

ANNEX
Under Seal
***ex parte*, only available to the Prosecution**

**Corrected version of the ‘Warrant of Arrest for Mr Osama
Elmasry / Almasri Njeem’ dated 18 January 2025 (ICC-
01/11-149-US-Exp), including Dissenting Opinion of Judge
Socorro Flores Liera**

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **18 January 2025**

PRE-TRIAL CHAMBER I

Before:

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

SITUATION IN LIBYA

Under seal, *ex parte*, only available to the Prosecution

Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem

Warrant of Arrest to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Mr Karim A. A. Khan
Ms Nazhat Shameem Khan
Ms Nicole Samson

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representative

Others

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 this warrant of arrest pursuant to article 58(1) of the Rome Statute (the ‘Statute’) for

Osama Elmasry Njeem

also known as **Osama Almasri Njeem**,¹ a national of Libya, born on 16 July 1979 in Tripoli, Libya.²

I. Procedural history

1. On 26 February 2011, the United Nations Security Council (the ‘Security Council’), acting under Chapter VII of the Charter of the United Nations, referred the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Court, in accordance with article 13(b) of the Statute, deciding, *inter alia*, that ‘Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’, and urging ‘all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor’ (the ‘2011 Resolution’).³
2. On 2 October 2024, the Prosecution, under seal, applied for a warrant of arrest (the ‘Application’),⁴ for Osama Elmasry Njeem (‘Mr Njeem’), for the following crimes against humanity and war crimes within the Court’s jurisdiction, committed in Libya from around February 2015 to at least 2 October 2024:
 - (i) imprisonment as a crime against humanity (article 7(1)(e) of the Statute);
 - (ii) outrages upon personal dignity as a war crime (article 8(2)(c)(ii) of the Statute);
 - (iii) cruel treatment as a war crime (article 8(2)(c)(i) of the Statute);
 - (iv) torture as a war crime and as a crime against humanity (article 8(2)(c)(i) and 7(1)(f) of the Statute);
 - (v) other inhumane acts as a crime against humanity (article 7(1)(k) of the Statute);

¹ Alternative versions and spellings of the name, as submitted by the Prosecution, include: Usamah N’Jeem and Osama Najim.

² Annex 4 to the Prosecution’s application under article 58 for a warrant of arrest against Osama Elmasry / Almasri NJEEM (“Osama NJEEM”), 2 October 2024, ICC-01/11-140-US-Exp-Anx4; and LBY-OTP-00020210.

³ United Nations, Security Council, Resolution 1970, 26 February 2011, S/RES/1970 (2011).

⁴ Prosecution’s application under article 58 for a warrant of arrest against Osama Elmasry / Almasri NJEEM (“Osama NJEEM”), 2 October 2024, ICC-01/11-140-US-Exp (with under seal, *ex parte*, annexes 1-9).

- (vi) sexual violence as a war crime and as a crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute);
- (vii) rape as a war crime and as a crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute);
- (viii) murder and attempted murder as a war crime and as a crime against humanity (articles 8(2)(c)(i) and 7(1)(a) of the Statute);
- (ix) passing of sentences without previous judgment pronounced by a regularly constituted court as a war crime (article 8(2)(c)(iv) of the Statute);
- (x) enslavement as a crime against humanity (article 7(1)(c) of the Statute);
- (xi) sexual slavery as a war crime and a as crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute); and
- (xii) persecution as a crime against humanity (article 7(1)(h) of the Statute).⁵

II. Jurisdiction and admissibility

3. Pursuant to article 19(1) of the Statute, the Chamber must consider whether the Court has jurisdiction over the alleged conduct. The majority of the Chamber, Judge Flores Liera dissenting, is satisfied that Mr Njeem's conduct, as alleged by the Prosecution, falls within the jurisdiction of the Court. In this regard, and considering the time elapsed since the Security Council's referral of the situation in Libya to the Court, the Chamber has considered as part of its assessment the question of whether Mr Njeem's conduct is sufficiently linked to the situation as it was originally referred.
4. The majority of the Chamber recalls in this regard that a previous composition of this Chamber has found that 'for the case at hand not to exceed the parameters defining the [...] situation under investigation, the crimes referred to in the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the [2011 Resolution]'.⁶ It has also been noted that a situation 'can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are

⁵ Application, paras 1, 11-13.

⁶ *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1 ('*Mbarushimana* Art. 58 Decision'), para. 6.

sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral'.⁷

5. Turning to the specifics in this case, the majority of the Chamber observes that there has been an ongoing situation of crisis in Libya since 2011. It is a fact of common knowledge⁸ that violence erupted in Libya in February 2011 in the context of an uprising against the regime of Muammar Mohammed Abu Minyar Gaddafi and that after the fall of the Gaddafi regime, the fighting and civil unrest continued in Libya.⁹ The information before the Chamber also shows that the violence between the organisation referred to by the Prosecution as the 'Libyan National Army' (the 'LNA') – an armed group previously referred to as Khalifa Haftar's Libyan National – and the 'Government of National Accord' (the 'GNA') – previously known as the General National Congress – 'amplified the existing proxy conflict that took shape after 2011'.¹⁰
6. On the basis of the information contained in the reports of the United Nations Support Mission in Libya and the Independent Fact-Finding Mission on Libya, submitted by the Prosecution, the majority of the Chamber considers that it is sufficiently shown that a situation of turmoil has been ongoing since the 2011 Resolution. For the purposes of its present consideration, the majority is therefore satisfied that the crisis in Libya extended until at least 2 October 2024, i.e. the day the Prosecution submitted the Application.¹¹
7. The Prosecution alleges that crimes against humanity and war crimes were committed from around February 2015 to the day it submitted the Application¹² by members of the Special Deterrence Forces – also known colloquially as RADA – (the 'SDF/RADA') at the Mitiga Prison in Tripoli.¹³ The majority considers that there are reasonable grounds to believe that, as submitted by the Prosecution, the SDF/RADA emerged as a result of the 2011 crisis that triggered the 2011 Resolution, and the aftermath of this crisis.¹⁴ The

⁷ *Mbarushimana* Art. 58 Decision, para. 6. See also Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the 'Defence Challenge to the Jurisdiction of the Court', 26 October 2011, ICC-01/04-01/10-451, para. 41; Pre-Trial Chamber II, *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 14; Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302), 17 May 2021, ICC-02/05-01/20-391, para. 25.

⁸ See article 69(6) of the Statute.

⁹ See e.g. LBY-OTP-0053-0990, paras 31-41.

¹⁰ LBY-OTP-00000526, at 000002.

¹¹ LBY-OTP-00000537; LBY-OTP-00000426; LBY-OTP-00000425; LBY-OTP-00000427; LBY-OTP-00000427; LBY-OTP-00000524, paras 88-92; LBY-OTP-00019126; LBY-OTP-00019127.

¹² Application, para 7.

¹³ Application, para. 7.

¹⁴ LBY-OTP-0070-3925, p. 13.

group originated as a revolutionary military group from the Tripoli district of Souk al Juma that was fighting Gaddafi forces.¹⁵ In 2011, the group participated in taking control of Mitiga airbase, located near Souk Al Juma,¹⁶ and in 2012 started the construction of a prison or detention centre.¹⁷ The Mitiga airbase was later targeted by the LNA in November 2014.¹⁸

8. The material provided indicates that during the time period relevant to the alleged conduct, the SDF/RADA was affiliated to the GNA.¹⁹ In 2016, the GNA recognised SDF/RADA²⁰ and in October 2017 it recognised the Mitiga prison as the Tripoli Main Correction and Rehabilitation Institution.²¹ In May 2018, SDF/RADA was formally renamed the Deterrence Apparatus for Combatting Organised Crime and Terrorism (“DACOT”) under the Ministry of Interior.²²
9. That at least some of the persons held at the Mitiga Prison were detained for reasons related to the fighting or tensions between different groups involved in the ongoing situation of crisis in Libya,²³ further illustrates a link between the crimes alleged by the Prosecution and the situation that triggered the jurisdiction of the Court.
10. It is a fact of common knowledge that the Prosecution submits periodical reports to the Security Council on actions taken pursuant to the 2011 Resolution. The fact that the Prosecutor continues reporting before the Security Council, including on contemporary matters, and no objection to these reports have been raised, is another indication of the ongoing jurisdiction of the Court over alleged crimes committed in the context of the ongoing crisis in Libya.
11. In light of the above, the majority of the Chamber is satisfied that the alleged crimes described in the Application are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral, as they took place

¹⁵ LBY-OTP-0070-3752, p. 3; LBY-OTP-00018600; LBY-OTP-00018699, paras 30-32.

¹⁶ LBY-OTP-00001491, paras. 135-136; LBY-OTP 0083-0052, para. 27; LBY-OTP-0085-0063, para. 29; LBY-OTP-0070-3752, p. 3; LBY-OTP-00018600 (translation: LBY-OTP-00019507; LBY-OTP-00018699, para. 30.

¹⁷ See LBY-OTP-0066-0332, at 0333 and LBY-OTP-0066-0349, at 0351-0378.

¹⁸ LBY-OTP-00018913 (translation: LBY-OTP-00019375); ; LBY-OTP-0053-0990, para. 37.

¹⁹ LBY-OTP-00001538 (translation: LBY-OTP-00020191), paras. 237-239; LBY-OTP-00018953 (translation: LBY-OTP-00019191).

²⁰ LBY-OTP-00018655 (translation: LBY-OTP-00019369). See also LBY-OTP-00018738, p. 18.

²¹ See LBY-OTP-00018157 (translation: LBY-OTP-00019183) (referring to decision 699/2017).

²² LBY-OTP-0069-0146 (translation: LBY-OTP-0070-0004).

²³ LBY-OTP-0072-0387, paras 13, 26-28, 58; LBY-OTP-00019878; LBY-OTP-00019138. See also LBY-OTP-0070-3752, p. 4.

in the context of the situation of crisis that triggered the adoption of the 2011 Resolution, and has persisted since.

12. The majority of the Chamber declines, at this stage, to use its discretionary *proprio motu* power to determine the admissibility of the case against Mr Njeem as there is no ostensible cause or self-evident factor which impels it to exercise its discretion pursuant to article 19(1) of the Statute.²⁴
13. The above findings are without prejudice to the determination of any future challenge to the jurisdiction of the Court or the admissibility of a case under article 19 of the Statute. For reasons in line with her dissenting opinions appended to a previous series of warrants of arrest in the Libya Situation,²⁵ Judge Flores Liera respectfully disagrees with her colleagues and considers that the alleged crimes described in the Application are not sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral. She will append a dissenting opinion. The determination of the remainder of the Application, which follows next, is by the majority of the Chamber only.

III. Standard of proof

14. The findings of facts, as set out below, are made based on the relevant evidentiary standard, namely 'reasonable grounds to believe', as required by article 58(1)(a) of the Statute. The evidence must only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court. This need not be the only reasonable conclusion that can be drawn from the evidence.²⁶

²⁴ See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, ICC-01/04-169 (OA), paras 1-2, 52; Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1, p. 4; *Mbarushimana* Art. 58 Decision, para. 9; Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Mandat d'arrêt à l'encontre d'Ahmad Al Faqi Al Mahdi, 18 September 2015, ICC-01/12-01/15-1-Red, para. 12; and Pre-Trial Chamber I, *Situation in Georgia*, Arrest warrant for Gamlet Guchmazov, 30 June 2022 (confidential version issued on 24 June 2022), ICC-01/15-41-Red, para. 3.

²⁵ E.g., Warrant of Arrest for Abdurahem Khalefa Abdurahem Elshgagi ('Abdulahem Al Kani'), issued on 6 April 2023, unsealed on 4 October 2024, ICC-01/11-141-Anx1, para. 16 and the 'Dissenting Opinion of Judge Socorro Flores Liera' appended thereto.

²⁶ Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 3 February 2010, ICC-02/05-01/09-73 (OA), paras 33, 39. See also Pre-Trial Chamber I, *Situation in Georgia*, Arrest warrant for Gamlet Guchmazov, 30 June 2022 (confidential version issued on 24 June 2022),

IV. Requirements of article 58(1) of the Statute

15. Article 58(1) of the Statute provides that the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest for a person if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, and if the arrest of the person appears necessary.
16. The arrest must appear necessary to: a) ensure the person's appearance at trial, b) ensure that the person does not obstruct or endanger the investigation or the court proceedings, or c) to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.²⁷ These conditions are alternative in nature, and at least one of the requirements must be fulfilled to demonstrate the need for detention.²⁸

A. *Whether there are reasonable grounds to believe Mr Njeem has committed a crime within the jurisdiction of the Court (Article 58(1)(a) of the Statute)*

1. Contextual elements of war crimes

17. War crimes pursuant to article 8(2)(c) and (e), which are alleged by the Prosecution in the Application, can only be committed if international humanitarian law ('IHL') applicable to non-international armed conflicts applied to the conduct in question at the relevant time. Additionally, the contextual elements of article 8(2)(c) and (e) require that: (i) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (ii) the perpetrator was aware of factual circumstances that established the existence of the armed conflict.²⁹ As the second element relates to Mr Njeem specifically, it will be addressed below when considering Mr Njeem's *mens rea*.
18. According to the material provided by the Prosecution, fighting between different armed groups has been ongoing in multiple parts of Libya since at least May 2014, when the

ICC-01/15-41-Red, para. 4; Pre-Trial Chamber II, *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red (confidential version issued on the same day), para. 19.

²⁷ Article 58(1)(b) of the Statute.

²⁸ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the review of detention, 12 April 2021, ICC-02/05-01/20-338, para. 20, and references therein.

²⁹ See article 8(2)(c) and (e) of the Elements of Crimes.

country experienced the most serious emergence of hostilities since 2011.³⁰ Since then, armed confrontations have been shaped by fragmentation and emergence of armed actors and the recurring shift in alliances among them. For the purpose of this warrant, the Chamber identifies the two main blocs opposing each other to be the GNA and the LNA and considers that fighting between them took place regularly throughout the period relevant to this Application. Accordingly, the majority of the Chamber finds that the intensity requirement was, for the purposes of the present assessment and subject to a more stringent consideration combined with an analysis of the timing of the arrest of specific alleged victims, was met during the majority of the period of the alleged conduct.

19. The majority notes the Prosecution's submissions on the possible impact of the ceasefire agreement reached between the two blocs in October 2020 on the intensity requirement.³¹ However, the majority notes that the detention of the alleged victims is by-and-large alleged to have commenced prior to October 2020. Since the IHL protection of a person who is arrested for reasons related to an armed conflict continue for the duration of the detention and does not cease if the conflict (in relation to which the detention started) ends, the majority considers that at the present stage, it need not address the impact of the ceasefire agreement and whether or not during or after this agreement a non-international armed conflict continued to exist.
20. The material before the Chamber shows that during the period relevant to this warrant, the SDF/RADA acted for or in association with the GNA. Since the SDF/RADA participated on the side of the entity that must be considered as the government, the Chamber need not consider whether the SDF/RADA itself fulfilled the organisation requirement.³² The LNA was sufficiently organised to qualify as an organised armed group. The majority therefore finds reasonable grounds to believe that during all or significant parts of the temporal scope of the alleged conduct, the GNA and the SDF/RADA were involved in at a minimum one non-international armed conflict with another party.

³⁰ LBY-OTP-0053-0990, paras 34-39; LBY-OTP-0053-1204, para. 2.

³¹ See LBY-OTP-00000524, paras 88-92; LBY-OTP-00019126; LBY-OTP-00019127, para. 28.

³² See Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359 (the 'Ntaganda Trial Judgment'), para. 711, referring to ICTY, *Haradinaj et al.* Trial Judgment, para. 60; and ICRC, *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016), para. 429.

21. The majority of the Chamber recalls that for the purposes of the type of war crimes alleged, which concern violations of IHL committed against persons deprived of their liberty and as such in the hands of the opponent, the key question is whether the alleged victims were protected under IHL at the relevant time. As indicated above, the answer to that question depends on whether a (non-international) armed conflict existed at the time the persons were arrested or otherwise detained. It is neither relevant for the present assessment whether that conflict continued throughout the detention, nor does it matter whether the protection of IHL resulted from one and the same non-international armed conflict or different ones that took place at different points in time. So long as IHL applied to the conduct in question, the perpetrator's conduct need not take place as part of hostilities. Moreover, the majority recalls that the alleged acts may have been temporally or geographically removed from the actual fighting, so long as the victims were protected under IHL.³³

22. Based on the foregoing, the majority of the Chamber considers that, for the purposes of the present application, there are reasonable grounds to believe that the conduct underlying the alleged crimes took place in the context of, and was associated with, an armed conflict not of an international character.

2. Contextual elements of crimes against humanity

23. SDF/RADA was vested with sufficiently efficient structures or mechanisms to carry out an 'attack' within the meaning of article 7(1) of the Statute, as demonstrated *inter alia* by the group's ability to command significant resources.³⁴ According to the material before the Chamber, the Mitiga Prison was the largest detention facility in western Libya.³⁵ During the relevant time period, i.e. between February 2015 and March 2024,³⁶ there were several thousand detained persons held at this facility.³⁷ The conduct discussed below thus affected a very large number of persons.

³³ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Trial Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red ('Ongwen Trial Judgment'), para. 2689; *Ntaganda* Trial Judgment, para. 731.

³⁴ See, for example, LBY-OTP-0070-4009, p. 10.

³⁵ E.g., LBY-OTP-0069-0584, para. 32; LBY-OTP-0080-0032, paras 36-37.

³⁶ See LBY-OTP-00019195, paras 130, 158.

³⁷ LBY-OTP-0073-0025, para. 26; LBY-OTP-0069-0584, para. 119; LBY-OTP-0080-0608, paras 38, 79; LBY-OTP-0070-7295, para. 164; LBY-OTP-00019195, paras 62-63. See also LBY-OTP-00018738, p. 18; LBY-OTP-0070-4037, para. 35.

24. The majority notes the Prosecution's submissions that the 'civilian population' for the purposes of article 7(1) of the Statute consists of the detainees at Mitiga Prison.³⁸ However, in relation to the Prosecution's allegation that the crime against humanity of imprisonment was committed against the detainees, it would be circular to argue that the civilian population is defined by the victims of the crime. Instead, the majority considers that the civilian population against which an attack within the meaning of article 7(1) of the Statute was directed, was comprised of segments of the population in Libya, who – for a variety of reasons – were perceived to be opposing the SDF/RADA or this group's ideology.
25. To the extent those arrested were detained for reasons related to an armed conflict, the persons detained were either civilians or civilians directly participating in hostilities at the time of their arrest or capture. Either way, once detained they qualified as civilians for the purposes of article 7(1) of the Statute – together with the persons who were detained for reasons unrelated to an armed conflict. As discussed in more detail below, these crimes were further committed in a systematic manner, and frequently followed a specific pattern or *modus operandi*.
26. In light of the above, the majority of the Chamber finds reasonable grounds to believe that between at least February 2015 and at least March 2024, i.e. when the last person who the Prosecution's material submitted in support of the Application refers to was released, the conduct directed against the persons detained in the Mitiga Prison, who were – at least in part – perceived to be opposed to the GNA or SDF/RADA,³⁹ constituted a widespread and/or systematic attack against a civilian population. This attack consisted of multiple acts under article 7(1) of the Statute,⁴⁰ and took place over a period over multiple years. For these reasons, the majority finds reasonable grounds to believe that it was carried out pursuant to or in furtherance of an organisational policy of the SDF/RADA.

³⁸ See Application, paras 7, 18, 37, 62.

³⁹ See Annex 5.

⁴⁰ See the section below discussing, e.g., the crimes against humanity of imprisonment, torture and persecution.

3. The crimes alleged

27. As noted above, the crimes alleged by the Prosecution relate in particular to a prison facility in Tripoli most commonly known as the Mitiga Prison.⁴¹ At the time of the alleged conduct, the Mitiga Prison was largest detention facility in western Libya.⁴² It encompassed the main prison building, divided into 12 sections with multiple cells and solitary confinement cells, as well as an administrative building, known as 'Naqliah', with further offices and rooms.⁴³

28. The Prosecution claims that the precise number of detainees in Mitiga Prison could not be specified and estimates that SDF/RADA 'imprisoned at least 5140 persons'⁴⁴ during the time encompassed by the Application. The Prosecution further presents a '[n]on exhaustive list of victims at Mitiga Prison.'⁴⁵ The majority's findings as regards the crimes subject to this warrant are based solely on the concrete information referred to in the Application, even if considered as examples of a potentially bigger pattern of criminal conduct.

29. In the interests of clarity, the Chamber will analyse the crimes alleged by the Prosecution in different order than the Prosecution's alleged counts.

i. Imprisonment as a crime against humanity (article 7(1)(e) of the Statute)

30. The Prosecution alleges that all SDF/RADA detainees at Mitiga Prison, calculated to be at least 5140 from February 2015 to 2 October 2024, were imprisoned or otherwise severely deprived of their physical liberty in violation of fundamental rules of international law, in all cases due to circumstances and conditions of detention, and in many cases also due to the absence of any lawful authority to detain them.⁴⁶

31. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of imprisonment are as follows: (i) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical

⁴¹ Application, paras 7, 18, 37.

⁴² See above at para. 23.

⁴³ See Annexes 7-9 to the Application.

⁴⁴ Application, para 9.

⁴⁵ See Application, fn 230, referring to LBY-OTP-00020195.

⁴⁶ Application, paras 66-67.

liberty; (ii) the gravity of the conduct was such that it was in violation of fundamental rules of international law; and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct.⁴⁷

32. The majority recalls that for the conduct to be in violation of fundamental rules of international law, the person must have been deprived of his or her physical liberty without due process of law (e.g. without legal basis or in violation of procedural rights).⁴⁸

33. While some detainees may have been imprisoned on a lawful basis, the information before the Chamber shows that many were not. SDF/RADA imprisoned people for religious reasons (such as being Christian⁴⁹ or atheist⁵⁰); for their perceived contraventions to SDF/RADA's religious ideology (e.g. suspected of 'immoral behaviour'⁵¹ and homosexuality⁵²); their alleged support or affiliation to the LNA⁵³ or ISIS⁵⁴; for the purpose of coercion;⁵⁵ or a combination of some of these reasons.⁵⁶ Sometimes, detainees were not informed of the reason of their detention⁵⁷ or were subject to accusations which they did not understand or that were inconsistent.⁵⁸

34. In addition, SDF/RADA imprisoned individuals at the Mitiga Prison in clear violation of procedural safeguards and due process of law. SDF/RADA (i) arrested individuals without warrants or any other legal basis and without informing them of the reason of their arrest; (ii) conducted arrests wearing masks;⁵⁹ (iii) coerced detainees to make appointments with their contacts so that SDF/RADA could also arrest them;⁶⁰ (iv) coerced detainees to unlock their mobile phones in order to access their contacts,

⁴⁷ Article 7(1)(e) of the Elements of Crimes.

⁴⁸ Situation in the Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, 9 November 2017, ICC-01/17-9-Red, para. 68.

⁴⁹ LBY-OTP-0080-0169, paras 122-125.

⁵⁰ LBY-OTP-00001491, paras 31-33, 64-66; LBY-OTP-00001491, paras 29-32.

⁵¹ LBY-OTP-0073-0025, para. 86; LBY-OTP-0073-0025, paras. 78-80, 82, 109-110, 112.

⁵² LBY-OTP-0073-0025, para. 105-109.

⁵³ LBY-OTP-0072-0387, paras 28-29; LBY-OTP-0070-6952, para. 51; LBY-OTP-00016896, paras. 27, 32; LBY-OTP-0069-0584, para. 106; LBY-OTP-0070-6952, para. 51; LBY-OTP-0070-7295, para. 85.

⁵⁴ LBY-OTP-00007275, paras. 30; LBY-OTP-0069-0584, paras 101-103; LBY-OTP-00018787, paras 21-22.

⁵⁵ LBY-OTP-00018075, para. 38; LBY-OTP-00015405, para. 82; LBY-OTP-0080-0032, paras 2-54.

⁵⁶ LBY-OTP-0072-0387, paras 51-54.

⁵⁷ LBY-OTP-0080-0169, paras 122-125; LBY-OTP-00001491, paras 31-33, 64-66;

⁵⁸ ; LBY-OTP-00015405, paras 40-41, 92; LBY-OTP-00007275, paras 30, 71-72; LBY-OTP-0069-0506, paras 19, 47; LBY-OTP-00018134, para. 51;

⁵⁹ LBY-OTP-0073-0025, paras 74-80.

⁶⁰ LBY-OTP-0073-0025, para. 82

messages and social media accounts during arrests and interrogations;⁶¹ (v) severely abused detainees during interrogations, including extensive beatings⁶² (vi) overall, denied detainees procedural rights,⁶³ such as the right to counsel,⁶⁴ the right to have the lawfulness of their detention promptly determined, and the right to have access to family and to medical care.⁶⁵ As explained above, the material shows that at least some of the detainees were captured for reasons related to the armed conflict.⁶⁶

35. Based on the foregoing, the majority of the Chamber finds that the specific elements of the crime against humanity of imprisonment pursuant to article 7(1)(e) of the Statute are therefore met at this stage of the proceedings.

36. The majority further notes that the conditions of detention at Mitiga Prison were dire. As explained further below, SDF/RADA systematically subjected detainees to an initial period of brutal interrogation and torture, designed to extract information, to compel physical and mental submission, and to punish them.⁶⁷ Subsequently, SDF/RADA transferred detainees to a room to be subjected to strip and cavity searches.⁶⁸ Once detained, the detainees were held in small units on solitary confinement,⁶⁹ in overcrowded cells⁷⁰ and in such small spaces that they had to take turns to lay down and sleep.⁷¹ Cells were filthy,⁷² contaminated and without sufficient ventilation. Overall, hygiene conditions were deplorable and women were denied basic menstrual care.⁷³

⁶¹ LBY-OTP-0073-0025, para. 78; LBY-OTP-0072-0387, paras 25-27; LBY-OTP-0072 0387, para 28; LBY-OTP-0080-0169, para. 129, 127, 171-172; LBY-OTP-0070-6952, paras 52-53; LBY-OTP-00001491, para. 28, 64; LBY-OTP-0085-0063, paras. 52-53; LBY-OTP-00015125, para. 82; LBY-OTP-00018075, para. 81; LBY-OTP-0068-0003, para. 17; LBY-OTP-00018134, para. 28; LBY-OTP-0080-0032, para. 48; LBY-OTP-00018787, para. 18.

⁶² LBY-OTP-0073-0025, paras 105-109; LBY-OTP-0072-0387, paras 57-58, 63, 71, 73, 88.

⁶³ LBY-OTP-0080-0468, para. 105.

⁶⁴ LBY-OTP-00007275, para. 77; LBY-OTP-0070-6952, para. 125.

⁶⁵ LBY-OTP-0069-0584, para. 68; LBY-OTP-00007250, paras 31-33; LBY-OTP-00001491, para. 73; LBY-OTP-00015125, para. 35; LBY-OTP-00007275, para. 34.

⁶⁶ LBY-OTP-0072-0387, paras 28-29; LBY-OTP-0070-6952, para. 51; LBY-OTP-00016896, paras. 27, 32; LBY-OTP-0069-0584, para. 106; LBY-OTP-0070-6952, para. 51; LBY-OTP-0070-7295, para. 85.

⁶⁷ See the section on 'Torture as a war crime and a crime against humanity (articles 8(2)(c)(i) and 7(1)(f) of the Statute)' below.

⁶⁸ LBY-OTP-00016896, paras 31-33. See also LBY-OTP-0073-0025, para. 92; LBY-OTP-0068-0003, paras 18-19; LBY-OTP-0069-0584, paras 20, 63; LBY-OTP-00007250, para. 26; LBY-OTP-0069-0506, paras 32-33, LBY-OTP-0080-0032, para. 57.

⁶⁹ LBY-OTP-0066-0951, para. 31; LBY-OTP-00016896, paras 35-36;

⁷⁰ LBY-OTP-0068-0003, paras 20-21; LBY-OTP-0069-0584, paras 66; LBY-OTP-00007250, para. 27; LBY-OTP-0069-0506, paras 38-39, 67-68; LBY-OTP-00018134, paras 40, 61;

⁷¹ LBY-OTP-0066-0951, para. 31; LBY-OTP-0073-0025, paras 95, 99; LBY-OTP-00016916, para. 29; LBY-OTP-00019195, paras 41-42, 44-45; LBY-OTP-0080-0608, para. 23;

⁷² LBY-OTP-0069-0584, para. 64; LBY-OTP-0080-0468, para. 98;

⁷³ LBY-OTP-0083-0663, paras 162-163;

Detainees were not allow to move or exercise, they were malnourished and dehydrated.⁷⁴ Many of them got sick,⁷⁵ and some died.⁷⁶ Children were kept with their mothers at the Women's Section.⁷⁷ These problematic detention conditions are relevant context and the majority will bear them in mind when analysing the further alleged crimes below.

ii. *Torture as a war crime and as a crime against humanity (articles 8(2)(c)(i) and 7(1)(f) of the Statute)*

37. The Prosecution alleges that detainees held in Mitiga Prison were regularly tortured on arrival at the administrative building and later at the prison building, and that they were subjected to a consistent atmosphere of terror and oppression, including inadequate conditions of detention, verbal abuse, threats and violence.⁷⁸
38. In addition to the contextual elements referred to above, the remaining elements of the war crime of torture pursuant to article 8(2)(c)(i) of the Statute are as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; (iii) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities; and (iv) the perpetrator was aware of the factual circumstances that established this status.⁷⁹
39. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of torture pursuant to article 7(1)(f) of the Statute are as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were in the custody or under the control of the perpetrator; (iii) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.⁸⁰

⁷⁴ LBY-OTP-0069-0584, para. 122; LBY-OTP-00018772, para. 43.

⁷⁵ LBY-OTP-0069-0506, para. 42; LBY-OTP-00001491, para. 94;

⁷⁶ LBY-OTP-0066-0951, paras 37-38; LBY-OTP-0069-0584, paras 69-70; LBY-OTP-0069-0506, para. 65.

⁷⁷ LBY-OTP-0080-0032, para. 35; LBY-OTP-0080-0169, para. 92; LBY-OTP-0074-0889, paras 197-198.

⁷⁸ Application, paras 76-79.

⁷⁹ Article 8(2)(c)(i)-4 of the Elements of Crimes.

⁸⁰ Article 7(1)(f) of the Elements of Crimes.

40. During their imprisonment, SDF/RADA inflicted severe physical and psychological pain or suffering upon male and female detainees in their custody. This was regularly conducted on arrival and while interrogated at the administrative building,⁸¹ also known as *Naqliyah*⁸², as well as in the main prison building (e.g. at the so called 'Islamic Neighbourhood').⁸³ The violence was exercised by means of beating (with a plastic pipe known as a 'PPR',⁸⁴ fists, batons),⁸⁵ shooting,⁸⁶ electrocution,⁸⁷ the use of stress positions (such as '*balanco*',⁸⁸ and '*falqa*'⁸⁹) and close confinement in a metal box.⁹⁰ The majority further notes that the foregoing treatment took place within the general context of the problematic detention conditions in Mitiga Prison, as set out above.⁹¹
41. The violence was inflicted for the purpose of obtaining a confession,⁹² coercion,⁹³ getting information about other potential targets,⁹⁴ punishment,⁹⁵ and sometimes for the entertainment and amusement of guards.⁹⁶ Some of the abused detainees were questioned about their perceived affiliation with opposing armed groups.⁹⁷ It is evident from the material assessed, that the suffering did not arise from the imposition of lawful sanctions.
42. All detainees were in the custody and under the control of SDF/RADA. As found above, at least some of the detainees were detained for reasons related to the armed conflict, and as such protected under IHL at the time they were tortured, irrespective of their status prior to detention.

⁸¹ LBY-OTP-0073-0025, para. 84; LBY-OTP-00007250, para. 18-22;

⁸² LBY-OTP-0080-0032, para 52; LBY-OTP-0080-0032, paras 72-76; LBY-OTP-0074-0889, paras 52-57; LBY-OTP-0070-7295, para. 82; LBY-OTP-0085-0063, paras 79-81; LBY-OTP-00007275, paras 71-85;

⁸³ LBY-OTP-0069-0584, paras 90-94.

⁸⁴ LBY-OTP-0074-0889, para. 47;

⁸⁵ LBY-OTP-0069-0584, paras 101-103; LBY-OTP-00001491, paras 40-44; LBY-OTP-00018787, paras 19-22.

⁸⁶ LBY-OTP-00007275, para. 71.

⁸⁷ LBY-OTP-00007275, paras 99-104.

⁸⁸ LBY-OTP-0073-0025, para. 53; LBY-OTP-00007250, para. 18-22; LBY-OTP-00018134, paras 29-31; LBY-OTP-0080-0032, paras. 72-76; LBY-OTP-0070-7295, para. 96.

⁸⁹ LBY-OTP-00007275, para 50, 80-83; LBY-OTP-00018787, para. 46; LBY-OTP-00015405, para. 83; LBY-OTP-0073-0025, paras 106-107; LBY-OTP-0074-0889, paras 55-59.

⁹⁰ LBY-OTP-0083-0052, para. 142; LBY-OTP-00007275, paras 42-43; LBY-OTP-00018075, paras 72-73, 76-86; LBY-OTP-00015360, paras 26, 200.

⁹¹ See the last paragraph of the section 'Imprisonment as a crime against humanity (article 7(1)(e) of the Statute)'.

⁹² LBY-OTP-00018134, paras 29-31; LBY-OTP-0074-0889, para. 52-57; LBY-OTP-00015125, paras 46-54; LBY-OTP-00007275, paras 99-104; LBY-OTP-00007250, para. 39; LBY-OTP-0080-0468, paras 89, 93.

⁹³ LBY-OTP-0073-0025, paras 84-88, 101-113.

⁹⁴ LBY-OTP-0073-0025, paras 110-113; LBY-OTP-00001491, paras 40, 60-72.

⁹⁵ LBY-OTP-00016896, paras 31-33, 63-66; LBY-OTP-00016916, paras 36, 46; LBY-OTP-00018787, para. 47.

⁹⁶ LBY-OTP-00019195, paras. 65-68; LBY-OTP-0070-7295, para. 153.

⁹⁷ LBY-OTP-0069-0584, paras 100-106; LBY-OTP-0070-6952, paras 48-55.

43. Taking into account the findings above, the majority of the Chamber considers that there are reasonable grounds to believe that the specific elements of and the war crime and the crime against humanity of torture pursuant to articles 8(2)(c)(i) and 7(1)(f) of the Statute are met.

iii. Cruel treatment as a war crime (article 8(2)(c)(i) of the Statute)

44. The Prosecution submits that SDF/RADA severely mistreated detainees at Mitiga Prison and subjected them to degrading conditions of detention.⁹⁸

45. In addition to the contextual elements referred to above, the remaining elements of the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute are as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iii) the perpetrator was aware of the factual circumstances that established this status.⁹⁹

46. The available material indicates that SDF/RADA inflicted severe pain upon detainees at Mitiga Prison. As noted above, detainees were frequently abused, mistreated, and neglected.¹⁰⁰ While it cannot be established at this point in the proceedings and on the basis of the material submitted by the Prosecution, whether all cases of physical and psychological abuse fulfil the specific objective required for the war crime of torture, the majority is nevertheless satisfied that detainees imprisoned for reasons related to the armed conflict were subjected to the war crime of cruel treatment.

47. The majority considers that there are reasonable grounds to believe that the elements of the war crime of cruel treatment are met.

iv. Outrages upon personal dignity as a war crime (article 8(2)(c)(ii) of the Statute)

48. The Prosecution alleges that detainees at Mitiga were subjected to outrages upon personal dignity as count 2, but in its allegations on the facts related to the counts 1 to 6, it only generally refers to detainees being mistreated and being held in inadequate conditions.¹⁰¹ It does not in any way explain how, in its view, the elements of this war crime are met.

⁹⁸ Application, paras 73-74.

⁹⁹ Article 8(2)(c)(i)-3 of the Elements of Crimes.

¹⁰⁰ See the last paragraph of the section 'Imprisonment as a crime against humanity (article 7(1)(e) of the Statute)'.

¹⁰¹ Application, heading G.3.a on p. 27 and paras 73-75.

49. The elements of the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute, which the Prosecution must show, in addition to the contextual elements referred to above, are as follows: (i) the person humiliated, degraded or otherwise violated the dignity of one or more persons; (ii) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized an outrage upon personal dignity; and (iii) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.¹⁰²
50. The majority considers that the conditions of detention, set out above,¹⁰³ imposed by SDF/RADA at Mitiga Prison constituted humiliation, degradation or were otherwise a violation of the dignity of the detained persons, and were of a sufficient degree of severity to be generally recognised as an outrage upon personal dignity.
51. As noted above, and notwithstanding the Prosecution's lack of submissions and supporting materials on this element, at least some of the detained persons were detained for reasons related to the armed conflict, and thus protected under IHL (and more specifically Common Article 3 of the 1949 Geneva Conventions) during their detention, irrespective of their status as either a member of the armed forces, fighter, civilian or civilian who participated in hostilities, prior to being detained. Given the overall problematic treatment of the detainees in Mitiga Prison, at least a number of persons fell within the protective scope of Common Article 3 and for them the third element of crime is thus fulfilled. They must thus have been subjected to conduct that qualifies as outrageous upon their personal dignity.
52. At a later stage, the Prosecution would have to show how specific victims were protected under IHL and the conduct against them could thus violate this body of law and qualify as the war crime included in article 8(2)(c)(ii) of the Statute, but at this stage of the proceedings, the majority finds reasonable grounds to believe that the specific elements of the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute are met for at least a number of persons.

v. *Other inhumane acts as a crime against humanity (article 7(1)(k) of the Statute)*

¹⁰² Article 8(2)(c)(ii) of the Elements of Crimes.

¹⁰³ See the last paragraph of the section 'Imprisonment as a crime against humanity (article 7(1)(e) of the Statute)'.

53. The Prosecution submits that detainees at Mitiga Prison were subjected the crime against humanity of other inhumane acts.¹⁰⁴
54. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of other inhumane acts pursuant to article 7(1)(k) of the Statute are as follows: (i) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (ii) such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the act.¹⁰⁵
55. The majority of the Chamber notes article 22(2) of the Statute and recalls that the crime against humanity of other inhumane acts pursuant to article 7(1)(k) of the Statute ‘must be interpreted conservatively’.¹⁰⁶ Apart from providing material in its Application in support of this and five other ‘counts’,¹⁰⁷ the Prosecution failed to make separate submissions on the elements of the respective crimes and does not substantiate why or how the material referred to in such section would meet the elements of the crime against humanity of other inhumane acts. The majority considered that the Prosecution has failed to demonstrate, in accordance with the relevant standard, that the elements of the crime of other inhumane acts have been met. Accordingly, and mindful of the fundamental principle of legality, the majority rejects the Prosecution allegation in respect to this crime.

*vi. Sexual violence as a war crime and a crime against humanity
(articles 8(2)(e)(vi) and 7(1)(g) of the Statute)*

56. The Prosecution submits that at least 22 persons, including a 5-year-old boy, were subjected to sexual violence by Mitiga Prison guards.¹⁰⁸
57. In addition to the contextual elements referred to above, the remaining elements of the war crime of sexual violence pursuant to article 8(2)(e)(vi) of the Statute are as follows: (i) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention,

¹⁰⁴ See Application, paras 1, 9, 11, 117.

¹⁰⁵ Article 7(1)(k) of the Elements of Crimes.

¹⁰⁶ *Ongwen* Trial Judgment, para. 2741.

¹⁰⁷ See Application, paras 66-83 (‘section G.3.a’).

¹⁰⁸ Application, para. 84.

psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; (ii) the conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct.¹⁰⁹

58. In relation to crime against humanity of sexual violence pursuant to article 7(1)(g) of the Statute, the remaining elements are that: (i) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; (ii) such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct.¹¹⁰

59. According to the material before the Chamber, the following acts of sexual nature were committed against detainees at Mitiga Prison: (i) SDF/RADA staff, including Mr Njeem, touched a detainee's 'private parts' and hit him on the buttocks;¹¹¹ (ii) sexual harassment between detainees due to lack of space in cells;¹¹² (iii) alleged abuse of minor and young men by some of the prison's authorities;¹¹³ (iv) alleged abuse of female detainees held in the Women's Section.¹¹⁴ The SDF/RADA also forced detainees to strip and undertake 'anal cavity searches' in what was perceived by the detainees as a sexually and humiliating manner.¹¹⁵ Even though legitimate security reasons may exist for such

¹⁰⁹ Article 8(2)(e)(vi)-6 of the Elements of Crimes.

¹¹⁰ Article 7(1)(g)-6 of the Elements of Crimes.

¹¹¹ LBY-OTP-0069-0506, para. 126.

¹¹² LBY-OTP-0080-0169, paras 149-150; LBY-OTP-00018772, paras 45-47. See also LBY-OTP-0080-0608, para. 27; LBY-OTP-00007275, para. 37; LBY-OTP-00018787, paras 30, 36; LBY-OTP-00016916, para. 31.

¹¹³ LBY-OTP-0073-0025, paras 28-29, 34, 197 LBY-OTP-0069-0584, para. 192; LBY-OTP-0070-6952, para. 168; LBY-OTP-0069-0506, para. 102; LBY-OTP-0080-0169, paras 81-83, 102-103 LBY-OTP-0080-0608, paras 102-104 LBY-OTP-00020099, paras 71-76; LBY-OTP-00018772, para. 48; LBY-OTP-00015405, paras 64-65.

¹¹⁴ LBY-OTP-00018762, para. 63; LBY-OTP-00018763, para. 68; LBY-OTP-0083-0052, paras 174-177; LBY-OTP-0070-7295, para. 164; LBY-OTP-00018075, para. 100. See also LBY-OTP-0083-0663, para. 156; LBY-OTP-00015152, para. 122. See, however, LBY-OTP-00018134, para. 72; and LBY-OTP-00015405, para. 95 for statements to the contrary.

¹¹⁵ LBY-OTP-0080-0169, paras 140-142; LBY-OTP-0068-0003, para. 18; LBY-OTP-0069-0584, para. 63; LBY-OTP-00007250, para. 26; LBY-OTP-0069-0506, para. 32; LBY-OTP-0080-0032, para. 57; LBY-OTP-0083-0663, paras 87-88; LBY-OTP-00015360, para. 45; LBY-OTP-00015125, para. 30.

searches and they can be conducted lawfully, the majority notes that some of the searches took place in the presence of other detainees,¹¹⁶ and detainees were insulted, threatened or beaten when they did not immediately comply.¹¹⁷ In these circumstances it is likely that the searches amount to sexual violence.

60. The majority of the Chamber underscores the state of vulnerability of the alleged victims, who were deprived of their liberty and, in some instances, victimised by their prison guards. The majority further determines that the abovementioned acts were of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions. Accordingly, the specific elements of the war crime of sexual violence pursuant to article 8(2)(e)(vi) of the Statute are met at this stage of the proceedings.
61. Based on the facts found above, and the circumstances of the commission of the relevant conduct, the majority of the Chamber considers that the specific elements of the war crime and crime against humanity of sexual violence pursuant to articles 8(2)(e)(vi) and 7(1)(g) of the Statute are met.

*vii. Rape as a war crime and a crime against humanity
(articles 8(2)(e)(vi) and 7(1)(g) of the Statute)*

62. The Prosecution submits that at least eight persons, including a 15-year old boy, were raped.¹¹⁸
63. In addition to the contextual elements referred to above, the remaining elements of the war crime of rape pursuant to article 8(2)(e)(vi) of the Statute are as follows: (i) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive

¹¹⁶ LBY-OTP-0068-0003, para. 18; LBY-OTP-00007250, para. 26; LBY-OTP-00007275, paras 26-27, 32; LBY-OTP-00015360, para. 45.

¹¹⁷ LBY-OTP-0080-0468, para. 93; LBY-OTP-0080-0169, paras 140-142; LBY-OTP-00015360, para. 45; LBY-OTP-00015405, para. 44.

¹¹⁸ Application, para. 84.

environment, or the invasion was committed against a person incapable of giving genuine consent.¹¹⁹

64. As to the crime against humanity of rape pursuant to article 7(1)(g) of the Statute, the remaining elements are as follows: (i) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹²⁰

65. The available material establishes reasonable grounds to believe that at least six detainees, were raped in Mitiga Prison.¹²¹ In some instances the perpetrators were prison authorities, including SDF/RADA forces,¹²² and in some other they were other detainees.¹²³ As regards the victims' lack of consent, the majority underscores the coercive environment in which the alleged conduct took place; the aggravated state of vulnerability of the victims, who were at the relevant time deprived of their liberty; and the fact that one of the identified victims was reportedly a minor¹²⁴ at the time of the alleged conduct.

66. Based on the facts found above, and the circumstances of the commission of the relevant act, the majority of the Chamber considers that the specific elements of the war crime and crime against humanity of rape pursuant to articles 8(2)(e)(vi) and 7(1)(g) of the Statute are met.

viii. Murder and attempted murder as a war crime and a crime against humanity (articles 8(2)(c)(i), 7(1)(a), and 25(3)(f) of the Statute)

67. The Prosecution submits that at 'at least 51 SDF/RADA detainees at Mitiga Prison were murdered, or subjected to acts of attempted murder'.¹²⁵

¹¹⁹ Article 8(2)(e)(vi)-1 of the Elements of Crimes.

¹²⁰ Article 7(1)(g)-1 of the Elements of Crimes.

¹²¹ See LBY-OTP-00019195, para. 101.

¹²² LBY-OTP-00001367, p. 11, ln. 17-p. 17, ln. 8; LBY-OTP-0070-6952, paras 167, 170; LBY-OTP-00007275, paras 26-27, 32.

¹²³ LBY-OTP-0066-0951, paras 28, 45-47.

¹²⁴ LBY-OTP-0074-0889, paras 181-191.

¹²⁵ Application, paras 93 and 12.

68. In addition to the contextual elements referred to above, the remaining elements of the war crime of murder (article 8(2)(c)(i) of the Statute) are as follows: (i) the perpetrator killed one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iii) the perpetrator was aware of the factual circumstances that established this status.¹²⁶
69. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of murder (article 7(1)(a) of the Statute) requires that: (i) the perpetrator killed one or more persons; (ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and, (iii) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹²⁷
70. The material presented in support of the murder allegations establishes reasonable grounds to believe that at least 34 detainees were killed in Mitiga Prison within the temporal scope alleged by the Prosecution.¹²⁸ According to the material before the Chamber, at least four detainees died as a result of being shot;¹²⁹ at least 12 died as a result of being subjected to conduct that amounts to torture or other severe mistreatment;¹³⁰ around 16 detainees died as a result of lack of adequate medical treatment;¹³¹ and, at least two detainees died as a result of being obliged to sleep in the prison's yard despite the freezing temperature.¹³²
71. It is not clear from the material on the incident presented as attempted murder whether the alleged perpetrator attempted to kill or merely to hurt or intimidate the victim; or whether the perpetrator aimed at the detainee or was reckless when firing in his general

¹²⁶ Article 8(2)(c)(i)-1 of the Elements of Crimes.

¹²⁷ Article 7(1)(a) of the Elements of the Crimes.

¹²⁸ Application, para. 14.

¹²⁹ LBY-OTP-0083-0052, paras 36 and 116-117; LBY-OTP-00020099, paras 43 and 116-117; LBY-OTP-00015405, para. 55. See also LBY-OTP-0074-0889, paras 127-139.

¹³⁰ LBY-OTP-00015405, para. 106; LBY-OTP-00007275, para. 43; LBY-OTP-0083-0052, para. 133; LBY-OTP-00007250, paras 32-36; BY-OTP-00016896, paras 91, 93; LBY-OTP-0080-0608, para. 40; LBY-OTP-00015405, para. 55; LBY-OTP-0080-0468, paras 124-126; LBY-OTP-00015360, paras 158-159. See also LBY-OTP-00019195, paras 115-116; P-0595: LBY-OTP-0074-0889, paras 205-209; LBY-OTP-00007275, para. 60.

¹³¹ LBY-OTP-0074-0889, para. 165; LBY-OTP-00018787, para. 42; LBY-OTP-00016896, para. 92; LBY-OTP-00007275, para. 66; LBY-OTP-00016896, para. 92; LBY-OTP-00007275, para. 66; LBY-OTP-00015405, para. 55; LBY-OTP-0066-0951, para. 37; LBY-OTP-0074-0889, paras 161-164, 174-177, 178-179; LBY-OTP-00016896, paras 90, 92; LBY-OTP-00007275, para. 52; LBY-OTP-0070-7295, para. 141. LBY-OTP-0074-0889, paras 167-173; See also LBY-OTP-00007275, para. 51; LBY-OTP-00016896, para. 89; LBY-OTP-00018772, para. 55; LBY-OTP-0069-0584, paras 69-70; LBY-OTP-0080-0032, para. 82.

¹³² LBY-OTP-0069-0584, para. 70. See also LBY-OTP-0083-0052, para. 133.

direction.¹³³ Mindful of the Court's standard on intent and knowledge, the majority therefore does not further consider this allegation.

72. Although the Prosecution does not make any submissions or provide material to support the allegations that the victims of the alleged war crime of murder were protected under Common Article 3 of the 1949 Geneva Conventions and fulfilled the second element of the crime, the majority notes that it appears that at least some of the detainees were detained for reasons related to a non-international armed conflict. In relation to the third element, the majority further considers that since all the alleged victims were detained, and as such in the hands of the alleged perpetrators, the perpetrators were necessarily aware of the circumstances that established their protected status for the purposes of the second element.
73. Based on the foregoing, the majority of the Chamber finds that there are reasonable grounds to believe that at least 34 detainees have been intentionally killed in Mitiga Prison. Accordingly, the majority of the Chamber finds that the specific elements of the war crime of murder pursuant to article 8(2)(c)(i) of the Statute and the crime against humanity of murder pursuant to article 7(1)(a) of the Statute are therefore met at this stage of the proceedings.

*ix. Passing of sentences without previous judgment
pronounced by a regularly constituted court or 'summary
punishment' as a war crime (article 8(2)(c)(iv) of the Statute)*

74. The Prosecution submits that 'SDF/RADA summarily punished at least 14 detainees, by imprisoning, mistreating and/or murdering them'.¹³⁴
75. In addition to the contextual elements referred to above, the remaining elements of the war crime of sentencing or execution without due process pursuant to article 8(2)(c)(iv) of the Statute are as follows: (i) the perpetrator passed sentence or executed one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities; and (iii) the perpetrator was aware of the factual circumstances that established this status; (iv) there was no previous judgement pronounced by a court, or the court that rendered judgement was not 'regularly constituted', that is, it did not afford the essential guarantees of

¹³³ See LBY-OTP-00018772, para. 34.

¹³⁴ Application, para. 98.

independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law; (v) The perpetrator was aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.¹³⁵

76. The majority observes that this allegation is addressed in only one paragraph of the Application. On the basis of the submissions made, and material presented, the majority is not in a position to consider whether the aforementioned elements are fulfilled. As to the protected status under IHL of the alleged victims, for example, the majority notes that article 8(2)(c)(iv) concerns violation of Common Article 3. The material presented provides no information that allows the majority to assess whether the 14 detainees the Prosecution refers to were detained for reasons related to an armed conflict, and as such protected under Common Article 3 at the relevant time. Above all, the Prosecution does not substantiate why the treatment, in addition to fulfilling the elements of crimes already considered above, also qualifies as the passing of a sentence. It is not explained, for example, how the detention itself, which – as the Prosecution argues elsewhere in the Application – was unlawful imprisonment, arbitrary or without any judicial grounds, can at the same time be a ‘sentence’. Although the killing of a detainee could qualify as an ‘execution’ for the purposes of this war crime, the Prosecution does not explain who would have been executed and the majority notes that the persons who were allegedly murdered, are not listed in the supporting material for the present allegation.

77. In these circumstances, the majority is unable to make findings on the alleged war crime of the passing of sentences without previous judgment pronounced by a regularly constituted court or ‘summary punishment’.

x. Enslavement as a crime against humanity (article 7(1)(c) of the Statute)

78. The Prosecution submits that ‘SDF/RADA enslaved at least 36 persons, including a nine-year-old boy’.¹³⁶

79. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of enslavement pursuant to article 7(1)(c) of the Statute are as

¹³⁵ Article 8(2)(c)(iv) of the Elements of Crimes.

¹³⁶ Application, para. 99.

follows: (i) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹³⁷

80. On the basis of the material provided, it appears that some detainees, in particular sub-Saharan African detainees, were forced to conduct hard labour.¹³⁸ Others were forced to fight,¹³⁹ and some were forced to 'donate' blood.¹⁴⁰ Besides the general deprivation of liberty that all the detainees in the Mitiga Prison suffered from, and notwithstanding that sub-Saharan African detainees were frequently referred to as 'slaves',¹⁴¹ the Prosecution has not shown that powers attaching to the right of ownership over one or more persons were exercised over specific persons.

81. The majority therefore will not further consider this alleged crime against humanity.

xi. Sexual slavery as a war crime and a crime against humanity (articles 8(2)(e)(vi) and 7(1)(g) of the Statute)

82. The Prosecution submits that '[s]ome detainees subjected to rights of ownership were also caused to engage in acts of a sexual nature'.¹⁴² Without any evidentiary substantiation, the Prosecution alleges that five witnesses were victims of this crime.¹⁴³

83. In addition to the contextual elements referred to above, the remaining elements of the war crime of sexual slavery pursuant to article 8(2)(e)(vi) of the Statute are as follows: (i) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (ii) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹⁴⁴

84. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of sexual slavery pursuant to article 7(1)(g) of the Statute are as follows: (i) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering

¹³⁷ Article 7(1)(c) of the Elements of Crimes.

¹³⁸ See the section on persecution below.

¹³⁹ See the section on persecution below.

¹⁴⁰ LBY-OTP-00015405, para. 51; LBY-OTP-00020099, paras 41-42.

¹⁴¹ See the section below on persecution.

¹⁴² Application, para. 101.

¹⁴³ Application, para. 101; see also fn. 402.

¹⁴⁴ Article 8 (2) (e) (vi)-2 of the Elements of Crimes.

such a person or persons, or by imposing on them a similar deprivation of liberty; and (ii) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹⁴⁵

85. Based on the material before the Chamber and in view of the insufficient substantiation of this crime,¹⁴⁶ the majority of the Chamber is, at this stage, unable to find reasonable grounds to believe that the elements of the war crime and crime against humanity of sexual slavery have been met.

xii. Persecution as a crime against humanity (article 7(1)(h) of the Statute)

86. The Prosecution submits that at least 30 persons were persecuted at Mitiga Prison and that the underlying acts of persecution are the commission of the other crimes under the jurisdiction of the Court that are presented in its Application. It argues that the deprivation of fundamental rights was conducted on a number of discriminatory grounds, which sometimes intersected:¹⁴⁷ (i) at least 19 detainees were targeted based on national, racial and/or ethnic grounds¹⁴⁸; and (b) ‘some detainees’ were targeted on religious, political, and/or gender grounds.¹⁴⁹

87. In addition to the contextual elements referred to above, the remaining elements of the crime against humanity of persecution pursuant to article 7(1)(h) of the Statute are as follows: (i) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (ii) the perpetrator targeted such person or persons by reason of the identity of a group or collectively or targeted the group or collectively as such; (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; and (iv) the conduct was

¹⁴⁵ Article 7(1)(g)-2 of the Elements of Crimes.

¹⁴⁶ The relevant part of the Application consists of two sentences that are not supported by any relevant material (apart from a list of alleged victims), not even by means of cross-reference to other parts of the Application potentially containing such material. Furthermore, the Prosecution’s statement that the allegation concerning the crime of sexual slavery ‘could potentially be subsumed within a charge of enslavement’ is misleading; the Chamber recalls in this regard that, if one of the two alleged crimes against humanity of enslavement and sexual slavery can be subsumed by the other, it is the crime against humanity of enslavement, which ‘is in the abstract entirely encompassed within sexual slavery’, see Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Trial Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 3051.

¹⁴⁷ Application, para. 102.

¹⁴⁸ Application, para. 105.

¹⁴⁹ Application, para. 106.

committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.¹⁵⁰

88. It has been established that SDF/RADA severely deprived detainees of fundamental rights in violation of international law. Based on the available material, the majority finds that sub-Saharan African detainees were notably mistreated at the Mitiga Prison.¹⁵¹ They were treated as ‘slaves’¹⁵² assigned hard labour,¹⁵³ used for detainees’ management tasks (e.g. transport and searches) and to physical abuse them, including by suspending detainees in stress positions, locking them in a standing casket or ‘coffin’, and beating them with the ‘*Falqa*’ method.¹⁵⁴
89. Detainees who did not comply with the religious expectations of the SDF/RADA, such as detainees professing minority faiths, beliefs, or practices, or no faith at all, were, *inter alia*, mistreated and forced to attend religious classes.¹⁵⁵ Moreover, individuals were arrested and detained based on their perceived or actual non-compliance with SDF/RADA’s political stance¹⁵⁶ Lastly, both women and men were targeted in accordance with the SDF/RADA’s expectations associated with their sex or gender (e.g. homosexuality).¹⁵⁷
90. Based on the above, the majority considers that there are reasonable grounds to believe that different groups were persecuted at Mitiga Prison in connection with the crimes

¹⁵⁰ Article 7(1)(h) of the Elements of Crimes.

¹⁵¹ LBY-OTP-00018134, para. 76. *See also* LBY-OTP-00015125, para. 65.

¹⁵² LBY-OTP-0074-0889, para. 166; LBY-OTP-00015125, para. 65; LBY-OTP-0070-6952, para. 100; LBY-OTP-00020173, para. 92.

¹⁵³ LBY-OTP-0069-0506, paras 67, 136-137; LBY-OTP-0080-0608, para. 39; LBY-OTP-00016896, paras 54, 57-60; LBY-OTP-0074-0889, paras 52, 97, 101-102, 166, 225-226; LBY-OTP-0069-0584, paras 194-195; LBY-OTP-00020173, paras 72, 77, 79, 81, 83-90, 94, 96-100; LBY-OTP-00018134, paras 54, 76; LBY-OTP-0070-7295, paras 133-134.

¹⁵⁴ LBY-OTP-00018787, para. 93; LBY-OTP-0073-0025, paras 53, 84, 88, 91, 102, 105-108; *see also* LBY-OTP-0069-0584, paras 101-102; LBY-OTP-0069-0506, para. 115; LBY-OTP-00018134, paras 30, 76; LBY-OTP-0074-0889, paras 52, 226; LBY-OTP-0070-6952, para. 100; LBY-OTP-00015125, para. 41; LBY-OTP-00007275, paras 26-28, 32, 40, 43; LBY-OTP-00018772, paras 30-33; LBY-OTP-00016896, paras 29-30, 67; LBY-OTP-00019195, para. 132; LBY-OTP-0083-0052, para. 142.

¹⁵⁵ LBY-OTP-0080-0169, paras 58-59, 84, paras 119-122, 124-134, 160-175, 179-188, 190-191, 204-205, 209-211; LBY-OTP-0074-0889, paras 73-74, 77-82, 110, 242; LBY-OTP-00001491, paras 43-44, 92, 99-101, 104-106; LBY-OTP-00007250, paras 55-57; LBY-OTP-0070-7295, para. 208; LBY-OTP-00007275, para. 35.

¹⁵⁶ LBY-OTP-0069-0584, paras 39-42, 52, 97, 101, 106, 173, 190; LBY-OTP-0083-0052, paras 18, 84, 191; LBY-OTP-00007275, para. 65; LBY-OTP-0080-0468, paras 79-85; LBY-OTP-0083-0189, paras 30-35, 37-42, 66, 77-84, 89-91, 100, 119-130; LBY-OTP-00001366, p. 20, ln. 10 to p. 22, ln. 6; LBY-OTP-00018787, paras 17, 19-22, 58; LBY-OTP-0070-7295, paras 41, 51; LBY-OTP-0070-6952, paras 50-51; LBY-OTP-00016896, paras 22-23, 27.

¹⁵⁷ LBY-OTP-0073-0025, paras 105-113, 137; LBY-OTP-0072-0387, paras 52-54, 65, 93; LBY-OTP-00001366, p. 34, ln. 19 to p. 35, ln. 8; p. 37, ln. 1 to p. 40, ln. 11; p. 41, ln. 15 to 22; p. 42, ln. 25 to p. 44, ln. 14; p. 45, ln. 9 to p. 48, ln. 8; p. 55, ln. 14 to p. 57, ln. 1; LBY-OTP-00015125, para. 92.

included in this warrant. The majority of the Chamber considers that the specific elements of persecution as a crime against humanity, within the meaning of article 7(1)(h) of the Statute are therefore met at this stage.

4. Mr Njeem's individual criminal responsibility

91. As to the individual criminal responsibility of Mr Njeem, the Prosecution alleges that he intentionally and/or knowingly contributed as a co-perpetrator, under article 25(3)(a) of the Statute, to the crimes alleged in counts 1-16 which were committed in the implementation of the common plan.¹⁵⁸ It submits that Mr Njeem is *alternatively responsible* as an accessory to those crimes committed by one or more groups acting with a common purpose under article 25(3)(d) of the Statute¹⁵⁹ or, Mr Njeem is *alternatively responsible* as an aider and abettor of the specific crimes under article 25(3)(c) of the Statute.¹⁶⁰ Furthermore, the Prosecution submits that Mr Njeem is *additionally responsible*, under article 25(3)(c), for the crimes alleged in counts 17-19,¹⁶¹ although such crimes might not have been part of the common plan.

i. Actus reus

92. There are reasonable grounds to believe that during the time period relevant to the charges, Mr Njeem was the director of Mitiga Prison,¹⁶² or even if this would not have been his official title, that he occupied a high position within the administration of the prison.¹⁶³ As such he was in charge of the guards, as shown by the fact that he organised their shifts, and gave them instructions and orders.¹⁶⁴ By assisting in the processing,¹⁶⁵ deciding on

¹⁵⁸ Application, paras 143-149.

¹⁵⁹ Application, paras 150-151.

¹⁶⁰ Application, para. 152.

¹⁶¹ Application, paras 153-155.

¹⁶² LBY-OTP-00016916, para. 65; LBY-OTP-0080-0468, para. 46; LBY-OTP-0069-0506, paras 90-91; LBY-OTP-0073-0025, para. 24. See also LBY-OTP-0069-0584, paras 62, 135; LBY-OTP-0069-0506, paras 33, 90-91; LBY-OTP-0070-6952, paras 131, 135; LBY-OTP-0083-0052, para. 33; LBY-OTP-00018119, paras 66, 99; LBY-OTP-00016896, paras 101, 103; LBY-OTP-00015125, paras 90, 94; LBY-OTP-0080-0169, para. 50; LBY-OTP-0080-0032, paras 100, 105; LBY-OTP-00018134, paras 60, 81; LBY-OTP-0073-0025, para. 24; LBY-OTP-0074-0889, para. 238.

¹⁶³ LBY-OTP-00016916, paras 65, 81; LBY-OTP-0083-0663, para. 120; LBY-OTP-0074-0889, para. 238; LBY-OTP-0066-0951, para. 71. See also LBY-OTP-00015360, para. 74. However, see also *e.g.* LBY-OTP-00015405, paras 50, 53, 64; LBY-OTP-0074-0889, para. 28.

¹⁶⁴ LBY-OTP-0083-0052, para.160; LBY-OTP-00016896, para. 103; LBY-OTP-00018119, paras 66 and 99; LBY-OTP-00015420, paras 31, 37; LBY-OTP-0070-6952, para. 135; LBY-OTP-0080-0169, para. 50; LBY-OTP-00018134, paras 81 and 83; LBY-OTP-00018134, para. 82. See also LBY-OTP-0080-0608, paras 151; LBY-OTP-00015125, paras 90 and 94; LBY-OTP-0080-0169, paras. 40, 50 and 52.

¹⁶⁵ LBY-OTP-0069-0584, paras. 63, 135; LBY-OTP-00015405, para. 121.

the allocation and re-allocation of detainees for organisational purposes,¹⁶⁶ punishing detainees,¹⁶⁷ or impeding any form of contrarian behaviour,¹⁶⁸ he also appears to have exercised administrative control over the persons detained in Mitiga Prison.¹⁶⁹

93. Beating detainees was a common practice among prison guards and shift commanders,¹⁷⁰ who reported to Mr Njeem. In some occasions Mr Njeem was present when guards were beating detainees¹⁷¹ or shooting at them.¹⁷² He reportedly ordered guards to beat detainees in a way to ensure that injuries would not be visible.¹⁷³ Furthermore, he is said to have punished guards who were helping detainees having contact with their families or obtaining better food.¹⁷⁴

94. On the basis of the material provided by the Prosecution, the majority finds reasonable grounds to believe that Mr Njeem carried out, as a direct perpetrator or by having instructed others to do so, the following acts in regard to the detainees of Mitiga Prison: (i) beatings,¹⁷⁵ and ordering detainees to beat other detained persons;¹⁷⁶ (ii) torturing;¹⁷⁷ (iii) shooting;¹⁷⁸ (iv) sexually assaulting.¹⁷⁹ Moreover, Mr Njeem's direct acts also resulted in the death of some detainees.¹⁸⁰

¹⁶⁶ LBY-OTP-0083-0052, para. 135; LBY-OTP-00018134, paras. 60, 83. See also LBY-OTP-0069-0506, para. 33; LBY-OTP-0080-0608, para. 156.

¹⁶⁷ LBY-OTP-00016916, paras 58-60.

¹⁶⁸ LBY-OTP-0083-0052, para. 118.

¹⁶⁹ LBY-OTP-0080-0468, para. 46; LBY-OTP-00016896, para. 103. See also LBY-OTP-0074-0889, para. 238.

¹⁷⁰ LBY-OTP-0069-0506, paras 101 and 121; LBY-OTP-00007275, paras 80 and 86; LBY-OTP-00018119, paras 68 and 94; LBY-OTP-00016896, para. 105; LBY-OTP-00015420, paras 33 and 37; LBY-OTP-0073-0025, para. 35. See also LBY-OTP-00018119, para. 94; LBY-OTP-00016916, para. 65; LBY-OTP-0080-0169, paras. 97; LBY-OTP-0080-0608, paras 159-160.

¹⁷¹ LBY-OTP-0069-0584, paras 90-94; LBY-OTP-00007275, para. 43.

¹⁷² LBY-OTP-00007275, para. 43.

¹⁷³ LBY-OTP-00015360, para. 125.

¹⁷⁴ LBY-OTP-00015360, para. 54. See also LBY-OTP-0074-0889, para. 238.

¹⁷⁵ LBY-OTP-00015360, paras 78 and 80-81; LBY-OTP-0080-0032, para. 104; LBY-OTP-0080-0468, paras 48 and 141-142; LBY-OTP-0069-0506, para. 90; LBY-OTP-0070-6952, para. 135; LBY-OTP-00007275, paras 27-30; LBY-OTP-00007275, paras. 30-31 and 91; LBY-OTP-0083-0052, para. 178; LBY-OTP-0080-0608, paras 89 and 91; LBY-OTP-00001491, paras 90 and 92; LBY-OTP-00018119, para. 99; LBY-OTP-00016896, paras 48 and 63-66; LBY-OTP-00016896, para. 66; LBY-OTP-0074-0889, para. 238; LBY-OTP-00007250, para. 62; LBY-OTP-0069-0584, paras 90-92; LBY-OTP-00015405, para. 121; LBY-OTP-0080-0032, para. 102; LBY-OTP-0080-0032, paras 99, 104.

¹⁷⁶ LBY-OTP-0069-0584, paras. 63, 100-103; LBY-OTP-00007275, para. 43.

¹⁷⁷ LBY-OTP-00015360, para. 80; LBY-OTP-0080-0032, para. 100; LBY-OTP-00007250, para. 62; LBY-OTP-00018699, paras 40-41; LBY-OTP-00016896, paras 64-68; LBY-OTP-00018075, paras. 76-86; See also LBY-OTP-0069-0584, paras 90-94.

¹⁷⁸ LBY-OTP-00019195, paras. 90-91; LBY-OTP-00015360, para. 71; LBY-OTP-00001491, para. 91; LBY-OTP-00007275, paras 43 and 64. See also LBY-OTP-00016896, para. 76.

¹⁷⁹ LBY-OTP-0069-0506, para. 126. See also LBY-OTP-00018075, para. 100.

¹⁸⁰ LBY-OTP-00007275, para. 43.

95. Considering that the information available suggests that in some instances, Mr Njeem personally beat, tortured, shot, sexually assaulted and killed detainees in Mitiga Prison as well as he ordered guards to beat and torture detainees, the majority of the Chamber finds reasonable grounds to believe that he directly perpetrated or co-perpetrated these acts within the meaning of articles 25(3)(a) of the Statute, as well as that he ordered the commission of such acts within the meaning of 25(3)(b) of the of the Statute.
96. In light of the above findings, the majority of the Chamber further finds reasonable grounds to believe that, in the alternative, given his position and his role in the administration of the Mitiga Prison, including but not limited to the allocation of cells, Mr Njeem's conduct could also be construed as: (i) aiding or abetting for the purpose of facilitating the commission of the above-found crimes within the meaning of article 25(3)(c) of the Statute; or (ii) as an accessory to those crimes committed by one or more groups acting with a common purpose under article 25(3)(d) of the Statute.

ii. Mens rea

97. In relation to Mr Njeem's intent and knowledge within the meaning of article 30 of the Statute, the material submitted by the Prosecution establishes reasonable grounds to believe that Mr Njeem made intentional contributions to mistreat, torture and kill detainees in Mitiga Prison which included but was not limited to committing or participating in specific criminal acts within this context.¹⁸¹ In addition to taking part in the unlawful conduct himself, he also gave orders to commit acts that necessarily were criminal since no justification could ever exist for, inter alia, the sexual violence or torture of the detainees. Given his position as the director, Mr Njeem was not only aware of the problematic detention conditions but by leaving them in place for a prolonged period, he necessarily intended for the conditions to exist, and intended for the detainees to be harmed by them. He was either aware of the criminal acts being committed against detainees or, when they were committed at times he was not present, he meant for the acts to happen and knew they would occur in the ordinary course of events.
98. In light of the above, the majority of the Chamber finds reasonable grounds to believe that Mr Njeem acted with intent and knowledge within the meaning of article 30 of the Statute in relation to all the crimes found to have been committed.

¹⁸¹ See para. 93 above.

5. Conclusion

99. Accordingly, the majority of the Chamber concludes that there are reasonable grounds to believe that Mr Njeem is criminally responsible within the meaning of article 25(3)(a) and (b) of the Statute for: the crime against humanity of imprisonment (article 7(1)(e) of the Statute); the war crime of outrages upon personal dignity (article 8(2)(c)(ii) of the Statute); the war crime of cruel treatment (article 8(2)(c)(i) of the Statute); the war crime and crime against humanity of torture (articles 8(2)(c)(i) and 7(1)(f) of the Statute); the war crime and crime against humanity of sexual violence (articles 8(2)(e)(vi) and 7(1)(g) of the Statute); and the war crime and crime against humanity of murder (articles 8(2)(c)(i) and 7(1)(a) of the Statute) committed in Mitiga Prison from 15 February 2015 onwards. In the alternative, the majority of the Chamber finds reasonable grounds to believe that Mr Njeem is criminally responsible within the meaning of article 25(3)(d) or 25(3)(c) of the Statute for the aforementioned crimes.

100. Furthermore, the majority of the Chamber concludes that, for certain incidents, there are reasonable grounds to believe that Mr Njeem is primarily criminally responsible within the meaning of article 25(3)(d) or 25(3)(c) of the Statute for: the war crime and crime against humanity of sexual violence (articles 8(2)(e)(vi) and 7(1)(g) of the Statute); the war crime and a crime against humanity of rape (articles 8(2)(e)(vi) and 7(1)(g) of the Statute); and, the war crime and a crime against humanity of murder (articles 8(2)(c)(i) and 7(1)(a) of the Statute), committed in Mitiga Prison from 15 February 2015 onwards.

101. For the war crime and a crime against humanity of rape of a detainee by fellow-detainees (articles 8(2)(e)(vi) and 7(1)(g) of the Statute) and the crime against humanity of persecution (article 7(1)(h) of the Statute) committed in Mitiga Prison from 15 February 2015 onwards, the majority of the Chamber concludes that there are reasonable grounds to believe that Mr Njeem is criminally responsible for these acts within the meaning of article 25(3)(c) of the Statute.

B. Necessity of the arrest

102. The Prosecution submits that the arrest of Mr Njeem is necessary to ensure his appearance before the Court.¹⁸² The majority of the Chamber accepts that it is ‘highly

¹⁸² Application, para. 159.

unlikely that [Mr Njeem] would surrender voluntarily, given his alleged conduct, nor in any event is it likely that the Libyan authorities will cooperate in [Mr Njeem's] voluntary appearance given Libya's challenges to the ICC's jurisdiction over all crimes and suspects within its territory, and lack of domestic proceedings related to the serious allegations contained in [the Application]'.¹⁸³ After evaluating the information submitted by the Prosecution,¹⁸⁴ the majority of the Chamber is satisfied that the arrest of Mr Njeem is necessary within the meaning of article 58(1)(b)(i) of the Statute to ensure his appearance before the Court.

¹⁸³ Application, para. 159.

¹⁸⁴ LBY-OTP-00018876, pp 17-19.

FOR THESE REASONS, THE MAJORITY OF THE CHAMBER HEREBY

ISSUES a warrant of arrest for Osama Elmasry Njeem, for: the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute; the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute; the war crime of torture pursuant to article 8(2)(c)(i) of the Statute; the war crime of sexual violence pursuant to article 8(2)(e)(vi) of the Statute;; the war crime of murder pursuant to article 8(2)(c)(i) of the Statute; and, the war crime of rape pursuant to article 8(2)(e)(vi) of the Statute committed in Mitiga Prison from 15 February 2015 onwards and for: the crimes against humanity of imprisonment pursuant to article 7(1)(e) of the Statute; the crime against humanity of torture pursuant to 7(1)(f) of the Statute; the crime against humanity of sexual violence pursuant to article 7(1)(g) of the Statute; the crime against humanity of rape pursuant to article 7(1)(g) of the Statute; the crime against humanity of murder pursuant to article 7(1)(a) of the Statute; and the crime against humanity of persecution pursuant to article 7(1)(h) of the Statute committed in Mitiga Prison from 15 February 2015 onwards, as set forth in this warrant of arrest.

DECIDES that the warrant of arrest, currently classified under seal, *ex parte* Prosecution only, may be communicated, or its existence be revealed, and that the existence of the Prosecution's application for the present warrant may be mentioned, to any State or international organisation for the purposes of the execution of the warrant of arrest;

DECIDES that the Registrar shall, if at the indication of the Prosecution a situation arises warranting to do so: (i) prepare a request for cooperation seeking the arrest and surrender of Mr Njeem, and containing the information and documents required by articles 89(1) and 91 of the Statute and rule 187 of the Rules of Procedure and Evidence; (ii) transmit, in consultation and coordination with the Prosecution, the request to the competent authorities of any relevant State, or to any international organisation, in accordance with article 87 of the Statute and Resolution 1970 (2011) of the United Nations Security Council, to cooperate with the Court for the purpose of executing the request for arrest and surrender of Mr Njeem; and (iii) submit a progress report on the status of the execution of the request for cooperation no later than 15 days after the request is made;

DIRECTS the Registrar to prepare and transmit to any relevant State, in consultation and coordination with the Prosecution, any request for transit pursuant to article 89(3) of the Statute or any request for provisional arrest pursuant to article 92 of the Statute which may be necessary for the surrender of Mr Njeem to the Court; and

ORDERS the Prosecution to transmit to the Registry all information available to it that may be of assistance in the execution of the request for arrest and surrender as well as any information of relevance to assessing any risks to victims and witnesses associated with the transmission of the request for arrest and surrender.

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



Judge Iulia Antoanella Motoc
Presiding Judge



Judge Reine Adélaïde Sophie Alapini-
Gansou



Judge María del Socorro Flores Liera

Dated this Saturday, 18 January 2025

At The Hague, The Netherlands

Dissenting Opinion of Judge Socorro Flores Liera

1. I respectfully disagree with my colleagues' decision to issue a warrant of arrest against Osama Almasri Njeem (the 'Majority Decision'). Pursuant to article 19(1) of the Statute, the Chamber must consider whether the Court has jurisdiction over the alleged conduct. While I agree in general with the jurisprudence on the criteria to assess whether a case falls within the jurisdiction of the Court,¹⁸⁵ I disagree with the way it has been applied in this case. The reasons underpinning the present opinion are largely based on the views expressed in my dissenting opinions appended to a previous series of warrants for arrest in the Libya situation.¹⁸⁶
2. The Prosecution alleges that Mr Njeem is responsible for war crimes and crimes against humanity 'committed as part of an attack directed against the Libyan civilian population detained in Mitiga Prison in Tripoli'.¹⁸⁷ According to the Prosecution, the crimes 'were committed from around February 2015 to until at least 2 October 2024'.¹⁸⁸
3. By reference to previous decisions rendered by Pre-Trial Chamber I, the Prosecution contends that 'acts committed in the context of the conflict(s) occurring in Libya until at least 2018 [are] at least sufficiently linked to this situation'.¹⁸⁹ It is the Prosecution's contention that the crimes alleged in its application '(from 2015 until the present) are linked to and follow from the ongoing crisis in Libya which prompted [the 2011 Resolution]'.¹⁹⁰
4. The majority of the Chamber finds reasonable grounds to believe that the alleged crimes described in the Application are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral given that they took place in the context of the situation of crisis that triggered the adoption of the 2011 Resolution.¹⁹¹ While the alleged crimes are grave and warrant an investigation and prosecution from the competent authorities, for the reasons that follow, I respectfully disagree with my colleagues insofar as they conclude that the Court enjoys jurisdiction to adjudicate these crimes.

¹⁸⁵ Majority Decision, para. 4 (setting out the previous jurisprudence on sufficient link).

¹⁸⁶ See e.g. Dissenting Opinion of Judge Socorro Flores Liera to the 'Warrant of Arrest for Abdurahem Khalefa Abdurahem Elshgagi ('Abdulahem Al Kani')', issued on 6 April 2023, public redacted version issued on 4 October 2024, ICC-01/11-141-Anx1, pp. 26-32 (the 'First Dissenting Opinion').

¹⁸⁷ Application, para. 7.

¹⁸⁸ Application, paras. 7.

¹⁸⁹ Application, para. 15.

¹⁹⁰ Application, para. 16.

¹⁹¹ Majority Decision, para. 11.

5. The 2011 Resolution refers to 15 February 2011 as the starting point for the Court's temporal jurisdiction without explicitly indicating until which point in time such jurisdiction would continue.¹⁹² Although it is difficult to indicate a precise time frame, referrals by the Security Council are not without limits. They are subject to the entire legal framework of the Statute and cannot be interpreted in a vacuum. A referral under article 13(b) of the Statute is necessarily linked to the context that originated it. In the present case, a plain reading of the resolution clearly demonstrates that the situation in Libya was referred to the Court after the Security Council: 'condemn[ed] the violence and use of force against civilians'; '[d]eplor[ed] the gross and systematic violation of human rights, including the repression of peaceful demonstrators, express[ed] deep concern at the deaths of civilians, and reject[ed] unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government'.¹⁹³ The Security Council further '[c]onsider[ed] that the widespread and systematic attacks [at the time] taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'.¹⁹⁴

6. It is therefore clear that the situation in Libya was referred to the Court as a result of the actions by the Gaddafi regime against its own civilian population; acts that may have amounted to crimes against humanity. This is also clear from the text of the 2011 Resolution recalling 'the Libyan authorities' responsibility to protect its own population'.¹⁹⁵ While it may be correct that after the death of Muammar Mohammed Abu Minyar Gaddafi on 20 October 2011, 'the fighting and civil unrest continued in Libya',¹⁹⁶ these events are not related to those that triggered the referral by the Security Council. This is because the latter were focused on the 'widespread and systematic attacks [...] against the civilian population' primarily carried out by 'the highest level of the Libyan government'.¹⁹⁷ This is clear both from the language used in the 2011 Resolution as explained above as well as from the initial focus of the Prosecution's

¹⁹² S/RES/1970 (2011), p. 2.

¹⁹³ S/RES/1970 (2011), p. 1.

¹⁹⁴ S/RES/1970 (2011), p. 1.

¹⁹⁵ S/RES/1970 (2011), p. 2.

¹⁹⁶ Majority Decision, para. 5.

¹⁹⁷ S/RES/1970 (2011), p. 1.

investigation on members of the Gaddafi regime¹⁹⁸ and on crimes against humanity rather than war crimes.¹⁹⁹

7. I note that the Prosecution has attempted to address the concerns and reservations expressed in my previous dissenting opinions regarding its prior characterisation of the events in Libya as the 'same conflict'.²⁰⁰ It now submits that 'irrespective whether the course of events should be characterised technically as a single armed conflict, or multiple conflicts, the question for the purpose of jurisdiction is factual', and '[i]n that regard, the serious armed violence which indisputably began in 2011 continues until the present day'.²⁰¹ I remain unpersuaded. On the basis of the limited information, it cannot be assessed whether fighting during the period of the alleged conduct amounted to a non-international armed conflict at all, for which a sufficient level of intensity in hostilities between two or more sufficiently organised armed actors is required, or whether the alleged non-international armed conflict was the same or rather a different conflict than the one that took place in early 2011.

8. I disagree on this point with the view adopted by my colleagues in the warrants of arrest issued with respect to Al-Werfalli and other related cases.²⁰² In those cases the Chamber established the 'sufficient link' on the basis that the suspects were part of the Al-Saiqa Brigade, a party that was involved in the conflict since the events that triggered the 2011 Resolution, and which satisfied the Court that the 'alleged crimes are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral'.²⁰³ Disagreement aside, the Chamber made an effort at that time to find a sufficient link. However, in the current situation, there is no comparable temporal link to the events that triggered the 2011 referral.

9. My colleagues consider that 'it is sufficiently shown that a situation of turmoil has been ongoing since the 2011 Resolution', and for the purposes of establishing the jurisdiction of the

¹⁹⁸ Pre-Trial Chamber I, *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, [Warrant of Arrest for Al-Tuhamy Mohamed Khaled](#), 18 April 2013, ICC-01/11-01-13-1; Pre-Trial Chamber I, *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'](#), 27 June 2011, ICC-01/11-01/11-1 ('*Gaddafi et al.* Warrant of Arrest').

¹⁹⁹ [Gaddafi et al. Warrant of Arrest](#).

²⁰⁰ First Dissenting Opinion, para. 7.

²⁰¹ Application, para. 17.

²⁰² [Al-Werfalli Warrant of Arrest](#), paras 4-6, 25; Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al Werfalli*, [Second Warrant of Arrest](#), 4 July 2018, ICC-01/11-01/17-13 ('*Al-Werfalli* Second Warrant of Arrest'), paras 9-13, 33.

²⁰³ [Al-Werfalli Warrant of Arrest](#), para. 23. See also [Al-Werfalli Second Warrant of Arrest](#), para. 20.

Court, are ‘therefore satisfied that the crisis in Libya extended until at least 2 October 2024’.²⁰⁴ While it may be factually correct that a situation of turmoil has been ongoing since the 2011 Resolution, this does not automatically establish a sufficient link between the criminal allegations put forward by the Prosecutor and the situation as it was originally referred. A sufficient link requires a direct connection between the situation that triggered the referral and the alleged crimes and is crucial to ensure justice. In my view, it is also a stretch to assert that the Special Deterrence Forces – also known colloquially as RADA ‘emerged as a result of the 2011 crisis that triggered the 2011 Resolution, and the aftermath of this crisis’.²⁰⁵

10. It appears that there is an effort to force a link with the events that triggered the jurisdiction of the Court which, if accepted, in practice would mean that the Court may continue exercising its jurisdiction indefinitely over a non-State party. I am unable to agree with such an approach, which finds no basis in the specific Security Council referral, in the legal framework of the Court or in international law more generally.

11. The approach proposed is also inconsistent with that followed in relation to State referrals, thereby somehow suggesting a differential treatment to referrals by the Security Council. By way of example, the Central African Republic (the ‘CAR’) referred the situation in its territory since 1 July 2002 to the Court with no end date specifically included.²⁰⁶ This triggered the first investigation into the CAR. However, on 30 May 2014, the CAR submitted a new referral in relation to the situation in its territory since 1 August 2012, triggering the so-called CAR II situation.²⁰⁷ The Prosecution treats these situations as different for the purposes of its investigations.

12. Similarly, Côte d’Ivoire submitted a first declaration accepting the Court’s jurisdiction pursuant to article 12(3) of the Statute on 18 April 2003 to investigate acts committed in its territory ‘since the events of 19 September 2002’.²⁰⁸ The declaration was ‘made for an indeterminate duration’.²⁰⁹ However, both on 14 December 2010 and on 3 May 2011, Côte

²⁰⁴ Majority Decision, para. 6.

²⁰⁵ Majority Decision, para. 7.

²⁰⁶ [OTP Press Release](#), 7 January 2005.

²⁰⁷ [OTP Press Release](#), 24 September 2014.

²⁰⁸ [Cote d’Ivoire first declaration](#).

²⁰⁹ [Cote d’Ivoire first declaration](#).

d'Ivoire reconfirmed its acceptance of jurisdiction, referring in particular to alleged crimes committed since March 2004.²¹⁰

13. The above illustrates that the Court's jurisdiction triggered by the Security Council referral in this case seems to be interpreted more expansively when compared with situations where the Court's jurisdiction has been triggered by State referrals. If anything, jurisdiction triggered on the basis of referrals by the Security Council, given their effects, should be interpreted within the strict limits of the resolution originating them, and not in a more expansive form compared to the Court's jurisdiction triggered by a State referral. It is important to recall that Security Council referrals may concern non-State Parties that have not ratified the Rome Statute – as is the case for the only two Security Council referrals to date. It is also important to note that, contrary to investigations that concern State Parties, the option of withdrawal pursuant to Article 127 of the Statute and thereby express a view on the Court's jurisdiction, is not open to non-State Parties referred to the Court by the Security Council. Overstretching the jurisdiction of the Court in these situations implies a serious risk of undermining the credibility of the Court.

14. I disagree also with the Prosecution and with my colleagues on the interpretation they give to the submission of periodical reports to the Security Council by the Prosecutor and to the lack of objection to such reporting as a way to “sanction” the expansive jurisdiction from the Court.²¹¹ This is an interpretation not compatible with the Rome Statute and with the practice of the Security Council.²¹² The Prosecution's periodic reporting to the Security Council derives from the specific terms of resolution 1970 (2011) in which it extended a standing invitation to the Prosecution to address periodically the Council on actions taken pursuant to such resolutions.²¹³

15. It cannot be argued that the presentation of periodical reports alter the terms and scope of the 2011 Resolution or expand the jurisdiction of the Court. In this context, it is important to recall that the Security Council is a collegial body that, as such, acts through the resolutions adopted by its members under the applicable rules of procedure. I note that there have been no resolutions by this UN body validating the Court's alleged ongoing jurisdiction in the Libya

²¹⁰ [Cote d'Ivoire second declaration](#); [Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'](#), 15 November 2011, ICC-02/11-14-Corr, para. 10.

²¹¹ Majority Decision, para. 10; Application, paras 44-45.

²¹² For the Practice of the Security Council, see documents S/96/Rev.7 and S/2017/507.

²¹³ See Resolution 1970 (2011), para. 7.

Situation. On the contrary, all resolutions adopted by the Security Council on Libya since resolution 1970 (2011) recall the terms of such resolution. Libya could voluntarily ratify the Statute and become a State Party or could accept the jurisdiction of the Court under Article 12(3) of the Statute, allowing in this way the Prosecution to broaden the scope of its investigations beyond the terms and scope of the 2011 Resolution.

16. Lastly, I note the Prosecution's allegation that 'at all material times, there was a relevant [non-international armed conflict], and a nexus between the alleged crimes and the [non-international armed conflict]'.²¹⁴ In my previous dissenting opinions I have expressed some reservations on this point. The arguments and the material adduced to address these concerns do not bring any new legal or factual elements which would warrant reconsideration of my opinion on the matter. Indeed, the new submissions do not change my view that the Prosecution's position is legally flawed. However, in light of my views on the jurisdictional matter, I need not delve into this matter any further.

17. In light of the above considerations, I disagree with the issuance of a warrant of arrest against Mr Njeem.

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



Judge María del Socorro Flores

Liera

Dated this Friday, 24 January 2025

At The Hague, The Netherlands

²¹⁴ Application, para. 47.