

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-01/11-01/25
Date: 18 September 2026

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF THE PROSECUTOR v. KHALED MOHAMED ALI EL HISHRI

PUBLIC

**Public redacted version of Defence request for
leave to appeal "Second decision on contact restrictions"**

Source: Defence for Mr Khaled Mohamed Ali El Hishri

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ Counsel Support Section

☒ Victims and Witnesses Unit

☒ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri (“Defence”) requests leave to appeal the “Second decision on contact restrictions”¹ pursuant to Article 82(1)(d) of the Rome Statute. The Impugned Decision significantly impacts on Mr El Hishri’s human rights, notably his right to privacy and family life. If the restrictions continue in their current form, there is a risk they will have an increasingly deleterious effect on his well-being in detention, and the consequent ability of Mr El Hishri to effectively participate in the proceedings.

2. The Defence therefore seeks leave to appeal the following issue since it significantly affects the fair and expeditious conduct of the proceedings:

Whether the Pre-Trial Chamber erred in determining that the contact restrictions are necessary and proportionate to the objectives being served.

3. Immediate review by the Appeals Chamber is necessary to “ensur[e] that the proceedings follow the right course,” and to provide a “safety net for the integrity of the proceedings.”²

4. The Defence has only had sight of a heavily redacted confidential version of the Impugned Decision and reserves the right to modify or amplify this request for leave in the event it receives an unredacted or lesser redacted version.

5. CLASSIFICATION

¹ ICC-01/11-01/25-70-Conf-Red, 20 February 2026 (“Impugned Decision”)

² *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“DRC Leave to Appeal Judgment”), para. 15

6. This request is classified as confidential pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”) because it relates to documents filed with the same classification.

II. PROCEDURAL HISTORY

7. On 10 July 2025, Pre-Trial Chamber I (“PTC”) issued the warrant of arrest against Mr El Hishri.³

8. On 16 July 2025, Mr El Hishri was arrested in the Federal Republic of Germany.

9. On 4 August 2025, the Prosecution filed its first request for “measures to restrict Mr EL HISHRI’s communications from the Detention Centre in The Hague immediately upon his surrender to the International Criminal Court” (“First Request”).⁴ The measures requested are set out in unredacted form in paragraphs 27 and 28 of the confidential redacted version of the First Request to which the Defence has access, although the evidential basis for seeking the restrictions is heavily redacted.

10. On 5 August 2025, the Registry provided its observations on the First Request (“First Observations”).⁵

11. On 31 October 2025, the Prosecution filed additional information said to be of relevance to the First Request, together with a second request for contact restrictions (“Second Request”).⁶ The confidential redacted version of the Second Request is

³ Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, ICC-01/11-188-US-Exp, 10 July 2025; ICC-01/11-188-US-Exp-tARB, 15 July 2025; reclassified as public on 31 July 2025

⁴ Prosecution’s request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, ICC-01/11-201-US-Exp, 4 August 2025, para. 1; confidential redacted version filed on 3 December 2025, ICC-01/11-01/25-10-Conf-Red

⁵ Registry’s Observations on the “Prosecution’s request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court” (ICC-01/11-201-US-Exp) dated 4 August 2025, ICC-01/11-202-US-Exp, 5 August 2025; confidential redacted version filed on 3 December 2025, ICC-01/11-01/25-17-Conf-Red

⁶ Prosecution’s provision of additional information regarding contact restrictions and second request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, ICC-01/11-212-US-Exp, 31 October 2025; confidential redacted version filed on 3 December 2025, ICC-01/11-01/25-21-Conf-Red

accompanied by an Annex containing six unredacted documents originating from the Dutch Ministry of Justice, the Dutch Minister for Legal Protection, and an excerpt of Dutch internal regulations on detainees (with their English translations), and three additional documents redacted in their entirety. Again, the evidential basis for seeking the restrictions is heavily redacted in the confidential redacted version of the Second Request, as are the requested additional restrictions themselves.

12. On 5 November 2025, the Registry provided its observations on the Second Request (“Second Observations”).⁷ The confidential redacted version is heavily redacted.

13. On 26 November 2025, the PTC issued its first decision on contact restrictions (“First Decision”) in which it *inter alia* dismissed the Second Request but invited the Prosecution to file an amended request.⁸

14. On 1 December 2025, the Prosecution filed additional information regarding its requests for contact restrictions and an amended second request (“Amended Request”).⁹ Again, the evidential basis for seeking the restrictions is heavily redacted in the confidential redacted version, as are the requested additional restrictions themselves.

15. Also on 1 December 2025, Mr El Hishri was surrendered to the custody of the Court.

16. Later on 1 December 2025, the PTC issued by email an urgent order to the Registry to provisionally implement the contact restrictions requested in paragraphs 27 and 28 of the First Request.¹⁰

⁷ Registry’s Observations on the “Prosecution’s provision of additional information regarding contact restrictions and second request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court” (ICC-01/11-212-US-Exp) dated 31 October 2025, ICC-01/11-213-US-Exp, 5 November 2025; confidential redacted version filed on 3 December 2025, ICC-01/11-01/25-22-Conf-Red

⁸ First decision on contact restrictions, ICC-01/11-219-US-Exp, 26 November 2025, para. 7; confidential redacted version filed on 4 December 2025, ICC-01/11-01/25-24-Conf-Red

⁹ Prosecution’s provision of additional information regarding its requests for contact restrictions and amended second request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, ICC-01/11-220-US-Exp, 1 December 2025; confidential redacted version filed on 4 December 2025, ICC-01/11-01/25-25-Conf-Red

¹⁰ Decision communicated by email, subject [REDACTED]

17. On 4 December 2025, the Prosecution filed a further request for contact restrictions (“Further Request”).¹¹ Once again, the evidential basis for seeking the restrictions is heavily redacted in the confidential redacted version, as are the requested additional restrictions themselves.

18. On 5 December 2025, the Registry provided its observations on the Amended Request (“Third Observations”).¹² The confidential redacted version is heavily redacted.

19. Also on 5 December 2025, the PTC issued various orders by email, including an order to the Defence “to file a consolidated response to pending requests regarding contact restrictions by no later than C.O.B. on Monday 15 December 2025” (“Order for Response”).¹³

20. On 9 December 2025, the Registry provided its observations on the Further Request (“Fourth Observations”).¹⁴ Again, the confidential redacted version is heavily redacted.

21. On 11 December 2025, the Defence filed a motion seeking access to unredacted versions of the Pending Requests, and requesting an extension of the deadline to file its consolidated response thereto until seven days after the Defence has received unredacted versions of the Pending Requests and Observations (“Defence Request”).¹⁵

¹¹ Prosecution’s further request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, ICC-01/11-01/25-31-US-Exp, 4 December 2025; confidential redacted version filed on 5 December 2025, ICC-01/11-01/25-31-Conf-Red

¹² Registry’s Observations on the “Prosecution’s provision of additional information regarding its requests for contact restrictions and amended second request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, 1 December 2025, ICC-01/11-220-US-Exp, ICC-01/11-01/25-33-US-Exp, 5 December 2025; confidential redacted version filed on 9 December 2025, ICC-01/11-01/25-33-Conf-Red

¹³ Order communicated by email, subject [REDACTED]

¹⁴ Registry’s Observations on the “Prosecution’s further request for contact restrictions pursuant to regulation 101(2) of the Regulations of the Court”, 4 December 2025, ICC-01/11-01/25-31-US-Exp, ICC-01/11-01/25-36-US-Exp, 9 December 2025; confidential redacted version also filed on 9 December 2025, ICC-01/11-01/25-36-Conf-Red

¹⁵ Defence motion for access to unredacted versions of pending requests regarding contact restrictions, 11 December 2025, ICC-01/11-01/25-37-Conf

22. Also on 11 December 2025, the PTC issued by email an order maintaining the deadline of Monday, 15 December 2025 for a consolidated Defence response, in addition to further orders for submissions regarding the *ex parte* classification of certain Prosecution filings (“Order of 11 December 2025”).¹⁶

23. On 15 December 2025, the Defence filed its preliminary consolidated response to the Prosecutions contact restrictions requests (“Defence Response”).¹⁷

24. Also on 15 December 2025, the Prosecution filed an explanation of its *ex parte* classifications and responded to the Defence Request.¹⁸

25. On 18 December 2025, the Chamber instructed the Prosecution and the Registry to prepare and put lesser redacted versions of their relevant filings on the record by 22 December 2025, set the deadline for any supplementary Defence submissions in response to pending contact restriction requests to seven working days after the notification of the lesser redacted versions of filings, and ordered the Registry to reclassify certain filings.¹⁹

26. Between 18 and 19 December 2025, the Prosecution and Registry effected these reclassifications.

27. On 13 January 2026, the Defence filed its response to the Further Request (“Defence Additional Response”).²⁰

¹⁶ Decision communicated by email, subject [REDACTED]

¹⁷ Defence preliminary consolidated response to Prosecution requests regarding contact restrictions, 15 December 2025, ICC-01/11-01/25-39-Conf

¹⁸ Prosecution explanations for the factual and legal basis of *ex parte* classifications, [REDACTED]

¹⁹ Decision on Defence Motion for access to unredacted versions of pending requests regarding contact restrictions, 18 December 2025, ICC-01/11-01/25-44-Conf

²⁰ Defence Response to Prosecution Second Request for Contact Restrictions, 13 January 2026, ICC-01/11-01/25- 52-Conf

28. On 20 February 2026, the PTC delivered the Impugned Decision in which it provided for the first time reasons for the First Decision, and decided on the Further Request.

III. APPLICABLE LAW

29. Article 82(1)(d) of the Statute provides that either party may appeal “[a] decision that involves an issue that would affect significantly the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

30. For requests for leave to appeal, the following requirements must be met:

- (a) the matter constitutes, singly or collectively, an “appealable issue”;
- (b) the(se) issue(s) could significantly affect:
 - (i) the fair and expeditious conduct of the proceedings, or
 - (ii) the outcome of the trial; and
- (c) in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²¹

²¹ *Prosecutor v. Yekatom and Ngaïssona*, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, ICC-01/14-01/18-206, 24 May 2019 (“Yekatom and Ngaïssona Leave to Appeal Decision”), para. 10; *Prosecutor v. Ntaganda*, Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’, ICC-01/04-02/06-322, 4 July 2014, para. 9; *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008 (“Lubanga Leave to Appeal Decision”), para. 9

31. Requirements (a), (b) and (c) above are cumulative and therefore failure to fulfil one or more of them is fatal to an application for leave to appeal.²² There is no prescribed order in which the requirements must be considered.

32. It is important to recall that the applicable threshold is not that interlocutory resolution will materially advance the proceedings, but only that it “may” do so.

33. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that:

[o]nly an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.²³

34. Materially advancing the proceedings

does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, “will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process”.²⁴

²² Yekatom and Ngaissona Leave to Appeal Decision, para. 11; *Situation in Democratic Republic of the Congo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN, 31 March 2006, para. 28; Lubanga Leave to Appeal Decision, para. 10

²³ DRC Leave to Appeal Judgment, para. 9. *See also* *Prosecutor v. Joseph Kony and Vincent Otti*, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, ICC-02/04-01/05-367, 10 February 2009, para. 22; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the “Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'”, ICC- 01/09-02/11-27, 1 April 2011, para. 7

²⁴ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198, ICC-02/05-01/20-254, 12 January 2021, para. 7, *referring to* *Prosecutor v. Bemba Gombo et al.*, Joint decision on the applications for leave to appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/05-01/13-801, 23 January 2015, para. 17 (quoting DRC Leave to Appeal Judgment, para. 16)

35. The notion of “materially advance” involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”²⁵ The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”²⁶ and “[remove] doubts about the correctness of the decision or [map] a course of action along the right lines.”²⁷

36. The term “proceedings” in the second part of Article 82(1)(d) refers to the proceedings in their entirety.²⁸ Accordingly, it is insufficient that an appeal would be legitimate or even necessary at some stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.²⁹ Interlocutory appeals shall be regarded as exceptional and Chambers must be vigilant in determining which issues truly require immediate determination.³⁰

37. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues significantly affect the fairness of the proceedings.³¹ Thus, the “materially advance” criterion can be assessed only in relation to the *consequences*, not the *correctness*, of the decision from which interlocutory appeal is sought.

²⁵ DRC Leave to Appeal Judgment, para. 14

²⁶ DRC Leave to Appeal Judgment, para. 15

²⁷ DRC Leave to Appeal Judgment, paras 14-15

²⁸ DRC Leave to Appeal Judgment, para. 17

²⁹ Lubanga Leave to Appeal Decision, para. 12

³⁰ *Prosecutor v. Yekatom and Ngaïssona*, Decision on the Defence Requests for leave to appeal the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, ICC-01/14-01/18-154, 21 March 2019, para. 12; Lubanga Leave to Appeal Decision, paras 12-13

³¹ *Prosecutor v. Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11- 185)’”, ICC-01/09-02/11-253, 18 August 2011, para. 28

38. The Appeals Chamber has determined that “it is for the Pre-Trial of Trial Chamber to determine not only whether a decision may be appealed, but also to what extent”.³²

IV. SUBMISSIONS

39. The issue in this case directly relates to Mr El Hishri’s human rights, notably his right to privacy and family life. It also relates to his right to be treated with “humanity and with respect to the inherent dignity of the human person” as provided for in Article 10(1) of the International Covenant on Civil and Political Rights.

40. There can be no controversy in the assertion that the contact restrictions ordered by the PTC in the Impugned Decision inevitably interfere with Mr El Hishri’s rights. The question is whether the interference is, in all the circumstances, necessary and proportionate to the objectives being served.

41. In the *Ntaganda* case, Trial Chamber VI was asked to grant leave to appeal exactly the same issue as an identifiable subject as in the instant case. In granting leave, the Chamber found that:

in ordering that the Restrictions be maintained, the Impugned Decision entailed considerations of Mr Ntaganda’s fundamental human rights, and that the Third Alternative Issue, which relates to the lawfulness of the limitations on Mr Ntaganda’s right to family and private life in a custodial setting, bears upon such rights. In light of this, the Chamber considers that the fairness of the proceedings would be significantly affected if the Chamber had wrongly decided the Third Alternative Issue. It is further recalled in this regard that the Restrictions were imposed, and maintained, in order to safeguard interests which are fundamental to the fairness of the proceedings, including to

³² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, ICC-02/11-01/15-744, 1 November 2016, para. 13, quoting *Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(1) of the Rome Statute’”, ICC-02/11-01/11- 572, 16 December 2013, para. 63. See also *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”, ICC-01/05-01/13-1533, 23 December 2015, para. 16, fn 29

ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings.³³

42. The Trial Chamber further found that:

Finally, in light of the aforementioned impact of the Impugned Decision, the Chamber considers that immediate resolution of the Third Alternative Issue would materially advance the proceedings and would be an appropriate way in which to remove any doubt as to the correctness of the Impugned Decision thus providing a 'safety net for the integrity of the proceedings'.³⁴

43. In light of this jurisprudence, it is submitted that it is appropriate for the PTC to grant leave to appeal the Impugned Decision on the issue identified in paragraph 2 above.

Respectfully submitted,



Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 18 September 2026
at The Hague, The Netherlands

³³ *Prosecutor v. Ntaganda*, Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', ICC-01/04-02/06-1513, 16 September 2016, para. 18