

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/11-01/25

Date: 22 July 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

PUBLIC

Defence request for leave to appeal Decision on confirmation of charges

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”) requests leave to appeal the Pre-Trial Chamber’s decision on confirmation of charges (“Impugned Decision”)¹ pursuant to Article 82(1)(d) of the Rome Statute.
2. The Defence seeks leave in respect of the following two appealable issues since they significantly affect the fair and expeditious conduct of the proceedings:
 - (i) The PTC erred in fact and in law in finding that the conduct forming the basis of the charges was committed in the context of, and was associated with, a non-international armed conflict (“NIAC”). Consequently, the crimes charged in counts 2, 3, 5, 8, 10 and 12 did not meet the definition of war crimes, and should not have been confirmed.
 - (ii) The PTC erred in law in finding that (a) Black Migrants, and other non-Libyans of different nationalities and ethnicities, were detained for reasons related to opposing SDF/RADA or its ideology, and therefore were part of the same civilian population that was attacked, and (b) the alleged perpetrators exercised powers attaching to the right of ownership over the other (Libyan) detainees. Consequently, the crimes charged in count 13, and in counts 14 and 16 insofar as they relate to Black Migrants, should not have been confirmed.
3. Immediate review by the Appeals Chamber is necessary to “ensur[e] that the proceedings follow the right course,” and to provide a “safety net for the integrity of the proceedings.”²

¹ Decision on confirmation of the charges against Mr Khaled Mohamed Ali El Hishri, ICC-01/11-01/25-143, 16 July 2026.

² *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“DRC Leave to Appeal Judgment”), para. 15.

II. PROCEDURAL HISTORY

4. On 10 July 2025, Pre-Trial Chamber I (“PTC”) issued the warrant of arrest against Mr El Hishri.³
5. On 16 July 2025, Mr El Hishri was arrested in the Federal Republic of Germany.
6. On 1 December 2025, Mr El Hishri was surrendered to the custody of the Court.
7. On 3 December 2025, Mr El Hishri had his initial appearance before the Court.⁴
8. On 26 March 2026, the Office of the Prosecutor (“OTP”) filed the Document Containing the Charges (“DCC”),⁵ its Pre-Confirmation Brief (“PCB”),⁶ and its list of evidence.⁷
9. On 28 April 2026, the Defence filed its notes and observations on the factual and legal elements of the Prosecution’s case (“Defence Submissions”).⁸
10. The Confirmation Hearing took place between 19 and 21 May 2026.⁹
11. On 16 July 2026, the PTC issued the Impugned Decision.

III. APPLICABLE LAW

12. Article 82(1)(d) of the Statute provides that either party may appeal “[a] decision that involves an issue that would affect significantly the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-

³ Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-188-US-Exp, 10 July 2025; ICC-01/11-188-US-Exp-tARB, 15 July 2025; reclassified as public on 31 July 2025.

⁴ ICC-01/11-01/25-T-001.

⁵ Document Containing the Charges, ICC-01/11-01/25-92, 26 March 2026.

⁶ Pre-Confirmation Brief, ICC-01/11-01/25-94-Conf-Corr, 24 April 2026 (public redacted version filed on 1 May 2026).

⁷ Prosecution’s submission of the List of Evidence, ICC-01/11-01/25-93, 26 March 2026.

⁸ Defence written notes and observations relating to factual and legal elements of the Prosecution’s case against Mr Khaled Mohamed Ali El Hishri, , ICC-01/11-01/25-107, 28 April 2026.

⁹ ICC-01/11-01/25-T-004; ICC-01/11-01/25-T-005; ICC-01/11-01/25-T-006.

Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

13. For requests for leave to appeal, the following requirements must be met:

- (a) the matter constitutes, singly or collectively, an “appealable issue”;
- (b) the(se) issue(s) could significantly affect:
 - (i) the fair and expeditious conduct of the proceedings, or
 - (ii) the outcome of the trial; and
- (c) in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁰

14. Requirements (a), (b) and (c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.¹¹ There is no prescribed order in which the requirements must be considered.

15. It is important to recall that the applicable threshold is not that interlocutory resolution will materially advance the proceedings, but only that it “may” do so.

16. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that:

¹⁰ *Prosecutor v. Yekatom and Ngaïssona*, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, [ICC-01/14-01/18-206](#), 24 May 2019 (“Yekatom and Ngaïssona Leave to Appeal Decision”), para. 10; *Prosecutor v. Ntaganda*, Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’, [ICC-01/04-02/06-322](#), 4 July 2014, para. 9; *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, [ICC-01/04-01/06-1191](#), 26 February 2008 (“Lubanga Leave to Appeal Decision”), para. 9.

¹¹ Yekatom and Ngaïssona Leave to Appeal Decision, para. 11; *Situation in Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN, 31 March 2006, para. 28; Lubanga Leave to Appeal Decision, para. 10.

[o]nly an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.¹²

17. Materially advancing the proceedings

does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, “will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process”.¹³

18. The notion of “materially advance” involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”¹⁴ The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”¹⁵ and “[remove] doubts about the correctness of the decision or [map] a course of action along the right lines.”¹⁶

19. The term “proceedings” in the second part of Article 82(1)(d) refers to the proceedings in their entirety.¹⁷ Accordingly, it is insufficient that an appeal would be

¹² DRC Leave to Appeal Judgment, para. 9. See also *Prosecutor v. Joseph Kony and Vincent Otti*, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, ICC-02/04-01/05-367, 10 February 2009, para. 22; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali’”, ICC- 01/09-02/11-27, 1 April 2011, para. 7.

¹³ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198, [ICC-02/05-01/20-254](#), 12 January 2021, para. 7, referring to *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, [ICC-01/05-01/13-801](#), 23 January 2015, para. 17 (quoting DRC Leave to Appeal Judgment, para. 16).

¹⁴ DRC Leave to Appeal Judgment, para. 14.

¹⁵ DRC Leave to Appeal Judgment, para. 15.

¹⁶ DRC Leave to Appeal Judgment, paras 14-15.

¹⁷ DRC Leave to Appeal Judgment, para. 17.

legitimate or even necessary at some stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.¹⁸ Interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.¹⁹

20. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues significantly affect the fairness of the proceedings.²⁰ Thus, the “materially advance” criterion can be assessed only in relation to the *consequences*, not the *correctness*, of the decision from which interlocutory appeal is sought.

21. The Appeals Chamber has determined that “it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent”.²¹

IV. SUBMISSIONS

(i) *The PTC erred in fact and in law in finding that the conduct forming the basis of the charges was committed in the context of, and was associated with, a NIAC*

22. The PTC found that during the charged period of 1 May 2014 to 30 June 2020, there was a NIAC in Libya.²² For the purpose of this request for leave to appeal, the Defence

¹⁸ Lubanga Leave to Appeal Decision, para. 12.

¹⁹ *Prosecutor v. Yekatom and Ngaïssona*, Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, ICC-01/14-01/18-154, 21 March 2019, para. 12; Lubanga Leave to Appeal Decision, paras 12-13.

²⁰ *Prosecutor v. Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11- 185)’”, [ICC-01/09-02/11-253](#), 18 August 2011, para. 28.

²¹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, [ICC-02/11-01/15-744](#), 1 November 2016, para. 13, *quoting* *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(1) of the Rome Statute’”, ICC-02/11-01/11- 572, 16 December 2013, para. 63. *See also* *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the “Requête en appel de la défense de Monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”, [ICC-01/05-01/13-1533](#), 23 December 2015, para. 16, fn 29.

²² Impugned Decision, paras 67-68, 72.

does not take issue with that finding, whilst not conceding its legal or factual sustainability. The Defence does submit, however, that there was no, or no sufficient, evidence before the PTC to allow it to find that the conduct forming the basis of the charges was committed in the context of, and was associated with, a NIAC. The inevitable consequence of the PTC's error in so finding is that the crimes charged in counts 2, 3, 5, 8, 10 and 12 met the definition of war crimes and were confirmed when they should not have been.

23. The PTC correctly recalled that "[i]n line with international humanitarian law ('IHL'), there must be a sufficient link between each criminal act and the armed conflict" and that "[t]he existence of an armed conflict and the general applicability of IHL to the relevant parties is not in itself sufficient to conclude that all acts committed during an armed conflict will amount to a war crime."²³

24. The PTC also recalled the test to be applied that was set out by the Appeals Chamber:

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.²⁴

25. This mirrored the Defence's earlier submissions that the requirement that an alleged war crime took place in the context of, and was associated with, a NIAC is vital to prevent any undue expansion of the reach of the law of war crimes. The Defence had also recalled that not every criminal act that takes place on the territory of and at the

²³ Impugned Decision, para. 69. It is presumed that the PTC means here all *criminal* acts.

²⁴ Impugned Decision, para. 69, citing *Prosecutor v. Bosco 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", 15 June 2017, [ICC-01/04-02/06-1962](#) OA5, para. 68; *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, [ICC-02/17-138](#) OA4, para. 69, referring to ICTY, Appeals Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, 12 June 2002, IT-96-23 & IT-96-23/1-A, paras 58-60.

same time as a NIAC is considered to be a war crime.²⁵ 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.”²⁶

26. The PTC correctly summarised the position that “given that Mitiga Prison is a State detention facility where persons are deprived of their liberty for different reasons, the existence of a nexus between the criminal act and the armed conflict is key.”²⁷

27. However, notwithstanding the correct recitation of the principles to be applied in the determination of whether a nexus between the alleged criminal acts and the armed conflict existed, the PTC erred in its evaluation of the evidence relied on by the Prosecution to these principles. In particular, the PTC erred in finding that the evidence established that “some individuals were detained and abused due to suspected affiliation with the LNA”,²⁸ and that, in any event, this created a sufficient nexus with the NIAC, even if there was (political) opposition between the LNA and SDF/RADA. There was no evidence adduced by the Prosecution that SDF/RADA itself was engaged in the NIAC with the LNA, and therefore no evidence that Mr El Hishri was a combatant of any kind whatsoever.

28. Similarly, the PTC erred in conflating evidence that detainees were allegedly mistreated on account of their *political* opposition to SDF/RADA with the Prosecution’s unsupported case that such detainees were allegedly mistreated due to their status as *military* enemies of the GNC/GNA in the NIAC.²⁹ In any event, no evidence was placed

²⁵ Defence Submissions, para. 30.

²⁶ Defence Submissions, para. 30.

²⁷ Impugned Decision, para. 70.

²⁸ Impugned Decision, para. 73.

²⁹ Impugned Decision, para. 74.

before the PTC by the Prosecution that the alleged criminal acts of Mr El Hishri “may be said to serve the ultimate goal of a military campaign.”

29. Further, the PTC erred in finding that the NIAC “facilitated the means, structures, or authority through which crimes were perpetrated by the SDF/RADA, and by extension, Mr El Hishri.”³⁰ The evidence by which the Mitiga Compound may have been seized by an alleged precursor group around August 2011 is insufficient and too remote to lead to a finding that the NIAC facilitated the SDF/RADA to commit war crimes.

30. Consequently, the crimes charged in counts 2, 3, 5, 8, 10 and 12 did not meet the definition of war crimes, and should not have been confirmed.

31. The foregoing meets the test of an issue that is an identifiable subject or topic requiring a decision for its resolution. This first issue is not merely a question over which there is disagreement between the Defence and the PTC. Resolution of the first issue is “essential for the determination of matters arising in the judicial cause under examination” because the DCC is the principal charging document. If, as the Defence submits, the Impugned Decision is vitiated by legal and factual errors in the determination of such a fundamental question as the existence of nexus between the alleged criminal acts and the NIAC, it is important for this to be remedied by the Appeals Chamber without delay.

32. The Defence underscores that “a request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues significantly affect the fairness of the proceedings.”³¹ Thus, the “materially advance” criterion can be assessed only in relation to the *consequences*, not the *correctness*, of the decision from which interlocutory appeal is sought.

³⁰ Impugned Decision, para. 75.

³¹ *Prosecutor v. Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11- 185)’”, [ICC-01/09-02/11-253](#), 18 August 2011, para. 28.

33. It is respectfully submitted that, while the Defence has broadly identified the *incorrectness* of the Impugned Decision, what is actually important is that it has adequately identified the *consequences* of the first issue in the Impugned Decision if it remains uncorrected by the Appeals Chamber.

(ii) The PTC erred in law in confirming count 13, and counts 14 and 16 insofar as they relate to Black Migrants

34. The Defence recalls that the crimes confirmed in the Impugned Decision in counts 1-17, largely mirror those for which the Warrant of Arrest was sought and granted. However, as highlighted in the Defence Submissions, the inclusion of count 13, enslavement as a crime against humanity pursuant to article 7(1)(c), in the DCC is of notable relevance.³²

35. The Prosecution had attempted to persuade the PTC, in its request for a Warrant of Arrest, 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.³³

³² Defence Submissions, para. 36

³³ Warrant of Arrest, para. 81.

36. The PTC permitted the Prosecution's attempt to resurrect enslavement as a crime against humanity in the Impugned Decision,³⁴ even though it was bound to apply the more onerous "substantial grounds to believe" standard.

37. In the Impugned Decision, the PTC committed a striking *volte face* when compared to its finding in the Warrant of Arrest that "[t]he 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." That *volte face* simply goes unexplained in the Impugned Decision. The PTC makes no attempt to explain why there is now evidence linking what the Prosecution describes as the Black Migrants to the same civilian population that it found had been the subject of the widespread and systematic attack, and what that evidence was.

38. The PTC goes to great lengths to explain how the so-called Mitiga Perpetrators exercised powers attaching to the right or ownership over "enslaved Libyan and non-Libyan detainees of ages and gender [including the Black Migrants] but conspicuously fails to engage in the fundamental question of how the Black Migrants could now be considered to have been detained for reasons related to opposing SDF/RADA or its ideology so as to bring them within the same targeted civilian population.

39. That failure amounts to a legal and factual error and, as a consequence, fatally impacts the validity of the PTC confirmation of count 13, irrespective of the findings about the Mitiga Perpetrators exercise of powers attaching to the right of ownership over them.

40. Similarly, the PTC erred in confirming count 14 (persecution on political grounds) and count 16 (persecution on nationality, race and/or ethnicity grounds) insofar as they relate to Black Migrants because there is no evidence that this class of detainees was

³⁴ Impugned Decision, paras 112-120

detained for reasons related to opposing SDF/RADA or its ideology so as to bring them within the same targeted civilian population.

41. Consequently, the crimes charged in count 13, and in counts 14 and 16 insofar as they relate to Black Migrants, should not have been confirmed.

42. The foregoing meets the test of an issue that is an identifiable subject or topic requiring a decision for its resolution. This second issue is not merely a question over which there is disagreement between the Defence and the PTC. Resolution of this issue is “essential for the determination of matters arising in the judicial cause under examination” because the DCC is the principal charging document. If, as the Defence submits, the Impugned Decision is vitiated by legal and factual errors as identified in the second issue, it is important for this to be remedied by the Appeals Chamber without delay.

43. The Defence repeats that “a request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues significantly affect the fairness of the proceedings.”³⁵ It is respectfully submitted that, while the Defence has broadly identified the *incorrectness* of the Impugned Decision, it is reiterated that what is actually important is that it has adequately identified the *consequences* of the Impugned Decision if the second issue remains uncorrected by the Appeals Chamber.

44. For the foregoing reasons, it is submitted that it is appropriate for the PTC to grant leave to appeal the Impugned Decision on the two issues identified.

³⁵ *Prosecutor v. Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11- 185)’”, [ICC-01/09-02/11-253](#), 18 August 2011, para. 28.

Respectfully submitted,

A handwritten signature in black ink, reading "Yasser Hassan". The signature is fluid and cursive, with the first name "Yasser" and last name "Hassan" clearly distinguishable.

Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 22 July 2026
at The Hague, The Netherlands