



Original: English

No. ICC-01/11-01/25

Date: 3 August 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

THE PROSECUTOR V. KHALED MOHAMED ALI EL HISHRI

Public

Decision on the ‘Defence request for leave to appeal Decision on confirmation of charges’

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the
Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation
and Reparations Section

☐ Other

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues the present decision on the ‘Defence request for leave to appeal Decision on confirmation of charges’ (the ‘Request’).¹

I. PROCEDURAL HISTORY

1. On 14 July 2026, the Chamber issued the ‘Decision on confirmation of the charges against Mr Khaled Mohamed Ali El Hishri’ (the ‘Impugned Decision’) confirming all the charges presented by the Prosecution and committing Khaled Mohamed Ali El Hishri (‘Mr El Hishri’) to trial.²

2. On 22 July 2026, the Defence submitted the Request, seeking leave to appeal the Impugned Decision in respect of the following issues:

- Whether ‘[t]he [Chamber] 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’ (the ‘First Proposed Issue’);³
- Whether ‘[t]he [Chamber] erred in law in confirming count 13, and counts 14 and 16 insofar as they relate to Black Migrants’ (the ‘Second Proposed Issue’).⁴

3. On 24 July 2026, the Prosecution submitted its response opposing to the Request (the ‘Prosecution’s Response’).⁵

4. On 27 July 2026, the Office of Public Counsel for Victims (the ‘OPCV’) submitted its response opposing to the Request (the ‘OPCV’s Response’).⁶

5. On 29 July 2026, the Defence requested leave to reply to the Prosecution’s Response and the OPCV’s response (the ‘Request for Leave to Reply’).⁷

6. On 31 July 2026, the OPCV submitted a response to the Request for Leave to Reply.⁸

¹ 22 July 2026, [ICC-01/11-01/25-152](#).

² [ICC-01/11-01/25-143](#).

³ [Request](#), paras 22-33.

⁴ [Request](#), paras 34-43.

⁵ [Prosecution response to “Defence request for leave to appeal ‘Decision on confirmation of charges’”](#), ICC-01/11-01/25-154.

⁶ [Victims’ response to the Defence request for leave to appeal the Decision on confirmation of charges \(ICC-01/21-01/25-152\)](#), ICC-01/11-01/25-156.

⁷ Defence consolidated request for leave to reply to Prosecution and Victims responses to Defence request for leave to appeal Decision on confirmation of charges, [ICC-01/11-01/25-158](#).

⁸ Victims’ response to the “Defence consolidated request for leave to reply to Prosecution and Victims responses to Defence request for leave to appeal Decision on confirmation of charges” (ICC-01/21-01/25-158), [ICC-01/11-01/25-159](#).

II. APPLICABLE LAW

7. At the outset, the Chamber recalls article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court.

8. Based on the Court’s long-established jurisprudence, the Chamber recalls the exceptional character of the remedy of interlocutory appeals under article 82(1)(d) of the Statute, and that the following requirements must be met in order for leave to appeal to be granted: (a) a decision must involve an issue that would significantly affect (i) both the ‘fair’ and ‘expeditious’ conduct of the proceedings; or (ii) the outcome of the trial; and (b) in the view of the Pre-Trial Chamber, an immediate resolution of the issue by the Appeals Chamber is warranted as it may materially advance the proceedings.⁹

9. The Chamber also recalls that an appealable ‘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; it must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.¹⁰

III. DETERMINATION

i. Preliminary matter

10. At the outset, with respect to the Request for Leave to Reply, the Chamber notes that the issues raised by the Defence could have been anticipated, in particular the Defence could have anticipated that the Prosecution and OPCV would argue that the proposed issues were insufficiently developed or unclear to constitute a factual or legal question,¹¹ as well as submit that the proposed issues amounted to mere disagreements with the Impugned Decision rather

⁹ See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, (the ‘DRC Leave to Appeal Judgment’), paras 7-8; Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, [Decision on the ‘Kony Defence request for leave to appeal \[the\] “Decision on the criteria for holding confirmation of charges proceedings in absentia”](#)’, 28 January 2025, ICC-02/04-01/05-551 (‘Kony Leave to Appeal Decision’), para. 26.

¹⁰ [DRC Leave to Appeal Judgment](#), para. 9; [Kony Leave to Appeal Decision](#), para. 26. See also Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’](#), 24 May 2019, ICC-01/14-01/18-206, para. 12; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges](#), 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *The Prosecutor v. Bosco 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”](#), 4 July 2014, ICC-01/04-02/06-322, para. 10.

¹¹ [Request for Leave to Reply](#), para. 12. See also [Prosecution’s Response](#), paras 4 and 7, and [OPCV’s Response](#), para. 17.

than identifying appealable errors.¹² For this reason, and considering that the Chamber would not be assisted by any further submissions for its determination of the Request, the Chamber rejects the Request for Leave to Reply.

ii. First Proposed Issue

11. The Defence submits that the Chamber erred in fact as ‘there was no, or no sufficient, evidence before the [Chamber] 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’.¹³ The Defence argues that the Chamber allegedly erred in finding that the charged conduct against Mr El Hishri was sufficiently connected to a NIAC.¹⁴ In this regard, the Defence submits 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’.¹⁵ The Defence further submits that if the required nexus to the NIAC is absent, then counts 2, 3, 5, 8, 10, and 12 do not constitute war crimes under the Statute and therefore should not have been confirmed. In addition, the Defence considers that ‘the [Chamber] erred in finding that the evidence established that “some individuals were detained and abused due to suspected affiliation with the LNA”, 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’.¹⁶ In this regard, the Defence sustains that ‘[t]here 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’.¹⁷ The Defence further asserts that the First Proposed Issue ‘is not merely a question over which there is disagreement between the Defence and the [Chamber]. 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’.¹⁸

12. The Prosecution responds that the First Proposed 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’.¹⁹ The

¹² [Request for Leave to Reply](#), para. 13. See also [Prosecution’s Response](#), para. 7, and [OPCV’s Response](#), para. 17.

¹³ [Request](#), para. 22.

¹⁴ [Request](#), para. 22.

¹⁵ [Request](#), para. 25.

¹⁶ [Request](#), para. 27.

¹⁷ [Request](#), para. 27.

¹⁸ [Request](#), para. 31.

¹⁹ [Prosecution’s Response](#), para. 7.

Prosecution asserts that the Defence ‘merely disagrees with the Decision, without showing “an identifiable subject or topic requiring a decision for its resolution”’.²⁰ The Prosecution submits that the Defence ‘purports to contend that the [First Proposed Issue] encompasses one or more errors of law as well as one or more errors of fact’ but it ‘fails to explain the nature of any supposed legal error at all’²¹ and it does not show ‘the impact of [its] evidentiary disagreements (given the multi-factored nature of the nexus assessment), nor does [it] 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 was satisfied’.²²

13. The OPCV responds that the First Proposed Issue ‘is directed solely at the Chamber’s evaluation of the evidence and the factual conclusions it drew’ and therefore a mere disagreement with the Chamber’s assessment of the evidence and its conclusions.²³ The OPCV submits that ‘the Chamber undertook a detailed and comprehensive assessment of the evidence before it and concluded that the conduct underlying the charges against the Accused was committed in the context of, and was associated with, a NIAC’.²⁴ The OPCV further submits that ‘it is well established that a chamber is entitled to assess the evidence as a whole and is under no obligation to provide an exhaustive account of every piece of evidence before it or to engage explicitly with every argument raised by the parties, including those advanced by the Defence’ and instead the ‘chamber is required to provide sufficient reasoning to demonstrate that it has considered the relevant evidence and applied the correct legal standard’.²⁵ In this regard, the OPCV asserts that the Impugned Decision ‘is based on multiple, mutually reinforcing findings supporting the existence of the requisite nexus. Even assuming that one factual inference were open to debate, the Defence does not explain why the Chamber’s remaining findings would be insufficient to establish substantial grounds to believe that the nexus requirement was met.’²⁶

14. The Chamber finds the arguments formulated in the Prosecution and OPCV Responses with respect to the First Proposed Issue convincing. Contrary to the Defence’s assertion,²⁷ the Chamber notes that in the Impugned Decision it carried out a thorough assessment of all the evidential material on the record in the context of a multi-factored assessment for its

²⁰ [Prosecution’s Response](#), para. 10.

²¹ [Prosecution’s Response](#), para. 10.

²² [Prosecution’s Response](#), para. 10.

²³ [OPCV’s Response](#), para. 18.

²⁴ [OPCV’s Response](#), para. 19.

²⁵ [OPCV’s Response](#), para. 20.

²⁶ [OPCV’s Response](#), para. 21.

²⁷ [Request](#), paras 22-23.

determination as to whether the required nexus was established. As noted by the OPCV,²⁸ the Chamber does not need to provide an exhaustive account of every piece of evidence before it or to engage explicitly with every argument raised by the parties. This approach is consistent with the specific scope and purpose of the confirmation proceedings, namely to determine if ‘there is sufficient evidence to establish substantial grounds to believe’ that the suspect committed the crimes charged, and with the need to avoid predetermining issues or pre-adjudicating the probative value of evidence. As identified by the Prosecution,²⁹ the Defence also fails to demonstrate how the alleged factual errors, even if established, would undermine the Chamber's overall finding that there were substantial grounds to believe that the charged conduct was committed in the context of, and was associated with, the NIAC. Instead, the Defence confines itself to challenging isolated factual findings without engaging with the Chamber's reasoning in its entirety. The Chamber further observes that, as rightly pointed out by the Prosecution and OPCV,³⁰ the Defence agrees with the Chamber on the legal principles to be applied in the determination of whether a nexus between the alleged criminal acts and the armed conflict existed³¹ and it fails to identify any purported error in law.

15. In light of the above, the Chamber considers that the First Proposed Issue consists of a mere disagreement with the Impugned Decision and therefore it does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute. Accordingly, it is not necessary for the Chamber to address the remainder of the cumulative criteria of article 82(1)(d) of the Statute.

iii. Second Proposed Issue

16. The Defence submits that the Chamber erred in law in confirming count 13, 14 and 16 in relation to the Black migrants. The Defence recalls that, in the warrant of arrest against Mr El Hishri (the ‘Arrest Warrant’),³² the Chamber considered that there was insufficient evidence to enable it to find reasonable grounds to believe that the elements of the crimes against humanity of enslavement had been met. In this regard, the Defence further argues that, in the Impugned Decision, ‘even though [the Chamber] was bound to apply the more onerous “substantial grounds to believe standard”,³³ it ‘committed a striking *volte face*’ and the Chamber did not

²⁸ [OPCV's Response](#), para. 20.

²⁹ [Prosecution's Response](#), para. 10.

³⁰ See [Prosecution's Response](#), para. 10 and [OPCV's Response](#), para. 18.

³¹ [Request](#), para. 27. See also [Prosecution's Response](#), para. 10 and [OPCV's Response](#), para. 18.

³² [Warrant of Arrest for Khaled Mohamed Ali El Hishri](#), ICC-01/11-01/25-7-US-Exp (reclassified as public on 31 July 2025, ICC-01/11-01/25-7), para. 81.

³³ [Request](#), para. 37.

make any ‘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’.³⁴ In addition, the Defence argues that the Chamber erred in confirming counts 14 and 16 insofar as they relate to Black Migrants because ‘there is no evidence that this class of detainees was detained for reasons related to opposing SDF/RADA or its ideology so as to bring them within the same targeted civilian population.’³⁵ The Defence further asserts that the Second Proposed Issue ‘is not merely a question over which there is disagreement between the Defence and the [Chamber]. 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.’.³⁶

17. At the outset, the Chamber notes that the Prosecution considers that the Second Proposed Issue consists of two separate ones, namely (i) whether the Chamber ‘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’³⁷; and, (ii) whether the Chamber ‘erred in law in finding that [...] the alleged perpetrators exercised powers attaching to the right of ownership over the other (Libyan) detainees’.³⁸

18. Regarding the definition of the civilian population, the Prosecution responds that the Defence’s ‘argument overlooks that, in the [Impugned 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”’³⁹ and that this definition was used only in the Arrest Warrant.⁴⁰ The Prosecution further submits that, in the Document Containing the Charges (the ‘DCC’), it has ‘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’.⁴¹ In this regard, the Prosecution asserts that ‘since the [Impugned 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).’⁴² Additionally, regarding the

³⁴ [Request](#), para. 37.

³⁵ [Request](#), para. 40.

³⁶ [Request](#), para. 42.

³⁷ [Prosecution’s Response](#), para. 2.

³⁸ [Prosecution’s Response](#), para. 2.

³⁹ [Prosecution’s Response](#), para. 15.

⁴⁰ [Prosecution’s Response](#), para. 16.

⁴¹ [Prosecution’s Response](#), para. 16.

⁴² [Prosecution’s Response](#), para. 17.

crime against humanity of enslavement, the Prosecution sustains that the argument of the Defence in this regard is ‘manifestly insufficient to identify any issue’ as ‘no such error is explained or even identified in the body of [its] submissions—rather, [the Defence] merely observes, without further comment, that “[t]he [Chamber] 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]’”’.⁴³

19. The OPCV responds that the Second Proposed Issue ‘does not amount to an appealable issue but rather constitutes a mere disagreement with the Chamber’s evaluation of the evidence and the conclusions it drew concerning the Black Migrants’.⁴⁴ The OPCV further submits that ‘the Defence appears to take issue with the fact that the Chamber adopted a different approach to the allegations concerning the Black Migrants than the one reflected in the Warrant of Arrest. In doing so, the Defence attempts to demonstrate that the Chamber departed from its earlier assessment without proper justification’.⁴⁵ The OPCV asserts that ‘the fact that the Chamber adopted a different position concerning Black Migrants in the Confirmation Decision than in the Arrest Warrant does not constitute an appealable issue. The Confirmation Decision was rendered on the basis of a substantially more developed evidentiary record and pursuant to the legal standard governing confirmation proceedings, which is distinct from the standard applicable to the issuance of a warrant of arrest, as recognised by the Defence itself’.⁴⁶

20. The Chamber recalls that the definition of civilian population provided by the Prosecution in the DCC and in the PCB, and then adopted by the Chamber in the Impugned Decision, consists of ‘civilian population in and around Tripoli, including persons in the custody and/or control of the Mitiga Perpetrators, principally at Mitiga Prison (which was controlled by SDF/RADA)’.⁴⁷ The Chamber is not persuaded by the Defence’s argument that the Chamber was required to explain an alleged departure from its findings in the Arrest Warrant.⁴⁸ As pointed out by the OPCV,⁴⁹ the confirmation proceedings were conducted on

⁴³ [Prosecution’s Response](#), para. 19.

⁴⁴ [OPCV’s Response](#), para. 23.

⁴⁵ [OPCV’s Response](#), para. 24.

⁴⁶ [OPCV’s Response](#), para. 26.

⁴⁷ See [Document Containing the Charges](#), 26 March 2026, ICC-01/11-01/25-92, para. 8; [Prosecution Pre-Confirmation’s Brief](#), 26 March 2026, ICC-01/11-01/25-94-Conf-Corr (confidential corrected version notified on 24 April 2026 and public redacted version thereof notified on 1 May 2026, ICC-01/11-01/25-94-Corr-Red), paras 6-7. See also [Impugned Decision](#), para. 51.

⁴⁸ [Request](#), para. 37.

⁴⁹ See [OPCV’s Response](#), para. 26.

the basis of a more developed evidentiary record and under the distinct legal framework of article 61 proceedings. Accordingly, the Chamber was required to determine whether the evidence presented at the confirmation stage established substantial grounds to believe that the charged crimes had been committed. In the Impugned Decision, the Chamber proceeded to do so and provided its reasoning as to why it found that there are substantial grounds to believe that the crimes against humanity of enslavement and persecution were committed against the Black Migrants.⁵⁰ The fact that the Defence disagrees with the Chamber's assessment of the evidence and its conclusions does not render the Chamber's reasoning deficient or insufficient. The Chamber is of the view that the Request does not articulate any error of law in the Chamber's interpretation of the elements of the crimes or the applicable legal standard and it also fails to demonstrate that the Chamber erred in law by reaching conclusions different from those adopted at the arrest warrant stage.

21. In light of the above, the Chamber considers that the Second Proposed Issue does not arise from the Impugned Decision and/or consists of a mere disagreement, whereby the Defence essentially attempts to re-litigate the matter by relying on the Chamber's findings in the arrest warrant. Without more, the Request fails to identify an appealable issue within the meaning of article 82(1)(d) of the Statute. Accordingly, it is not necessary for the Chamber to address the remainder of the cumulative criteria of article 82(1)(d) of the Statute.

⁵⁰ See [Impugned Decision](#), paras 112-131.

FOR THESE REASONS, THE CHAMBER HEREBY

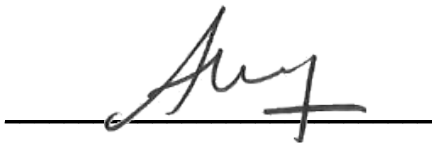
REJECTS the Request for Leave to Reply; and

REJECTS the Request.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Iulia Antoanella Motoc, Presiding



**Judge Reine Adélaïde Sophie Alapini-
Gansou**



Judge María del Socorro Flores Liera

Dated this Monday, 3 August 2026

At The Hague, The Netherlands