘*sufficiently* detailed notice of the charges’, and that what constitutes *sufficient* detail ‘turn[s] on the particular circumstances of the case, taking into account the nature of the charges and the ability of the accused to prepare a meaningful defence.’”³² Notice “should be given in a timely manner, ‘before the start of the *trial* hearings’.”³³ The right to notice “does not impose any special formal requirement as to the manner in which an accused is to be informed of the nature and cause of the charges”.³⁴

16. The Defence fails to engage with any of these principles. In particular, it conflates matters relevant to the proper formulation of the charges (which must be determined by the Chamber) and matters relevant to notice (which may also be addressed *following* the confirmation of charges, at the pre-trial stage). Consistent with the specific submissions below, the Defence overlooks that charges may properly be formulated in the terms proposed in the DCC in cases such as the present—where thousands of persons are victimised by a factually identifiable group of persons, over a lengthy but precisely defined time period. It ignores the detailed notice already provided in the PCB, as well as the potential for further notice to be given in the reasoning of the Confirmation Decision itself, as well as in other auxiliary documents (such as the Prosecution’s Pre-Trial Brief) after Mr El Hishri has been committed for trial and in advance of the opening of the trial.³⁵

³¹ [Duterte Confirmation Decision](#), paras. 17-22 (quoting [ICC-01/04-02/06-2666-Red A A2](#) (“*Ntaganda* Appeal Judgment”), paras. 5, 326).

³² [ICC-02/04-01/15-2022-Red](#) (“*Ongwen* Appeal Judgment”), para. 235 (emphasis added, citing [ICC-01/04-01/06-3121-Red A5](#) (“*Lubanga* Appeal Judgment”), 123; [ICC-01/14-01/18-874 OA2](#) (“*Yekatom and Ngaïssona* Charging Appeal Judgment”), paras. 38-39, 44; [Ntaganda Appeal Judgment](#), para. 322). See also paras. 232-233, 237.

³³ [Ongwen Appeal Judgment](#), para. 234 (emphasis added, citing [Lubanga Appeal Judgment](#), para. 129; [Ntaganda Appeal Judgment](#), para. 322).

³⁴ [Yekatom and Ngaïssona Charging Appeal Judgment](#), para. 54; [Ongwen Appeal Judgment](#), para. 259.

³⁵ See e.g. [Ongwen Appeal Judgment](#), paras. 259-260.

B.2. The Defence Observations are based on incorrect assumptions about the law

17. The Defence Observations criticise 56 particular passages in the DCC.³⁶ However, these criticisms rely upon incorrect assumptions about the law, as the following paragraphs explain.³⁷

B.2.a. Not every perpetrator or co-perpetrator need be identified individually

18. The Defence Observations assume that each and every alleged perpetrator or co-perpetrator must be identified individually and/or exhaustively.³⁸ This is incorrect. For the purpose of article 74 of the Statute, depending on the facts of the case, it may be necessary only to charge “an identifiable group of perpetrators”.³⁹ Furthermore, under article 67 of the Statute, the Appeals Chamber has also affirmed that “there may be no need to identify each member of the common plan [co-perpetrator] by name”.⁴⁰ Rather, “the level of detail required to satisfy the notice requirement [...] needs to be assessed in light of the particular circumstances of the case, including the specific mode or modes of liability charged.”⁴¹

19. On the facts of this case, the Prosecution has expressly alleged an identifiable group of perpetrators, on a functional basis, as “persons holding leadership roles in Mitiga Prison”, “persons who carried out the charged crimes at Mitiga Prison”, and “persons who carried out the charged crimes at other locations in and around Tripoli, acting under the direction or control, or with the agreement of, the Mitiga Prison Leadership”. The Prosecution further specified that this includes “guards at Mitiga Prison”, “other persons participating in the running of Mitiga Prison or interacting with the detainees at Mitiga Prison”, and “detainees who were compelled or instructed to carry out crimes”.⁴² While the Prosecution has individually identified only certain persons in the DCC,⁴³ this is permissible given the circumstances of the case where the alleged crimes are committed on a large scale, over a lengthy period of time, in the context of an institutionalised system of mistreatment and abuse.⁴⁴ Furthermore, the Defence has received

³⁶ See [Defence Observations](#), paras. 22-23.

³⁷ See also *below* para. 33 (Defence failure to read the charges in context).

³⁸ See e.g. [Defence Observations](#), paras. 22(b), 22(e), 22(f), 22(g), 22(k), 23(a), 23(b), 23(c), 23(g), 23(i), 23(j), 23(n), 23(o), 23(p), 23(q), 23(r), 23(s), 23(t), 23(u), 23(cc), 23(ee), 23(ff), 23(hh), 23(ii), 23(jj), 23(kk).

³⁹ See [Ntaganda Appeal Judgment](#), para. 326. See also [Duterte Confirmation Decision](#), paras. 18, 24.

⁴⁰ [Ongwen Appeal Judgment](#), para. 274.

⁴¹ [Ongwen Appeal Judgment](#), para. 275. For example, in *Ongwen*, where the alleged modes of liability included “indirect co-perpetration, where the control over the crimes is retained through the use of an organised power apparatus”—that is, through the Lord’s Resistance Army or LRA—the Appeals Chamber upheld “a more generic identification of the other indirect co-perpetrators”, namely “[Mr] Ongwen, Joseph Kony, and the Sinia brigade leadership”: see paras. 275-278.

⁴² See [DCC](#), paras. 6-7.

⁴³ See e.g. [DCC](#), paras. 3-5, 71.

⁴⁴ Cf. [Defence Observations](#), para. 26. See [Ntaganda Appeal Judgment](#), para. 326.

additional notice of alleged perpetrators or co-perpetrators through the PCB, and the underlying evidence, and fails to make any concrete showing of how this is inadequate.⁴⁵

B.2.b. Not every victim need be identified individually

20. The Defence Observations assume that it is necessary to identify each and every alleged victim.⁴⁶ This is incorrect. For the purpose of article 74 of the Statute, depending on the facts of the case, it may be necessary only to charge “an identifiable group of victims”,⁴⁷ and this may be non-exhaustive such that “the number of victims mentioned in the charges, whilst providing an indication of the scope of the charged crime, sets neither the upper nor the lower limit” and “[t]he Trial Chamber hearing the case can eventually find that a larger or smaller number of persons fell victim to the relevant crime than the figure arrived at by the Pre-Trial Chamber at the confirmation stage.”⁴⁸ While the accused is separately entitled to *notice* of the identities of alleged victims in advance of trial, under article 67, this is only to the extent practicable in the circumstances and need not be included in the DCC.

21. On the facts of this case, the Prosecution has expressly alleged an identifiable group of victims, on a functional basis, as “Mitiga Prison detainees or persons otherwise in the[] custody or control [of the Mitiga Perpetrators], principally at Mitiga Prison.”⁴⁹ This is permissible given the circumstances of the case where the alleged crimes are committed on a large scale, over a lengthy period of time, in the context of an institutionalised system of mistreatment and abuse.⁵⁰ As the Chamber has previously noted, “it may be necessary to allow for a broader description of the charges in circumstances in which it would otherwise be impossible or difficult to adequately capture the extent of the victimisation as well as the suspect’s alleged responsibility therefor.”⁵¹

22. Furthermore, the Defence has received additional notice of individual victims through detailed annexes to the PCB, and the underlying evidence, and fails to make any concrete showing of how this is inadequate.⁵² Likewise, it shows no error by its further complaint that it cannot identify victims “whose first name is unknown (FNU), or last name is unknown (LNU),

⁴⁵ *Contra* Defence Observations, paras. 23(s), 23(t), 23(u), 23(ee), 23(hh), 23(ii), 23(jj), 23(kk).

⁴⁶ See Defence Observations, para. 23(g) (victims of rape and sexual violence); para. 23(i) (victims of murder and attempted murder); para. 23(j) (victims of enslavement); 23(n)-(r) (victims of persecution), paras. 23(v), 23(z), 23(aa), 23(bb) (victims of conduct directly perpetrated by Mr El Hishri).

⁴⁷ See [Ntaganda Appeal Judgment](#), para. 326. See also [Duterte Confirmation Decision](#), paras. 18, 24.

⁴⁸ [Duterte Confirmation Decision](#), para. 22. See also para. 35.

⁴⁹ See DCC, para. 25.

⁵⁰ See [Ntaganda Appeal Judgment](#), para. 326.

⁵¹ [Duterte Confirmation Decision](#), para. 20.

⁵² *Contra* Defence Observations, paras. 23(v), 23(z), 23(aa), 23(bb). See [PCB](#), Annexes 8-14.

or both (FNU LNU), or whose name has been redacted, or for whom only a nickname has been provided.”⁵³ This merely reflects the evidence as presently understood by the Prosecution, and will be updated if the Prosecution receives new information in this regard.

B.2.c. Temporal and geographic parameters should be assessed case-by-case

23. The Defence Observations assume the existence of an abstract legal standard limiting temporal and geographic parameters, such that particular words or formulations will always be considered improper, or that it is necessary to identify all relevant times and locations “exhaustively” and “with precision”.⁵⁴ This is incorrect. For the purpose of article 74 of the Statute, depending on the facts of the case, it may be necessary only to “specify[] a period of time during which and an area where criminal acts were allegedly committed”.⁵⁵ This is not contradicted by reference to the *Bemba* Appeal Judgment, where the Appeals Chamber merely observed that such parameters are inappropriate if they are over broad.⁵⁶

24. What constitutes an appropriate temporal or geographic parameter is to be assessed on a case-by-case basis, taking account *inter alia* of “the scale of the criminality and the mode of individual criminal responsibility alleged”.⁵⁷ For example, in *Abd-Al-Rahman*, the Pre-Trial Chamber affirmed that it neither impermissibly extended “the geographical scope of the charges or ma[de] them unduly broad or vague” to include not only expressly identified general locations (Kodoom and Bindisi, and the towns of Mukjar and Deleig) but also “surrounding areas” given the evidence that the relevant crimes were also committed against victims as they fled those places or were taken from those places for the purpose of the alleged crimes.⁵⁸ In *Mbarushimana*, the Pre-Trial Chamber affirmed similar language, also taking account of the fact that further details were provided when the DCC was read in light of the evidence disclosed to the Defence.⁵⁹

25. On the facts of this case, the Prosecution has expressly identified relevant temporal parameters (from 1 May 2014 until 30 June 2020, or “the charged period”) and geographic parameters (crimes occurring “principally at Mitiga Prison”, but also “at other locations in and

⁵³ *Contra* Defence Observations, para. 23(z) (fn. 13). See also paras. 23(aa), 23(bb).

⁵⁴ See Defence Observations, paras. 22(c), 22(i), 22(j), 23(d), 23(g), 23(i), 23(j), 23(n), 23(o), 23(p), 23(q), 23(r), 23(v), 23(w), 23(z), 23(aa), 23(bb), 23(cc), 23(dd), 23(ee), 23(gg), 23(hh), 23(ii), 23(jj), 23(kk).

⁵⁵ See *Ntaganda Appeal Judgment*, para. 326.

⁵⁶ *Contra* Defence Observations, para. 25 (quoting *Bemba Appeal Judgment*, para. 110).

⁵⁷ *Ntaganda Appeal Judgment*, para. 326. See also *Yekatom and Ngaïssona Charging Appeal Judgment*, para. 60 (“there is no formal requirement that certain terminology be used in a charging document aside from the language of the Statute”); *Ongwen Appeal Judgment*, para. 259.

⁵⁸ See [ICC-02/05-01/20-433-Corr](#) (“*Abd-Al-Rahman* Confirmation Decision”), paras. 24-25; [ICC-02/05-01/20-1240](#) (“*Abd-Al-Rahman* Trial Judgment”), para. 19.

⁵⁹ See [ICC-01/04-01/10-465-Red](#) (“*Mbarushimana* Confirmation Decision”), para. 84.

around Tripoli” (including but not limited to other locations in the Mitiga Compound) where linked to the conduct at Mitiga Prison through the relevant perpetrators and victims).⁶⁰ This is permissible given the circumstances of the case where the alleged crimes are committed on a large scale, over a lengthy period of time, in the context of an institutionalised system of mistreatment and abuse.⁶¹

26. Within such a context, it is neither appropriate nor practicable to allege as part of the charges precise dates on which particular incidents occurred, especially given the potential difficulties which witnesses may sometimes reasonably encounter in keeping track of time while held in such a context.⁶² The Defence has received additional notice of alleged incidents (with information as to timing, where available) through the PCB, and the underlying evidence.

B.2.d. There is no requirement to plead the evidence

27. The Defence Observations assume a requirement to plead the evidence in the DCC.⁶³ This is incorrect. To the contrary, the Prosecution is *prohibited* from pleading in the DCC any information other than material facts.⁶⁴ For the purpose of confirmation proceedings, rather, the Prosecution is obliged to disclose the evidence upon which it is to rely, as it has, and may relate this evidence to the charges in auxiliary documents such as the PCB and in oral submissions in the forthcoming confirmation hearing. Similar principles apply at trial.

28. The prohibition of pleading evidence in the DCC—and indeed the need for due caution in requiring notice of the factual significance of particular evidence—is the corollary of the Trial Chamber’s power to assess the evidence freely. For example, as the Appeals Chamber recalled in the context of co-perpetration under article 25(3)(a) of the Statute, “as a matter of law, there is no separate requirement to give notice of the means by which the crimes could have been frustrated” because this: (i) is merely the implication of the legal requirement that the accused “had control over the crime” and; (ii) requires “a normative assessment of the

⁶⁰ See e.g. [DCC](#), paras. 1, 6, 8, 10, 25, 63. See also [PCB](#), paras. 7, 9, 11.

⁶¹ See [Ntaganda Appeal Judgment](#), para. 326.

⁶² Cf. [Defence Observations](#), para. 27.

⁶³ See [Defence Observations](#), paras. 23(g), 23(k), 23(l), 23(m), 23(r), 23(v), 23(x), 23(y), 23(z), 23(dd), 23(ff), 23(gg), 23(ll). See also paras. 22(a), 22(d), 22(h), 22(i), 22(l), 22(m), 22(n), 22(o), 22(p), 22(q), 22(r).

⁶⁴ See [Regulations of the Court](#), reg. 52(2) (“the [DCC] shall contain any submissions or references to, or analysis of, evidence”). See also [Procedural Order](#), paras. 5 (“a DCC must be limited to the *essential* factual and legal elements of the charges”, emphasis added), 6-7 (“shall not contain factual or legal assertions that either exceed the elements [...] or are not relevant to support the legal elements”). See further e.g. [Ongwen Appeal Judgment](#), para. 299 (“the ‘facts’ in article 74(2) of the Statute ‘must be distinguished from the evidence put forward by the Prosecutor [...] to support a charge’”).

person's role in the implementation of the common plan".⁶⁵ Likewise, as this Chamber has previously affirmed:

[I]t is critical that the charges do *not* contain unnecessary details that could be too specific and limiting at trial. The rationale for this is that, even when the evidence presented at the confirmation stage adequately supports these details, such matters can only be properly determined on the basis of the full evidentiary record as established at trial, once the parties have presented their cases and have had the opportunity to challenge the evidence. Because of the limitations inherent in its statutory role, and the Prosecution's prerogative to expand and vary the evidentiary basis relied upon following confirmation and until the deadline to be set by the Trial Chamber, the Pre-Trial Chamber is not in a position to conclusively determine all such details.⁶⁶

29. The prohibition on pleading evidence is likewise supported by, and implicit within, the Pre-Trial Chamber's endorsement of a "flexible approach" concerning specific details of charged facts, such as the exact numbers of victims, the timing of charged incidents, or the nature and quantity of appropriated property.⁶⁷ More fundamentally, it is also consistent with the principle that the Pre-Trial Chamber may confirm the *entirety* of a charge based on its consideration of "evidence of *some aspects* of the crimes charged".⁶⁸

30. On the facts of this case, the Defence shows no error in the formulation of the charges in the DCC, nor any inadequacy in the notice provided in the PCB, with regard to any of the evidentiary issues raised by the Defence such as:

- Libyan societal gender norms, the perpetrators' expectations of sex and/or gender, and the manner in which this context may intersect with other relevant societal factors in the forming of discriminatory intent;⁶⁹

⁶⁵ [Ongwen Appeal Judgment](#), para. 253 (citing [Lubanga Appeal Judgment](#), para. 473; [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#) ("Bemba et al. Appeal Judgment"), para. 810; [Ntaganda Appeal Judgment](#), paras. 1060, 1064, 1067).

⁶⁶ [Duterte Confirmation Decision](#), para. 33 (emphasis added). See also [Kony Confirmation Decision](#), para. 40.

⁶⁷ See e.g. [Kony Confirmation Decision](#), paras. 45-46; [Duterte Confirmation Decision](#), paras. 34-35.

⁶⁸ See [Kony Confirmation Decision](#), para. 47 (emphasis supplied, explaining further: "For example, a charge relating to the crime of murder or rape of several individuals may be confirmed on the basis of sufficient evidence to establish substantial grounds to believe that *some* persons were murdered or raped, as alleged, and all the relevant elements of the crimes are fulfilled, with the determination of the specific number of persons [...] being left to the Trial Chamber", emphasis added).

⁶⁹ *Contra* [Defence Observations](#), paras. 23(g), 23(m), 23(r). But see also e.g. [PCB](#), paras. 68-73, 91-103, 149, 187.

- Specific indicators of the exercise of powers of ownership—although, in any event, the Prosecution did allege, non-exhaustively, and provide an evidentiary basis for five such indicators;⁷⁰
- Specific categories of forced labour—although, in any event, the Prosecution did allege, non-exhaustively, and provide an evidentiary basis for six such categories;⁷¹
- The various means by which Mr El Hishri imposed and/or enforced inhumane detention conditions in Mitiga Prison—although, in any event, the Prosecution did allege and provide an evidentiary basis for: Mr El Hishri's authority and influence over the Mitiga Perpetrators; the means, non-exhaustively, by which the Mitiga Perpetrators and Mr El Hishri imposed and/or enforced such conditions; and the direct control exercised by Mr El Hishri over the Women's Section including over the detention conditions;⁷²
- The means by which Mr El Hishri controlled access to the Women's Section, determined the detention conditions therein, and mistreated Women's Section detainees—although, in any event, the Prosecution did allege, non-exhaustively, and provide an evidentiary basis for such control and mistreatment;⁷³
- The means by which Mr El Hishri ensured that Mitiga Perpetrators would commit the relevant crimes in the Women's Section—although, in any event, the Prosecution did allege, non-exhaustively, and provide an evidentiary basis for such conduct;⁷⁴
- SDF/RADA's interests or views, and the relationship between the scope of the Common Plan and the Common Purpose;⁷⁵
- The means by which Mr El Hishri made an essential contribution to the crimes forming part of the Common Plan—although, in any event, the Prosecution did allege and provide an evidentiary basis for such means.⁷⁶

⁷⁰ *Contra* Defence Observations, para. 23(k). See DCC, para. 43(a)-(e) (control or restrictions of movement and physical environment; control over sexuality, sexual and reproductive autonomy; torture, cruel treatment, and abuse/coercion; psychological control and pressure/coercion; forced labour and servility). See also paras. 44-46. See further PCB, paras. 90-112.

⁷¹ *Contra* Defence Observations, para. 23(l). See DCC, para. 44(a)-(f). See further PCB, paras. 113-119.

⁷² *Contra* Defence Observations, para. 23(w). See e.g. DCC, paras. 28-32, 55-56, 59-61, 67. See further e.g. PCB, paras. 52-66, 158-168, 184-189, 200-204.

⁷³ *Contra* Defence Observations, paras. 23(x), 23(y), 23(z). See DCC, paras. 58-60. See further PCB, paras. 181-187.

⁷⁴ *Contra* Defence Observations, para. 23(dd). See DCC, paras. 67-68. See further PCB, paras. 200-204.

⁷⁵ *Contra* Defence Observations, paras. 23(ff), 23(ll).

⁷⁶ *Contra* Defence Observations, para. 23(gg). See DCC, paras. 54-61, 74. See further PCB, paras. 157-189, 227-228.

B.2.e. There is no requirement to plead the law

31. The Defence Observations seem to assume some kind of obligation to plead the law in the DCC, and/or to provide notice of the applicable law before trial.⁷⁷ This is incorrect, since the judges know the law (*iura novit curia*). Rather, as in regulation 52, the DCC need only set out “[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7, 8, or 8bis and the precise form of participation under articles 25 and 28” meaning “clear identification of both the relevant sub-provision in articles 25 and 28 of the Statute and the applicable mode or modes under that sub-provision”.⁷⁸ Specifically, “there is no rule requiring notice of the legal elements [...] in all cases”.⁷⁹ This is consistent with the fact—as also noted by this Chamber⁸⁰—that neither the views of the Prosecution nor even those of a Pre-Trial Chamber on the applicable law “are [...] binding on a trial chamber”, since “the task of a trial chamber is always to interpret and apply the sources of law as codified in article 21 of the Statute” and “[t]his core judicial function must not be fettered before the trial begins.”⁸¹

32. On the facts of this case, the Defence shows no error in the formulation of the charges in the DCC, nor any inadequacy in the notice provided in the PCB, with regard to any of the legal issues raised. Specifically:

- There is no requirement to characterise the particular fundamental rights violated by the conduct allegedly underlying the charged imprisonment, other inhumane acts, and persecution.⁸² Yet, in any event, the Prosecution has not only specified the relevant conduct, but also provided a non-exhaustive description of the fundamental rights which may be implicated.⁸³
- There is no requirement to explain the legal basis for concluding that the alleged conditions of imprisonment were “inappropriate and degrading”, yet in any event the Prosecution did provide, non-exhaustively, a factual and evidentiary basis for this assertion.⁸⁴

⁷⁷ See [Defence Observations](#), paras. 23(e), 23(f), 23(h), 23(o), 23(p), 23(q), 23(r).

⁷⁸ See [Regulations of the Court](#), reg. 52(1)(c); [Ongwen Appeal Judgment](#), para. 236.

⁷⁹ [Yekatom and Ngaïssona Charging Appeal Judgment](#), para. 44. See also paras. 46, 54; [Ongwen Appeal Judgment](#), paras. 239-242; [Kony Confirmation Decision](#), para. 52.

⁸⁰ See [Duterte Confirmation Decision](#), para. 37 (refraining from entering “separate findings of fact or law in the confirmation decision”).

⁸¹ [Yekatom and Ngaïssona Charging Appeal Judgment](#), para. 46.

⁸² *Contra* [Defence Observations](#), paras. 23(e), 23(o), 23(p), 23(q), 23(r).

⁸³ See e.g. [DCC](#), paras. 27, 49-52. See further [PCB](#), paras. 47-51, 137-153.

⁸⁴ *Contra* [Defence Observations](#), para. 23(f). See [DCC](#), para. 34. See further [PCB](#), paras. 68-73.

- There is no requirement to state the Prosecution's "position regarding the age of consent applicable before the Court", yet in any event the Prosecution did allege that "victims who were children were incapable of giving genuine consent".⁸⁵

B.3. The Defence Observations fail to read the charges correctly and in context

33. Finally, the Defence criticism of particular wording in the charges—which it rejects as "imprecisions"—reflects an atomistic and incorrect reading which overlooks the relevant context.⁸⁶ In particular, the terms "Mitiga Prison Leadership" and "Mitiga Perpetrators" are expressly defined in the DCC, and an explanation also provided for the reference to "associates" as well as "members" of SDF/RADA.⁸⁷ Likewise, where inclusive terminology is used in the DCC, this does not make any aspect of the charges overly broad or vague, especially when read in the context of the allegations in the DCC as a whole and the evidence adduced.⁸⁸ The use of certain qualifications or adjectives reflects appropriate care in framing relevant allegations on the basis of the present evidence.⁸⁹

C. There is ample evidence establishing the contextual elements of the charged crimes

34. The Defence Observations reflect an evidentiary disagreement with the Prosecution allegations concerning certain contextual elements of the charged crimes. Specifically, undeveloped evidentiary submissions in the Defence Observations cannot be given any weight, and should be disregarded. Furthermore, the Defence Observations mischaracterise the position set out in the PCB, and mistake the applicable law.

C.1. Undeveloped evidentiary submissions must be disregarded

35. Without further elaboration, the Defence Observations simply claim that "[t]he Prosecution has failed to produce sufficient evidence of the existence of a widespread or systematic attack against the civilian population."⁹⁰ This undeveloped submission must be disregarded, since it merely disagrees with the argument set out in the PCB without substantiation.⁹¹

C.2. The Defence Observations mischaracterise the Prosecution submissions on article 8

36. The Defence Observations assert that "[t]he Prosecution has failed to produce sufficient evidence of an armed conflict nexus" for the purpose of the charged war crimes, and submit

⁸⁵ *Contra* [Defence Observations](#), para. 23(h). See [DCC](#), para. 38. See further [PCB](#), para. 77.

⁸⁶ *Contra* [Defence Observations](#), para. 22.

⁸⁷ *Contra* [Defence Observations](#), paras. 22(a), 22(b), 22(e), 22(f), 22(g), 22(h), 22(k). See [DCC](#), paras. 6-7.

⁸⁸ *Contra* [Defence Observations](#), paras. 22(c), 22(i), 22(j), 22(q), 22(r).

⁸⁹ *Contra* [Defence Observations](#), paras. 22(d), 22(l), 22(m), 22(o), 22(p).

⁹⁰ [Defence Observations](#), para. 28.

⁹¹ See [PCB](#), paras. 6-23.

that, “for the vast majority of Mitiga Prison detainees, the circumstances of their arrest and detention had nothing to do with any [non-international armed conflict (“NIAC”)] in Libya.”⁹² Yet the Defence mischaracterises the Prosecution position (and therefore overlooks relevant evidence), as well as mistaking the applicable law as further addressed below.⁹³

37. In particular, the Defence suggests that the Prosecution’s basis for establishing the nexus to the armed conflict depends on the proposition 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.’”⁹⁴ While it is correct that this forms *part* of the Prosecution’s argument, this is not the *entirety* of the argument—and this is significant since the article 8 nexus is a fact-sensitive and multi-factored test which, even applied rigorously, requires a holistic assessment.⁹⁵ Rather, the paragraph partially quoted by the Defence submits in full that, in assessing the nexus requirement, consistent with *Ntaganda* and *Afghanistan*:

[T]he Chamber should consider in particular factors such as: the affiliation of the Mitiga Perpetrators to SDF/RADA and the GNC/GNA, as a party to the conflict; the status of the victims as civilians or fighters *hors de combat*; the commission of the relevant conduct by the Mitiga Perpetrators in the context of their official functions; and the substantial part played by the NIAC in enabling the Mitiga Perpetrators to carry out the relevant conduct, the manner in which it was committed, and/or the purpose for which it was committed. Notably, 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.⁹⁶

38. In the PCB, the Prosecution then relates these factors to the evidence in the case.⁹⁷ This is simply ignored in the Defence Observations.⁹⁸ The further Defence argument that “[a]ctions of domestic law enforcement are generally found to fall outside of the conflict nexus” is, at the

⁹² Defence Observations, paras. 29, 34.

⁹³ See below paras. 40-42.

⁹⁴ Defence Observations, para. 31 (quoting PCB, para. 40).

⁹⁵ See e.g. ICC-01/11-01/25-14 OA (“Prosecution Appeal Brief (Nexus)”), paras. 20-23 (citing ICC-01/04-02/06-1962 OA5 (“*Ntaganda* Second Jurisdiction Appeal Judgment”), para. 68; ICC-02/17-138 OA4 (“*Afghanistan* Appeal Judgment”), para. 69; ICTY, *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 (“*Kunarac* Appeal Judgment”), paras. 58-60; ICTR, *Rutaganda v. the Prosecutor*, ICTR-96-3-A, Judgment, 26 May 2003 (“*Rutaganda* Appeal Judgment”), paras. 569-570). See also ICC-01/12-01/18-2594-Red (“*Al Hassan* Trial Judgment”), paras. 1099-1100; PCB, para. 36.

⁹⁶ PCB, para. 40.

⁹⁷ See PCB, paras. 41-43.

⁹⁸ *Contra* Defence Observations, para. 31 (“the Prosecution points to no material in the PCB to support this sweeping assessment”).

very least, potentially misleading.⁹⁹ While it is true that conduct which has “no [...] connection” to an armed conflict will not satisfy the nexus test (and that domestic law enforcement action may *sometimes* be an example of such conduct),¹⁰⁰ this does not mean that ostensible law enforcement actions *cannot* satisfy the nexus test.¹⁰¹

39. For example, in *Al Hassan*, the Trial Chamber rejected the assertion that “any action undertaken by a member of a police force, during a conflict, must be considered as ‘neutral’ and pertaining to the ‘civilian domain’ and falls automatically under international human rights law only”.¹⁰² Rather, the crimes committed by Ansar Dine/AQIM had the requisite nexus, even though purportedly carried out as ‘law enforcement’, including *because* Ansar Dine/AQIM “were using their power and violence to punish contraventions of the rules they established” and the conflict had “placed the material perpetrators in a position of power, which allowed them to commit the crimes under consideration”.¹⁰³ While the perpetrators in this case did not exercise precisely the same kind of territorial control in Tripoli as Ansar Dine/AQIM did in Timbuktu, nevertheless in both cases the conflict played a substantial part in their ability to commit the charged crimes and the manner in which those crimes were ultimately committed.

C.3. The Defence Observations mistake the applicable law

40. The Defence further states, incorrectly, that in assessing the article 8 nexus “the key question is why [the alleged victims] were detained”, and that “[o]ne particularly vital element [...] in a case involving alleged crimes committed in a detention facility is ‘whether the detainees were captured for reasons related to an armed conflict’.”¹⁰⁴ However, applying the established test repeatedly affirmed by the Appeals Chamber and other international tribunals, the fact that a person was detained for reasons unrelated to the conflict does *not* preclude that crimes committed against that detainee may satisfy the nexus text and constitute war crimes.¹⁰⁵

⁹⁹ *Contra* Defence Observations, para. 31.

¹⁰⁰ [Prosecution Appeal Brief \(Nexus\)](#), para. 23 (quoting [ICRC, Convention \(III\) relative to the Treatment of Prisoners of War: Commentary of 2020, Art. 3](#), para. 494, emphasis added).

¹⁰¹ Nor is it necessarily appropriate to characterise the acts charged in this case even as ostensible law enforcement actions, even though some of the perpetrators may some of the time have sought to cloak themselves in the mantle of law enforcement authority. The Defence assertion that “SDF/RADA was formally established in 2013 at the latest by a decree of the Libyan Cabinet and subsequently operated in affiliation with the Interior Ministry pursuant to a decision of the Presidential Council of the Government of National Accord” must be read in light of all the evidence in the case concerning the actual origins, organisation, and conduct of SDF/RADA: *contra* [Defence Observations](#), para. 32.

¹⁰² [Al Hassan Trial Judgment](#), para. 1271 (fn. 4079).

¹⁰³ [Al Hassan Trial Judgment](#), paras. 1275-1279, especially paras. 1276-1277.

¹⁰⁴ *Contra* Defence Observations, paras. 32-33.

¹⁰⁵ *Contra* [Defence Observations](#), para. 33. See above fn. 95.

41. The Defence presents no authority supporting its legal position, other than referring to the analysis of this Chamber in the warrant of arrest, which the Prosecution sought to appeal.¹⁰⁶ The Prosecution respectfully submits that the Chamber should now clarify its analysis on this point, based on the fuller opportunity for argument at this stage of proceedings and in light of the evidence which has been presented. In particular, the Defence does not explain how reducing the nexus assessment to the ostensible motivation for certain conduct (the “reasons” for a victim’s detention) can be reconciled with the established fact-sensitive, multi-factored nexus test, which is not a motive requirement. While the “purpose for which [a crime] was committed” may be one relevant consideration, 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”.¹⁰⁷

42. In any event, even if the Chamber considers it necessary to explore the perpetrators’ motive(s), the evidence in the case contradicts any notion that victims were confined in the context of legitimate law enforcement activity.¹⁰⁸ Furthermore, for most of the charged crimes, the initial reason(s) for the detention of the victim is simply prologue to the sustained and institutionalised mistreatment to which they were subjected once they arrived at Mitiga Prison. In assessing the article 8 nexus in that context, the question is much less why the victims had come to be there, and more about how and why the conflict shaped the ability of the perpetrators to carry out the charged crimes with impunity in the prison in the way that they did.

D. The charges are properly laid before the Chamber

43. The Defence Observations note that the time period for which Mr El Hishri is charged slightly exceeds the time period specified in the warrant for his arrest, and includes certain counts not contained in that warrant, namely counts 6 (other inhumane acts), 13 (enslavement), 14 and 16 (persecution, insofar as it relates to Black Migrants).¹⁰⁹

44. While this is correct, it shows nothing improper in the charges now presented for confirmation. First, Pre-Trial Chamber determinations under article 58, leading to the issue of

¹⁰⁶ See [Prosecution Appeal Brief \(Nexus\)](#), paras. 15-39. The Appeals Chamber declined to rule on the merits of the appeal, given the procedural context: [ICC-01/11-214 OA](#) (“Nexus Appeal Admissibility Decision”). See also [PCB](#), paras. 37-39.

¹⁰⁷ See [Afghanistan Appeal Judgment](#), para. 69.

¹⁰⁸ Even for count 1 (imprisonment), it is the Prosecution case that “[w]hile some detainees may have been held at Mitiga Prison on a lawful basis (as criminal suspects on remand, or serving a judicial sentence), most were not” as “evident from: the circumstances of their arrest by the Mitiga Perpetrators; the absence of due process once detainees were brought to Mitiga Prison; and the Mitiga Perpetrators’ rejection of external authority, including arbitrary refusals to yield detainees to prosecutorial or judicial authorities”: see e.g. [PCB](#), para. 47.

¹⁰⁹ See [Defence Observations](#), paras. 35-42.

an arrest warrant, do not prejudice the charges subsequently laid by the Prosecution, or the Chamber's confirmation of those charges. Second, to any extent that the charges exceed the factual course of conduct for which the suspect was surrendered, this is a procedural matter to be resolved with the surrendering State according to article 101 of the Statute.

D.1. Determinations for the purpose of article 58 do not prejudice the charges presented for confirmation under article 61

45. "The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued."¹¹⁰ As such, the decision of the Prosecutor not to present certain allegations in applying for a warrant of arrest—or the decision of the Chamber not to rely on certain allegations for the purpose of issuing a warrant of arrest—does not preclude the subsequent presentation of charges based on those same allegations. As the Appeals Chamber expressly recalled in this case, "[n]othing" in a decision under article 58 "prevents the Prosecutor [...] from making further submissions" when presenting charges for confirmation, "including on the applicable law" or "presenting additional evidence for the Pre-Trial Chamber to decide upon".¹¹¹

46. The Defence Observations therefore show nothing improper in the inclusion of charges in the DCC which were either not presented for the purpose of the original arrest warrant, or which were previously presented but on which the Chamber did not make positive findings.

47. Beyond recalling aspects of the procedural history, the Defence thus shows no basis for its submission that the Chamber should dismiss count 13 (enslavement) simply because no such finding was made for the purpose of the arrest warrant.¹¹² To the contrary, the Chamber may now consider whether to confirm this charge on the basis of the fuller evidentiary basis provided, and with the assistance of additional legal argument. Concerning the scope of application of crimes against humanity more generally, the Prosecution made clear that it respectfully disagreed with certain aspects of the Chamber's legal analysis by seeking to appeal those passages in the arrest warrant.¹¹³ Additionally, in the DCC, the Prosecution has in any event adjusted the definition of the civilian population so as to further clarify its view of the scope of the attack for the purpose of article 7 of the Statute.¹¹⁴

¹¹⁰ [Chambers Practice Manual](#), 8th Ed. (2024), para. 31. See also e.g. [Mbarushimana Confirmation Decision](#), para. 88 ("in principle, the description of facts and their related legal characterisations, as contained in any request for a warrant of arrest and in the decision issuing such order, are provisional").

¹¹¹ [Nexus Appeal Admissibility Decision](#), para. 41.

¹¹² *Contra* Defence Observations, paras. 37-38.

¹¹³ See [Prosecution Appeal Brief \(Nexus\)](#). See also [Nexus Appeal Admissibility Decision](#).

¹¹⁴ See [DCC](#), para. 8. See further [PCB](#), paras. 6-7.

D.2. Any matter arising under article 101 is for the surrendering State, and may if necessary be cured by the surrendering State through a waiver

48. The parties seem to agree that “the rule of speciality is not, in principle, violated by the inclusion in the DCC of one or more crimes, which were not explicitly described or legally characterised in the warrant of arrest, but are otherwise implicit in the description of the course of conduct underlying the crimes in relation to which a ‘concise statement of the facts’, in accordance with article 58(2)(c) of the Statute, has been provided”.¹¹⁵

49. In this case, the charges in the DCC encompass the *same* course of conduct for which a warrant was issued for Mr El Hishri’s arrest—that is, “crimes committed in Libya, in or near Mitiga Prison, from around February 2015 to, at least, early 2020”, notably against detainees in Mitiga Prison, in the context of a non-international armed conflict, and carried out as part of a widespread or systematic attack against a civilian population pursuant to a State or organisational policy of SDF/RADA.¹¹⁶ None of the three modifications to the charges in the DCC is of such a nature as to depart from the overall course of conduct for which Mr El Hishri was surrendered to the Court. Specifically, these modifications relate to: the alleged temporal period of the charges (but taking account of the open-ended qualifications “around” and “at least” in the arrest warrant); the precise definition of the civilian population or the State or organisational policy, and; the addition of further legal characterisations or specifications of relevant conduct such as other inhumane acts, enslavement, and persecution. As such, article 101 is no impediment to confirming the charges presented in the DCC.

50. In any event, however, even if the Chamber were to consider that anything in the DCC exceeded the course of conduct identified in the warrant for the arrest of Mr El Hishri, this may be cured by obtaining a waiver from the surrendering State. As set out in the *Chambers Practice Manual*, it is for the Chamber “to request in time, through the Registrar”, any necessary waiver.¹¹⁷ The submission of the DCC by the Prosecution to the Chamber is the trigger for such a procedure. Accordingly, even were it necessary to obtain such a waiver, the mere existence of such a need does not constitute a basis to dismiss the charges.

¹¹⁵ [Mbarushimana Confirmation Decision](#), para. 91. Compare [Defence Observations](#), para. 40. See further [Statute](#), art. 101(1) (referring to “the conduct or *course of conduct* which forms the *basis* of the crimes for which that person has been surrendered”, emphasis added).

¹¹⁶ See [ICC-01/11-188](#) (“Warrant of Arrest”), Disposition.

¹¹⁷ [Chambers Practice Manual](#), 8th Ed. (2024), para. 34.

E. Mr El Hishri has declined to provide notice of any alibi

51. In the first status conference, the Chamber instructed the Defence that it must provide notice of any alibi.¹¹⁸ The Defence Observations state that “the Defence is simply not in a position at this juncture to raise the existence of an alibi”—but seek to qualify this as “without prejudice to the Defence’s right to revisit this position”,¹¹⁹ due to its alleged inability to “investigat[e] whether Mr El Hishri may have an alibi for any or all of the alleged criminal acts”.¹²⁰

52. The Chamber should give no weight to this purported qualification in any future consideration of the significance of the fact that Mr El Hishri provided no notice of any alibi at this stage. Contrary to the implication of the Defence, both the time period (1 May 2014 to 30 June 2020) and location (Mitiga Prison and its environs, in Tripoli) material to any potential alibi are abundantly clear from the DCC and the PCB. Mr El Hishri himself is best placed to know where he was at that time, without requiring any “investigation” by the Defence. At present, he has declined to raise any alibi for the times and places charged.

CONCLUSION

53. For all the reasons above, and in accordance with the further submissions of the parties and participants at the confirmation hearing, the Chamber should dismiss the Defence Observations, confirm the charges, and commit Mr El Hishri for trial.



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 5th day of May 2026

At The Hague, the Netherlands

¹¹⁸ See also Defence Observations, para. 43. See further [ICC RPE](#), rule 79(1)(a).

¹¹⁹ Defence Observations, para. 45.

¹²⁰ Defence Observations, para. 27.