

1 International Criminal Court
2 Pre-Trial Chamber I
3 Situation: Libya
4 In the case of The Prosecutor v. Khaled Mohamed Ali El Hishri - ICC-01/11-01/25
5 Presiding Judge Iulia Antoanella Motoc, Judge Reine Adélaïde Sophie Alapini-Gansou and
6 Judge María del Socorro Flores Liera
7 Confirmation of Charges Hearing - Courtroom 1
8 Wednesday, 20 May 2026
9 (The hearing starts in open session at 10.04 a.m.)
10 THE COURT USHER: [10:04:30] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE MOTOC: [10:04:57](Interpretation) Good morning, everybody.
14 Court officer, could you please call the case.
15 THE COURT OFFICER: [10:05:07] Good morning, Madam President. Good morning, your
16 Honours.
17 This is the situation in Libya, in the case of The Prosecutor versus Khaled Mohamed Ali El
18 Hishri, case reference ICC-01/11-01/25.
19 And for the record, we are in open session.
20 PRESIDING JUDGE MOTOC: [10:05:23](Interpretation) Thank you.
21 I would like to welcome everyone to this second day of the confirmation of charges hearing.
22 I would like to first of all ascertain with the parties and participants if there have been any
23 changes to the composition of their teams. I would like to start today with the Defence.
24 Counsel, Mr Hassan.
25 MR HASSAN: [10:05:52] Good morning, your Honour. Good morning, honourable panel.

1 No changes, but if we can finish today, we will be -- finish all four hours today, if that's
2 possible.

3 PRESIDING JUDGE MOTOC: [10:06:14](Interpretation) Thank you very much, counsel.

4 I now turn to the Legal Representatives of Victims. Have there been any changes in your
5 team, Madam Pellet?

6 MS PELLET: [10:06:27](Interpretation) Thank you, Madam President. No, there have not
7 been any changes.

8 PRESIDING JUDGE MOTOC: [10:06:32](Interpretation) Thank you.

9 And finally, for the OTP, counsel?

10 MS KHAN: [10:06:38] Good morning, Madam President. There are no changes in our
11 appearances.

12 PRESIDING JUDGE MOTOC: [10:06:42](Interpretation) Thank you very much, Deputy
13 Prosecutor.

14 As I said, we are now commencing the second day of our confirmation of charges hearing.

15 We shall continue today with our arguments on the merits, and I now hand the floor to the

16 OTP. Please take your time to set up, and I think that we shall finish or wrap up at about
17 midday. You shall have the entire session of this morning. Thank you.

18 MS LUPING: [10:07:09] Thank you, Madam President, your Honours. My name is

19 Dianne Luping. I appear on behalf of the Prosecution. I'll be addressing the crimes of
20 enslavement and persecution, starting with enslavement, count 13.

21 Sorry, Madam President. I appear to have some problems with the -- no, now it's working.

22 At Mitiga there was an institutionalised system of enslavement so that even where different

23 people suffered from multiple and different forms of exercise of powers of ownership over

24 them, many of their descriptions of what they suffered and the acts of their different enslavers

25 were consistent. The controls to which enslaved detainees were subjected, and their

1 corresponding deprivation of liberty and autonomy, went far beyond those of any lawful
2 prison facility and instead amounted to an exercise of powers of the rights of ownership over
3 them.

4 P-943, a female detainee in the Women's Section, described Khaled El Hishri's controls over
5 the lives of women and children in the Women's Section, including her own, all detailed in
6 the Pre-Confirmation Brief. She concludes, and I quote:

7 "Khaled El Hishri was my nightmare. He showed me what hell was [...]. I was beaten and
8 tortured for no reason. [...]. El Hishri is more than evil, he is almighty." End quote.

9 Controls over the lives and men and boys in other parts of Mitiga were similarly
10 all-encompassing and indicative of their enslavement.

11 One witness, who was a detainee enslaved in many ways, including for forced labour, was a
12 *capo*. As you have heard, *capos* were enslaved detainees placed in charge of other detainees
13 and forced to facilitate crimes committed against them. He explained why he became a *capo*,
14 saying, quote:

15 "I did my best to survive in prison and I had to show that I was obedient." End quote.

16 P-498 described one of the many common experiences of controls over all detainees; namely,
17 deliberate starvation and how this deprived them of their autonomy. Quote:

18 "It is a policy in Mitiga Prison to starve you to the point where your only focus is what I will
19 eat today. They want you to forget about everything else, your family, your work, your
20 whole life. You can only think about what you will eat. My thinking became limited when
21 I was detained. I even forgot about family visits. I lost hope and the same [of] my family."
22 End quote.

23 As witnesses collectively describe, a living hell, a struggle for daily survival, controls over
24 detainees' liberty and autonomy in essentially every aspect of their lives, even their thoughts.
25 This was the grim reality for all enslaved detainees at Mitiga. From their viewpoint, their

1 enslavers, including Khaled El Hishri, literally became all powerful, able to control their lives
2 and exercise powers of ownership over them in a very systematic and deliberate way.

3 Your Honours, I will be first highlighting some key points relevant to understanding the
4 scope of the crime of enslavement in this case and will then look at examples of key categories
5 of enslaved detainees.

6 First, to better understand the scope of enslavement in this case, I will address briefly four
7 points: Who the enslaved detainees were; where they were held and enslaved; for how long
8 they were enslaved; and how the perpetrators enslaved them.

9 First, turning to who was enslaved. The enslaved detainees were Libyans and non-Libyans,
10 including Black Migrants, namely non-Libyans from east, west, central and southern Africa.
11 They were also of different ethnicities, races, beliefs, religions, ages, genders, and sexual
12 identities.

13 Second, turning to where they were enslaved. Enslaved detainees were enslaved within
14 Mitiga Compound and in and around Tripoli. Most enslaved detainees were enslaved
15 within the main prison inside Mitiga Compound. They were also enslaved elsewhere
16 outside the main prison within the compound. For instance, enslaved fighters held in
17 underground bunkers or by the Naqliah, enslaved children and adults held isolated in other
18 separate locations, such as in solitary cells or near the rehabilitation training centre and
19 mosque.

20 Enslaved children and adults were also used for forced labour in the compound. And
21 enslaved women and girls sexually violated and abused inside the Women's Section, and
22 some inside so-called leisure areas belonging to leaders, including El Hishri, within the
23 compound.

24 Outside Mitiga Compound, enslaved detainees were also subjected to an exercise of powers
25 of ownership in and around Tripoli. Libyans, non-Libyans, including Black African

1 Migrants, were taken out of Mitiga and used for hostilities. For instance, armament
2 deliveries inside Tripoli, such as at the airport; by the beach; in Al Kremiya/Kremia district;
3 and around, including outside Tripoli, such as at Sabratah and Tarhunah.

4 They were also used for fighting and hostilities, including at the front line in Tripoli, both
5 within and outside the compound. They were taken out of the compound and used for
6 forced labour by the beach road at the so-called leisure farms of leaders such as Kara and
7 El Hishri. Libyans, non-Libyans, males, females, including children, were enslaved by
8 sexual violence and rape outside Mitiga, at the beach, and in the leaders' leisure farms,
9 including that of El Hishri.

10 Third, in terms of for how long were the detainees enslaved at Mitiga, as you've heard, some
11 were held and enslaved just for a few days, whilst others for many years. As ICC Chambers
12 have confirmed, including in Ntaganda, there is no minimum period of time for enslavement.
13 Additionally in this case, even after some were supposed to be released, they continued to be
14 subjected to controls by perpetrators. For instance, those forced to join the SDF/RADA, or
15 those forced to convert to the belief system imposed by the perpetrators and then monitored
16 to ensure their continued compliance. In Ntaganda and other ICC cases, it has been
17 recognised that enslavement is a continuing crime.

18 Fourth, turning to how Mitiga Perpetrators enslaved detainees. Enslavement was
19 institutionalised and systematic. First, the leadership, including Khaled El Hishri, Kara and
20 Njeem, themselves enslaved detainees through many acts of exercise of powers of ownership
21 over many persons, and forced their subordinates to support and sustain this enslavement
22 system.

23 Second, the enslavement conduct happened constantly against all types of detainees and
24 controlling essentially all aspects of their autonomy. It was often intersectional, in that for
25 all detainees it was sexualised, gendered, in differing degrees, and for many also racialised.

1 Jurisprudence, set out at paragraphs 86 to 88 of the Pre-Confirmation Brief, makes clear the
2 following points when assessing if a person had powers of ownership exercised over them.
3 First, it is a case-by-case, fact-sensitive test. So what might be an indicator of enslavement in
4 one case, or for one person, can be different in another.
5 Second, indicators are therefore not exhaustive.
6 Third, there is no need to prove any one indicator and if one or more indicators of
7 enslavement are identified as applicable, enslavement is established.
8 Fourth, this also means looking at any relevant indicators as a whole and in the context,
9 which, in this instance, is an institutionalised system of enslavement.
10 Fifth, amongst the many indicators of enslavement mentioned in previous jurisprudence, at
11 least four are relevant in this case and common to all enslaved detainees, demonstrating how
12 the Mitiga Perpetrators exercised powers of ownership over them and deprived them of their
13 liberty and their autonomy. But these indicators are mere examples. There are also
14 additional indicators in this case relevant for different enslaved detainees, including those
15 enslaved by forced labor or because of their especial vulnerability, both these factors being
16 stand-alone indicators in themselves of enslavement.
17 I will now outline the four key indicators.
18 Turning to the first indicator, Mitiga Perpetrators, including El Hishri, exerted powers of
19 ownership over enslaved detainees by exerting controls over personal liberty, physical
20 movement, including through detention and unlawful imprisonment. The perpetrators
21 systematically restricted the detainees' physical movement, including by forcing them to
22 suffer inhumane cell conditions, as was described yesterday.
23 These extreme movement controls were institutionalised. Khaled El Hishri even rebuked or
24 punished other Mitiga Perpetrators he thought were too lenient with detainees. For instance,
25 bringing them -- for bringing them out of their cells for health reasons.

1 Perpetrators also deprived detainees of their personal liberty and physical autonomy through
2 their unlawful detention and imprisonment. This was systematic in that many were
3 unlawfully imprisoned, arbitrarily detained by being held without charge or without any
4 valid charge; and they were all *subjected to the unlawful, inhumane conditions in which
5 they were kept.

6 Many were detained with the very purpose to enslave them. I refer to Pre-Confirmation
7 Brief, footnote 293. The leaders, including El Hishri, deliberately prevented their release.
8 They decided whether detainees would be released, often ignoring official and judicial release
9 orders. The leaders enslaved by unlawfully imprisoning as many detainees as possible, in
10 part because of financial gain.

11 Turning to the second indicator, perpetrators, including leaders such as El Hishri and Njeem,
12 exercised powers of ownership over detainees by their systematic, constant cruel treatment,
13 abuse, including torture of all detainees, controlling physical and psychological autonomy.
14 This systematic abuse included regular, individual, collective punishments, daily beating,
15 starvation, deprivation of medication and medical treatment, many forced to give blood for
16 injured RADA fighters, and, as will be explained later, this also includes unlawful forced
17 labour.

18 Khaled El Hishri and other leaders institutionalised these controls by themselves perpetrating
19 this enslavement conduct, and Khaled El Hishri even violently punished guards and enslaved
20 detainees he viewed as obstructing this type of mistreatment.

21 Turning to the third indicator, Mitiga Perpetrators, including Khaled El Hishri, exercised
22 powers of ownership by subjugating all detainees through psychological control, pressure
23 and coercion, and by using their vulnerabilities, such as race, gender, age, to further subjugate
24 and make these detainees submissive and subservient to the will of Mitiga Perpetrators.

25 Psychological pressure and coercion were systematic, institutionalised, as the leaders,

1 including El Hishri and their subordinates constantly used these same methods, including
2 violence and threat of violence, violent retribution, threat of violent retribution, constant
3 torture, cruel treatment, abuse, dehumanising derogatory language, pressure by threats or
4 actual harm, including criminal abduction of family members to pressure the targeted
5 persons to do what the leaders and other perpetrators wanted them to do. And nobody was
6 spared, even children and the elderly. Controls over personal thoughts and
7 beliefs - religious and political - by psychological and physical coercion, including torture.
8 Turning to the fourth indicator, the leaders, including El Hishri and other perpetrators,
9 exercised powers of ownership over detainees by exerting controls over their sexuality, sexual
10 and gender identity in different ways and in different degrees, depriving them of their
11 autonomy over sexual and gender identity, sexual and reproductive autonomy. This too
12 was systematic and institutionalised.

13 The perpetrators, the leaders, including El Hishri, exercised their powers of ownership by
14 controlling and restricting the detainees' autonomy over their sexual and gender identity by
15 imposing their views about gender and gender hierarchies. In particular, they did this in the
16 following way.

17 First, as you've heard, they constantly used sexualised, gendered, dehumanising language to
18 control, subjugate and deprive both male and female detainees of their sexual autonomy.

19 Second, they arrested and punished, including by torture and cruel treatment, women and
20 girls perceived as having jobs that they viewed as inappropriate for their gender - politicians,
21 journalists, singers, footballers - or for behaviour that they considered inappropriate for their
22 gender, such as being seen at the beach or using social media. They similarly arrested and
23 punished by torture and cruel treatment detainees whose gender identity or expression was
24 perceived as inappropriate. Women, girls perceived as being so-called "manly". Men, boys
25 being actually or perceived as being gay or so-called effeminate.

1 Thirdly, they treated as inferior, women, girls, based on the perpetrators' views of gender
2 hierarchies. For instance, El Hishri transported women and girls like cattle by sticks and
3 ropes.

4 Fourth, they imposed their gendered controls over appearances and dress codes for males
5 and females with punishments, including severe beatings for non-compliance. El Hishri even
6 shot a woman for having an item of clothing he found inappropriate.

7 Fifth, they imposed unlawful gendered labour roles. Men used to fight and torture other
8 detainees; women and girls beaten when taken out of their cells to do domestic labour.

9 Sixth, they attacked the sexual and reproductive autonomy of males and females, depriving
10 them of that autonomy, by the following:

11 They conducted and ordered sexualised bodily searches that amount to rape and sexual
12 violence. They committed other forms of rape, sexual violence, threats of both during or
13 outside torture. For instance, P-439, anally raped by penis, by his torturer was told, and I
14 quote: "you will be under RADA all your life". End quote.

15 They deliberately targeted and attacked genitals, anus, buttocks, alongside gendered insults
16 and other controls over bodies designed to disempower and emasculate, denigrate and
17 control men and boys.

18 The perpetrators carried out similar attacks against women and girls, with additional attacks
19 on their breasts, and some perpetrators, including Khaled El Hishri, by ejaculating over their
20 bodies. All of this behaviour designed to control, subjugate, denigrate, reinforce gender
21 hierarchies over women and girls.

22 For instance, when El Hishri raped one victim, he subjected her to extreme controls over her
23 sexuality and bodily integrity by a horrific sexual assault on her body, described graphically
24 at paragraph 93 of the Pre-Confirmation Brief. Some perpetrators were even notorious for
25 attacking the genitals of enslaved detainees, including El Hishri.

1 They permanently deprived some women, men and children of their reproductive autonomy
2 or ability to have children. This includes a child, F-3029, raped multiple times by leaders,
3 including El Hishri. She was impregnated, and El Hishri brought her to a clinic where she
4 was forced to have an abortion and her uterus was removed.

5 El Hishri and others also deprived women and children of adequate food and medicines until
6 some, in desperation, were subjected to sexual violence in exchange for food or medicines for
7 themselves or their children.

8 Many of these detainees were especially vulnerable, which is also an indicator of enslavement.

9 All these groups were subjected to systematic and institutionalised enslavement. And the
10 four indicators of enslavement apply to them all. This includes: Male and female Black
11 African Migrants; women and children in the Women's Section; children in the men's section;
12 boys and youth held apart from others, isolated in special sections; men and boys perceived
13 as or actually gay or so-called effeminate, women or girls perceived as manly; prisoners held
14 for perceived ideological status, religious, political beliefs; and enslaved forced labourers.

15 Black African Migrants were treated the worst. But there were others enslaved. All
16 enslaved detainees were subjected to different forms of, one or more, exercise of powers
17 attaching to the rights of ownership within the institutionalised systemic enslavement.

18 I will address two examples.

19 First, enslaved forced labourers. The leaders, including El Hishri and other perpetrators,
20 systematically enslaved detainees, Libyans, non-Libyans, including Black African Migrants,
21 of all genders and ages, by unlawful forced labour to serve their group and personal interests
22 so that forced labour was systematic and institutionalised.

23 Relevant to indicator 1, they were all subjected to movement restrictions and unlawfully
24 imprisoned. Some, like 1041, were meant to be released but instead remained unlawfully
25 imprisoned and threatened to be killed to work for SDF/RADA. Others, including those

1 who so-called volunteered for labour and even blood transfusions for a bit more food or a bit
2 more room in a cell, remained enslaved, so had no free choice.

3 In fact, like all slavery crimes, consent is irrelevant and not possible where the detainee is
4 enslaved. As the Appeals Chamber in Kunarac confirmed, lack of consent is not an element
5 of the crime of enslavement, because this crime flows from claimed rights of ownership.

6 Relevant to both indicators 2 and 3, the perpetrators forced enslaved detainees to do unlawful
7 forced labour; help commit crimes against other detainees; do unsanitary or hazardous labour,
8 such as treat contagious detainees; do extremely hard, dangerous labour, such as heavy
9 construction at the leaders' private properties, including El Hishri; and fight in armed
10 hostilities for RADA forces, including under Kara; and to do labour that exposed them to the
11 greater risks of physical and psychological harm by being forced to move out of their cells
12 into areas where crimes were happening or where they were forced to face violent
13 perpetrators like El Hishri.

14 Relevant to indicator 4, forced labour was also gendered, men and boys forced to fight or help
15 torture others, the women and girls forced to do domestic labour, being exposed to greater
16 risk. Both genders * being forced to do invasive bodily cavity searches amounting to sexual
17 violence and rape, also making them victims as well of sexual violence. And the forced
18 labour was racialised, Black African Migrants and other non-Libyans given the worst types of
19 work.

20 Turning to children and youth.

21 El Hishri and other perpetrators enslaved children and youth held throughout Mitiga Prison:
22 children in the Women's Section and in the men's section; children and youth isolated in
23 separate locations in Mitiga, including in the children's cell; and others held near the
24 rehabilitation and training centre. Children born to enslaved persons in Mitiga were also
25 victims of enslavement. And I refer to the Kony Confirmation Decision.

1 All indicators 1, 2, 3 and 4 are applicable to how these vulnerable children and youth were
2 enslaved by institutionalised, systematic forms of enslavement.

3 Relevant to indicator 1: The perpetrators controlled and restricted their movements and
4 unlawfully imprisoned them. Some were even criminally abducted to pressure family
5 members to do what the perpetrators wanted. Others, even those sent by their parents, were
6 also unlawfully imprisoned because of their inhumane conditions, torture, and, for some,
7 even rape.

8 Relevant to indicators 2 and 3: El Hishri and other perpetrators exercised powers attaching to
9 the rights of ownership over children and youth by subjecting them to torture, cruel
10 treatment, abuse and psychological coercion. For instance, depriving all of them of adequate
11 food, medicine and medical treatment. As one child in the main prison said, and I quote,
12 "we were starving so much, [that] if given the choice between freedom and food, we would
13 have chosen the food". End quote.

14 The leaders and perpetrators also exercised powers of ownership over them by other forms of
15 torture, cruel treatment, abuse and psychological coercion.

16 Children in the Women's Section, forced to watch their mothers and other adults forcibly
17 nude, subjected to invasive bodily searches, tortured, beaten, and then -- and themselves hit,
18 and some tortured and raped. They were also deprived of their ideological autonomy.

19 Beautiful religious recitations that usually give great comfort to Muslims were instead used
20 by El Hishri as a form of sensory torture. One devout Muslim said it was played constantly,
21 and I quote, "so loud the young children always cried". End quote.

22 This also impacted on the ability for some to keep enjoying these religious recitations. For
23 instance, one devout Muslim said that El Hishri played these recitations whilst he was
24 beating women and girls, including her. She can no longer listen to them because, and I
25 quote, "this caused me a trauma [...]. I am always reminded of the beating". End quote.

1 El Hishri also verbally showed that he and other perpetrators viewed the children as enslaved.
2 When he took them from the Women's Section to the perpetrators' operated school where
3 they imposed their ideology on them, he said to them, and I quote, "You are the RADA
4 children". End quote.

5 Mitiga leaders and other perpetrators also exercised controls, through indicators 2 and 3, over
6 children and youth held isolated in separate areas.

7 Many of the young prisoners taken to the mosque and -- for rehabilitation training were
8 tortured by *falqa* torture method * on the soles of their feet, by being beaten, chastising them
9 to make them obedient, and severely punish them for non-compliance. Young boys kept in
10 the children's cell were beaten and whipped with a PPR if they made any trouble or noise.

11 Leaders, including El Hishri and other perpetrators, regularly tortured and beat other
12 children and youth in the men's section. One detainee was regularly tortured, by suspension
13 torture, beatings, sexualised torture - threats of rape and hitting of his testicles.

14 Relevant to indicator 4: Children in the Women's Section, by being forced to watch their
15 mothers and other adults subjected to sexual violence, themselves became victims of sexual
16 violence, and some of these children were raped themselves. Other children and youth, held
17 isolated or separated from their parents, had acts of sexual violence, including rape,
18 committed against them, including one child who confirmed that he was raped by a Mitiga
19 leader, who other witnesses describe as a notorious rapist of boys and youth.

20 I now turn, your Honours, to the crime of persecution, counts 14 and 17.

21 Many detainees were persecuted on different grounds, some intersecting. I will address
22 three key points:

23 The counts, grounds of persecution and who were the targeted groups; intersectionality, how
24 these grounds intersect; and the non-exhaustive numbers of persecuted detainees.

25 There are four counts and four relevant grounds of persecution in this case.

1 Starting first with count 14: Political persecution:

2 In this case all Black African Migrants were persecuted on political grounds, for being
3 perceived as irregular migrants, and as obstacles to what Mitiga Perpetrators viewed,
4 politically, to be irregular migration. But it was unlawful for these perpetrators to target any
5 and all Black African Migrants for persecution on political grounds, by: automatically treating
6 any Black African Migrant as an irregular migrant because of their perceived or assumed
7 irregularity; as well as by targeting them for especially cruel treatment and as slaves because
8 of their perceived inferiority to Libyans.

9 Persecution on political grounds is not just limited to a persecuted victim's membership of a
10 political party or adherence to any particular ideology, but relates to any difference of opinion
11 over public affairs. Even if a person has no political views, they can still be targeted on
12 political grounds if they are perceived as opponents or obstacles to the perpetrators'
13 implementation of their political agenda.

14 For instance, when one detainee was purportedly facilitating illegal smuggling of migrants,
15 El Hishri sarcastically said to her, I quote: "I will do you a favour and put you with your
16 African migrant friends." End quote. For the detainee, quote, "[t]his was meant as
17 punishment", end quote, because all of these Black African Migrants, quote, "were treated
18 very poorly and considered as slaves". End quote. They were in extremely small, heavily
19 overcrowded cells.

20 Libyan detainees were also targeted on political grounds, for them -- for their perceived
21 non-compliance with the Mitiga Perpetrators' political stance, namely as perceived opposition
22 to the perpetrators' own agendas or interests.

23 For instance, 1026 stated, and I quote: "RADA goes after anyone who is from the East of Libya
24 because they are believed to be supporters of Haftar". End quote.

25 Moving to count 15: Religious persecution. Libyans, non-Libyans, including Black African

1 Migrants, were all targeted for religious persecution.

2 And they didn't just target for persecution those perceived as nonbelievers or those who
3 disagreed with the perpetrators' practices or beliefs, but anybody perceived as not complying
4 with their practices or views. This also included devout Muslims, some of whom may even
5 have held the same religious beliefs as the perpetrators, but all of who -- who suffered as well
6 because of the violent way in which the perpetrators imposed their ideological practices and
7 beliefs on all of them.

8 For instance, some devout Muslims for whom it is important to perform ablutions before
9 prayer were prevented in doing this because detainees were beaten to leave their cells quickly
10 for prayer. And as explained, all women and children, including those who are devout
11 Muslims, suffered from sensory torture inflicted by El Hishri because of the way he played so
12 loudly and constantly recitations on loudspeakers, and whilst they were being beaten. Now,
13 to be clear, the torture was not what was being broadcast, but the harsh loudness, constant
14 playing, and connection to being tortured by severe beating.

15 Additionally, perpetrators specifically targeted for torture and harsh treatment those that
16 they did perceive as disagreeing with their ideological practices or beliefs, or otherwise
17 viewed as non-compliant. This included other Muslims who were adherents of ideological
18 views or practices different to that of perpetrators, Christians, atheists, those perceived as
19 using sorcery. They forced them to convert: tortured them until they repented and
20 converted, and then monitored after they were released to make sure they continued to
21 practice the perpetrators' practices and beliefs.

22 One detainee was a Muslim whose ideological views and practices were different to that of
23 the perpetrators. He was tortured by suspension method, beaten, threatened at gunpoint to
24 agree with their different religious views, which he did, stating, and I quote, "I just wanted to
25 survive". End quote.

1 A Christian detainee arrested and held for his religious beliefs was forced to do religious
2 activities and tortured, stating, and I quote, "[...] We wanted to show we were making an
3 effort to learn but it was like ideological rape, forced to attend lecture and perform prayers
4 against our will [...]." End quote. He was mocked by one torturer who said to him, quote,
5 "you are a dog, you are a Christian". End quote. And even after his release they continued
6 to monitor his forced conversion.

7 Another detainee, an atheist, described how one torturer said to him, and I quote: "You either
8 believe in God or we will lift you to God". End of quote.

9 Turning to count 16: Primarily Black African Migrants were targeted for persecution on
10 grounds of nationality, race and ethnicity, both males and females. They were targeted for
11 arrest, detention and severe mistreatment, because of their nationalities; their racialised
12 ethnicities, as Black Africans not from northern Africa; and, because of the perpetrators' racist
13 perceptions of them as inferior, including because of their discriminatory views that
14 dark-skinned persons are, quote, "slaves".

15 And this was also compounded by their perceived status as irregular migrants.

16 They received the worst treatment at Mitiga, persecuted by being subjected to physical,
17 psychological abuse amounting to torture and cruel treatment.

18 A female detainee in the Women's Section described how F-3028, a Black African Migrant
19 woman, was deliberately refused medical aid by El Hishri and died. The suspect said, and I
20 quote: "Let her die. When the angels die, it's better for the" -- sorry, "When the devil dies, it's
21 better for the angels." End quote.

22 595 described the fate of all Black African Migrants at Mitiga, stating, and I quote: "Generally
23 speaking, African prisoners are discriminated against, so they get beaten more and get treated
24 like slaves inside the prison." End quote.

25 All agreed Black African Migrants received the worst treatment. However, there were some

1 other detainees also targeted for persecution on grounds of nationality, race and ethnicity.

2 For instance, 1710 described how detainees including Libyans who were of ethnicities that
3 were dark-skinned were also called slaves and also persecuted. They were treated less
4 favourably than other Libyans. 730 describes how Mitiga Perpetrators targeted for
5 discriminatory conduct almost all non-Libyans and gave them the worst types for forced
6 labour compared with Libyans.

7 Turning to count 17: Detainees were also persecuted on grounds of gender. There were
8 three main categories; namely, all women and girls at Mitiga; some because of their actual or
9 perceived gender identity including sexual orientation, such as gay or so-called effeminate
10 men and boys, as well as women and girls perceived as masculine; and all men and boys who
11 were subjected to violence to emasculate or feminise them.

12 These detainees were all targeted by arrest, detention and mistreatment, including, but not
13 limited to, acts and threats of sexual and reproductive violence.

14 Under Article 7(3) of the Statute, gender is defined as the two sexes, male and female, quote,
15 "within the context of society", end quote. This reference to "within the context of society"
16 means examining relevant societal constructs of gender including gender hierarchies, gender
17 and sexual identities and gender expressions, and this includes sexual orientation. As stated
18 in Triffterer, Article 7(3) must be read together with Article 21(3) to interpret these provisions
19 broadly, inclusively to include targeting of persons based on their sexual orientation.

20 Likewise, in this Court, PTC II recently confirmed in the decision on arrest warrants against
21 senior Taliban leaders that gender persecution includes the targeting of persons based on
22 expressions of sexuality or gender identity, and this includes sexual orientation.

23 In Colombia, the Special Jurisdiction for Peace has confirmed in a number of cases, including
24 the Marco Case 11, that persons targeted because of their sexual orientation and/or gender
25 identity or expression are considered victims of gender-based violence.

1 In this case, victims were targeted for gender persecution because of their expressions of
2 sexuality, their gender identity including sexual orientation, which were regarded as
3 inconsistent with the perpetrators' views on gender.

4 First, women and girls: Some arrested for conduct viewed as deviating from the
5 perpetrators' views of so-called appropriate societal behaviour for gender; as I've mentioned,
6 some arrested because of their jobs, such as politicians or singers; some because of their
7 public behaviour, such as being on social media or being seen with boyfriends.

8 All were tortured and subjected to cruel treatment and abuse in gendered ways; for instance,
9 by the violence that targeted their breasts, their buttocks, and by vaginal, anal and the oral
10 rapes, and by the misogynistic references to their gender, such as female sex

11 slaves - *sabiya* - bitch, whore, slut. Some had their reproductive autonomy targeted, such as
12 a pregnant woman who was tortured even after her waters had broken. Some were targeted
13 for sexual violence and rapes; some raped by El Hishri and others at the prison or in so-called
14 leisure areas or farms. Others, women and girls, compelled to have sexual intercourse to get
15 food or medicine for themselves or their children.

16 As I've mentioned, forced labour was on gendered lines: Some women and girls forced to
17 do domestic chores, exposing them to risks of beatings and witnesses of crimes. And they
18 all had dress and appearance codes imposed on them, which were gendered and which
19 usually involved harsh punishments for non-compliance.

20 El Hishri also treated baby boys and baby girls in the Women's Section differently because of
21 their gender. For instance, he allowed urgent medical treatment for a newborn baby boy,
22 but he denied urgent medical treatment for a newborn baby girl after finding out her gender.
23 She died.

24 Perceived allies of women and girls were also targeted for gender persecution, arrested and
25 mistreated. For instance, victim F-2152 was arrested for supporting women viewed by

1 perpetrators as wearing inappropriate clothing. Second, actual and perceived LGBTQI+
2 persons were arrested, detained, mistreated because they were viewed as not compliant with
3 the perpetrators' views and expectations on gender. They were targeted for sexualised
4 torture, reproductive violence and by discriminatory verbal abuse and threats.

5 One detainee, a gay man, during his torture, was stripped naked; beaten severely on his
6 buttocks; told to repent; asked how many times he had been penetrated; was orally, anally
7 raped; forced to touch a perpetrator's penis; called a mule, a Libyan derogatory term for a gay
8 man; mocked by others who tried to digitally penetrate his anus. One rapist, after raping
9 him said, and I quote: "I know many other gays like you [...] If you stay here, you will have
10 the same fate as others and be killed". End quote. And a senior Mitiga leader said to him,
11 and I quote, "you will never repent; you deserve to be killed". End quote.

12 Others, including P-54, targeted for beatings and torture for being perceived as gay, although
13 he was not, and F-3042, targeted for beating, sexual assault, forced labour for being viewed as
14 effeminate.

15 Third, men and boys were subjected to sexual reproductive violence in ways to emasculate
16 and feminise. As you've heard in great detail, some were subjected to anal rape, targeting of
17 their genitals, their penis, their buttocks. As Witness 1710 said, when he described how he
18 was beaten on his buttocks and his genitals, I quote, it "made me feel I was no longer a man".
19 End of quote.

20 Turning to intersectionality and numbers of victims, many victims of persecution were
21 persecuted on multiple intersecting grounds. Your Honours might decide, for instance, that
22 for certain grounds of persecution, such as religion -- in fact, all of the detainees at Mitiga
23 were persecuted. The Prosecution took a conservative approach for its numbers.

24 In the Document Containing the Charges it was stated that there were at least 138 victims of
25 persecution and that this was a non-exhaustive number. In the Pre-Confirmation Brief,

1 stating that at least 173 victims.

2 Like the figure for enslavement, both numbers are minimum figures. In annex 13, each

3 individual was listed only once and under a key ground of persecution for that victim.

4 However, it is evident from the facts related to each individual victim of persecution that

5 there are intersecting grounds relevant to them. Therefore, the numbers of victims under

6 each count are greater when each individual is counted amongst the intersecting grounds on

7 which they were persecuted.

8 I'd like to show visually how these 173 victims of persecution and certain targeted groups of

9 persecuted persons can be best understood and grouped under each ground.

10 Count 14: There were at least 19 victims on political grounds.

11 Count 15: At least 17 victims on religious grounds.

12 Count 16: At least 47 victims on national, racial ethnic grounds.

13 Count 17: At least 90 victims on gender grounds.

14 However, it's important to understand how these intersecting grounds of persecution and the

15 different relevant targeted groups intersect. For instance, this, starting with Black African

16 Migrant men, we listed at least 47 Black African Migrant men as victims of persecution under

17 national, racial, ethnic grounds. But these same 47 Black African Migrants were also

18 persecuted on political grounds and, like other detainees, on grounds of religion.

19 Second, Black African Migrant women. We listed at least four Black African Migrant

20 women as victims on the grounds of gender. But these four Black African Migrant women

21 were also persecuted on grounds of national, racial, ethnic grounds; religious and political

22 grounds.

23 Third, other women and girls accounted for 67 of the listed victims of persecution on grounds

24 of gender. Women and girls were also all victims of persecution on grounds of religion.

25 Likewise, other victims, men and boys, who accounted for 11 of the victims of persecution on

1 grounds of gender, were also all victims on religious grounds and eight of them also victims
2 on political grounds. Therefore, it's relevant when assessing individual victims of
3 persecution to consider both individual circumstances, but also relevant types of targeted
4 groups.

5 Your Honours, just briefly looking at the issue of persecutory intent. Mitiga Perpetrators
6 acted with the necessary persecutory intent when committing the crime of persecution.

7 What does this mean? Like any crime there is a difference between motivation and intent,
8 and it is irrelevant what the motivations might have been for the different perpetrators to
9 persecute detainees, some possibly motivated by power, money; others motivated
10 ideologically. But the question is whether they intended to persecute and on the relevant
11 grounds. For instance, a Mitiga guard who beats a detainee to get them out of their cell,
12 forces them to kneel, to recite the required prayers of the perpetrators, beats them for
13 non-compliance, intends to persecute that detainee on the grounds of religion. It is
14 irrelevant whether that guard was motivated by their own personal ideology or not.

15 In conclusion, Madam President, your Honours, there are substantial grounds to believe that
16 these crimes were committed, and counts 13 to 17 should be confirmed for trial.

17 I now pass the floor to my colleague, Mr Hesham Mourad.

18 PRESIDING JUDGE MOTOC: [10:59:08](Interpretation) Thank you very much.

19 Mr Mourad, you have the floor.

20 MR MOURAD: [10:59:51] Thank you, Madam President, your Honours.

21 In my submission, I will address Khaled El Hishri's individual criminal responsibility.

22 The Prosecution argues that Khaled El Hishri is criminally responsible under Article 25(3)(a),
23 (b), (c) and/or (d), as shown on the screen. Based on the evidence, the Prosecution submits
24 that there are substantial grounds to believe that Khaled El Hishri committed the crimes
25 charged under all these modes of liability. While noting that these modes are applicable to

1 the facts of the case cumulatively and/or alternatively, the Prosecution requests that the
2 Chamber confirm each of these modes.

3 This will ensure judicial economy and give the Defence an advanced notice of the different
4 modes of liability under which he may stand trial. It will then be up to the Trial Chamber,
5 on the basis of a full trial, to determine on which specific modes, if any, Khaled El Hishri may
6 eventually be convicted.

7 This approach is also consistent with your Honours' recent decision on the confirmation of
8 charges in Duterte case.

9 Before resuming my presentation, I would like to pause for a second and to note that on the
10 direct perpetration mode alone, Khaled El Hishri personally committed all 17 counts of the
11 charged crimes against no less than 159 victims.

12 This number is only a representative sample of victims that the Prosecution has
13 conservatively identified.

14 Looking at the facts of this case, we note that Khaled El Hishri's conduct under the direct
15 perpetration mode is significant in at least two ways:

16 First, there is not a single crime charged that he did not personally commit.

17 Second, this number of identified victims, while chosen conservatively for the purpose of the
18 confirmation hearing, remains one of the highest numbers of victims targeted by any suspect
19 as a direct perpetrator before this Court to date.

20 This makes it clear that Khaled El Hishri was hands on in the commission of the crimes,
21 creating a culture of impunity for the alleged crimes and setting a negative example for the
22 Mitiga Perpetrators to follow.

23 Your Honours, I will divide my presentation into two parts.

24 In the first, and in order to avoid unnecessary repetition, I will focus on Khaled El Hishri's
25 essential contributions to the crimes, which form a common basis for all charged modes of

1 liability.

2 In the second part, and in the interests of time, I will only focus on three different modes
3 under Article 25(3)(a), as shown on the screen.

4 Our complete submission on all these modes, including also under Article 25(3)(b), (c) and (d),
5 are set out in paragraphs 154 to 255 of the Pre-Confirmation Brief.

6 I will turn now to the suspect's essential contribution.

7 First, Khaled El Hishri contributed to the commission of the crimes through his exercise of
8 general authority and influence through the Mitiga Prison.

9 Over 20 witnesses provide corroborative evidence confirming his authority and senior role in
10 SDF/RADA and in the prison, as described in paragraphs 158 to 160 of the Prosecution brief.

11 At least five witnesses stated in clear terms that Khaled El Hishri was the second in command
12 after Abdalraouf Kara, the undisputed leader of SDF/RADA.

13 Evidence shows that Khaled El Hishri was not a figurehead. Far from it. Witnesses
14 describe him as a powerful man, as one of the founders of RADA and a high-ranking official,
15 one of the main pillars of RADA, and that he held absolute power.

16 He exercised a role of real power and authority over prison staff, including shift commanders,
17 guards, medical staff, interrogators, arrest units, and all detainees, as set out in paragraph 161
18 of our brief.

19 Even members of the judicial police who officially fall under the authority of Njeem, the
20 prison director, could not go against Khaled El Hishri's orders. When they arrested

21 Khaled El Hishri's friend and seized his animals, Khaled El Hishri went to the judicial police
22 headquarters, shot at them, released his friend and returned the seized animals.

23 While the Prosecution takes the conservative position that El Hishri is at least a peer of Njeem,
24 many witnesses place Njeem under El Hishri's authority despite his official position as the
25 prison director. Some even say that Njeem was intimidated by El Hishri and that guards

1 and shift commanders were visibly more afraid of El Hishri than of Njeem.

2 In one instance, Njeem ordered a detainee to install certain cameras in the prison. When
3 El Hishri learned about this order, he shouted at the detainee saying, "This is not going to
4 happen." He ordered him to return to Njeem and tell him directly that the installation
5 would not proceed.

6 It was clear to everyone that Khaled El Hishri's orders had to be followed.

7 Prison guards, and even Njeem, could not overturn El Hishri's orders. For example, on one
8 occasion El Hishri tortured a detainee and left him suspended from the ceiling for hours.

9 His agonising screams drew the attention of a sheikh from the prison who came to his aid,
10 but once he realised that this was El Hishri's doing, he told the detainees, and I quote:

11 "He could not intervene because it was El Hishri who had ordered it. He said he would
12 have stepped in to stop the torture if the decision had come from anyone else. He said that if
13 he tried to help, he risked being hung himself by El Hishri." End quote.

14 Evidence also shows that when El Hishri placed a detainee in a cell, not the guards, not even
15 Njeem could remove the detainee to a different cell.

16 Even in matters as minor as opening a closed hatch in a cell door so that detainees could get
17 some fresh air, or switching -- or even switching on a ventilator, guards often expressed their
18 inability to make the slightest change that may appear to alter something that was done or
19 ordered by El Hishri.

20 When Witness P-1673 requested from the guards to open the hatch, the guards replied, and I
21 quote: "Sheikh Khaled Al Booti closed it and we have no power to open it." End quote.

22 As shown by the evidence, El Hishri's authority in the prison extended to defy even the
23 orders issued by the attorney general of Libya.

24 Once, when Khaled El Hishri learned that the attorney general had ordered the transfer of a
25 detainee out of Mitiga to another prison, he was enraged. He dragged the detainee, tore the

1 transfer order, and told her, and I quote:

2 "You went to Alsour to complain about us. Alsour has no power. He is no one compared
3 to us. We have the power." End quote.

4 On another occasion, El Hishri refused to release P-665, beat her all over her body and said,
5 and I quote: * "I am Khaled Mohamed El Hishri and I am the attorney general." He then
6 brought her back to the prison where she remained in detention.

7 Madam President, your Honours, while these were just a few examples highlighting
8 El Hishri's powers and authority throughout the prison, the evidence collection before you
9 shows beyond these examples that El Hishri's exercise of authority over detainees extended to
10 each aspect of their lives.

11 He was frequently present, running the day-to-day matters in the prison. Detainees often
12 saw him multiple times per day. He conducted prison tours and cell inspections. He
13 monitored both detainees and guards through surveillance cameras.

14 El Hishri could decide on the quantity and quality of the food provided to the detainees and
15 on their access to medical care.

16 He imposed severe detention conditions on the detainees and refused any attempt to make
17 these conditions lenient or less harsh. Rather, he often took measures to worsen the
18 detention conditions and increase the detainees' suffering.

19 He denied family visits and imposed harsh punishments. He often chose the type of
20 punishment that inflicted the highest level of pain.

21 In the words of Witness 1720, El Hishri, and I quote: "... made decisions about everything
22 inside and outside the prison." End quote.

23 Likewise, Witness 1673 said El Hishri managed daily matters of detainees, transferring
24 detainees, and oversaw their torture. His name alone instilled fear among both prisoners
25 and guards.

1 Once, because some detainees made noise in their cell or left the lights on, El Hishri, as
2 described by Witness 650, took all detainees in this cell into the yard and forced them into a
3 stress position. He then walked around and beat any prisoner who could not maintain this
4 position. He would leave the yard and watch from the surveillance cameras and then come
5 back again and beat up any detainee who had left the stress position.

6 As shown by the evidence, Khaled El Hishri's family empowered him further, especially that
7 his maternal uncle is Dhawi N'zam, a senior SDF/RADA member. El Hishri's two brothers
8 also worked at the prison.

9 In this respect, detainees referred to the Mitiga Prison as, quote unquote, a "family prison"
10 and referred to El Hishri's family as the "ruling family" in it.

11 Khaled El Hishri's own words were illustrative of the significance of his family ties in the
12 prison. When one of El Hishri's relatives complained to him about how Njeem was treating
13 him, El Hishri told him, and I quote: "Do whatever you want; we are the family that owns
14 this place." End quote.

15 Many witnesses detained in Mitiga who saw and observed firsthand El Hishri's exercise of
16 authority in the prison describe how he was feared by all.

17 Witness P-1685 said that throughout his detention, which lasted for years, he could see that
18 guards were very afraid of El Hishri whenever he entered. They would do anything to
19 avoid interacting with him. He could go to any cell, take out any detainee, he simply had
20 absolute power. The witness went on to say that El Hishri was also well known to be quick
21 tempered and could always grab his gun and kill or shoot anyone he wanted.

22 To explain how El Hishri's authority was perceived in the prison, Witness P-569 says, and I
23 quote: "People feared him more than God himself". End quote.

24 Further, El Hishri had the authority to discipline the Mitiga Perpetrators. For instance, he
25 once placed a shift commander and his guards in solitary confinement just because they gave

1 a detainee a phone to speak to his family.

2 Other examples described in paragraphs 163 and 164 in our brief, show that he also punished
3 other guards by beating them or even shooting them.

4 Your Honours, El Hishri ordered guards and other perpetrators to commit violent acts
5 against detainees, including to beat, torture, suspend, to commit acts of sexual violence
6 against them as well.

7 For instance, he ordered guards and enslaved detainees to hang three detainees, he
8 prohibited them from giving any assistance of any kind to these detainees, he specifically
9 instructed them not to give them food until they die from starvation.

10 These orders were followed. Three days later at least one of these detainees died.

11 Several witnesses were themselves victims of crimes committed pursuant to El Hishri's orders.

12 I refer your Honours to paragraphs 68 and 169 of our brief where we describe victimisation of
13 at least seven witnesses on El Hishri's orders.

14 I turn now to Khaled El Hishri's second essential contribution. He had the unique position
15 of exercising direct control over the Women's Section.

16 And through that control, he contributed to the commission of the crimes.

17 Over 30 witnesses confirm this role as described in paragraphs 181 to 187 of the Prosecution
18 brief. I will only mention a few in my presentation as I go through some of the ways in
19 which he controlled this section.

20 First, he strictly controlled access to the Women's Section, even when he was not physically
21 present.

22 Witnesses describe that El Hishri had complete control over the Women's Section. He had
23 the keys to the section. No one was allowed into the section without his permission. The
24 undisputed leader of RADA, Abdalraouf Kara, expressly banned anyone but El Hishri from
25 entering the Women's Section, including Njeem, the director of the prison.

1 Witness P-943, who herself was detained in that section, described that, and I quote:

2 "Khaled El Hishri came to the Women's Section daily. He had the keys to our section, so he
3 was always the one who opened the doors [...] escorted the other guards in and out. He
4 always said that he did not trust anyone else with the keys." End quote.

5 Another female detainee, Witness 1736, says El Hishri was the only person who decided
6 anything related to the female detainees.

7 This was a common knowledge among detainees.

8 Witness 569 describes that guards were banned from accessing the Women's Section in his
9 absence, even to serve food. He must be there.

10 Medical emergencies were no exception.

11 Witness P-54 describes an incident where a female prisoner suffered a stroke and with all the
12 screaming for help, no one would dare open the door unless El Hishri arrived.

13 Being the one controlling access to the Women's Section meant in such cases El Hishri need to
14 be informed to decide what to do if there is any case of emergency.

15 Witness 665 stated that there was a detained girl who suffered from asthma. The other
16 female detainees in the cell thought she was dead, so they kept banging on the door and
17 screaming that the girl had died. El Hishri, who was outside the prison at the time, got very
18 annoyed because this incident disturbed him and meant that he had to return to the prison.

19 When he arrived, he threatened the female detainees, saying, and I quote, "if he comes and
20 sees that the girl is still alive, he will hang all the girls outside". End quote.

21 Second, he exercised daily control over the women, girls and young children held in the
22 Women's Section. He controlled their access to food and medical care. He determined
23 their detention, cell allocation and release.

24 He personally handcuffed, blindfolded, and escorted women and girls in and out of the
25 section. He often took them to the areas known as "Islamic Neighbourhood" or the

1 "Naqliah" and participated in their interrogation and torture.

2 He also carried out body searches of female detainees and ordered other detainees to carry

3 out these searches under his supervision, while he was there watching.

4 Third, El Hishri's authority was also manifested in his unfettered power to personally beat

5 girls and women over and over again and in the open in front of everybody to see.

6 Witnesses describe El Hishri's beatings to women and girls as continuous and brutal. This

7 led Witness P-1736, for example, to put her thick winter clothing in summer to protect herself

8 and reduce the suffering from the recurring beatings. When El Hishri beat her while she had

9 these additional layers on, she suffered, but her winter clothing gave her some relief.

10 Noticing what she did, El Hishri surprised her the very next day. He came early, without

11 giving her a chance to put on the extra layer of clothing, and he beat her severely. The

12 beating was so severe that she was bleeding from all over her body. The next day, he just

13 did the same.

14 Evidence shows that beating was the norm and could be triggered by any reason. Witness

15 1750 describes that, and I quote: "Khaled El Hishri [...] used to beat the women at dinner

16 time so that they would not make noise at night". End quote.

17 Witnesses describe that women's screams were so overwhelming that other detainees would

18 cry from just hearing the screams. They would cover their ears so they could not hear these

19 agonising screams.

20 Your Honours, El Hishri's third essential contribution was that he himself directly carried out

21 many crimes repeatedly, on a large scale, and in the most savage ways.

22 Witnesses invariably describe El Hishri as a notorious torturer.

23 P-1710 says, "[El Hishri] tortured detainees barbarically. He [...] would beat anyone with

24 whatever he had in his hands, [be it] a hammer, a shovel, or a PPR."

25 He repeatedly punished all detainees in a cell or a section for any reason, or for no reason at

1 all. As described by Witness 1720, El Hishri frequently ordered the guards to take out the
2 witnesses and all his -- all detainees in his cell to an inner yard. El Hishri would then order
3 the detainees to lie down on their stomachs and beat them with a PPR, while insulting and
4 cursing them. The witness described that, and I quote: "These punishments broke [my]
5 spirit. They were humiliating and belittling [...] and I felt my dignity was degraded,
6 especially knowing that I had done nothing wrong." End quote.

7 Witness P-571 described that El Hishri, after shooting detainees, he often instructed the
8 guards not to give any medical treatment.

9 His brutality is illustrated by the following concrete examples:

10 In one incident, he tortured Witness 1685 and another detainee to extract information from
11 them. He beat them with a reinforced metal bar used in construction. The beating targeted
12 the weak points of the kneecaps, elbow and head. The beating continued until the metal bar
13 bent. Describing the pain he suffered, the witness says he felt as if he was, and I quote,
14 "being electrocuted in [his] brain [he] could feel it through [his] spine." End quote. After
15 the beating, El Hishri was told that the detainees were going to die, to which he simply
16 replied "let them rot".

17 Your Honours, on El Hishri's orders, Witness P-925, a former detainee at the prison, was
18 taken to the so-called Islamic Neighbourhood. There, he found four detainees already hung
19 with hooks attached to the grilled structure in the ceiling.

20 While two of them had their shoulders dislocated from the suspension, El Hishri was simply
21 sitting in front of them eating quietly. The witness described that he could not believe that
22 someone could calmly eat while facing people hanging and screaming in pain and begging
23 for mercy. When El Hishri interrogated the witness, he said -- the witness said that he was
24 innocent and did nothing wrong. El Hishri reacted to this by ordering Black African
25 Migrants to hang the witness. The pain from the hanging was so severe that the witness

1 could not take it anymore and then he start shouting. To this, El Hishri simply took his
2 handgun and shot the witness. This bullet, as described by the witness, was a mercy shot
3 because it was this bullet that made him lose consciousness and therefore he no longer felt the
4 pain.

5 Madam President, your Honours, the evidence before you is replete with many, many
6 examples of the violent acts committed by the suspect. We heard over the course of the
7 Prosecution presentation when he was chasing a prisoner with a shovel, holding it like an axe,
8 striking the victim until he could no longer move and his blood covered the floor. We also
9 heard that he routinely beat female detainees and he would not stop the beating until he saw
10 blood. Or when he used the longest PPR to inflict pain on the maximum number of women
11 * with each blow. Or when he saw detainees suspended with their hands in front of their
12 bodies, to him this was not painful enough, so he suspended them with their hands behind
13 their back, pulled their bodies down until their shoulders dislocated.

14 Again, these were just some of the many examples of the violent acts Khaled El Hishri
15 personally committed.

16 Your Honours, this brings me to second part of my presentation focusing on the alleged
17 modes of liability under Article 25(3)(a), and I will start with the joint perpetration mode.

18 On the evidence before your Honours, there are substantial grounds to believe, we argue, that
19 El Hishri carried out the crimes charged in all counts jointly with other co-perpetrators,
20 including Abdalraouf Kara, Dhawi N'zam and Njeem.

21 Abdalraouf Kara is a founding member of SDF/RADA and its ultimate leader. He exercised
22 overall control over the Mitiga Prison, through Mitiga Prison leadership, including El Hishri,
23 N'zam and Njeem. He personally attended the prison, interrogated detainees, ordered their
24 torture, refused to allow medical care, and permitted violent commission of crimes by other
25 co-perpetrators, including the suspect and Njeem.

1 Dhawi N'zam, a close associate of Kara and a senior member of SDF/RADA. As noted, he is
2 also El Hishri's maternal uncle. He collaborated closely with Kara and the other
3 co-perpetrators. He helped maintain control over Mitiga Prison and the Mitiga Compound
4 more broadly. He disciplined SDF/RADA members. He participated in the commission of
5 crimes, including by torturing detainees together with El Hishri and Njeem.

6 Finally, Osama Njeem was a senior SDF/RADA member and a close associate of Kara. He
7 served, as you heard, as the official director of Mitiga Prison. He carried out and supervised
8 many acts of torture and abuse, a fact supported by the issuance of a warrant of arrest against
9 him by this Court for alleged crimes of the same nature, at the same location, and within a
10 time frame encompassing the temporal scope of this case.

11 El Hishri coordinated with his co-perpetrators in imposing and maintaining the system of
12 mistreatment and abuse, this system that they put in place at Mitiga to commit the crimes
13 through a common plan.

14 Evidence shows that the crimes alleged in all counts were committed as part of a common
15 plan between the co-perpetrators with the objective to exercise control over persons in the
16 Mitiga Perpetrators' custody or control in pursuit of SDF/RADA interests or views and/or
17 those of its members, through means such as punishment, coercion and exploitation,
18 principally at Mitiga Prison but also in other locations in and around Tripoli, within the
19 temporal scope of the case.

20 Your Honours, as established by the jurisprudence of the Court, a common plan need not be
21 explicit. It can be inferred from the facts and circumstances of the case.

22 In this case, the existence of the common plan is evidenced by the following points:

23 One, the co-perpetrators used Mitiga Prison as a tool to serve the interests of SDF/RADA and
24 their own, in particular, to punish perceived opponents, to gain money, to have access to free
25 labour often by targeting Black African Migrants, to intimidate persons, or to extract

1 information.

2 This is further illustrated by the following examples:

3 On one occasion, Kara ordered the torture of a detainee so that, and I quote, he "knows who
4 RADA is and understands the consequences of speaking ill about RADA." End quote.

5 El Hishri, Njeem and N'zam tortured detainees because they were suspected to be affiliated
6 with rival armed groups. N'zam demanded and collected ransom for the release of
7 detainees.

8 When a relative to one of the detainees criticised SDF/RADA publicly, N'zam threatened the
9 detainee that he would place him in a solitary confinement and force him to commit -- to
10 admit to committing crimes on camera if his relative did not apologise publicly about what he
11 said about SDF/RADA.

12 These are simple examples to show how the crimes and for what purpose the crimes were
13 committed to serve their interest as a group or as individuals.

14 Second, the existence of the common plan is also inferred from the systematic nature of the
15 alleged crimes and the prolonged period of their commission.

16 As discussed by my colleague, Mr van der Werf, there is abundance of evidence
17 demonstrating the systematic nature of the mistreatment of detainees from their induction,
18 initial torture and interrogation, followed by conspicuous and sustained mistreatment and
19 abuse throughout their detention over a prolonged period of time. This exemplifies the
20 constant control exerted by the co-perpetrators over the detainees and persons in their
21 custody and control, consistent with the objective of the common plan.

22 Third, the common plan is also evidenced through the co-perpetrators' own conduct
23 participating in the crimes at Mitiga Prison, of which the Prosecution has already given many
24 examples during its presentation today and yesterday.

25 This conduct demonstrates that the co-perpetrators had all embraced the common plan and

1 participated in its implementation.

2 And, finally, the common plan is inferred by the measures taken by the co-perpetrators to
3 conceal the crimes at Mitiga, revealing their consciousness of guilt of the criminal component
4 of the common plan, and establishing their intent to ensure the continuous implementation of
5 the common plan without any external pressure.

6 These measures included, for example, first, limiting inspection of Mitiga Prison by any
7 external organisations. When inspection could not be avoided, the co-perpetrators took
8 measures to hide entire sections from inspection, remove detainees in large numbers from
9 cells to give the misleading impression that cells were not overcrowded.

10 For instance, when a human rights organisation sought to inspect Mitiga Prison, El Hishri, he
11 oversaw the removal of almost 200 detained women and children from the Women's Section
12 to another location, leaving only a reduced number of detainees. He also threatened the
13 detainees that were left to meet the representative of the organisation so that they do not
14 report on the abuses that happened in detention.

15 Second, another measure that the co-perpetrators used to conceal the crimes was posting
16 online videos of confessions to unlawful behaviour demonstrating to the public that
17 SDF/RADA is a law enforcement agency, fighting crimes in a lawful manner, contrary to the
18 evidence establishing that these videos were made under duress to enhance SDF/RADA's
19 reputation. And I refer your Honours to paragraph 222 in our brief.

20 Third, detainees before their release were threatened and warned against speaking about
21 what goes on inside the prison and the mistreatment they endured or witnessed.

22 Fourth, on the occasion that family visits were allowed, detainees were instructed to conceal
23 any visible injuries or wounds before they could go and see their families.

24 Madam President, your Honours, the co-perpetrators jointly controlled the commission of the
25 crimes directly by carrying out the crimes and by contributing to the creation and

1 maintenance of the criminal system at the prison, and indirectly by controlling the
2 organisation, including the Mitiga Perpetrators, and steering them towards the
3 implementation of the common plan through their senior positions of authority and their
4 ability to punish and discipline the Mitiga Perpetrators, ensuring automatic compliance with
5 their orders.

6 As already discussed in the first part of my presentation, El Hishri made essential
7 contributions to the implementation of the common plan. Specifically, not only did he
8 directly carry out numerous crimes and played a leading personal role in maintaining the
9 criminal system in the prison, but also he controlled the actions of other perpetrators with
10 access to the Women's Section.

11 Now I move to discuss Khaled El Hishri's intent and knowledge.

12 The evidence shows that El Hishri's various contributions to the common plan were
13 intentional and that he meant for the crimes to occur, or at least knew that they would occur
14 in the ordinary course of events in the implementation of the common plan.

15 First, for counts 1 to 6, El Hishri meant for persons to be detained unlawfully in Mitiga Prison
16 in inadequate conditions and to suffer severe physical or mental pain or suffering amounting
17 to torture. This is evident from the fact that he personally and repeatedly participated in
18 such conduct; he ordered and encouraged others to engage in this conduct; he opposed
19 efforts to make the detention conditions lenient or less harsh; he knew that detainees were
20 provided with inadequate food because he oversaw its distribution; he knew that sick
21 detainees did not receive adequate medical treatment because he prohibited it.

22 Even if he had done none of these things, El Hishri could still not have failed to see the
23 conspicuous signs of the violent, prolonged and systematic mistreatment of detainees because
24 he was regularly present almost every day in the prison. He was conducting prison rounds
25 sometimes multiple times a day. He was monitoring detainees and guards in person and

1 through surveillance cameras. He could not have failed to see detainees being tortured in
2 open spaces in prison. He could not have missed the overcrowded cells in the daily rounds
3 he made. Detainees complained directly to El Hishri about the harsh detention conditions
4 and begged him to change them. He either dismissed them or punished them for
5 complaining.

6 Second, for counts 7 to 10, El Hishri meant for detainees and other persons in the Mitiga
7 Perpetrators' custody or control to be raped and subjected to other sexual violence, or at least
8 he knew that this would occur in the ordinary course of events. This is because he himself
9 again raped and committed acts of sexual violence against detainees. He was aware of and
10 participated in the pattern of conduct that resulted in these criminal acts being committed,
11 including: 1, strip searches and internal cavity examination for detainees; 2, sexualised
12 torture; and, 3, the detention of detainees in overcrowded cells and with detainees notorious
13 for sexually assaulting other detainees.

14 Evidence also shows that El Hishri knew of allegations of sexual abuse done by Mitiga
15 Perpetrators against other detainees and did nothing about it. Instead, he punished the
16 person that tried to take an action against it by banning him temporarily from coming to the
17 prison and did nothing to the perpetrators. I refer your Honours in this context to
18 paragraph 233 of our brief and footnote 1256.

19 Third, for counts 11 and 12, El Hishri intended or was aware that detainees would die as a
20 consequence of the violent, prolonged and systematic mistreatment. This is because he
21 himself killed many detainees. His own statements reveal his intention. We heard many of
22 these statements today and yesterday. For example, when warned that his torture of
23 detainees would cause their deaths, he simply said, "Let them rot". Or when he scolded a
24 senior Mitiga official for taking detainees out of the cells to get some sun for medical reasons,
25 he said, "What are you doing, you are trying to help him, we are trying to make them die."

1 Or, as we heard today and yesterday on several occasions, El Hishri gave clear instructions
2 not to provide food or any kind of assistance to tortured and suspended detainees so that
3 they die where they were suspended, and die they did as intended.

4 Fourth, for count 13, El Hishri meant for detainees to be enslaved, or at least knew that this
5 would occur in the ordinary course of events. He knew that detainees were subjected to
6 exercise of powers attaching to the right of ownership, such as acts of forced labor, or to give
7 blood, because he exercised such powers himself as part of an institutionalised system. He
8 knew that detainees were subjected to powers attaching to the right of ownership, such as
9 controls over their personal liberty and physical movement, controls over sexuality, sexual
10 and reproductive autonomy, because he himself tortured detainees and detained them
11 unlawfully without due process and refused their release, even when such release was
12 ordered by the attorney general of Libya, and committed acts of sexual and reproductive
13 violence, including rape against them.

14 Finally, for counts 14 to 17, Khaled El Hishri meant for detainees or other persons in Mitiga
15 Perpetrators' custody or control to be persecuted. He shared the discriminatory intent to
16 target persons on the alleged grounds. This intent was manifested in his own words and
17 conduct, viewed in the broader context in which the crimes were committed. Evidence
18 shows that Khaled El Hishri used misogynistic terms when referring to female detainees,
19 calling them names like "whore", "bastard" and "animal" and treating them as inferior.

20 Your Honour, as you heard in the course of the Prosecution presentation, El Hishri
21 deliberately denied medical care necessary to keep a newly born baby alive just because she
22 was a girl. As a result, she died.

23 In another incident, when a female black African migrant got sick, as we heard earlier today,
24 another detainee informed El Hishri and begged him to help her. He refused and simply
25 said, and I quote, "Let her die. When the devil dies, [it's] better for the angels." End quote.

1 Evidence shows that he imposed his religious and ideological views and practices on
2 detainees whom he perceived as non-compliant.

3 Now I will turn to the second mode of liability. And I will be brief in discussing the second
4 and third modes of liability.

5 This mode is concerning direct perpetration.

6 As noted, El Hishri committed as a direct perpetrator all 17 counts of charged crimes against
7 at least 159 identified victims. He targeted each of these victims with more than just one
8 crime as set out in annex 14 to the Prosecution brief.

9 As your Honour can see on the screen, he personally committed the crimes under counts 1 to
10 6 against 117 to 119 victims.

11 He personally raped two victims under counts 7 and 8.

12 He personally committed acts of sexual violence against 12 victims under counts 9 and 10.

13 He personally committed murder and attempted murder against 24 victims under counts 11
14 and 12.

15 He personally enslaved 97 victims under count 13.

16 He personally committed acts of persecution against 23 victims on political grounds under
17 count 14, against 76 victims on religious grounds under count 15, against 12 victims on
18 national, ethnic and/or racial grounds under count 16, and against 78 victims on gender
19 grounds under count 17.

20 He committed these acts with the requisite intent and knowledge.

21 His intention to engage in the conduct underlying the crimes he directly carried out and his
22 intention to cause the consequences of that conduct or his knowledge that those consequences
23 would occur in the ordinary course of events are unmistakable and evident by many factors,
24 including:

25 First, his use of weapons, tools, torture devices and techniques specifically designed to cause

1 the intended harm.

2 Second, the compound nature of his criminal acts with which he often targeted the same
3 victims. His criminal acts were rarely in isolation. His beatings were often coupled with
4 restraining and suspension or with insults and threats or with forcing the victims into a stress
5 position and, in many instances, with shooting the victims with a firearm.

6 Third, as shown in many examples, his criminal acts were often associated with statements
7 revealing not only the intent to commit the crimes, but also the zeal with which he committed
8 them.

9 Finally, his intent and knowledge are evident by the number of years over which he carried
10 out these criminal acts as part of an overall pattern of institutionalised mistreatment and
11 abuse of detainees and other persons in their custody or control.

12 I now turn to the last mode of liability in my presentation, indirect perpetration.

13 Through his direct control over the Women's Section that we demonstrated in the first half of
14 my presentation, as well as his general authority and influence over the prison, El Hishri
15 controlled and used the perpetrators whom he allowed to access this section to commit
16 crimes against women, girls and young children held in that section.

17 In particular, he used them to impose and maintain the system of mistreatment and torture of
18 these victims, including to commit acts of sexual violence, enslavement and persecution.

19 With his direct authority over the Women's Section, El Hishri controlled the guards, enslaved
20 detainees and other Mitiga Perpetrators who could only access this section with his
21 permission and under his control. In this way, he subjugated them to his will to commit the
22 crimes.

23 This is clear, for example, in the instance where he ordered the strip search of female
24 detainees while he was watching.

25 Witness P-943 described that the detainee conducting the strip search was clearly, quote

1 unquote, "afraid of him". Witness P-665 stated she could not blame the detainee conducting
2 the strip search because she had to obey El Hishri's orders. I refer your Honours to
3 paragraphs 68 and 202 in our brief. These examples clearly demonstrate that
4 Khaled El Hishri through his authority controlled the actions of the direct perpetrators who
5 had no choice but to submit to his will.

6 Madam President, your Honours, on the evidence of this case, the Prosecution requests that
7 the Chamber confirm all the crimes charged based on each of the alleged modes of liability
8 and commit this case to trial.

9 This brings me to the end of my presentation, and with this the Prosecution concludes its
10 submissions on the merits. Thank you very much, your Honour.

11 PRESIDING JUDGE MOTOC: [11:54:26](Interpretation) Thank you very much, Mr Mourad.

12 Before we move to our luncheon, I now turn to the representative of the Office of Public
13 Counsel for Victims and then to Defence to understand exactly the allotted time for the oral
14 submissions and basically how are we going to organise ourselves for our afternoon session.

15 Madam Pellet.

16 MS PELLET: [11:54:56](Interpretation) Thank you very much, your Honour. The Legal
17 Representatives of Victims will not be making submissions to the merits. Thank you.

18 PRESIDING JUDGE MOTOC: [11:55:05](Interpretation) Thank you very much, Ms Pellet.

19 I turn now to the Defence. You have the floor, sir.

20 MR EDWARDS: [11:55:13] Thank you, your Honour. Mr Hassan took I think 45 to
21 50 minutes in his opening yesterday. We will be sure to use no more than the four hours
22 that have been allotted to us. Our intention is to start after the luncheon adjournment, with
23 your Honours' leave, given the hour. Yes, I mean, I can start, but five minutes seems not
24 really worth it. So, if your Honour is content, I'll start after the lunch adjournment. But we
25 obviously won't finish today.

1 PRESIDING JUDGE MOTOC: [11:56:03](Interpretation) Thank you very much.

2 All right. So now we will move to the luncheon adjournment and we shall resume in an

3 hour and a half time at half past 1 p.m. hearing from the Defence.

4 And I note the attendance in the body of the court of Mr El Hishri. Thank you very much.

5 And we shall see each other after the luncheon adjournment this afternoon. Thank you.

6 THE COURT USHER: [11:56:36] All rise.

7 (Recess taken at 11.56 a.m.)

8 (Upon resuming in open session at 1.32 p.m.)

9 THE COURT USHER: [13:32:48] All rise.

10 Please be seated.

11 PRESIDING JUDGE MOTOC: [13:33:14](Interpretation) I first hand over to the Office of the

12 Prosecutor because I understand there's a change in the makeup of the Prosecution team.

13 Deputy Prosecutor, you have the floor.

14 MS KHAN: [13:33:32] Madam President, yes, indeed. One member of the Prosecution

15 team asks to be excused this afternoon, Ms Jessica Lacey, and she is replaced this afternoon by

16 Mr Thomas Hope, trial support assistant, on my left. Thank you, Madam President.

17 PRESIDING JUDGE MOTOC: [13:33:49](Interpretation) Thank you very much, Deputy

18 Prosecutor.

19 Now I hand over to the Defence. Mr Edwards, you have the floor.

20 MR EDWARDS: [13:33:56] Thank you, your Honour. Much, if not all, of this afternoon will

21 be taken up with me speaking about five matters.

22 I'll start by saying a few words about the prejudice caused to the Defence by the huge volume

23 of material in this case, specifically witness statements that the Prosecution has relied on from

24 witnesses whose identities have been withheld.

25 I will then move on to talk about the prejudice caused by the unduly vague and imprecise

1 language employed by the Prosecution in the Document Containing the Charges.

2 And I'll then link those two matters together and speak about the specific prejudice that is
3 caused by those two preceding points in terms of the Defence's ability at this stage to advance
4 any grounds excluding criminal responsibility and the ability to raise an alibi.

5 I then propose to turn to the substance and speak for some time about the contextual
6 elements of war crimes charged in the DCC, and it will be our submission that the
7 Prosecution has failed to produce anywhere near enough evidence of a nexus between any
8 armed conflict and the charged crimes.

9 And, finally, I will pick up on a point, or the topic, addressed by my learned friend this
10 afternoon and deal with the Prosecution's attempt to persuade, or perhaps re-persuade, your
11 Honours' Chamber to confirm charges of enslavement under count 13 and persecution under
12 counts 14 and 16 insofar as they relate to Mitiga detainees from east, west, central or southern
13 Africa, referred to by the Prosecution in the DCC as the "Black Migrants". And it will be our
14 submission that that attempt must fail.

15 After I speak, lead counsel Mr Hassan will take up the baton and continue the submissions
16 that we have the honour to present on behalf of Mr El Hishri.

17 So, your Honours, with your leave, I'll start with the problem of the secretive nature of the
18 evidence in these pretrial proceedings.

19 You have seen from the Prosecution's presentation over the last two days that they rely on the
20 evidence of 63 witnesses, not 64. It's our understanding that the evidence of P-1764 is no
21 longer relied upon.

22 Now, of these 63 witnesses, the Defence has only been told the identity of 25. The identity of
23 more than six out of 10 Prosecution witnesses has been kept from us. It's been kept secret.

24 And fully one-third of those anonymous witnesses have only been disclosed to the Defence
25 by way of carefully tailored summaries of parts of their accounts. Coincidentally, perhaps,

1 but to illustrate the point, this is almost exactly the same ratio of secret witnesses as those
2 cited by Madam Deputy Prosecutor yesterday morning during her opening remarks. She
3 cited to seven Defence witnesses -- seven witnesses, rather, P-1046, 1031, 0644, 1673, 0943,
4 0872 and 1682, seven witnesses about whose identity we have no idea whatsoever. And, on
5 top of that, as if a starker illustration is needed, six of the witnesses cited during Ms Samson's
6 presentation on war crimes yesterday are anonymous witnesses.

7 This is intolerable. It is unfair.

8 The Prosecution will tell you and the public watching that in fact this is fine, that this is the
9 way of conducting international criminal litigation. It's provided for by the Rules of
10 Procedure and Evidence, this is how we do things at this Court.

11 The Prosecution will, no doubt, say that for every witness whose identity has been withheld
12 from the Defence, applications were made to your Honours' Chamber. Your Honours have
13 overseen that process and your Honours have made the rulings that you have. The
14 Prosecution will say at the ICC, "There's nothing to see here, this is fine".

15 Now, we don't dispute for a moment that the process has been subject to your Honours'
16 oversight and supervision. Whether we agree with your Honours' ruling is neither here nor
17 there, of course, and I don't suppose to re-litigate it today. But I want to say a few words
18 about what some of the concrete consequences to the Defence -- what the consequences of
19 those rulings are.

20 The fact that such an important feature of pretrial proceedings before this Court can be
21 shrouded in so much secrecy, can exclude the Defence to the extent it is, is not fine. It
22 may be permitted by the rules, and we don't dispute that, but that in itself doesn't make it
23 fair.

24 We described in our written notes and observations relating to the factual and legal elements
25 of the Prosecution's case against Mr El Hishri -- that's filing 107, 28 April 2026 -- we described

1 that these proceedings are indistinguishable from secret proceedings and we stand by that
2 description. We have no idea who 60 per cent, more than 60 per cent, of Mr El Hishri's
3 accusers are.

4 Now, we've had the advantage of the Prosecution's response to the Defence's written notes
5 and observations -- that's filing 115 of 5 May -- and it has helpfully given us notice of its
6 position ahead of this week's hearings. And, essentially, in response, the Prosecution make
7 four points: that the Rules allow them to hide evidence from the Defence; that the Defence's
8 claims of prejudice are overstated; that there is in fact no unfairness; and, fourthly, in dealing
9 with the issue of anonymous evidence, the Prosecution mounts an argument that becomes a
10 theme, actually, throughout its response, filing 115, an attempt to sweep away the Defence's
11 concerns and complaints by a tactic that we think is not far from gaslighting, by saying that
12 our concerns are based on pervasive misconception concerning the distinct nature of
13 confirmation and trial proceedings. Essentially, they say, "You, the Defence, you do not
14 understand. We, the Prosecution, we understand the rules, we understand how things
15 works, but the Defence, bless them, they don't get it". That's their position.

16 Now, setting aside the sheer patronising tone of the Prosecution in that filing, the attitude
17 serves as a distraction, an excuse for failing to deal with the real issue. Of course,
18 confirmation proceedings are not the same as trial proceedings. There is no one in this room
19 who doesn't understand that. The Prosecution, rather bizarrely, stated at paragraph 9 of its
20 response that "the Defence concedes that [confirmation proceedings] are of 'limited scope' and
21 are not to be treated as 'a mini trial'".

22 A curious use of the word "concedes" here, your Honours may think, since just a couple of
23 paragraphs earlier the Prosecution suggests that the Defence do confuse preparation for
24 confirmation with preparation for trial. Gaslighting, your Honours.

25 None of that means that the Defence should just keep quiet and accept it when served with

1 anonymous witness statement after anonymous witness statement, or, worse, anonymous
2 summary after anonymous carefully tailored summary.
3 Unfairness and prejudice to the Defence -- not to any other party -- have been baked into the
4 confirmation of charges process at this Court. The mere fact that the regulatory architecture
5 of this Court permits the withholding of identifying information from the Defence does not,
6 cannot, make that inherent prejudice, that inherent unfairness, magically disappear. Nor is
7 there any proper answer to our concerns and our complaints for the Prosecution to say,
8 effectively, "Look stop complaining, you've received some evidence from witnesses whose
9 identity we've deigned to give you. We've thrown you some bones." It's no answer,
10 because the Prosecution don't rely only on the evidence of identified witnesses; they rely on
11 all the witnesses -- the majority, anonymous witnesses, and the minority, identified
12 witnesses -- alike.

13 So, it's patently not an answer for the Prosecution to say, "You have not been treated unfairly,
14 because in addition to the unfairness, on occasion, you have been treated fairly."

15 The prejudice to the Defence in not knowing the identities of most of Mr El Hishri's accusers,
16 especially those who say they have been detained at Mitiga, is that we cannot carry out our
17 own investigations into them. We cannot investigate whether these many individuals were
18 in fact ever detained at Mitiga. Or if they were, why. Or if they were, from when. Or if
19 they were, until when. Why does it matter? Why does it matter that we can't carry out
20 these investigations? Well, we say that it's important in three main ways.

21 The first way is that had we known the identities, had we been able to carry out
22 investigations, it could allow us to establish at even this very early stage of proceedings
23 whether there is any nexus between the detention of these individuals and the existence of
24 any armed conflict, or whether their arrests were and detention was simply a matter of
25 perfectly standard law enforcement.

1 And we say that that's something that if we were able to investigate, it's a matter that would
2 not involve a conclusive determination of credibility, something that we understand at this
3 stage your Honours will not engage in.

4 The second reason why this is important is related to the ability or, rather, the inability of the
5 Defence to advance any kind of alibi. Now, I'm going to deal with that a little bit later, but
6 I just flag it up now.

7 The third thing is, had we been told the identity of all of these witnesses, or even more of
8 these witnesses, it would allow us to establish if any of these witnesses have provided their
9 accounts to others, others apart from the OTP -- to NGOs, to civil society activists, to national
10 or international bodies charged with determining claims for refugee status. These are just by
11 way of example. The point is, your Honours, we simply don't know. We have been placed
12 at a substantial disadvantage because of this secrecy and the odds have been stacked against
13 us in these proceedings. We've been placed in the same position, if I can use this analogy, as
14 a person who goes into a casino and wants to play roulette but is told, "You can't bet on red or
15 black, you can only play roulette on exact numbers, and the only numbers that you will be
16 allowed to bet on are 4, 25 and 33." The odds of winning for such a gambler would be
17 stacked against them. If you don't like the gambling analogy, let me put it this way. It's as
18 if the Defence is a boxer in a title match but our opponent is three weight categories heavier,
19 and we, the lighter boxer, have one arm behind our back. That boxer has practically no
20 chances of prevailing. That boxer has the odds stacked against him and that's where we are.
21 Now, if the odds were not so heavily stacked against the Defence, if the Defence had a fair
22 chance at contesting these confirmation proceedings, your Honours could well imagine a
23 situation -- I'm not saying it's inevitable -- but your Honours could imagine a situation where,
24 following a fair and sensible analysis of the evidence, that evidence doesn't quite stack up in
25 the way the Prosecution would want you to believe.

1 Your Honours could well imagine a situation where huge holes in the Prosecution's case are
2 revealed, where, in fact, applying the standard appropriate for these proceedings, where
3 there is simply not sufficient evidence to establish substantial grounds to believe that
4 Mr El Hishri has committed the crimes charged, or at least some of them.

5 Your Honours could even imagine a situation where it dawns on the Prosecution at the
6 conclusion of these proceedings that they simply don't have the evidence to go further, just as
7 they did in the case of Mokom. Your Honours will recall that in that case, in contrast to the
8 situation we are faced with, the Defence had been provided with witness statements and
9 prior statements of identified witnesses, and also transcripts of those witnesses' evidence in
10 the case of Ngaïssona and Yekatom. And that gave the Mokom Defence the opportunity to
11 painstakingly compare and contrast these differing accounts and point out the plethora of
12 contradictions and inconsistencies -- fatal contradictions -- in the accounts of Prosecution
13 witness after Prosecution witness until no reasonably reliable evidence remained.

14 The consequence of which, of course, in Mokom was that the Prosecution concluded, entirely
15 properly, that even if the charges were confirmed by the Pre-Trial Chamber against
16 Mr Mokom, there was no reasonable prospect of a conviction at trial. That result in Mokom
17 was only arrived at because the Defence had been proved with the evidence of identified
18 witnesses and could carry out its investigations. If those same considerations had applied in
19 our case, Mr El Hishri's case, and to return to the boxing analogy, the Prosecution may well
20 have decided it had no option but to throw in the towel, as a result of which Mr El Hishri
21 would have been entitled to see the charges against him dismissed, to allow him to leave the
22 detention centre, to allow him to return to his family and his home a free man.

23 But the odds are stacked against the Defence. The secrecy gives precious little scope for the
24 Defence to prevail in these proceedings, and so Mr El Hishri, in all likelihood, has very little
25 choice, very little chance other than to stay in detention while the wheels of this gargantuan

1 edifice of the International Criminal Court slowly turn.

2 I want to make it clear, we don't say that these confirmation proceedings were deliberately
3 designed to be unfair and prejudicial to the Defence, but it just so happens that that is the way
4 they work. The Prosecution have enormous latitude and that is to the detriment of the
5 Defence, and that means the proceedings are unfair.

6 I now move on to the second point, which is the unduly vague and imprecise language
7 employed by the Prosecution in the Document Containing the Charges.

8 We say that the Prosecution has very deliberately, very carefully used the broadest and
9 vaguest possible language in the DCC. Now, whatever the motivation for doing so, the
10 consequence of this approach, we suggest, is that the Prosecution has availed itself of the
11 greatest latitude to mold its case, post confirmation, against Mr El Hishri, depending on how
12 the evidence unfolds at trial. That is unfair. It violates the spirit of two decades' worth of
13 international jurisprudence originating in the ad hoc tribunals. It also flies in the face of the
14 Appeals Chamber's interpretation of Regulation 52(b) of the Regulations of the Court to
15 which we refer in our written notes and observations, but which provides that the:
16 "Document containing the charges" -- forgive me for reading -- "referred to in article 61 shall
17 include: [...] A statement of the facts, including the time and place of the alleged crimes,
18 which provides a sufficient legal and factual basis to bring the person or persons to trial,
19 including relevant facts for the exercise of jurisdiction by the Court".

20 Now, in our written observations, at paragraph 25, we cite to that Appeals Chamber decision.

21 It's in the Bemba case. It's the judgment on appeal, in fact, filing 3636.

22 And we cite to what in the Bemba judgment the Appeals Chamber expects of a DCC in order
23 that it complies with the requirements of Regulation 52(b). And this is what the Chamber
24 says:

25 "Simply listing the categories of crimes with which a person is to be charged or stating, in

1 broad general terms, the temporal and geographical parameters of the charge is not sufficient
2 to comply with the requirements of regulation 52(b) of the Regulations of the Court and does
3 not allow for a meaningful application of article 74(2) of the Statute."

4 In our submission, this is a relevant reference to the jurisprudence because it describes
5 precisely what the OTP has done in this case. The Document Containing the Charges really
6 simply lists categories of crimes with which Mr El Hishri is charged and states in broad
7 general terms the temporal and geographical parameters of the charges.

8 So, if we look at paragraph, just by way of example -- but if we look at paragraph 26 of the
9 DCC, dealing with the allegation of torture, cruel treatment, imprisonment, outrages upon
10 personal dignity, counts 1 to 6, and it starts:

11 "During the charged period, the Mitiga Perpetrators violently arrested, detained and
12 systematically mistreated at least 5,140 persons, principally at Mitiga Prison."

13 So, looking first at the temporal parameters of the charges during the charged period, you
14 could not imagine a broader exposition of the temporal parameter, because we know from
15 paragraph 1 of the DCC that the charged period is a period of six years and two months.

16 And then in terms of the geographical parameters of the charges, Mitiga Prison -- well, that's
17 fine. But what they say is, the Prosecution, "principally at Mitiga Prison." What does that
18 mean? That's not acceptable. It's overly broad. It is impermissibly vague.

19 If certain charged crimes were committed in locations other than Mitiga Prison, for goodness
20 sake tell us. One searches in vain in the Document Containing the Charges for some
21 indication of geographical parameters that is more precise, that is more than put in broad
22 general terms. The best one can find is paragraph 8 in the DCC, when explaining the
23 contextual elements of the crimes against humanity, where the Prosecution talk about the
24 widespread and systematic attack directed against the civilian population in and around
25 Tripoli. It's not much better.

1 We say that that is a perfect example of merely stating in broad general terms the temporal
2 and geographical parameters of the charges faced by Mr El Hishri.

3 Now, the Prosecution argue at paragraph 23 of their response that identification of temporal
4 and geographic parameters need not be provided with precision in the DCC. But it does
5 acknowledge, the Prosecution, that the Bemba appeal judgment observed that overbroad
6 identification of such parameters is inappropriate. We say that the El Hishri Document
7 Containing the Charges is a paradigm case of overbroad and, therefore, inappropriate
8 specificity, and we urge your Honours' Chamber to put the position right and order the
9 Prosecution to do their job properly.

10 The Prosecution also argues that the Defence conflates matters of relevance to the formulation
11 of the charges, which must be determined by the Chamber, and matters relevant to notice
12 under Article 67(1)(a). If that's what the Prosecution think, then that would suggest that the
13 Prosecution has either not read or has fundamentally misunderstood or has chosen to
14 misunderstand the Defence's observations.

15 The Prosecution also, rather alarmingly, suggests at paragraph 16 of their response that its
16 duty to provide adequate notice to the Defence can be outsourced to your Honours,
17 subcontracted to a pretrial chamber. The Prosecution suggests that the Defence ignores that
18 notice provided in the Pre-Confirmation Brief can potentially be supplemented with further
19 notice to be given in the reasoning of the confirmation decision itself. So, in other words, it
20 seems to be suggested that your Honours' Chamber can do the Prosecution's job for them, at
21 least in part, by analysing the evidence, and giving the Defence the full and proper notice it,
22 the Prosecution, should be giving. It's an extraordinary shirking of responsibility, your
23 Honours may think. The Prosecution suggest that the Pre-Trial Chamber should accept to
24 undertake a job that you are not and never have been designed to do.

25 So, this, we say, is a perfect opportunity for your Honours to set the record straight and to

1 remind the OTP in no uncertain terms that they are the ones who bring the case against

2 Mr El Hishri, they are the ones expected to develop and advance a case strategy, they are the

3 ones who have the responsibility to disclose the details of their case, and your job is to

4 oversee that process, to referee that process.

5 It should never be the case that it is for pretrial judges to give the accused detailed notice of

6 the case -- of the case that he must face in the reasoning in the confirmation decision, and that

7 is not what the Appeals Chamber in the Ongwen judgment found. If the Prosecution truly

8 believe that that is how the various duties of the different actors at this Court should be

9 apportioned, the Prosecution must be disabused of that belief without delay.

10 I don't want to spend an unduly long time on this point of vagueness, and the lack of

11 precision, because we set out the examples of the imprecision as we find it in paragraphs 22

12 and 23 of our written notes and observations quite fully. But, in sum, can I just put it this

13 way. We say that Regulation 52(b) has not been respected in the formulation of the DCC. I

14 mean, just in terms of an example, as much for the public as anyone else, but in terms of the

15 charge of imprisonment, the Prosecution sets out the fundamental rights of which detainees

16 were deprived, so they say. But instead of providing an inclusive list of these rights, the

17 Prosecution non-exhaustively charges "including but not limited to". To employ the

18 terminology in the Bemba appeal, that is not sufficient to comply with Regulation 52(b).

19 Another example, just very briefly, of the vagueness in the DCC in terms of the identification

20 of perpetrators and co-perpetrators. The Prosecution argue at paragraphs 18 and 19 of their

21 response that not every alleged perpetrator or co-perpetrator needs to be identified. And we

22 accept that. As a matter of law, that may be right. But as much precision should be

23 provided as possible than the vaguest of vague terminology that the OTP elects to use when it

24 talks about the "Mitiga Prison leadership" or the "Mitiga Perpetrators". In concrete terms,

25 your Honours, what on earth do those groups encompass precisely? We simply cannot

1 know because they've chosen not to tell us. When we turn to the Pre-Confirmation Brief to
2 see if there are any clues in that document about, for example, who precisely the Mitiga
3 leadership is, we are left scratching our heads. Only three names are given, the same three
4 names that were put on the screen this morning in terms of the Mitiga leadership. But, again,
5 couched in terms of vagueness, including these three people -- or Mr El Hishri and these three
6 people.

7 We have to know, in order to be able to carry out our investigations, in order to be able to
8 adequately defend Mr El Hishri, but the clear decision, and, I dare say, the tactical decision on
9 the part of the Prosecution not to tell us, makes our job impossible.

10 There's also sort of a fundamental and unacceptable circularity of reasoning in the
11 Prosecution's attempt to define the Mitiga Perpetrators on a functional basis. They
12 essentially say that the Defence is on notice of who the Mitiga Perpetrators are by virtue of
13 the fact that they are perpetrators of crimes at any given time at Mitiga. It's a self-identifying
14 group, but it's utterly unhelpful. It is vague by design. Precisely designed so that the
15 Prosecution can feel itself at liberty to mould its case to the evidence as that evidence reveals
16 at trial.

17 And it should not be allowed.

18 I move on to my third point and this focuses on the specific prejudice that is caused by the
19 two preceding points in terms of the Defence's ability at this stage to advance any grounds for
20 excluding criminal responsibility or raising an alibi.

21 Now, your Honours will recall inviting the Defence in its written notes and observations to
22 set out grounds - any grounds - for excluding criminal responsibility or raising the existence
23 of an alibi in accordance with Rule 79(1) of the Rules of Procedure and Evidence.

24 And at section 7 of our written notes and observations, we indicate that the Defence advances
25 no grounds for excluding criminal liability at this stage, but that this is without prejudice to

1 the Defence's right to revisit its position before the Trial Chamber if the charges are
2 confirmed.

3 The main reason for the Defence's inability in this respect is the extraordinarily wide charged
4 period, about which I spoke a few moments ago, and the general imprecision of dates on
5 which Mr El Hishri is alleged to have committed the charged crimes.

6 We simply are not in a position to raise the existence of any alibi in any meaningful sense of
7 the word. We're also unable to raise any meaningful alibi because of the very confidentiality
8 of so many Prosecution witnesses.

9 What do I mean by that, because it may not be obvious? If we knew the names of all the
10 detainees, this would allow us, or might allow us, to establish with greater certainty when
11 any such witnesses were detained. And if we knew with -- if we had some clarity about that,
12 any clarity of approximately when Mr El Hishri is alleged to have committed the crimes with
13 which he is charged beyond this ridiculously wide charged period of six years and two
14 months, that may allow us to establish whether Mr El Hishri had an alibi worthy of the name.
15 Mr El Hishri was in possession of a passport. He had the ability and indeed was in the habit
16 of travelling during the charged period. Establishing solid alibis, meaningful alibis for
17 definite periods of time could well result in your Honours' Chamber concluding that for some
18 charges at least there is not, after all, sufficient evidence to establish substantial grounds to
19 believe that he committed the crimes charged, or some of the crimes charged.

20 And the same holds true, albeit to a lesser extent I accept, in terms of advancing any grounds
21 for excluding criminal responsibility provided for in Article 31(1) of the Rome Statute.

22 The Prosecution responded to what we say about our inability to advance an alibi and, in a
23 curious choice of language, submitted that Mr El Hishri has declined to provide notice of any
24 alibi. Declined. Well, the underlying sense of that word being that if Mr El Hishri wanted to,
25 he could have given details of an alibi but he has taken a positive decision to keep it secret at

1 this stage.

2 Your Honours, utter nonsense. The Prosecution's suggestion that he can provide an alibi
3 that would be worth the paper it's written on for a period of six years and two months, and
4 from a location that is as broad as it is set out in the DCC, is laughable.

5 The Prosecution knows, the Prosecution should know, that alibis have to be precise.

6 Sometimes to the hour. Sometimes to the minute. Alibis, if they are meaningful in any
7 sense of the word, cannot be vague. What value would an alibi be to an allegation that, just
8 by way of example, Mr El Hishri shot an unnamed detainee in the knee on an unknown date?

9 If the only alibi we could advance is that for two weeks in, I don't know, June 27, maybe it

10 was July, he was on holiday with his family. Of course, we can't provide any kind of

11 meaningful alibi given the broadness and the vagueness of the DCC. And the Prosecution,

12 frankly, falls back on the laziest of responses by saying that Mr El Hishri is best placed to

13 know where he was at the time without there being a requirement for any investigations by

14 the Defence.

15 Well, the most generous thing that we could say is that the Prosecution's retort demonstrates

16 a fundamental naivety about how criminal litigation works. We are confident that your

17 Honours don't operate under the same naivety and that you have a far superior

18 reality -- understanding of the realities of criminal litigation. But about that I will say no

19 more.

20 Contextual elements of the crimes. Now, probably now -- where are we? It will probably

21 be tomorrow now, but Mr Hassan, my learned lead counsel, will address you on the

22 contextual elements of crimes against humanity probably tomorrow now.

23 The Prosecution, at paragraph 35 of their response to our written notes and observations,

24 argue that undeveloped submissions must be disregarded because -- and it's fair to say we

25 don't go into much detail about the contextual elements of crimes against humanity in our

1 written notes and observations, but the Prosecution completely ignores of course what we say
2 at paragraph 2 and then again at paragraph 46 in our notes, that those notes were never
3 intended to be the Defence's only and final word on the arguments that it wishes to advance
4 in these proceedings. The Defence made it absolutely clear that these notes should not be
5 understood to amount to a comprehensive treatment of all the arguments that the Defence
6 wishes to address before your Honours. And lest there be any doubt, the Defence made it
7 clear again in its conclusion, and I'm going to cite it in full:

8 "For the foregoing reasons, which will be complemented and fully elaborated upon during
9 the confirmation of charges hearing, the Defence will respectfully request that the Pre-Trial
10 Chamber decline to confirm any of the charges ..."

11 We made it clear that this is like a skeleton argument, and the Prosecution ignore those
12 caveats in a rather grumpy and unfair submission, asking the Chamber to ignore allegedly
13 undeveloped arguments. But, anyway, that's a matter for Mr Hassan tomorrow.

14 I'm going to focus now on the insufficiency of evidence of a nexus between the alleged armed
15 conflict in Libya at the material time and the charged crimes.

16 But because I'm not wearing my headphones, can I just check with the interpreters I'm not
17 going too fast.

18 Thank you.

19 We said in our written notes and observations, and we reiterate now, that the circumstances
20 of the alleged arrest and detention and alleged mistreatment of the complainants at Mitiga
21 had no, or no sufficient nexus, with any non-international armed conflict. I'll shorten that to
22 NIAC for the rest of my submissions.

23 Now, we accept that whether a nexus has been established or not is a fact-sensitive exercise.

24 We agree with what the Prosecution submitted yesterday. We focus on paragraph 40 of the
25 Pre-Confirmation Brief, where the Prosecution say this:

1 "Notably, but for the conflict and the power vacuum and factionalism which had been created
2 by it, [the NIAC] the Mitiga Perpetrators could not have carried out the alleged crimes at all,
3 or in any event in a similar institutionalised and sustained way."

4 And that language mirrors, doesn't it, the Prosecution's submissions in its application for an
5 arrest warrant against Mr El Hishri. The Prosecution said this:

6 "The alleged crimes in Mitiga Prison all had the requisite nexus. In particular, SDF/RADA
7 members could not have committed the crimes without the conflict - which enabled
8 SDF/RADA to maintain its exclusive control of Mitiga Prison where the crimes occurred ..."
9 and they go on.

10 This is the heart of it:

11 "Without the conflict," say the Prosecution, "the Libyan authorities would not have permitted
12 SDF/RADA to function as it did. As such, the conflict was an essential condition for the
13 prolonged and systematic commission of crimes at Mitiga Prison."

14 That's from paragraph 50 in the arrest warrant application.

15 Your Honours will note the "but for" test in that application and that was the key test
16 advanced by the Prosecution, and your Honours' Chamber agreed. In your decision, the
17 warrant of arrest decision, paragraph 14, you state in the clearest terms, your Honours, "the
18 key question is why [the alleged victims] were detained. Even if an armed conflict is
19 ongoing, not every detained person falls within the scope of IHL, especially when it concerns
20 a government prison".

21 A perfectly valid bit of judicial reasoning. It's plainly obvious.

22 The Prosecution say, well, in fact, the "but for" test is only one factor for the Pre-Trial
23 Chamber to take into account as part of a wider and more holistic approach. There are other
24 factors that must be examined.

25 And so -- and so -- in its Pre-Confirmation Brief, paragraph 40, the Prosecution argue that

1 when considering this nexus requirement, the Chamber should consider in particular four
2 factors. One, the affiliation of the Mitiga Perpetrators to SDF/RADA and the GNC/GNA as a
3 party to the conflict. That's one. Two, the status of the victims as civilians or fighters *hors*
4 *de combat*. Thirdly, the commission of the relevant conduct by the Mitiga Perpetrators in the
5 context of their official functions. And, fourthly, the substantial part played by the NIAC in
6 enabling the Mitiga perpetrators to carry out the relevant conduct, the manner in which it
7 was committed, and/or the purpose for which it was committed.

8 With your Honours' leave, I'd like to start by discussing the sources of the applicable
9 standard for determining whether a nexus exists, and a good point to start is the elements of
10 crime. That publication of this Court, or that fundamental text of this Court, states that
11 for criminal conduct to amount to a war crime, "The conduct must have taken place in the
12 context of and was associated with an armed conflict not of an international character."

13 In terms of international criminal jurisprudence, the starting point in any examination of the
14 nexus requirement is the Kunarac judgment before the ICTY -- the Appeals judgment,
15 actually. I hope your Honours will forgive me for reading out from one or two paragraphs,
16 because it is interesting to remind ourselves of what is said in Kunarac. Because you will
17 agree with me, I think, that what is said in Kunarac not only is a good starting point, but it
18 makes absolute sense.

19 Paragraph 58, Kunarac:

20 "What ultimately distinguishes a war crime from a purely domestic offence is that a
21 war crime is shaped by or dependent upon the environment - the armed conflict - in which it
22 is committed. It need not have been planned or supported by some form of policy. The
23 armed conflict need not have been causal to the commission of the crime, but the existence of
24 an armed conflict must, at a minimum, have played a substantial part in the perpetrator's
25 ability to commit it, his decision to commit it, the manner in which it was committed or the

1 purpose for which it was committed. Hence, if it can be established, as in the present case,
2 that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would
3 be sufficient to conclude that his acts were closely related to the armed conflict."

4 And then moving on to paragraph 59:

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

11 Kunarac was discussed in the ICTR Appeal Judgment in Rutaganda. And in that judgment,
12 paragraph 570, the Chamber says this, that they agree with the criteria highlighted and with
13 the explanation of the nexus requirement given in Kunarac, but what the Appeals Chamber
14 says in Rutaganda is this:

15 "It's only necessary to explain two matters. First, the expression 'under the guise of the
16 armed conflict' does not mean simply 'at the same time as an armed conflict' and/or 'in any
17 circumstances created in part by the armed conflict'.

18 So I pause there, that really is just an exposition of the obvious.

19 But the Appeals Chamber in Rutaganda gives an example and it is a useful example. It is
20 illustrative. So they say this:

21 "For example, if a non-combatant takes advantage of the lessened effectiveness of the police in
22 conditions of disorder created by an armed conflict to murder a neighbour he has hated for
23 years, that would not, without more, constitute a war crime under Article 4 of the Statute."

24 And I pause for a moment to say that that kind of example is the sort of example that we will
25 urge you to bear in mind throughout the rest of these submissions and, indeed, in your

1 consideration in these confirmation proceedings.

2 The Appeals Chamber in Rutaganda contrasted that example with Kunarac himself, because
3 they say the accused in Kunarac, for example, were combatants who took advantage of their
4 positions in military authority to rape individuals whose displacement was an express goal of
5 the military campaign in which they took place.

6 And then I jump forward a bit:

7 "Particular care is needed when the accused is a non-combatant." And then moving from the
8 ICTY and the ICTR to this Court in the Afghanistan Situation, the Appeal Judgment cited by
9 my learned friend yesterday, 5 March 2020, that case, at paragraph 69 the Appeals Chamber
10 says:

11 "It has been observed that the function of the nexus requirement is to differentiate 'war crimes
12 [...] from "ordinary" or "common" crimes under domestic law, such as the common crime of
13 murder and rape'.

14 The Appeals Chamber cites to Kunarac and also states this at paragraph 70:

15 "The Appeals Chamber endorsed this approach in the Ntaganda case, while also noting
16 that" -- and I cite -- "'any undue expansion of the reach of the law of war crimes can be
17 effectively prevented by a rigorous application of the nexus requirement'."

18 So, whilst we agree that the nexus question is a fact-sensitive question, we endorse that which
19 is said by the Appeals Chamber in Afghanistan, that we must always be wary not to get
20 involved in undue expansion of the reach of the law of war. A rigorous application of the
21 nexus requirement is always needed. It's when the right questions have been identified and
22 asked that we see that in Mr El Hishri's case those answers don't assist the Prosecution.

23 So, looking at the factors mentioned in Kunarac, is the perpetrator a combatant? Well, here
24 there's no evidence that Mr El Hishri is a combatant in any NIAC in Libya. Were detainees
25 combatants or non-combatants? Well, the vast majority were non-combatants. The vast

1 majority of detainees were arrested and detained, on the Prosecution's case, for reasons
2 entirely unconnected with any status, any combatant status. So we're looking at arrest and
3 detention on the basis of religion, sexuality, perceived moral misbehaviour, ethnicity,
4 immigration status in Libya, and so on, perceived opposition to the interests of RADA.
5 Now, I say the vast majority. Even where the Prosecution state that persons were detained
6 on the basis of suspicion of membership of an armed group, for example ISIS, your Honours'
7 Chamber must carefully assess whether the arrests were made on the basis of some suspicion
8 of combatant status or, in fact, for much more straightforward reasons connected with ISIS
9 members' affiliation, or suspected affiliation, with a terrorist organisation, in which case, of
10 course, any arrest would be perfectly justifiable on the ground of domestic law enforcement
11 reasons. Every country in the world has the right to arrest and detain suspected terrorists,
12 because terrorist activities are crimes, including very often in many jurisdictions simple
13 membership of terrorist organisations.
14 So, just because somebody has been arrested on suspicion of ISIS, you cannot jump to the
15 conclusion that that is because they were a suspected combatant.
16 Thirdly, the fact that the arrest or detention may be said to serve the ultimate goal of a
17 military campaign. Here the Prosecution has produced no evidence whatsoever that any of
18 the alleged arrests served the ultimate goal of any military campaign.
19 The fact that a crime is committed as part of or in the context of a perpetrator's official
20 duty -- again, there is no evidence that Mr El Hishri, even on the Prosecution's case, no
21 evidence at all that he had any official duties associated with military matters or combatant
22 matters.
23 So, that's running through the list of questions identified by Kunarac.
24 Let's now come to the factors identified by the Prosecution at paragraph 40 of its
25 Pre-Confirmation Brief. Let's have a look at the factors of relevance in this case.

1 They ask you to look at the affiliation of the Mitiga Perpetrators to SDF/RADA and the
2 GNC/GNA as a party to the conflict. We say that, really, the important question for you to
3 answer is whether SDF/RADA itself was connected to any NIAC. Any association with the
4 GNC/GNA without more is, in our submission, too remote to tie SDF/RADA as an
5 organisation to the armed conflict. And that's just talking about the organisations. The
6 same goes, to a greater extent, with regard to the Mitiga Perpetrators, whoever they may be,
7 and much less still to Mr El Hishri himself. Care must be exercised, we respectfully submit,
8 by your Honours' Chamber to avoid the undue expansion of the reach of the law of
9 war crimes by undertaking a vigorous application of the nexus requirement. The
10 Prosecution say you have to look at the status of the victims as civilians or fighters *hors de*
11 *combat*. Well, yes, exactly. The vast majority of detainees were not fighters, they were
12 civilians, on the Prosecution's case. But if there is evidence of fighters *hors de combat*, or any
13 suggestion that detainees were fighters *hors de combat*, the evidence would suggest that they
14 were arrested for reasons associated with their criminal membership or association with a
15 terrorist organisation as proscribed under Libyan municipal law, rather than as fighters or
16 former fighters per se.

17 And then we look at the point raised by the Prosecution, the substantial part played by the
18 NIAC in enabling the Mitiga perpetrators to carry out the relevant conduct, the manner in
19 which it was committed, and/or the purpose for which it was committed.

20 And here, your Honours, there is a real danger of overreach, we say. The existence of an
21 armed conflict as an enabler of perpetrators to carry out their criminal conduct cannot in and
22 of itself reliably create a war crime nexus, and I come back to the very example given by the
23 ICTR Appeals Chamber in Rutaganda of a non-combatant taking advantage of the lessened
24 effectiveness of the police in conditions of disorder created by an armed conflict to murder a
25 neighbour. That is an observation that is as pertinent today and obviously as correct today

1 as it was all those years ago.

2 And then -- coming now to the "but for" test, as part of the holistic assessment -- "but for the
3 conflict", say the Prosecution, "and the power vacuum and factionalism which had been
4 created by it, the Mitiga Perpetrators could not have carried out the alleged crimes at all, or in
5 any event in a similar institutionalised and sustained way."

6 Here we say that whilst it's right that this be a question that is considered as part of the
7 holistic and multifaceted approach to be taken, here, we say, this is the Prosecution engaging
8 in pure speculation. It's the Prosecution imagining a counterfactual, an alternate history.

9 But by "counterfactual" I mean an expression of what has not happened, but could, would, or
10 might under differing conditions. So, in the case at hand, if there had been no NIAC, the
11 Mitiga Perpetrators would not or could not have carried out the alleged crimes, and
12 Mr El Hishri would not be here. We argue that this is the Prosecution inviting your
13 Honours to engage in the most soaring and the most dangerous speculation that has no place
14 in a court of law, in a place where what is required is evidence. Yet, the Prosecution points
15 to no convincing material in the Pre-Confirmation Brief to support the sweeping assessment
16 that arrests and detention of persons for domestic criminal offences, and the alleged arrests
17 and detention of persons for, for example, broader ideological reasons, could not have been
18 carried out in precisely the same manner, or indeed in any other manner, in the absence of the
19 NIAC.

20 On any reasonable and impartial and dispassionate view of the evidence, we are confident
21 that your Honours will find that there is simply no, or no sufficient evidence to establish
22 substantial grounds to conclude that a nexus exists between any NIAC in Libya and the
23 crimes alleged against Mr El Hishri.

24 My final topic before you this afternoon focuses on our response to the Prosecution's attempt
25 to persuade in Chamber to confirm the charges described as, by the Prosecution -- sorry, the

1 alleged mistreatment of persons described by the Prosecution as Black Migrants. So we're
2 talking about enslavement, in count 13; and persecution on political grounds, count 14; and
3 on nationality, race and/or ethnicity grounds, count 16.

4 Count 13 -- enslavement -- finds itself in the DCC, doesn't it? The Prosecution had valiantly,
5 albeit in a state of some over-optimism perhaps, attempted to convince your Honours that
6 enslavement should be included on the arrest warrant. And it will be recorded that your *
7 Honours having examined the evidence that you had been shown, you declined to include
8 enslavement. And, if I may, your reasons were beyond reproach. You said this, at
9 paragraph 81 of the warrant of arrest decision:

10 "... the Chamber also notes that the Prosecution defines the civilian population targeted by
11 this crime [of enslavement] as 'segments of the population in Libya perceived to be opposing
12 SDF/RADA or its ideology'. The material provided indicates that the Sub-Saharan
13 detainees" -- as they were described in the arrest warrant application -- "were detained for
14 reasons unrelated to opposing SDF/RADA or its ideology, and therefore cannot be considered
15 part of the same civilian population that was being attacked. Regarding the other
16 detainees" -- because it wasn't just the sub-Saharan detainees, it was other Libyan
17 detainees -- "the Chamber considers that the Prosecution has failed to show that the alleged
18 perpetrators exercised powers attaching to the right of ownership over them. Based on these
19 considerations, the Chamber will not further examine the alleged crime against humanity
20 with respect to both Sub-Saharan African and Libyan detainees."

21 It is worth highlighting for the benefit of the public, if for no one else, that at the stage of
22 pretrial litigation relating to the request for an arrest warrant, the standard of proof
23 demanded in the Rome Statute is very low. The Prosecution does not have to bring enough
24 evidence to satisfy the Court of its request beyond reasonable doubt. That's the standard for
25 trial. The Prosecution doesn't even have to meet the test of bringing sufficient evidence to

1 establish substantial grounds to believe that the target of the warrant has committed the
2 crime for which the Prosecution wants to arrest him or her. That is a lower standard than
3 beyond reasonable doubt, and it's in fact the standard applicable at these confirmation of
4 charges proceedings.

5 To succeed in a request for an arrest warrant, all the Prosecution has to do is place enough
6 evidence before the Chamber to satisfy the judges that there are reasonable grounds to believe
7 that the target has committed the crime for which the Prosecution wants to arrest him or her.
8 It is a low standard. It's the lowest standard in fact applicable before this Court. It's similar
9 to the standard of probable cause that's familiar to American jurists, the standard to be
10 applied by grand juries in the United States when deciding whether to issue a criminal
11 indictment.

12 There's another similarity between the American grand jury procedure and the procedure to
13 be followed for the issuance of an arrest warrant at this Court -- they are both *ex parte* the
14 Defence.

15 So, what happens? The Prosecution puts forward its best case without any fear of
16 contradiction from the other side. It's not an adversarial process. And because it is so
17 one-sided, and because the applicable standard is so low, it is a famous idiom in American
18 legal circles that a grand jury would indict a ham sandwich.

19 Returning to this case, even on the lowest standard, the arrest warrant standard, your
20 Honours were so utterly unpersuaded by the Prosecution's argument and evidence regarding
21 enslavement that you declined to further examine that crime. And quite rightly, if we may
22 say. And now, now that the test is that much higher, the Prosecution attempts to resurrect
23 enslavement as a crime against humanity. But now the standard is more onerous -- the
24 substantial grounds to believe. Your Honours, this attempt must fail.

25 We, in our submissions, refer to Article 101 of the Rome Statute, which defines the rule of

1 speciality. I see the time, so I'm not going to read it. It's not impermissible or a violation of
2 the principle of specialty to add charges prior to the confirmation hearing which were not
3 contained in the arrest warrant if they are part of the course of conduct for which the suspect
4 was arrested. And the authority for that proposition is Mbarushimana. But our case today,
5 Mr El Hishri's case, can readily be distinguished from Mbarushimana, because you have
6 already ruled, and to a lower standard, that the allegation included in the Prosecution's
7 request for the arrest warrant relating to enslavement was simply not made out. The
8 Prosecution has not shown that that ruling was wrong, and there is no basis to believe that
9 your Honours should arrive at a finding that is in any way different to your prior and plainly
10 correct findings that the Black Migrants were detained for reasons unrelated to opposing
11 SDF/RADA or its ideology, and cannot be considered as part of the same population that was
12 being attacked. And the Prosecution has failed to show that the alleged perpetrators
13 exercised powers attaching to the right of ownership over the other, the Libyan detainees.
14 And so, for those reasons, we say that you should and you must decline to confirm count 13,
15 and for exactly the same reasons, because the Prosecution have produced no evidence that the
16 sub-Saharan detainees or the Black Migrants were detained for reasons related to opposing
17 SDF/RADA, for the same reasons counts 14 and counts 16 insofar as they relate to Black
18 Migrants must be refused.
19 Your Honours, that brings me to the end of those five points that I had.
20 There's one final point, and I'm just going to take up one moment of your time if I may,
21 because, this morning, just before the lunch adjournment, when dealing with the question of
22 modes of liability, Mr El Hishri's alleged modes of liability, the Prosecution stated, didn't they,
23 that they charge him under four sub-articles of the Rome Statute for the sake of judicial
24 economy. Can I put it this way: they throw the kitchen sink at Mr El Hishri for reasons of
25 judicial economy, whilst at the same time stating clearly that, on their case, he directly

1 perpetrated acts under each of the crimes charged.

2 So, we ask ourselves this, and we invite yourselves to ask yourselves this question: if judicial
3 economy is the concern, why not just charge him with direct perpetration under
4 Article 25(3)(a) of the Rome Statute and be done with it? It's difficult to understand why
5 they don't simply pin their colours to the mast.

6 We wonder, in fact we suggest, that this is a sign of prosecutorial timidity. What they're
7 basically saying is, * "We're going to throw everything at the Court and let the judges pick the
8 bones out of that." But that's not fair. That doesn't give us notice of the way in which the
9 Prosecution really put their case against Mr El Hishri, and judicial economy cannot be the
10 reason for the way in which they put their case, because that will require, at trial, significant
11 amounts of time in calling evidence and dealing with evidence that deals with all the other
12 sorts of modes of liability, modes of liability that require additional evidence. Judicial
13 economy cannot be the reason.

14 Your Honours, I thank you for your time. Those are the submissions that I have to make, a
15 little bit before 3 o'clock. Unless your Honours have any questions for me, that's where
16 I propose to stop.

17 PRESIDING JUDGE MOTOC: [14:55:05](Interpretation) Thank you very much, counsel. I
18 have consulted my colleagues. I would like to thank you, but we have no questions. How
19 do you proceed from here, members of your Defence team?

20 MR HASSAN: [14:55:28] (Interpretation) Thank you, Madam President. We need
21 approximately one hour and a half. We need approximately one hour and a half, therefore,
22 the remaining time for today will be insufficient and we will have to interrupt our
23 submissions. So, after your permission, we would like to start tomorrow.

24 PRESIDING JUDGE MOTOC: [14:55:56](Interpretation) So, if I've understood, you wish to
25 finish the hearing now and start early to put your submissions; is that right?

1 MR HASSAN: [14:56:09](No Interpretation)

2 PRESIDING JUDGE MOTOC: [14:56:13](Interpretation) Have I got that right?

3 THE INTERPRETER: [14:56:19] Microphone please, your Honour.

4 PRESIDING JUDGE MOTOC: [14:56:21](Interpretation) So I've consulted with my

5 colleagues. We are in agreement with Defence's proposal. We will rise now. I'd like to

6 thank all the parties and all the participants, the court reporters, and we shall reconvene

7 tomorrow. Oh, you wish to make a submission, Prosecution?

8 THE INTERPRETER: [14:56:42] Microphone please, says the interpreter. Microphone for

9 the Presiding Judge.

10 PRESIDING JUDGE MOTOC: [14:56:47](Interpretation) So we shall see each other

11 tomorrow as scheduled. Thank you very much. We rise.

12 THE COURT USHER: [14:56:53] All rise.

13 (The hearing ends in open session at 2.56 p.m.)

14 CORRECTIONS REPORT

15 The following transcribing correction, marked with an asterisk *, is brought into the

16 transcript.

17 Page 13 line 8:

18 " on the soles of their feet by beating "

19 is corrected to:

20 "on the soles of their feet, by being beaten"

21 The following interpretation corrections, marked with an asterisk *, are brought into the

22 transcript.

23 Page 7 line 4:

24 "subjected"

25 is corrected to:

- 1 "subjected to"
- 2 Page 11 line 16:
- 3 "being forced to"
- 4 is corrected to:
- 5 "being forced to do"
- 6 Page 25, line 5
- 7 "I am Khaled Mohamed Ali El Hishri and I am the attorney general."
- 8 Is corrected to
- 9 "I am Khaled Mohamed El Hishri and I am the attorney general"
- 10 Page 31 line 11
- 11 "with each below"
- 12 Is corrected to
- 13 "with each blow"
- 14 Page start 63, line start 7
- 15 "Honours having examined the evidence that you will be shown"
- 16 Is corrected to
- 17 "Honours having examined the evidence that you had been shown"
- 18 Page start 66, line start 7
- 19 "We're going to throw everyone at the Court"
- 20 Is corrected to
- 21 "We're going to throw everything at the Court"