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No.: **ICC-01/11-01/25**

Date: **24 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

Prosecution response to “Defence request for leave to appeal ‘Decision on confirmation of charges’”

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INTRODUCTION

1. On 16 July 2026, Pre-Trial Chamber I confirmed all the charges against Mr El Hishri, and committed him for trial.¹ Specifically, Mr El Hishri is charged with imprisonment, torture, other inhumane acts, rape and attempted rape, sexual violence, murder and attempted murder, enslavement, and persecution as crimes against humanity, and outrages upon personal dignity, cruel treatment, torture, rape and attempted rape, sexual violence, murder and attempted murder as war crimes. These alleged crimes were committed against a very large number of detainees at Mitiga Prison in Tripoli, Libya, and persons otherwise in the custody or control of the ‘Mitiga Perpetrators’, principally in Mitiga Prison, in the period from 1 May 2014 to 30 June 2020.

2. Mr El Hishri now seeks leave to appeal selected issues arising from the Decision.² While Mr El Hishri asserts that he seeks leave to appeal *two* issues (“Issues”) allegedly arising from the Decision, it is apparent that his second issue itself alleges two distinct claims relating to different charges,³ which are more aptly considered separately. Accordingly, the Prosecution understands Mr El Hishri to present *three* issues for the purpose of his application, namely whether:

- a. “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’)” (“the Conflict Nexus Issue”);⁴
- b. “The PTC erred [...] in finding that [...] *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” (“the Civilian Population Issue”);⁵
- c. “The PTC erred in law in finding that [...] the alleged perpetrators exercised powers attaching to the right of ownership over the *other (Libyan)* detainees” (“the Enslavement Issue”).⁶

3. The Prosecution structures its response to the Request accordingly.

¹ See [ICC-01/11-01/25-143](#) (“Decision”).

² See [ICC-01/11-01/25-152](#) (“Request”).

³ Cf. [Request](#), para. 2.

⁴ See [Request](#), para. 2(i). See further paras. 22-33.

⁵ See [Request](#), para. 2(ii) (emphasis added). See further paras. 34-44.

⁶ See [Request](#), para. 2(ii) (emphasis added). But see paras. 38-39.

SUBMISSIONS

4. The Request should be dismissed *in limine* because it is insufficiently developed. At least some of the proposed Issues are internally contradictory and unexplained, and in all respects the Request fails adequately to address the required elements of the test for leave to appeal under article 82(1)(d) of the Statute.

5. In any event, the Request should be dismissed on its merits.⁷ None of the proposed Issues is an ‘appealable’ issue genuinely arising from the Decision. Mr El Hishri does not show that any of the proposed Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor does Mr El Hishri show that intervention by the Appeals Chamber may materially advance the proceedings. Since these requirements are cumulative, failure to demonstrate any of them is fatal to the Request.⁸

A. The Issues are not ‘appealable’ issues genuinely arising from the Decision

6. As the Chamber has previously recalled, a party seeking leave to appeal must identify an “appealable issue”, understood as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion; it must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.” The issue must encompass “a specific [...] error”.⁹ None of the proposed Issues meets these requirements.

A.1. The Conflict Nexus Issue is a mere disagreement

7. The Conflict Nexus Issue cannot be an ‘appealable’ issue for the purpose of article 82(1)(d) because the errors supposedly identified by Mr El Hishri are too vague and nebulous, and merely amount to a disagreement with the Decision.¹⁰

8. In the Decision, the Chamber expressly noted that the question of the nexus to an armed conflict was contested by the Defence,¹¹ and carefully directed itself as to the applicable law affirmed by the Appeals Chamber and followed consistently by Trial Chambers.¹² In particular, the Chamber correctly recalled that assessment of the nexus is “case-specific” and to be undertaken with reference to a “non-exhaustive” list of factors including “the fact that the

⁷ *Contra Request*, para. 44.

⁸ See e.g. [ICC-01/11-01/25-82](#) (“Contact Restrictions Leave to Appeal Decision”), paras. 5-7.

⁹ See [ICC-01/11-01/25-75](#) (“Non-Disclosure Leave to Appeal Decision”), paras. 5-6. See also [Contact Restrictions Leave to Appeal Decision](#), para. 6 (referring to a “discrete factual or legal question”).

¹⁰ *Contra Request*, para. 31.

¹¹ [Decision](#), para. 65. See also para. 71.

¹² [Decision](#), paras. 69-70.

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.”¹³

9. On the facts, the Chamber noted that the detainees at Mitiga Prison included both persons who were detained for reasons related to the conflict and persons who were detained for other reasons.¹⁴ It considered that the nexus was satisfied with regard to alleged crimes against both types of persons.¹⁵ Specifically, it noted that “at least *some* individuals were detained and abused for reasons related to the conflict”, including “to advance the war efforts” of one party to the conflict.¹⁶ Additionally, it found that “the armed conflict facilitated the means, structures, or authority through which the crimes were perpetrated”,¹⁷ and that perpetrators including Mr El Hishri “committed the alleged crimes in the context of their official functions”.¹⁸

10. In this context, Mr El Hishri merely disagrees with the Decision, without showing “an identifiable subject or topic requiring a decision for its resolution”.

- First, although Mr El Hishri purports to contend that the Conflict Nexus Issue encompasses one or more errors of law as well as one or more errors of fact,¹⁹ he ultimately (and properly) concedes that the Chamber was “correct” in setting out the legal principles above.²⁰ He thus fails to explain the nature of any supposed legal error at all.²¹
- Second, while Mr El Hishri specifies several particulars in which he disagrees with the Chamber's evaluation of the evidence, this is insufficient.²² He neither shows the impact of his evidentiary disagreements (given the multi-factored nature of the nexus assessment), nor does he explain whether (and, if so, how) the Chamber's view of these particulars precluded its overall finding of “*substantial grounds* to believe” that the nexus requirement

¹³ [Decision](#), paras. 69-70. *See also* [Request](#), paras. 24-25.

¹⁴ *See* [Decision](#), paras. 72-73, 77.

¹⁵ *See* [Decision](#), para. 77.

¹⁶ [Decision](#), paras. 73-74.

¹⁷ [Decision](#), para. 75.

¹⁸ [Decision](#), para. 76.

¹⁹ *See* [Request](#), para. 2(i).

²⁰ *See* [Request](#), para. 27 (“notwithstanding the correct recitation of the principles to be applied in the determination of [the nexus], the PTC erred in its evaluation of the evidence”).

²¹ *See* [Request](#), paras. 27-29.

²² *Contra* [Request](#), paras. 27-29. Specifically, Mr El Hishri disagrees with the Chamber's assessment of the evidence concerning: (i) whether individuals were victimised due to suspected LNA affiliations; (ii) whether SDF/RADA itself “engaged in the NIAC” and whether Mr El Hishri “was a combatant”; (iii) whether the alleged crimes served the goals of the military campaign, and; (iv) whether the conflict “facilitated the means, structures, or authority through which crimes were perpetrated by the SDF/RADA”. *But see* [Decision](#), paras. 73-75.

was satisfied.²³ This is critical considering the limited purpose and scope of a confirmation decision—which, expressly, is not to pre-empt judicial fact-finding at trial, but merely to determine that there is a proper case to answer.²⁴

11. In particular, Mr El Hishri misunderstands the nature of the requirement for an ‘appealable’ issue when he denies that the Conflict Nexus Issue is a mere disagreement simply because it pertains to a “fundamental question” concerning the “principal charging document” for the trial.²⁵ He seems to confuse this distinct requirement with the other requirements of article 82(1)(d).²⁶

12. While it is true that—for the purpose of article 82(1)(d)—it is not the *correctness* of the Chamber’s disposition of the relevant issue which must be determined, it is likewise not solely the *consequence* of the proposed issue which is germane.²⁷ The fact that Mr El Hishri disagrees with an important conclusion does not change the fact that he merely disagrees with it. What remains lacking is any *concrete specification* of a topic in the Decision which is amenable for an interlocutory appeal. Absent such a showing, the Request should be dismissed.²⁸

A.2. The Civilian Population Issue does not genuinely arise from the Decision

13. The Civilian Population Issue does not genuinely arise from the Decision, but instead challenges a determination which the Chamber never made when confirming the charges (a ‘straw man’ argument).

14. Mr El Hishri claims errors of law and/or fact²⁹ in “finding that [...] Black Migrants, and other non-Libyans of different nationalities and ethnicities, were detained for reasons related

²³ See also [Decision](#), paras. 28-29.

²⁴ See e.g. [Decision](#), paras. 48 (“the confirmation hearing is not, and should not be seen as, or become, a ‘mini-trial’ or ‘a trial before the trial’”), 49 (“[w]hile the Chamber has engaged in an overall assessment of the entire evidentiary basis relied upon by the parties [...] a discussion of each and every item of evidence is not warranted”), 50 (“there is no reason for the Chamber to enter separate findings of fact or conclusions of law in the confirmation decision”, and “the Chamber has therefore refrained from doing so”). In this context, it is also important to recall the “exceptional” nature of interlocutory appeals (see e.g. [Non-Disclosure Leave to Appeal Decision](#), para. 4), especially from confirmation decisions—where the drafters of the Statute did not provide for an appeal as of right. This is in contrast to the article 74 judgments at the end of trial, from which—consistent with its function as the principal focus judicial fact-finding—the parties may appeal factual issues as of right.

²⁵ *Contra* [Request](#), para. 31. See also para. 42. See also below para. 22.

²⁶ See [Request](#), paras. 31-33. See also paras. 42-43.

²⁷ *Contra* [Request](#), paras. 31-33.

²⁸ See e.g. [Non-Disclosure Leave to Appeal Decision](#), para. 7 (dismissing an application for leave to appeal because it failed to identify “a sufficiently discrete [...] issue” (emphasis added) and merely aimed at re-litigating matters before the Appeals Chamber); [Contact Restrictions Leave to Appeal Decision](#), para. 6.

²⁹ The Prosecution notes that the Request is inconsistent on this point—while the Request initially defines the Civilian Population Issue only as relating to a supposed error of law, it subsequently claims both “a legal and factual error” compare e.g. [Request](#), para. 2(ii), with para. 39. In the interest of a comprehensive response, the Prosecution understands the Civilian Population Issue as alleging both types of error.

to opposing SDF/RADA or its ideology, and therefore were part of the same civilian population that was attacked”.³⁰ In particular, he states that the Decision “conspicuously fails to engage” in this question, and therefore implies that these persons could not fall “within the same targeted civilian population” as other victims.³¹ On this basis, he argues that the persecution and enslavement charges should not have been confirmed with regard to the groups of persons described as Black Migrants and other non-Libyans.³²

15. Critically, however, Mr El Hishri’s argument overlooks that, in the Decision, the Chamber did *not* define the civilian population which was the object of the article 7 attack as “opposing SDF/RADA or its ideology”.³³

16. To the contrary, as Mr El Hishri at least partially acknowledges,³⁴ this definition was used only in the warrant for his arrest—but he seems to assume, incorrectly, that the Chamber was then bound to apply this definition in the Decision.³⁵ Yet it is well established that “[t]he Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or summons to appear was issued”,³⁶ and the Appeals Chamber has expressly affirmed with regard to the warrant in this case that “[n]othing [...] prevents the Prosecutor from making further submissions” or “presenting additional evidence” concerning material allegations.³⁷ The Prosecution also specifically drew to Mr El Hishri’s attention that, “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.”³⁸ This was the basis upon which the charges in the case were subsequently confirmed.³⁹

³⁰ [Request](#), para. 2(ii).

³¹ [Request](#), para. 38. *See also* para. 37 (“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”).

³² *See* [Request](#), paras. 39-41.

³³ *See e.g.* [Decision](#), para. 54 (referring to “a civilian population in and around Tripoli, particularly persons in the custody and/or control of the Mitiga Perpetrators, principally at Mitiga Prison”). *See also* paras. 58 (“the crimes were committed against detainees or persons otherwise in the custody and/or control of the Mitiga Perpetrators, principally at Mitiga Prison”), 60 (“the civilian population targeted in the attack is clearly and sufficiently defined in the DCC by reference to a geographical location (*i.e.* in or around Tripoli) and by reference to the system of institutionalised and sustained mistreatment and violent abuse of all persons in the custody and/or control of the Mitiga Perpetrators”).

³⁴ *See e.g.* [Request](#), paras. 35, 37.

³⁵ *See e.g.* [Request](#), paras. 34, 36-37.

³⁶ [ICC, Chambers Practice Manual, 8th Ed. \(2024\)](#), para. 31. *See also* [ICC-01/04-01/10-465-Red](#) (“*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”).

³⁷ *See* [ICC-01/11-214 OA](#) (“Arrest Warrant Appeal Admissibility Decision”), para. 41.

³⁸ *See* [ICC-01/11-01/25-115](#) (“Prosecution Response to Defence Observations on the DCC”), para. 47.

³⁹ *See* [Decision](#), paras. 54, 58, 60, 170 (*especially* sub-paragraph 8).

17. Accordingly, since the Decision neither defined the civilian population by opposition to SDF/RADA or its ideology nor was required to do so, the Civilian Population Issue is wholly irrelevant and cannot be appealed under article 82(1)(d).

A.3. The Enslavement Issue is internally contradictory and unexplained

18. The Enslavement Issue should be dismissed *in limine* because it is insufficiently developed and Mr El Hishri’s position on this matter appears to be internally contradictory.

19. In defining the issues for which he seeks leave to appeal, Mr El Hishri initially refers to a supposed error of law in finding that “the alleged perpetrators exercised powers attaching to the right of ownership over the other (Libyan) detainees”.⁴⁰ However, no such error is explained or even identified in the body of his submissions—rather, Mr El Hishri merely observes, without further comment, that “[t]he PTC goes to great lengths to explain how the so-called Mitiga Perpetrators exercised powers attaching to the right o[f] ownership over ‘enslaved Libyan [...] detainees of ages and gender [sic]’”.⁴¹ This is manifestly insufficient to identify any issue for which leave to appeal could be granted under article 82(1)(d).

20. Furthermore, even if the Enslavement Issue were intended to relate in some way to the Civilian Population Issue—it is not clear how—it must fail for the same reasons previously identified.⁴²

B. None of the proposed Issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

21. The Request makes no adequate showing that any of the proposed Issues satisfies the statutory requirement for impact on the proceedings. On this basis, again, it should be dismissed.

22. First, at no point does Mr El Hishri squarely address the impact of the proposed Issues on “the fair and expeditious conduct of the proceedings” at all. Rather, he merely states that the proposed Issues relate to the content of the “principal charging document”, and therefore that (in his view) the “consequences” warrant appellate review.⁴³ Yet this is insufficient. Not only are his submissions on this point apparently confused both with the question whether the proposed Issues are themselves ‘appealable’ and the question whether immediate intervention

⁴⁰ Request, para. 2(ii).

⁴¹ Request, para. 38. See further e.g. Decision, paras. 112-120.

⁴² See above paras. 13-17.

⁴³ See e.g. Request, paras. 31-33, 42-43.

by the Appeals Chamber may materially advance the proceedings,⁴⁴ but in any event he fails to explain with any specificity how the proposed Issues relate *both* to the fairness of the proceedings *and* their expeditious conduct. It is well established that both limbs of this test must be addressed.

23. Furthermore, even if some degree of impact on both the fairness of the proceedings and their expeditious conduct were to be assumed *arguendo* (based on his very general reference to the “consequences”), Mr El Hishri still fails to articulate why any such impact would be “*significant*”. The very fact that article 82(1)(d) requires an issue to “*significantly*” affect the fairness of the proceedings underlines that this is a threshold assessment where not every impact will suffice.

24. Overall, if Mr El Hishri’s emphasis on (his view of) the consequences of any given issue in a confirmation decision were sufficient for the purpose of article 82(1)(d), then it would imply that leave to appeal should almost always be granted for any issue arising from such a decision. This is not only inconsistent with the Court’s established practice, but would *de facto* amount to an appeal as of right against decisions confirming the charges—for which the Statute does not provide. This would defeat the purpose of article 61 proceedings as a streamlined and expeditious procedure to ensure that a case is properly committed for trial, while not anticipating the trial process itself.

25. Second, since Mr El Hishri does not even attempt to argue that any of the proposed Issues has any impact on the “outcome of the trial”, the Request likewise cannot succeed on this basis.

C. Intervention by the Appeals Chamber would not materially advance the proceedings

26. In any event, Mr El Hishri does not show that intervention by the Appeals Chamber at this stage may materially advance the proceedings. To the contrary, it would not.⁴⁵ In particular, since the essence of the Request reduces to no more than his disagreement with the evidentiary basis of the nexus between his alleged crimes and an armed conflict,⁴⁶ this is quintessentially a matter to be resolved at trial, with the benefit of a full hearing of the relevant evidence. Immediate intervention by the Appeals Chamber would do nothing to advance this process.

⁴⁴ See e.g. *Request*, para. 20 (suggesting that it is “the ‘materially advance’ criterion [which] can be assessed only in relation to the *consequences*, not the *correctness*, of the decision”). See also para. 32. See also above para. 11.

⁴⁵ *Contra Request*, paras. 31, 42.

⁴⁶ See above para. 10.

CONCLUSION

27. For all the reasons above, the Chamber should dismiss the Request.



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 24th day of July 2026

At The Hague, the Netherlands