

ANNEX
Public

**Public redacted version of ‘Warrant of
Arrest for
Abdurahem Khalefa Abdurahem
Elshgagi (‘Abdulrahem
Al Kani’), issued on 6
April 2023 (ICC-01/11-93-US-Exp and
ICC-01/11-93-OPI-US-Exp)**

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/11**
Date: **6 April 2023**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN LIBYA

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

Warrant of Arrest for Abdurahem Khalefa Abdurahem Elshgagi ('Abdulrahem Al Kani')

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

The Office of the Prosecutor

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

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representative

Others

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this warrant of arrest pursuant to article 58(1) of the Rome Statute (the ‘Statute’) for

Abdurahem Khalefa Abdurahem ELSHGAGI

also known as **Abdulrahem Al Kani**,¹ a national of Libya, born on 22 February 1981 in Tarhunah, Libya.²

I. Procedural history

1. On 26 February 2011, the United Nations Security Council (the ‘Security Council’), acting under Chapter VII of the Charter of the United Nations, referred the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Court, in accordance with article 13(b) of the Statute, deciding, *inter alia*, that ‘Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’, and urging ‘all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor’ (the ‘2011 Resolution’).³
2. On 8 November 2022, the Prosecution, under seal, applied for a warrant of arrest (the ‘Application’),⁴ for Abdulrahem Al Kani (‘Mr Al Kani’), for the following war crimes within the Court’s jurisdiction, committed in Libya [REDACTED]

- (i) murder (article 8(2)(c)(i) of the Statute);
- (ii) outrages upon personal dignity (article 8(2)(c)(ii) of the Statute);
- (iii) cruel treatment (article 8(2)(c)(i) of the Statute);
- (iv) torture (article 8(2)(c)(i) of the Statute);
- (v) sexual violence (article 8(2)(e)(vi) of the Statute); and

¹ Alternative versions and spellings of the name, as submitted by the Prosecution, include: Abdurahem Khalefa Abdurahem Elshgagi Al Kani, Abd-al-Rahim Khalifa Abd-al-Rahim Al Shaqaqi, Abderrahim Khalifa Abderrahim Shqaqi Al-Kani, Abdurahem Al Kani, Abderrahim Al-Kani, and Abdul-Rahim Al Kani.

² For photographs the Prosecution submits are of Mr Al Kani, see ICC-01/11-83-US-Exp-Anx2. For a photograph of Mr Al Kani’s passport (as submitted by the Prosecution), see LBY-OTP-00000247, at 000001.

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

⁴ Prosecution’s application under article 58 for a warrant of arrest against Abdurahem Khalefa Abdurahem Elshgagi (‘Abdulrahem AL KANI’), 8 November 2022, ICC-01/11-83-US-Exp (with under seal, *ex parte*, annexes 1-10).

(vi) rape (article 8(2)(e)(vi) of the Statute).⁵

3. The Prosecution submits that Mr Al Kani intentionally and/or knowingly contributed to these crimes, which were committed by a group acting with a common purpose.⁶ In the alternative, the Prosecution alleges that Mr Al Kani directly perpetrated, or co-perpetrated, specific acts of cruel treatment, torture, and murder, or ordered, induced, or aided and abetted such acts.⁷

4. [REDACTED]

[REDACTED]⁸

II. Jurisdiction and admissibility

5. Pursuant to article 19(1) of the Statute, the Chamber must consider whether the Court has jurisdiction over the alleged conduct. The majority of the Chamber, Judge Flores Liera dissenting, is satisfied that Mr Al Kani's conduct, as alleged by the Prosecution, falls within the jurisdiction of the Court. In this regard, and considering the time elapsed since the Security Council's referral of the situation in Libya to the Court, the Chamber has considered as part of its assessment the question of whether Mr Al Kani's conduct is sufficiently linked to the situation as it was originally referred.
6. The majority of the Chamber recalls in this regard that a previous composition of this Chamber has found that 'for the case at hand not to exceed the parameters defining the [...] situation under investigation, the crimes referred to in the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the [...] referral'.⁹ It has also been noted that a situation 'can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently

⁵ Application, paras 2, 14.

⁶ Application, paras 87, 96-100.

⁷ Application, paras 101-103.

⁸

⁹ Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana](#), 28 September 2010, ICC-01/04-01/10-1 ('*Mbarushimana* Art. 58 Decision'), para. 6.

linked to the situation of crisis referred to the Court as ongoing at the time of the referral'.¹⁰

7. Turning to the specifics in this case, the majority of the Chamber observes that there has been an ongoing situation of crisis in Libya since 2011. It is a fact of common knowledge¹¹ that violence erupted in Libya in February 2011 in the context of an uprising against the regime of Muammar Mohammed Abu Minyar Gaddafi and that after the fall of the Gaddafi regime, the fighting and civil unrest continued in Libya. The information before the Chamber also shows that the violence between the organisation referred to by the Prosecution as the 'Libyan National Army' (the 'LNA') - an armed group previously referred to as Khalifa Haftar's Libyan National Army (which is now being 'restyled' as the 'Libyan Arab Armed Forces')¹² - and the Government of National Accord (GNA) 'amplified the existing proxy conflict that took shape after 2011'.¹³
8. On the basis of the information contained in the reports of the United Nations Support Mission in Libya and the Independent Fact-Finding Mission on Libya, submitted by the Prosecution, the majority of the Chamber considers that it is sufficiently shown that the situation of crisis in Libya extended until at least 5 June 2020.¹⁴
9. The Prosecution alleges that the crimes 'were committed [REDACTED] [REDACTED] by members of the Kaniyat [REDACTED] in Tarhunah.¹⁵ The majority considers that there are reasonable grounds to believe that, as submitted by the Prosecution, the Kaniyat emerged as a result of the 2011 crisis that triggered the 2011 Resolution, and the aftermath of this crisis.¹⁶

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

¹¹ See article 69(6) of the Statute.

¹² LBY-OTP-00000529, at 000007, footnote 6. It is recalled that this group should be distinguished from the Libyan National Army in existence during the Gaddafi regime.

¹³ LBY-OTP-00000526, at 000002.

¹⁴ LBY-OTP-00000537, at 000001-000004; LBY-OTP-00000526, at 000008; LBY-OTP-00000426, at 000001-000002; LBY-OTP-00000425, at 000001-000003; LBY-OTP-00000427, at 000001-000002; LBY-OTP-0070-9227, at 9234.

¹⁵ Application, paras 8-9.

¹⁶ LBY-OTP-0070-9227, at 9232; LBY-OTP-0081-0004, at 0017.

10. Furthermore, the material provided indicates that [REDACTED] [REDACTED] the Kaniyat was affiliated to the LNA. The Kaniyat played a role, for example, in an LNA attack on Tripoli on around 4 April 2019,¹⁷ referred to by the Prosecution as ‘Operation Flood of Dignity’. On the basis of the information submitted by the Prosecution, the majority of the Chamber also finds reasonable grounds to believe that the Kaniyat was for a certain period of time integrated into the LNA structure, namely into what was referred to as the ‘Support Forces’ for the so-called ‘9th Brigade’ of the LNA.¹⁸
11. A link between the crimes alleged by the Prosecution and the situation that triggered the jurisdiction of the Court is [REDACTED] related to the ongoing crisis in Libya.¹⁹
12. The majority of the Chamber notes that it is a fact of common knowledge that the Prosecution submits periodical reports to the Security Council on actions taken pursuant to the 2011 Resolution. The fact that the Prosecutor continues reporting before the Security Council and no objection to these reports have been raised is yet another indication of the ongoing jurisdiction of the Court over alleged crimes committed in the context of the ongoing crisis in Libya.
13. In light of the above, the majority of the Chamber is satisfied that the alleged crimes described in the Application are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral given that they took place in the context of the situation of crisis that triggered the adoption of the 2011 Resolution, and has persisted since.
14. The majority of the Chamber declines, at this stage, to use its discretionary *proprio motu* power to determine the admissibility of the case against Mr Al Kani as there is no ostensible cause or self-evident factor which impels it to exercise its discretion pursuant to article 19(1), second sentence, of the Statute.²⁰

¹⁷ LBY-OTP-0070-7578, at 7583; LBY-OTP-00000424, at 000001.

¹⁸ LBY-OTP-0081-0004, at 0034-0037; LBY-OTP-0070-7739, at 7747-7749; LBY-OTP-0070-7578, at 7583; LBY-OTP-0070-9227, at 9234.

¹⁹ See para. 28 below.

²⁰ See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#), 13 July 2006, ICC-01/04-169 (OA), paras 1-2, 52; Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Warrant of Arrest for Omar Hassan Ahmad Al Bashir](#), 4 March 2009, ICC-02/05-01/09-1, p. 4; [Mbarushimana Art. 58 Decision](#), para. 9; Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Mandat d’arrêt à l’encontre d’Ahmad Al Faqi Al Mahdi](#), 18 September 2015, ICC-01/12-01/15-1-Red,

15. The above findings are without prejudice to the determination of any future challenge to the jurisdiction of the Court or the admissibility of a case under article 19 of the Statute.
16. For reasons fully set out in her dissenting opinion, Judge Flores Liera disagrees with her colleagues and considers that the alleged crimes described in the Application are not sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral. She also considers that on the basis of the very limited information provided by the Prosecution, [REDACTED] it cannot be assessed whether fighting during the period of the alleged conduct amounted to a non-international armed conflict at all, or whether the alleged non-international armed conflict was the same or rather a different conflict than the one that took place in early 2011. For reasons explained in her dissenting opinion, Judge Flores Liera further considers that the Prosecution fails to show the link between the alleged crimes and the possible existence of a non-international armed conflict.
17. The determination of the remainder of the Application, which follows next, is by the majority of the Chamber only.

III. Standard of proof

18. The findings of facts, as set out below, are made based on the relevant evidentiary standard, namely ‘reasonable grounds to believe’, as required by article 58(1)(a) of the Statute. The evidence must only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court. This need not be the only reasonable conclusion that can be drawn from the evidence.²¹

para. 12; and Pre-Trial Chamber I, *Situation in Georgia*, [Arrest warrant for David Georgiyevich Sanakoev](#), 30 June 2022 (confidential version issued 24 June 2022), ICC-01/15-42-Red, para. 3.

²¹ Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’](#), 3 February 2010, ICC-02/05-01/09-73 (OA), paras 33, 39. See also Pre-Trial Chamber I, *Situation in Georgia*, [Arrest warrant for David Georgiyevich Sanakoev](#), 30 June 2022 (confidential version issued 24 June 2022), ICC-01/15-42-Red, para. 4; Pre-Trial Chamber II, *The Prosecutor v. Sylvestre Mudacumura*, [Decision on the Prosecutor’s Application under Article 58](#), 13 July 2012, ICC-01/04-01/12-1-Red (confidential version issued on the same day), para. 19.

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

19. Article 58(1) of the Statute provides that the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, and if the arrest of the person appears necessary.
20. The arrest must appear necessary to: a) ensure the person's appearance at trial, b) ensure that the person does not obstruct or endanger the investigation or the court proceedings, or c) to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.²² These conditions are alternative in nature, and at least one of the requirements must be fulfilled to demonstrate the need for detention.²³

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

1. Contextual elements

21. War crimes pursuant to article 8(2)(c) and (e), which are alleged by the Prosecution in the Application, can only be committed if international humanitarian law ('IHL') applicable to non-international armed conflicts applied to the conduct in question at the relevant time. Additionally, the contextual elements of article 8(2)(c) and (e) require that: (i) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (ii) the perpetrator was aware of factual circumstances that established the existence of the armed conflict.²⁴ As the second element relates to Mr Al Kani specifically, it will be addressed below when considering Mr Al Kani's *mens rea*.
22. According to the documentary material provided by the Prosecution, fighting took place regularly throughout the period relevant for the Application, and at least until 5 June 2020.²⁵ The principal actors opposing each other at this time were the Tripoli-based GNA

²² Article 58(1)(b) of the Statute.

²³ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, [Decision on the review of detention](#), 12 April 2021, ICC-02/05-01/20-338, para. 20 and references therein.

²⁴ See article 8(2)(c) and (e) of the Elements of Crimes.

²⁵ LBY-OTP-00000427, at 000005; LBY-OTP-0070-9227, at 9234.

and the LNA based in Benghazi.²⁶ Accordingly, the majority of the Chamber finds that a non-international armed conflict existed in Libya during the period of the alleged conduct.

23. The majority of the Chamber recalls that the nexus requirement under articles 8(2)(c) and (e) of the Statute mandates a case-by-case assessment, taking into account a variety of possible factors, such as the status of the perpetrator and the victim, whether the act may be said to serve the ultimate goal of a military campaign, and whether the crime is committed as part of, or in the context of, the perpetrator's official duties.²⁷ So long as IHL applied to the conduct in question, the perpetrator's conduct need not take place as part of hostilities. [REDACTED] the nexus requirement may still be satisfied if the alleged acts were temporally or geographically removed from the actual fighting, when the victims were protected under IHL.²⁸

24. In light of the factual allegations included in the Application, it is necessary to consider the information presented by the Prosecution on the creation and activities of the group called the Kaniyat, and how their activities related to the non-international armed conflict between the GNA and LNA.

25. As a matter of introduction, it is noted that the Application concerns alleged events in the city of Tarhunah. As noted above, the information presented indicates that following the fall of the Gaddafi regime, the Al-Shaqaqiat tribe, also known as the Al Kani family, emerged as an influential local power.²⁹ A group formed around the seven Al Kani brothers, among them Mr Al Kani, and became known as the Kaniyat.³⁰ By 2015, this group controlled Tarhunah, based on intimidation and violence.³¹ The Kaniyat controlled private businesses as well as some public authorities in Tarhunah, including notably the

²⁶ LBY-OTP-00000424, at 000001-000005; LBY-OTP-00000425, at 000001-000002 and 000005-000007; LBY-OTP-00000426, at 000001-000006; LBY-OTP-00000427, at 000001-000002 and 000005-000007; LBY-OTP-00000429, at 000001-000002 and 000005-000007; LBY-OTP-00000526, at 000008; LBY-OTP-00000529, at 000011 and 000017; LBY-OTP-00000537, at 000001-000004.

²⁷ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Red (the 'Ongwen Trial Judgment'), para. 2689; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359 (the 'Ntaganda Trial Judgment'), para. 732.

²⁸ [Ongwen Trial Judgment](#), para. 2689; [Ntaganda Trial Judgment](#), para. 731.

²⁹ LBY-OTP-0081-0004, at 0014-0018; LBY-OTP-0070-9054, at 9057-9058; LBY-OTP-00000008, at 000004-000005.

³⁰ LBY-OTP-0081-0004, at 0011, 0028; LBY-OTP-0070-9054, at 9058; LBY-OTP-0070-9130, at 9134; LBY-OTP-0070-9330, at 9334; LBY-OTP-0084-1979, at 2005-2006; LBY-OTP-0070-9227, at 9232-9235.

³¹ LBY-OTP-0070-9130, at 9133; LBY-OTP-0070-7739, at 7745; LBY-OTP-0070-7578, at 7582; LBY-OTP-0070-9227, at 9232-9233; LBY-OTP-0081-0004, at 0016-0019; LBY-OTP-0070-9330, at 9334.

police and local armed forces.³² In doing so, it had the support of the Tripoli government and the militias associated thereto.³³

26. According to the available information, the Kaniyat maintained an alliance or association with the government in Tripoli and the revolutionary forces in Misrata until 2018.³⁴ In 2018, the Kaniyat formally became, or became part of, what was referred to at the time as the ‘7th Brigade’ of the GNA army.³⁵ However, in around August 2018 the Kaniyat turned against the GNA and the ‘7th Brigade’ mounted an (unsuccessful) attack on Tripoli.³⁶

27. Subsequently, as noted above the material indicates that the Kaniyat played a role in Operation Flood of Dignity.³⁷ As considered above, there is information that in April 2019 the Kaniyat was integrated into the LNA structure, specifically into the ‘Support Forces’ for the so-called ‘9th Brigade’ of the LNA.³⁸ The GNA ultimately pushed the opposition away from Tripoli, and on or around 5 June 2020 the Kaniyat lost its control over Tarhunah.³⁹

28. The majority of the Chamber further notes that: (i) [REDACTED] [REDACTED] the Kaniyat participated in some of the fighting between the GNA and the LNA; (ii) [REDACTED]⁴⁰ and (iii) [REDACTED]

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

³² LBY-OTP-0081-0004, at 0020-0021; LBY-OTP-0070-9227, at 9233; LBY-OTP-0070-9054, at 9059; LBY-OTP-0070-7739, at 7745-7746; LBY-OTP-0070-9330, at 9334; LBY-OTP-00000037, at 000004.

³³ LBY-OTP-0081-0004, at 0014-0015, 0019-0020; LBY-OTP-0070-7578, at 7582-7583; LBY-OTP-0070-9227, at 9233.

³⁴ LBY-OTP-0081-0004, at 0019-0020; LBY-OTP-0070-9227, at 9233-9234.

³⁵ LBY-OTP-0081-0004, at 0031; LBY-OTP-0070-9227, at 9233-9234.

³⁶ LBY-OTP-0081-0004, at 0031-0032; LBY-OTP-00000037, at 00005; LBY-OTP-0070-9227, at 9234.

³⁷ LBY-OTP-0070-7578, at 7583; LBY-OTP-00000424, at 000001.

³⁸ See para. 10 above.

³⁹ LBY-OTP-0081-0004, at 0056; LBY-OTP-0070-9227, at 9234.

⁴⁰ LBY-OTP-00000292, at 000009-000010; LBY-OTP-00000037, at 000005-000007; LBY-OTP-00000580, at 0000018; LBY-OTP-00000008, at 0000007; LBY-OTP-0070-9330, at 9337-9338, 9342; LBY-OTP-0084-1955, at 1961; LBY-OTP-0070-7509, at 7514-7515; LBY-OTP-00000393, at 000012-000014; LBY-OTP-0070-7578, at 7591-7593; LBY-OTP-0070-9130, at 9140; 9153-9154; LBY-OTP-0070-9054, at 9061-9062; LBY-OTP-00000211, at 000005-000008; LBY-OTP-00000588, at 000008-000009.

2. The crimes alleged

29. [REDACTED].⁴¹ [REDACTED].⁴²

30. Some of the facts underlying the alleged crimes and modes of liability overlap. Given the specific purpose of a decision under article 58(1) of the Statute, any questions as to the appropriateness or permissibility of cumulative charging need not be resolved at the present stage. Considering this overlap and in the interests of clarity, it is appropriate to analyse the crimes alleged by the Prosecution in the following order: (i) murder as a war crime, (ii) cruel treatment as a war crime, (iii) torture as a war crime, (iv) outrages upon personal dignity as a war crime, (v) sexual violence as a war crime; and (vi) rape as a war crime.

i. Murder as a war crime (article 8(2)(c)(i) of the Statute)

31. The Prosecution alleges that at least 60 [REDACTED] were killed ‘including but not limited to’ seven specific incidents, referred to in the Application as incidents M1–M7.
43

32. In addition to the contextual elements referred to above, the remaining elements of the war crime of murder (article 8(2)(c)(i) of the Statute) are as follows: (i) the perpetrator killed one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iii) the perpetrator was aware of the factual circumstances that established this status.⁴⁴ The last element will be discussed in the section addressing Mr Al Kani’s individual criminal responsibility below.

33. The material presented in support of incidents M1 to M7 establishes reasonable grounds to believe that at least 60 [REDACTED] were killed within the temporal scope alleged by the Prosecution.⁴⁵

⁴¹ Application, paras 9, 14.

⁴² LBY-OTP-00000106, at 000039; LBY-OTP-0083-0524, at 0524; LBY-OTP-0084-1979, at 2014; LBY-OTP-00000238, at 000001.

⁴³ Application, para. 14.

⁴⁴ Article 8(2)(c)(i)-1 of the Elements of Crimes.

⁴⁵ Incident M1: LBY-OTP-00000580, at 000029-000030; LBY-OTP-0070-7739, at 7750; LBY-OTP-00000353, at 000012-000013, 000016; LBY-OTP-0070-9227, at 9246-9247; Incident M2: LBY-OTP-0070-9054, at 9070; LBY-OTP-00000366, at 000005; LBY-OTP-00001093, at 000004; Incident M3: LBY-OTP-0070-7739, at 7761; Incident M4: LBY-OTP-0070-7578, at 7602-7605; LBY-OTP-0070-9130, at 9149-9150; LBY-OTP-0070-9054, at 9076; Incident M5: LBY-OTP-00000037, at 000010-000011, 000013-000014; LBY-OTP-0084-1955, at 1964-1965; LBY-OTP-00001093, at 000003; Incident M6: LBY-OTP-00000037, at 000015-000016; LBY-OTP-

34. Based on the foregoing, the majority of the Chamber finds that there are reasonable grounds to believe that the Kaniyat killed at least 60 persons [REDACTED], [REDACTED],⁴⁶ and as such these persons were protected under IHL. This is irrespective of whether they had previously been taking any part in hostilities, [REDACTED]. As such, they were either rendered *hors de combat* or were civilians not actively taking part in hostilities at the time they were killed, [REDACTED]. Accordingly, the majority of the Chamber finds that the specific elements of the war crime of murder pursuant to article 8(2)(c)(i) of the Statute are therefore met at this stage of the proceedings.

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

35. The Prosecution submits that the mistreatment of [REDACTED] underlying the alleged crime of cruel treatment under article 8(2)(c)(i) of the Statute ‘includ[ed] but [was] not limited to’ 14 specific incidents, referred to in the Application as incidents T1–T14.⁴⁷

36. In addition to the contextual elements referred to above, the remaining elements of the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute are as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iii) the perpetrator was aware of the factual circumstances that established this status.⁴⁸ The last element will be discussed in the section addressing Mr Al Kani’s individual criminal responsibility below.

37. The majority of the Chamber considers that the material presented in support of incidents T1 to T14 establish reasonable grounds to believe that at least 19 [REDACTED] were severely mistreated [REDACTED].⁴⁹ [REDACTED], they were protected under IHL, [REDACTED]. Accordingly, the

00001093, at 000002; LBY-OTP-00000246, at 000030; Incident M7: LBY-OTP-00000037, at 000017-000020; LBY-OTP-0070-9330, at 9342-9345; LBY-OTP-0084-1955, at 1965-1966.

⁴⁶ See para. 28 above.

⁴⁷ Application, para. 14.

⁴⁸ Elements of Crimes, article 8(2)(c)(i)-3.

⁴⁹ Incident T1: LBY-OTP-00000008, at 000008-000011; Incidents T2 and T4: LBY-OTP-0070-7509, at 7516, 7518-7520, 7529-7530, 7534, 7538; Incident T3: LBY-OTP-00000292, at 000009, 000011, 000013-000016, 000020-000023; Incident T5: LBY-OTP-0070-7739, at 7752-7759, LBY-OTP-0070-9054, at 9077; Incident T6: LBY-OTP-0070-7739, at 7757-7758; LBY-OTP-00000353, at 000020-000021; LBY-OTP-0070-7578, at 7595; Incident T7: LBY-OTP-0070-9054, at 9067-9070; LBY-OTP-0070-7578, at 7587, 7591-7595, 7600, LBY-OTP-

majority of the Chamber considers that the specific elements of the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute are met at this stage of the proceedings.

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

38. The Prosecution submits that the torture [REDACTED] 'includ[ed] but [was] not limited to' 14 specific incidents, referred to in the Application as incidents T1–T14.⁵⁰
39. In addition to the contextual elements referred to above, the remaining elements of the war crime of torture pursuant to article 8(2)(c)(i) of the Statute are as follows: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; (iii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iv) the perpetrator was aware of the factual circumstances that established this status.⁵¹ The last element will be discussed in the section addressing Mr Al Kani's individual criminal responsibility below.
40. As noted above,⁵² the majority of the Chamber finds reasonable grounds to believe that at least 19 [REDACTED] were severely mistreated [REDACTED]. In addition, according to the available evidence, [REDACTED] were severely mistreated for the purposes of obtaining information,⁵³ intimidation⁵⁴ or as revenge or punishment on the suspicion of being opposed to the Kaniyat's interests [REDACTED].

0070-9130, at 9149; Incident T8: LBY-OTP-00000353, at 000017; LBY-OTP-0070-7578, at 7595-7596; LBY-OTP-0070-9130, at 9152; Incident T9: LBY-OTP-0070-9130, at 9151; Incident T10: LBY-OTP-0070-7578, at 7600-7601; Incident T11: LBY-OTP-00000037, at 000010-000011; Incident T12: LBY-OTP-0070-7578, at 7602, 7610; LBY-OTP-00000211, at 000013; Incident T13: LBY-OTP-00000211, at 000007-000009; LBY-OTP-0084-1955, at 1964-1965; Incident T14: LBY-OTP-00000037, at 000008, 000019-000020; LBY-OTP-0084-1955, at 1961-1962, 1966-1967, LBY-OTP-00000211, at 000011; LBY-OTP-00000588, at 000009, 000015-000016; LBY-OTP-0070-9330, at 9342-9344.

⁵⁰ Application, paras 14, 46.

⁵¹ Elements of Crimes, article 8(2)(c)(i)-4.

⁵² See para. 37 above.

⁵³ Incident T1: LBY-OTP-00000008, at 000009; Incident T5: LBY-OTP-0070-7739, at 7754-7755; Incident T13: LBY-OTP-00000211, at 000008-000009.

⁵⁴ Incident T2: LBY-OTP-0070-7509, at 7518-7519; Incident T4: LBY-OTP-0070-7509, at 7518-7520, 7538; Incident T8: LBY-OTP-0070-7578, at 7595-7596; Incident T9: LBY-OTP-0070-9130, at 9151; Incident T10: LBY-OTP-0070-7578, at 7600; Incident T12: LBY-OTP-0070-7578, at 7602-7603.

██████████⁵⁵ ██████████, and as such protected under IHL at the time they were tortured, ██████████.

41. Taking into account the findings above, the majority of the Chamber considers that the specific elements of the war crime of torture pursuant to article 8(2)(c)(i) of the Statute are met at this stage of the proceedings.

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

42. The Prosecution alleges that at least 190 ██████████ were subject to outrages upon personal dignity.⁵⁶ While Annex 3 to the Application indicates that all these persons were ‘victims of outrages upon personal dignity’, the Application itself does not substantiate allegations in respect of each of the 190 victims. The majority of the Chamber will thus consider whether the circumstances ██████████ explicitly mentioned by the Prosecution in section F.3 of its Application amount to outrages upon personal dignity under article 8(2)(c)(ii) of the Statute.

43. In addition to the contextual elements referred to above, the remaining elements of the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute are as follows: (i) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; (ii) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity; (iii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities; and (iv) the perpetrator was aware of the factual circumstances that established this status.⁵⁷ The last element will be discussed in the section addressing Mr Al Kani’s individual criminal responsibility below.

44. ██████████⁵⁸ At the same time, the Prosecution notes that ‘this conduct did not occur in isolation’, and was ‘[r]ather, [...] part and parcel of other conduct and circumstances further humiliating and degrading’ ██████████.⁵⁹ The Prosecution refers in particular to ‘verbal abuse and threats, [...] ██████████’⁶⁰ In view of the

⁵⁵ Incident T3: LBY-OTP-00000292, at 000013; Incident T6: LBY-OTP-0070-7739, at 7757-7758; Incident T7: LBY-OTP-0070-7578, at 7591; LBY-OTP-0070-9054, at 9069-9070; Incident T11: LBY-OTP-00000037, at 000010-000011; Incident T14: LBY-OTP-0084-1955, at 1961, 1966-1967; LBY-OTP-00000037, at 000020; LBY-OTP-0070-9330, at 9342-9344.

⁵⁶ Application, para. 13.

⁵⁷ Article 8(2)(c)(ii) of the Elements of Crimes

⁵⁸ Application, para. 35. See also paras 33-34, 36.

⁵⁹ Application, para. 36.

⁶⁰ Application, para. 36.

factual allegations supporting the elements of the war crime of outrages upon personal dignity, ██████████⁶¹

45. The majority of the Chamber notes the information submitted by the Prosecution concerning the conditions in which at least 16 persons ██████████, which included physical violence, humiliation and verbal violence, ██████████.⁶² This evidence provides reasonable grounds to believe that the circumstances in which at least 16 persons ██████████ constituted humiliation, degradation or were otherwise a violation of the dignity ██████████, and were of a sufficient degree of severity to be generally recognised as an outrage upon personal dignity. ██████████, and thus protected under IHL ██████████ ██████████. The specific elements of the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute are therefore met at this stage of the proceedings.

v. Sexual violence as a war crime (article 8(2)(e)(vi) of the Statute)

46. The Prosecution submits that at least three ██████████ ‘including but not limited to Incidents T1, T3 and T5’ were victims of sexual violence.⁶³

47. In addition to the contextual elements referred to above, the remaining elements of the war crime of sexual violence pursuant to article 8(2)(e)(vi) of the Statute are as follows: (i) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; (ii) the act was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions; and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the

⁶¹ See Application, paras 33-36.

⁶² LBY-OTP-00000211, at 000005-000009; LBY-OTP-0084-1955, at 1960-1963; LBY-OTP-0070-9330, at 9335-9336, 9341-9342; LBY-OTP-00000353, at 000004-000006, 000015, 000019-000020; LBY-OTP-00000292, at 000009-000011, 000040-000041; LBY-OTP-0070-9227, at 9236-9237, 9240-9246; LBY-OTP-0070-7509, at 7514-7515, 7518-7525; LBY-OTP-0070-9130, at 9138-9140, 9149, 9154-9155; LBY-OTP-00000008, at 000006-000010; LBY-OTP-0070-7578, at 7586-7587, 7591-7595, 7597, 7607, 7612; LBY-OTP-0070-9054, at 9067-9070, 9072, 9077; LBY-OTP-0070-7739, at 7754-7757, 7759; LBY-OTP-00000588, at 000010; LBY-OTP-00000037, at 000018-000020; LBY-OTP-00000754, at 000017; LBY-OTP-00000393, at 000011; LBY-OTP-00000580, at 000023-000024.

⁶³ Application, para. 14.

conduct.⁶⁴ The last element will be discussed in the section addressing Mr Al Kani's individual criminal responsibility below.

48. The majority of the Chamber considers that the material presented in support of incidents T1, T3 and T5 establish reasonable grounds to believe that the severe mistreatment of at least three [REDACTED] included sexual violence.⁶⁵ In light of the foregoing, there are reasonable grounds to believe that at least three [REDACTED] were victims of acts of a sexual nature within the meaning of article 8(2)(e)(vi) of the Statute. The majority of the Chamber further determines that these acts were of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions. Accordingly, the specific elements of the war crime of sexual violence pursuant to article 8(2)(e)(vi) of the Statute are met at this stage of the proceedings.

vi. Rape as a war crime (article 8(2)(e)(vi) of the Statute)

49. The Prosecution submits that at least one [REDACTED] 'including but not limited to Incident T1' was the victim of rape.⁶⁶

50. In addition to the contextual elements referred to above, the remaining elements of the war crime of rape pursuant to article 8(2)(e)(vi) of the Statute are as follows: (i) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶⁷

51. The majority of the Chamber considers that the material presented in support of incident T1 establishes reasonable grounds to believe that at least one [REDACTED] was raped

⁶⁴ Article 8(2)(e)(vi)-6 of the Elements of Crimes.

⁶⁵ Incident T1: LBY-OTP-00000008, at 000010-000011; Incident T3: LBY-OTP-00000292, at 000021; Incident T5: LBY-OTP-0070-7739 at 7754.

⁶⁶ Application, para. 14.

⁶⁷ Article 8(2)(e)(vi)-1 of Elements of Crimes

within the meaning of article 8(2)(e)(vi) of the Statute. According to the information available, [REDACTED] was forced naked, tortured,⁶⁸ [REDACTED].⁶⁹

52. Based on the facts found above, and the circumstances of the commission of the relevant act, the majority of the Chamber considers that the specific elements of the war crime of rape pursuant to article 8(2)(e)(vi) of the Statute are met at this stage of the proceedings.

3. Mr Al Kani's individual criminal responsibility

53. As to the individual criminal responsibility of Mr Al Kani, the Prosecution alleges that he 'intentionally and/or knowingly contributed to [the alleged crimes] which were committed by a group acting with a common purpose'.⁷⁰ It submits that '[f]urther, and/or in the alternative, AL KANI directly perpetrated or co-perpetrated specific acts of cruel treatment, torture, and murder, or ordered or induced or aided and abetted such acts'.⁷¹

54. From the Prosecution's submissions, it is not entirely clear whether the modes of liability are alleged in the alternative or, in relation to some specific incidents, cumulatively. The use of the expression '[f]urther and/or in the alternative' does not assist the Chamber's understanding in this regard. Notwithstanding the foregoing, the majority of the Chamber understands the Prosecution to allege that Mr Al Kani is responsible pursuant to article 25(3)(d) of the Statute in relation to all crimes, with the exception of some specific incidents in relation to which he would be responsible under article 25(3)(a) of the Statute. The majority of the Chamber understands that the modes of liability of ordering or inducing (article 25(3)(b) of the Statute) and aiding and abetting (article 25(3)(c) of the Statute) are alleged in the alternative in relation to those specific incidents.

i. Actus reus

55. According to the available material, [REDACTED] Mr Al Kani was a leader of the Kaniyat⁷² and was jointly in charge of what was referred to by one person as the 'military wing' of the Kaniyat.⁷³

56. In the Application, the Prosecution provides information establishing reasonable grounds to believe that Mr Al Kani carried out the following acts: (i) [REDACTED];⁷⁴ (ii)

⁶⁸ See paras 38-41 above.

⁶⁹ LBY-OTP-00000008, at 000010-000011.

⁷⁰ Application, para. 87.

⁷¹ Application, para. 87.

⁷² LBY-OTP-0070-9227, at 9234; LBY-OTP-0083-0449, at 0473; LBY-OTP-00000580, at 000009.

⁷³ LBY-OTP-0081-0004, at 0028.

⁷⁴ LBY-OTP-0070-7578, at 7587-7588; LBY-OTP-00000037, at 000007-000008.

██████████; ⁷⁵ (iii) ██████████; ⁷⁶ (iv) insulting, threatening and beating ██████████; ⁷⁷ (v) issuing instructions for others to beat or kill ██████████, ⁷⁸ (vi) killing ██████████, ⁷⁹ (vii) taking steps to conceal the evidence of the killings ██████████, ⁸⁰ and (viii) carrying out acts underlying the crime of torture and/or mistreatment ██████████. ⁸¹

57. In addition to Mr Al Kani's intentional contributions to the alleged crimes, there are reasonable grounds to believe that the alleged crimes were committed by members of the Kaniyat ██████████, who were acting with a common purpose to mistreat, torture, and kill persons ██████████. ⁸² Therefore, the majority of the Chamber finds reasonable grounds to believe that Mr Al Kani contributed to the alleged crimes within the meaning of article 25(3)(d)(i), or alternatively 25(3)(d)(ii) of the Statute.

58. Considering that the information available suggests that in some instances, Mr Al Kani personally killed, tortured and/or mistreated ██████████ (incidents T4, T7, T12, T14, M1, M2, M4, M7), ⁸³ the majority of the Chamber finds reasonable grounds to believe that he directly perpetrated or co-perpetrated these incidents within the meaning of article 25(3)(a) of the Statute.

59. In light of the above findings, the majority of the Chamber further finds reasonable grounds to believe that, in the alternative, Mr Al Kani's conduct could also be construed as: (i) inducing the war crimes of murder, cruel treatment and torture (incidents T4, T7, T12, T14, M1, M2, M4, M7), or ordering the war crime of murder in relation to incidents M1, M4 and M7 within the meaning of article 25(3)(b) of the Statute; or (ii) as aiding or

⁷⁵ LBY-OTP-0070-7578, at 7602-7605; LBY-OTP-00000580, at 000028; LBY-OTP-0070-7739, at 7756-7759; LBY-OTP-0070-7509, at 7536; LBY-OTP-00000211, at 000014.

⁷⁶ LBY-OTP-0070-7578, at 7592-7593, 7603; LBY-OTP-0070-7509, at 7529-7530; LBY-OTP-0070-9130, at 9149-9150; LBY-OTP-0070-9054, at 9076; LBY-OTP-0070-9330, at 9342-9343; LBY-OTP-00000037, at 000017-000020; LBY-OTP-0084-1955, at 1965-1966.

⁷⁷ LBY-OTP-0070-9054, at 9069-9070; LBY-OTP-0070-7578, at 7602-7603; LBY-OTP-0070-7509, at 7531-7532; LBY-OTP-00000037, at 000015-000016.

⁷⁸ LBY-OTP-00000580, at 000023-000027; LBY-OTP-0070-7509, at 7531-7532; LBY-OTP-0070-9054, at 9070, 9076; LBY-OTP-0070-7578, at 7603; LBY-OTP-0070-9130, at 9149-9150; LBY-OTP-0070-9330, at 9342-9343; LBY-OTP-00000037, at 000017-000020; LBY-OTP-0084-1955, at 1965-1966.

⁷⁹ LBY-OTP-00000580, at 000023-000027; LBY-OTP-0070-9054, at 9070, 9076; LBY-OTP-0084-1955, at 1965-1966; LBY-OTP-00000353, at 000009; LBY-OTP-0070-7739, at 7750-7751; LBY-OTP-0081-0004, at 0045-0046. See paras 33-34 above.

⁸⁰ LBY-OTP-0081-0004, at 0045-0046; LBY-OTP-0070-7509, at 7532-7533. See paras 33-34 above.

⁸¹ LBY-OTP-00000580, at 000023-000027; LBY-OTP-0070-7509, at 7523, 7529-7532; LBY-OTP-0070-7578, at 7590-7593, 7602-7603; LBY-OTP-0070-9054, at 9067-9070; LBY-OTP-00000037, at 000017-000020; LBY-OTP-0070-9330, at 9342; LBY-OTP-0084-1955, at 1965. See paras 37-40 above.

⁸² LBY-OTP-0070-9227, at 9241-9244, 9246-9247.

⁸³ See para. 56 above.

abetting for the purpose of facilitating the commission of the war crimes of murder, cruel treatment and torture within the meaning of article 25(3)(c) of the Statute (incidents T4, T7, T12, T14, M1, M2, M4, M7).

ii. Mens rea

60. In relation to Mr Al Kani's intent and knowledge within the meaning of article 30 of the Statute, the material submitted by the Prosecution establishes reasonable grounds to believe that: (i) Mr Al Kani made contributions to ██████████ a system to mistreat, torture, and kill ██████████ which included but was not limited to committing or participating in specific criminal acts within this context;⁸⁴ (ii) Mr Al Kani could not have mistaken the nature of this system given the conspicuous ██████████ nature of the acts of violence committed ██████████;⁸⁵ (iii) ██████████;⁸⁶ and (iv) Mr Al Kani's own conduct reflects that the severe mistreatment ██████████ was carried out with one or more of the purposes that make it amount to torture.⁸⁷
61. In light of the above, the majority of the Chamber finds reasonable grounds to believe that Mr Al Kani acted with intent and knowledge within the meaning of article 30 of the Statute in relation to the war crimes of murder, cruel treatment, torture and outrages upon personal dignity. As noted above,⁸⁸ given Mr Al Kani's position in the Kaniyat, the majority of the Chamber finds that he was aware of the role the Kaniyat played in the fighting between the warring parties in Libya, and thus of the factual circumstances that established the existence of the armed conflict. In addition, given ██████████ and specific contributions to the crimes, the majority of the Chamber is satisfied that Mr Al Kani was also aware of the resultant protected status of the victims under IHL.
62. In relation to the war crimes of sexual violence and rape, the majority of the Chamber notes that the Prosecution does not refer to any direct evidence to establish that Mr Al Kani acted with intent and knowledge within the meaning of article 30 of the Statute.⁸⁹ From the material before it, the majority of the Chamber is unable to conclude that reasonable grounds to believe that Mr Al Kani acted with the required knowledge and

⁸⁴ See para. 56 above.

⁸⁵ See paras 33, 37, 40, 45 above.

⁸⁶ LBY-OTP-0070-7578, at 7592-7593, 7602-7604; LBY-OTP-0070-7509, at 7529-7532; LBY-OTP-0070-7739, at 7750, 7757-7758; LBY-OTP-0070-9054, at 9068-9070, 9074-9076; LBY-OTP-0070-9130, at 9149-9150; LBY-OTP-0084-1955, at 1965-1967; LBY-OTP-00000588, at 000012-000013; LBY-OTP-00000037, at 000015-000019; LBY-OTP-00000580, at 000022-000023;; LBY-OTP-0070-9330, at 9342-9343.

⁸⁷ See paras 40, 56 above.

⁸⁸ See para. 55 above.

⁸⁹ See Application, para. 93.

intent have been established. This finding has no bearing on the majority's finding that, in relation to the same underlying incidents (T1, T3 and T5), Mr Al Kani did act with the knowledge and intent required for the crimes of cruel treatment and torture.

4. Conclusion

63. Accordingly, the majority of the Chamber concludes that there are reasonable grounds to believe that Mr Al Kani is criminally responsible within the meaning of article 25(3)(d)(i) or (ii) of the Statute for the war crimes of murder (article 8(2)(c)(i) of the Statute), cruel treatment (article 8(2)(c)(i) of the Statute), torture (article 8(2)(c)(i) of the Statute), and outrages upon personal dignity (article 8(2)(c)(ii) of the Statute), committed in Libya [REDACTED] as specified above. In relation to incidents T4, T7, T12, T14, M1, M2, M4, M7, the majority of the Chamber concludes that there are reasonable grounds to believe that Mr Al Kani is criminally responsible within the meaning of article 25(3)(a) of the Statute for the war crimes of murder (article 8(2)(c)(i) of the Statute), cruel treatment (article 8(2)(c)(i) of the Statute) and torture (article 8(2)(c)(i) of the Statute).

64. In the alternative, the majority of the Chamber finds reasonable grounds to believe that Mr Al Kani is criminally responsible for: (i) inducing the war crimes of murder (article 8(2)(c)(i) of the Statute), cruel treatment (article 8(2)(c)(i) of the Statute) and torture (article 8(2)(c)(i) of the Statute) in relation to incidents T4, T7, T12, T14, M1, M2, M4, M7, or ordering the war crime of murder (article 8(2)(c)(i) of the Statute) in relation to incidents M1, M4 and M7 within the meaning of article 25(3)(b) of the Statute; or (ii) aiding or abetting for the purpose of facilitating the commission of the war crimes of murder, cruel treatment and torture within the meaning of article 25(3)(c) of the Statute in relation to incidents T4, T7, T12, T14, M1, M2, M4, M7.

B. Necessity of the arrest

65. The Prosecution submits that the arrest of Mr Al Kani is necessary to ensure his appearance before the Court.⁹⁰ It avers that Mr Al Kani 'is or was previously wanted for arrest in Libya', but that 'he did not voluntarily come forward and instead remained as a fugitive'.⁹¹ After evaluating the information submitted by the Prosecution,⁹² the majority

⁹⁰ Application, paras 124-126.

⁹¹ Application, para. 125.

⁹² LBY-OTP-0070-7123, at 7124; LBY-OTP-00001077, at 000026; LBY-OTP-00001123, at 000027-000028.

of the Chamber is satisfied that the arrest of Mr Al Kani is necessary within the meaning of article 58(1)(b)(i) of the Statute to ensure his appearance before the Court.

V. [REDACTED]

66. [REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]⁹³

68. [REDACTED]

⁹³ [REDACTED]



FOR THESE REASONS, THE MAJORITY OF THE CHAMBER HEREBY

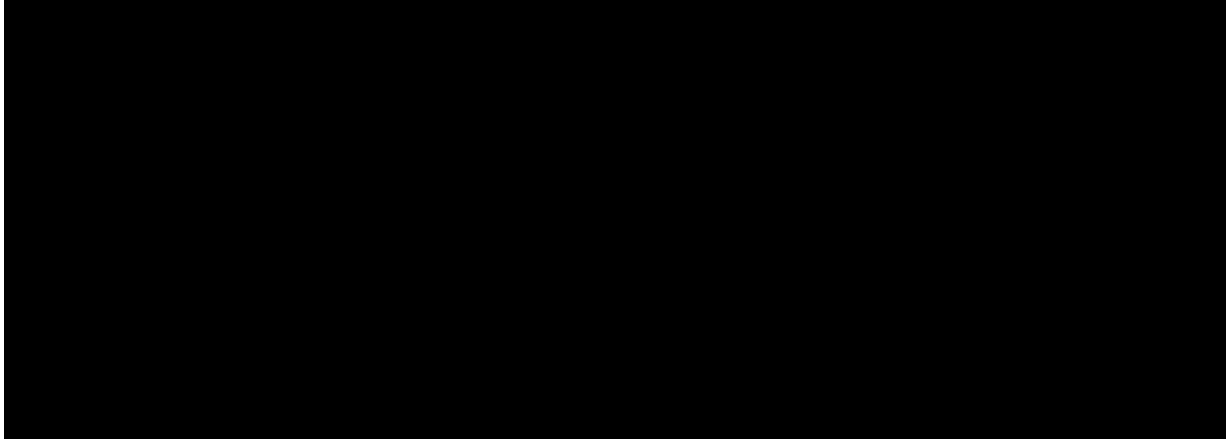
ISSUES a warrant of arrest for **Abdurahem Khalefa Abdurahem Elshgagi**, also known as **Abdulahem Al Kani**, a national of Libya, born on 22 February 1981 in Tarhunah, Libya, for his alleged criminal responsibility pursuant to article 25(3)(d) and/or article 25(3)(a),(b) or (c) of the Statute, for the war crime of murder pursuant to article 8(2)(c)(i) of the Statute, for the war crime of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute, for the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute and for the war crime of torture pursuant to article 8(2)(c)(i) of the Statute, committed in Libya [REDACTED] [REDACTED] as set forth in this warrant of arrest;

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

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

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

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



Done in both English and French, the English version being authoritative.

Judge Péter Kovács
Presiding Judge

**Judge Reine Adélaïde Sophie Alapini-
Gansou**

Judge María del Socorro Flores Liera

Dated this Thursday, 6 April 2023

At The Hague, The Netherlands

Dissenting Opinion of Judge Socorro Flores Liera

1. I respectfully disagree with my colleagues' decision to issue a warrant of arrest against Abdulrahem Al Kani (the 'Majority Decision'). Pursuant to article 19(1) of the Statute, the Chamber must consider whether the Court has jurisdiction over the alleged conduct. While I agree in general with the jurisprudence on the criteria to assess whether a case falls within the jurisdiction of the Court,¹ I disagree with the way it has been applied in this case.
2. The Prosecution alleges that Mr Al Kani is responsible for war crimes 'committed as part of a campaign to terrorise and exploit the civilian population of Tarhunah, and to punish suspected enemies or opponents once captured, and thus to maintain the dominance of the KANIYAT - the militia led by and centred upon the AL KANI brothers - in Tarhunah and the surrounding areas'.² According to the Prosecution, the crimes 'were committed [REDACTED]'.³
3. By reference to previous decisions rendered by Pre-Trial Chamber I, the Prosecution contends that 'an armed conflict not of an international character had been ongoing on the territory of Libya, from at least early March 2011 until at least February 2018, between governmental forces and different organised armed groups, or among various such armed groups'.⁴ It is the Prosecution's contention that '[t]his same conflict [...] continued well after February 2018, until at least July 2020'.⁵
4. The majority of the Chamber finds reasonable grounds to believe that the alleged crimes described in the Application are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral given that they took place in the context of the situation of crisis that triggered the adoption of the 2011 Resolution.⁶ For the reasons that follow, I respectfully disagree with my colleagues.
5. The 2011 Resolution refers to 15 February 2011 as the starting point for the Court's temporal jurisdiction without explicitly indicating until which point in time such

¹ Majority Decision, para. 6 (setting out the previous jurisprudence on sufficient link).

² Application, para. 8.

³ Application, paras 8-9.

⁴ Application, para. 22.

⁵ Application, para. 23.

⁶ Majority Decision, para. 13.

jurisdiction would continue.⁷ Although it is difficult to indicate a precise time frame, referrals by the Security Council are not without limits. They are subject to the entire legal framework of the Statute and cannot be interpreted in a vacuum. A referral under article 13(b) of the Statute is necessarily linked to the context that originated it. In the present case, a plain reading of the resolution clearly demonstrates that the situation in Libya was referred to the Court after the Security Council: ‘condemn[ed] the violence and use of force against civilians’; ‘[d]eplor[ed] the gross and systematic violation of human rights, including the repression of peaceful demonstrators, express[ed] deep concern at the deaths of civilians, and reject[ed] unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government’.⁸ The Security Council further ‘[c]onsider[ed] that the widespread and systematic attacks [at the time] taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity’.⁹

6. It is therefore clear that the situation in Libya was referred to the Court as a result of the actions by the Gaddafi regime against its own civilian population; acts that may have amounted to crimes against humanity. This is also clear from the text of the 2011 Resolution recalling ‘the Libyan authorities’ responsibility to protect its own population’.¹⁰ While it may be correct that after the death of Muammar Mohammed Abu Minyar Gaddafi on 20 October 2011, the following years were marked by clashes ‘between governmental forces and different organised armed groups, or among various such armed groups’,¹¹ these events are not related to those that triggered the referral by the Security Council. This is because the latter were focused on the ‘widespread and systematic attacks [...] against the civilian population’ primarily carried out by ‘the highest level of the Libyan government’.¹² This is clear both from the language used in the 2011 Resolution as explained above as well as from the initial focus of the

⁷ S/RES/1970 (2011), p. 2.

⁸ S/RES/1970 (2011), p. 1.

⁹ S/RES/1970 (2011), p. 1.

¹⁰ S/RES/1970 (2011), p. 2.

¹¹ Application, para. 22, referring, *e.g.* to Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al Werfalli*, [Warrant of Arrest](#), 15 august 2017, ICC-01/11-01/17-2 (‘*Al-Werfalli* Warrant of Arrest’), paras 4-6, and 25.

¹² S/RES/1970 (2011), p. 1.

Prosecution's investigation on members of the Gaddafi regime¹³ and on crimes against humanity rather than war crimes.¹⁴

7. The Prosecution's submission that an armed conflict not of an international character has been ongoing on the territory of Libya from at least early March 2011 until at least July 2020, and that this was the 'same conflict' is unpersuasive.¹⁵ On the basis of the very limited information provided by the Prosecution, it cannot be assessed whether fighting during the period of the alleged conduct amounted to a non-international armed conflict at all, for which a sufficient level of intensity in hostilities between two or more sufficiently organised armed actors is required, or whether the alleged non-international armed conflict was the same or rather a different conflict than the one that took place in early 2011.
8. I disagree on this point with the view adopted by my colleagues in the warrants of arrest issued with respect to Al-Werfalli and other related cases.¹⁶ In those cases the Chamber established the 'sufficient link' on the basis that the suspects were part of the Al-Saiqa Brigade, a party that was involved in the conflict since the events that triggered the 2011 Resolution, and which satisfied the Court that the 'alleged crimes are sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral'.¹⁷ Disagreement aside, the Chamber made an effort at that time to find a sufficient link. However, in the current situation, there is no comparable temporal link to the events that triggered the 2011 referral.
9. The Prosecution unsuccessfully attempts to apply the same logic with arguments that raise more doubts than certainties in terms of the sufficient link.¹⁸ In this regard, I note

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

¹⁴ [Gaddafi et al. Warrant of Arrest](#).

¹⁵ Application, paras 22-23.

¹⁶ [Al-Werfalli Warrant of Arrest](#), paras 4-6, 25; Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al Werfalli*, [Second Warrant of Arrest](#), 4 July 2018, ICC-01/11-01/17-13 ('*Al-Werfalli Second Warrant of Arrest*'), paras 9-13, 33.

¹⁷ [Al-Werfalli Warrant of Arrest](#), para. 23. See also [Al-Werfalli Second Warrant of Arrest](#), para. 20.

¹⁸ See e.g. Application, paras 17 ('Prior to the fall of the GADDAFI regime, the KANI family had no significant influence in Tarhunah. However, when the regime fell, the family—which initially supported GADDAFI - opportunistically sided with the revolution and received support from the new Government to suppress resistance to the revolution. The KANI family then progressively gained power in Tarhunah by engaging in criminal activities and systematically eliminating its opponents'); 27 ('the alleged crimes could not have happened without

that in support of its contention that a non-international armed conflict has been ongoing in Libya since 2011 until 2018, the Prosecution merely refers in footnotes to findings made by Pre-Trial Chamber I in other cases between 2017 and 2020.¹⁹ Other than this, the Prosecution fails to provide and, subsequently, refer to any supporting material *in this case* for this essential allegation, expecting the Chamber to simply take note of previous factual findings made in different cases on the basis of different facts found on the basis of supporting material presented to obtain those other warrants of arrest.

10. It appears that the Prosecution is trying to force a link with the events that triggered the jurisdiction of the Court which, if accepted, in practice would mean that the Court may continue exercising its jurisdiction indefinitely over a non-State party. I am unable to agree with such an approach, which finds no basis in the specific Security Council referral, in the legal framework of the Court or in international law more generally.
11. The approach proposed is also inconsistent with that followed in relation to State referrals, thereby somehow suggesting a differential treatment to referrals by the Security Council. By way of example, the Central African Republic (the 'CAR') referred the situation in its territory since 1 July 2002 to the Court with no end date specifically included.²⁰ This triggered the first investigation into the CAR. However, on 30 May 2014, the CAR submitted a new referral in relation to the situation in its territory since 1 August 2012, triggering the so-called CAR II situation.²¹ The Prosecution treats these situations as different for the purposes of its investigations.
12. Similarly, Côte d'Ivoire submitted a first declaration accepting the Court's jurisdiction pursuant to article 12(3) of the Statute on 18 April 2003 to investigate acts committed in its territory 'since the events of 19 September 2002'.²² The declaration was 'made for an indeterminate duration'.²³ However, both on 14 December 2010 and on 3 May 2011, Côte

the KANIYAT's dominance in Tarhunah -which itself could not have occurred in the absence of the conflict [...] By extorting money or other benefits from the civilian population of Tarhunah, the KANIYAT maintained itself and its utility to the LNA. Crimes which apparently served the personal interests of the KANIYAT were thus indivisible from the crimes').

¹⁹ Application, para. 22.

²⁰ [OTP Press Release](#), 7 January 2005.

²¹ [OTP Press Release](#), 24 September 2014.

²² [Cote d'Ivoire first declaration](#).

²³ [Cote d'Ivoire first declaration](#).

d'Ivoire reconfirmed its acceptance of jurisdiction, referring in particular to alleged crimes committed since March 2004.²⁴

13. The above illustrates that the Court's jurisdiction triggered by the Security Council referral in this case seems to be interpreted more expansively when compared with situations where the Court's jurisdiction has been triggered by State referrals. If anything, jurisdiction triggered on the basis of referrals by the Security Council, given their effects, should be interpreted within the strict limits of the resolution originating them, and not in a more expansive form compared to the Court's jurisdiction triggered by a State referral. It is important to recall that Security Council referral's may concern non-State Parties that have not ratified the Rome Statute – as is the case for the only two Security Council referrals to date.
14. I disagree also with my colleagues on the interpretation they give to the submission of periodical reports to the Security Council by the Prosecutor and to the lack of objection to such reporting as a way to “sanction” the expansive jurisdiction from the Court.²⁵ This is an interpretation not compatible with the Rome Statute, the voluntary nature of the standing invitation from the UN Security Council to report and to the practice of the Security Council.
15. In addition, there is no merit in the Prosecution's submissions supporting its conclusion that ‘[t]here are reasonable grounds to believe that the war crimes alleged in this Application were committed in the context of, and were associated with, the non-international armed conflict’,²⁶ and therefore disagree with my colleagues' conclusion on this point as well.²⁷ The Prosecution's submissions on a potential link between the alleged crimes and the possible existence of a non-international armed conflict are unconvincing. This is so particularly considering the very remote, if any, link between the alleged conduct taking place in [REDACTED] and any armed conflict that may have been ongoing [REDACTED] between the Government of National Accord (GNA) and the LNA.

²⁴ [Cote d'Ivoire second declaration; Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'](#), 15 November 2011, ICC-02/11-14-Corr, para. 10.

²⁵ Majority Decision, para. 12.

²⁶ Application, paras 24-27.

²⁷ Majority Decision, para. 28.

16. Apart from a cross-reference to the section of the Application dealing with the jurisdiction, the relevant paragraph has no supporting footnotes.²⁸ The absence of supporting material in this regard is further illustrated by [REDACTED]

[REDACTED]²⁹ [REDACTED]

[REDACTED]³⁰

17. Moreover, on the basis of the information provided, the Prosecution's submission that the armed conflict was ongoing from 2011 until at least July 2020 due to the lack of a peaceful settlement is rather simplistic and unpersuasive.³¹ This is because of the questionable applicability of such a parameter to contemporary non-international armed conflicts and in Libya in particular, where the scenarios appear to be complex, with sectarian violence and fighting between different actors. On the basis of the information provided, it is not evident that a single and continuous conflict existed. However, in light of my views on the jurisdictional matter, I need not delve into this matter any further.

18. In light of the above considerations, I disagree with the issuance of a warrant of arrest against Mr Al Kani.

²⁸ Application, para. 27.

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ Application, para. 23. Judge Flores Liera notes, in this regard, that the Prosecution refers to the International Committee of the Red Cross's 2016 commentary on Common Article 3 of the 1949 Geneva Conventions, but only partially quotes a relevant phrase, namely referring to 'a "lasting absence of armed confrontations" between the parties' instead of the complete phrase which reads as follows: 'the lasting absence of armed confrontations between the *original* Parties to the conflict may indicate – depending on the prevailing facts – the end of that non-international armed conflict, even though there might still be minor isolated or sporadic acts of violence' (ICRC Commentary of 2016 on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, para. 494; emphasis added).

Done in both English and French, the English version being authoritative.



Judge María del Socorro Flores

Liera

Dated this Thursday, 6 April 2023

At The Hague, The Netherlands