

**Cour
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**International
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Court**

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No. ICC-01/11-01/25
Date: 9 October 2026

TRIAL CHAMBER VII

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Miatta Maria Samba
Judge Beti Hohler

SITUATION IN LIBYA

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

PUBLIC

Public redacted version of “Defence response to ‘Prosecution’s request to maintain the existing contact restrictions until the end of the Prosecution’s case-in-chief and to immediately notify the VWU of any violations of the contact restrictions’ (ICC-01/11-01/25-184-Conf-Red)” ICC-01/11-01/25-192-Conf, 25 September 2026

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:

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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”) files this response to the Prosecution’s request to maintain the existing contact restrictions until the end of the Prosecution’s case-in-chief and to immediately notify the VWU of any violations of the contact restrictions.¹

2. The Defence reiterates its opposition to the Prosecution’s position that restrictions preventing Mr El Hishri from associating with Arabic-speaking detainees at the ICC Detention Centre (“DC”) – the only detainees with whom he can have any meaningful communication – should be maintained, and submits that such restrictions should be lifted. The Prosecution’s submission that the risks that the restrictions address “are even more pronounced in the phase leading to trial and during the Prosecution’s case in chief”² is unfounded and is an example of the most blatant and self-serving mission creep designed to keep Mr El Hishri as isolated as possible.

3. It is also submitted that there is no reason for the Trial Chamber to go beyond the current regime by which the Registry must inform the Chamber and Defence, on an *ex parte* basis, of any violations of the contact restrictions. There is no justification for immediate notification of the Victim and Witnesses Unit (“VWU”) of any breach.

II. CLASSIFICATION

4. This response is classified as confidential pursuant to Regulation 23bis(2) of the Regulations of the Court (“RoC”) because it is responsive to a document filed with the same classification.

III. PROCEDURAL HISTORY

5. The Defence adopts the procedural history as set out in paragraphs 5 to 11 of the Request.

¹ Confidential redacted version of “Prosecution’s request to maintain the existing contact restrictions until the end of the Prosecution’s case-in-chief and to immediately notify the VWU of any violations of the contact restrictions”, ICC-01/11-01/25-184-Conf-Exp, 14 September 2026, ICC-01/11-01/25-184-Conf-Red, 15 September 2026 (“Request”)

² Request, para.2

IV. APPLICABLE LAW

6. Article 67(1) of the Rome Statute enumerates the rights of the accused:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, **to a fair hearing** conducted impartially, and to the following minimum guarantees in full equality [...] ³

7. Regulation 101(2) and (3) of the RoC provide as follows:

2. The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds to believe that such contact:

- (a) Is for the purposes of attempting to arrange the escape of a detained person from the detention centre;
- (b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;
- (c) Could be harmful to a detained person or any other person;
- (d) Could be used by a detained person to breach an order for non-disclosure made by a judge;
- (e) Is against the interests of public safety; or
- (f) Is a threat to the protection of the rights and freedom of any person.

3. The detained person shall be informed of the Prosecutor's request **and shall be given the opportunity to be heard or to submit his or her views** [...] ⁴

8. Regulation 201 of the Regulations of the Registry ("RoR"), in relevant part, states as follows:

Segregation

1. The Chief Custody Officer may order that a detained person be segregated from all or some of the other detained persons in order to maintain security and good order of the detention centre or for the safety of any person(s) therein. ***Such a measure can be resorted to only when it is necessary and proportionate.*** Segregation under this regulation is without prejudice to measures taken pursuant to regulation 202 *bis*.

[...]

4. No detained person may be kept in segregation for more than seven consecutive days without review. The Chief Custody Officer shall review all cases of segregation at least once a week and report thereon to the Registrar.

5. If further segregation is necessary in accordance with sub-regulation 1 above or requested in accordance with sub-regulation 7 below, the Chief Custody Officer shall report the matter to the Registrar before the end of the seven-day period, providing the reasons for its extension. Any such extension(s) of segregation shall not exceed seven days.

[...]

7. In the circumstances referred to in sub-regulation 1, a detained person may ask to be segregated from all or some of the other detained persons. Upon receipt of such a request and the reason(s) for it, the Chief Custody Officer shall inform the medical officer, who ***shall inform the detained person of the consequences that segregation may have on his or her physical and mental health*** and ensure that he or she understands such consequences. The Chief Custody Officer shall then determine whether the requested segregation is acceptable and shall report the outcome to the

³ Emphasis added

⁴ Emphasis added

Registrar. Sub-regulations 2 and 4-6 apply mutatis mutandis.⁵

8. For the time the detained person is segregated, the Chief Custody Officer shall ensure that the detained person ***still enjoys access to meaningful human contact*** and, to the extent possible, enjoys his or her general entitlements under the present Regulations and the Regulations of the Court.⁶

9. Segregation ordered or requested pursuant to this regulation shall be terminated as soon as the basis for it no longer exists.

[...]

V. SUBMISSIONS

(a) *This Trial Chamber is not bound by Pre-Trial Chamber I's findings*

9. At the outset, the Defence notes that this is the first occasion on which this Trial Chamber is seized of a request to maintain the existing contact restrictions against Mr El Hishri. To date, contact restrictions were approved by Pre-Trial Chamber I ("PTC"). It need hardly be stated that the Trial Chamber is in no way bound by earlier – and increasingly boilerplate – findings of the PTC. The question of the maintenance of contact restrictions, in common with, for example, pre-trial detention, is a matter that must be kept under constant review. The Trial Chamber comes to the Request afresh and must make its own independent determination of the Prosecution's application. In any event, Article 21(2) of the Rome Statute provides that ICC jurisprudence is a non-binding source of law.⁷

10. It is submitted, therefore, that the Prosecution's reliance on earlier findings of the PTC is inapposite and should be ignored.⁸

(b) *The Defence has been prejudiced by the heavy redactions applied to the Request*

11. A fundamental feature of fairness in judicial proceedings, as guaranteed by Article 67(1) of the Rome Statute, is the right of a Party to be heard. It is an essential characteristic of natural justice, encapsulated in the maxim *audi alteram partem*.

⁵ Emphasis added

⁶ Emphasis added

⁷ G. Bitti, "Article 21 and the Hierarchy of Sources of Law before the ICC", in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015), p. 417. See also M.M. de Guzman, "Article 21" in O. Triffterer & K. Ambos (eds), *The Rome Statute of the International Criminal Court* (CH Beck, 2016), p. 945: "[t]his paragraph provides for the discretionary use of precedent by the Court. The Court is not obligated to adhere to its prior decisions through a binding rule of stare decisis. Rather, paragraph 2 permits the judges, in their discretion, to accord precedential value to principles and rules of law identified in prior decisions. This provision represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties before the court."

⁸ See for example Request, paras 16, 23, 25, 27, 30

12. Regulation 101(3) of the RoC makes it clear that a detained person must be informed of the Prosecutor's request for contact restrictions, and shall be given the opportunity to be heard or to submit his or her views. However, in order for a detained person to be able to *meaningfully realise* this right, he or she must be able to know what the basis for the request is.

13. This principle was neatly captured in the comments of Lord Denning in the United Kingdom Privy Council case of *Kanda v. Government of the Federation of Malaya*:

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. [...] It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.⁹

14. In Mr El Hishri's case, the Request is redacted to such an extent that the Defence has no, or only an imperfect and incomplete, understanding of the evidence or assertions upon which it is based. For example, as with paragraph 8 (a-k) of the Prosecution's request to maintain contact restrictions from April 2026,¹⁰ and paragraph 13 (a-d) of the Prosecution's request to maintain contact restrictions from June 2026,¹¹ paragraph 17 (a-d) of the Request, which purport to substantiate the argument that "SDF/RADA maintains both the capability and motivation to identify and intimidate victims and [REDACTED] witnesses and their families" is entirely redacted.

15. The Defence notes the redaction in the above citation,¹² but draws the Chamber's attention to the fact that in both the April Request and June Request, the words "([REDACTED])" before the words "witnesses and their families" were left unredacted. The Defence does not know for certain whether the Prosecution has redacted the same words in this Request. The Trial Chamber will be in a better position to ascertain the situation. But if it transpires that words that have been left unredacted in earlier requests to maintain contact restrictions are now being redacted, the Defence would submit that this would demonstrate the absurd, overly-cautious and

⁹ *Kanda v. Government of the Federation of Malaya* (Privy Council) [1962] A.C. 322 at 337

¹⁰ Confidential redacted version of "Prosecution's request to maintain contact restrictions", ICC-01/11-01/25-103-Conf-Exp, 13 April 2026, ICC-01/11-01/25-103-Conf-Red, 14 April 2026 ("April Request")

¹¹ Confidential redacted version of "Prosecution's request to maintain the existing contact restrictions until the commencement of trial and to grant additional measures", ICC-01/11-01/25-137, 22 June 2026, ICC-01/11-01/25-137-Conf-Red, 24 June 2026 ("June Request")

¹² Also at paras 12, 18-19, 23-24, 27, 30

disproportionate approach taken by the Prosecution to redaction.

16. Other parts of the Request that are redacted to such an extent that the Defence's ability to meaningfully respond has been significantly prejudiced can be found at paragraphs 20-21, 22-23 and 26-27. The Defence notes, however, that in respect of paragraph 22, the Prosecution's assertion of what it has recently been made aware appears to be entirely unsourced. The OTP's giving of evidence is to be deprecated.

17. The Defence has no fair opportunity to make fully informed and meaningful submissions to correct, challenge or contradict the evidence or assertions. Faced with the heavily redacted Request, the Defence is necessarily in a position by which, in large part, it can advance only vague and generic arguments of principle, lacking in the sort of focus and substance that a response would demand. This seriously prejudices Mr El Hishri in his attempt to have the requested contact restrictions lifted. It is profoundly unfair.

18. The Defence would therefore respectfully request that the Chamber order the Prosecution to review all its redactions with a view to adopting a more consistent and, frankly, less obstructive approach, and file a lesser redacted version of the Request without delay.

(c) The existing contact restrictions are neither necessary nor proportionate

19. The Prosecution continues to argue that the existing contact restrictions remain necessary and proportionate to safeguard the integrity of the proceedings and the safety and security of victims, [REDACTED] witnesses and their families.¹³ The Prosecution's arguments are entirely without merit.

20. Firstly, to the extent the Defence is able to understand the heavily redacted Request, the Prosecution makes no discernible link between the various alleged incidents of targeting and intimidation of persons said to be witnesses, and their actual status as witnesses in Mr El Hishri's case. The Prosecution's claims must be closely interrogated in order to ascertain whether any alleged intimidation can be linked to the present case, as opposed to merely unwelcome attention directed towards perceived opponents or previous detainees of SDF/RADA without there being any suggestion that the alleged culprits knew or believed that the complainants had any connection with the case.

¹³ Request, paras 15-30

21. If no link between the redacted incidents and Mr El Hishri's case is established, it equally cannot be established that restricting Mr El Hishri's contact with detainees with whom he can actually communicate is *necessary* to prevent further supposed incidents of interference with witnesses. Only if there is clear evidence that witnesses are being targeted because of their status as witnesses in this case, and not for one or more other reasons, could it reasonably be said that the Prosecution's claim is substantiated. In any other case, no connection between interference of persons who happen to be witnesses and Mr El Hishri's case will have been established.

22. Secondly, to the extent the Defence is able to understand the heavily redacted Request, the Prosecution makes no discernible link between any alleged incidents of targeting and intimidation of persons said to be witnesses and any acts of Mr El Hishri himself. The Prosecution points to no evidence that Mr El Hishri, since his arrival at the DC nine months ago in December 2025, ordered, solicited, or induced any acts of targeting or intimidation of witnesses in his case. Any potential acts of targeting of witnesses have been undertaken generally by "SDF/RADA" while Mr El Hishri has been subject to the existing contact restrictions. The contact restrictions and Mr El Hishri's faithful obedience to them have had no impact on any alleged acts of targeting of witnesses. Therefore, the Prosecution cannot reasonably advance the argument that preventing threats to witnesses, or interference with proceedings, can only be achieved by the extension of these contact restrictions. This fatally undermines the suggestion that the contact restrictions are necessary or proportionate to a legitimate aim.

23. Thirdly, the Prosecution points generally to the unpredictable "security situation on the ground" in Libya.¹⁴ This is, of course, something over which Mr El Hishri has absolutely no control. The volatile security situation should not be instrumentalised by the Prosecution in order to justify interference with Mr El Hishri's ability to freely associate with *all* detainees at the DC.

24. The Prosecution also argues that the absence of reported violations of existing contact restrictions to date does not indicate that the underlying risks have diminished.¹⁵ This may be so. However, what the absence of violations does demonstrate, and what is of most importance, it is submitted, is the lack of any evidence that Mr El Hishri has any intention to unlawfully share confidential information with others. Moreover, operating on the basis that one of the best ways of predicting future behaviour is by assessing a consistent trend of past behaviour, it is submitted

¹⁴ Request, para. 21

¹⁵ Request, para. 23

that the longer the unbroken period of absence of violations of contact restrictions, the greater the confidence the Trial Chamber can have that Mr El Hishri has no intention of disclosing, and will not disclose, confidential information to unauthorised persons in the future.

25. The suggestion by the Prosecution that such absence of violations “may be attributable to the preventative function of the restrictions themselves”¹⁶ is highly speculative. The absence of violations is at least just as attributable to Mr El Hishri’s absence of intention to make unlawful disclosure of confidential information. This too fatally undermines the suggestion that the contact restrictions are necessary or proportionate to a legitimate aim.

(d) *The existing contact restrictions do not strike a fair balance with Mr El Hishri’s rights*

26. The Prosecution unreasonably minimises the impact of the contact restrictions when it describes the restrictions as “only a limited and carefully circumscribed interference” with his rights.¹⁷ Insofar as the contact restrictions relate to Mr El Hishri segregation from other Arabic-speaking detainees in the DC, they cannot in good faith be described as “limited”. He is unable to communicate with the other, non-Arabic speaking, detainees. He does not speak any language other than Arabic. Even if he is not *stricto sensu* held in solitary confinement, his conditions of detention leave him in a state of segregation that amounts to *de facto* solitude.

27. The Prosecution’s current request to maintain the contact restrictions until the end of its case-in-chief proves that these are not a temporary measure. The Prosecution has requested, and been granted, contact restrictions limited in time, but subject to extension after extension. What started off as requests until the confirmation of charges has now been extended until the end of the Prosecution’s case. The Trial Chamber can be sure that the Prosecution will continue thereafter to seek further extensions indefinitely. This “mission creep” is obvious and intentional. And the Prosecution’s decision to proceed in this way instead of being transparent about its true intentions borders on the cynical. The Trial Chamber should, it is respectfully submitted, put a stop to it by lifting the contact restrictions in their entirety. In the alternative, the Prosecution should be obliged to apply for future extensions on a regular and time-defined basis.

28. Acknowledging that Mr El Hishri is not being held in solitary confinement, the terms of Regulation 201(8) of the RoR oblige the Chief Custody Office to ensure that detainees in

¹⁶ Request, para. 23

¹⁷ Request, para. 25

segregation – the *de facto* condition in which Mr El Hishri finds himself – have access to *meaningful* human contact.

29. The Defence reiterates that “meaningful human contact” has been interpreted by the European Committee for the Prevention of Torture as:

the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.¹⁸

30. It is impossible for Mr El Hishri to engage in “empathetic interpersonal communication” with co-detainees with whom he cannot speak. He cannot understand what the non-Arabic speaking detainees say to him, and they cannot understand him. Even if he is not physically separated from non-Arabic speaking detainees, the existence of the language barrier means he is linguistically isolated – and thereby socially isolated – from other detainees. Mr El Hishri’s inability to engage in meaningful communication in a language he speaks and understands equates to a deprivation of meaningful human contact. This in turn amounts to a violation of Regulation 201(8) of the RoR.

31. In the case of *Zhu v. United Kingdom* before the European Court of Human Rights (“ECtHR”), an Article 3 complaint was found inadmissible on its particular facts. However, the Third Section of the ECtHR found the applicant to have been isolated in prison in the UK, and that his “isolation from what was going on around him was exacerbated by the fact that, at least for the first six months of his detention, no Mandarin speaker was present in prison.”¹⁹

32. Mr El Hishri is in a comparable position. He is isolated in circumstances that are caused and exacerbated by his lack of meaningful human contact with detainees at the DC that speak his language. It is submitted that prolonged deprivation of empathetic interpersonal communication amounts to a breach of his right not to be subjected to inhuman treatment,²⁰ an absolute right that permits of no exceptions, limitations or derogations.

33. In the case of *Piechowicz v. Poland*, also before the ECtHR, the Court found that the applicant, a Polish speaker detained in a Polish prison, nevertheless found violations of ECHR

¹⁸ [European Committee on Crime Problems \(CDPC\), Draft Recommendation Rec\(2006\)2-rev of the Committee of Ministers to member States on the European Prison Rules, Commentary, 20 February 2020](#), page 34

¹⁹ ECtHR, *Zhu v. United Kingdom*, Application no. 36790/97, p. 5

²⁰ See Article 3 of the European Convention on Human Rights

Articles 3 and 8 on account of his isolation due to the high-security regime to which he was subject. In that case, even though the applicant enjoyed periods of time sharing a cell with another cellmate and numerous family visits, he was subjected to limited social isolation. The Court held that family visits and meetings with his lawyers “could not alone mitigate sufficiently the cumulative, adverse effects of the imposition of [the regime to which he was subject]”.²¹ Moreover, the Court expressed its concern that the applicant had not been provided with “appropriate stimulation and, in particular, with adequate human contact.”²²

34. The Trial Chamber cannot permit a situation where Regulation 201(8) of the RoR is being violated. This is not a case where violation amounts to an interference in Mr El Hishri’s right to privacy and family life. It is submitted that prolonged deprivation of empathetic interpersonal communication amounts to a breach of his right not to be subjected to inhuman treatment,²³ an absolute right that permits of no exceptions, limitations or derogations.

35. But even if the prolonged deprivation of empathetic interpersonal communication does not (yet) reach the minimum level of severity of mental suffering so as to amount to inhuman treatment, when weighed in the balance against the unsubstantiated risks to witnesses posed by Mr El Hishri personally, the inference in his right to meaningful human contact becomes “undue”. The continuation of the existing restrictions is therefore rendered disproportionate.

36. The suffering and consequent impact on Mr El Hishri’s physical and mental health caused by his isolation from any fellow detainee with whom he can have meaningful human contact risks a violation of the Registry’s obligation to ensure the “physical and mental health of detained persons”.²⁴ As Regulation 201(7) of the RoR imposes a duty on the Chief Custody Officer to inform a detained person who has requested his or her own segregation that segregation carries consequences on “physical and mental health”. This duty highlights the reality that extended segregation can be deleterious to a detainee’s health. The potential negative impact on Mr El Hishri’s mental health of an extended period of deprivation of empathetic interpersonal communication may not yet be apparent. However, the potential for such a negative impact on Mr El Hishri’s mental health must be considered when weighing the deprivation of Mr El Hishri’s rights against the Prosecution’s speculative submissions that contact with other Arabic-speaking

²¹ ECtHR, [Piechowicz v. Poland](#), Application no. 20071/07, para. 171

²² ECtHR, [Piechowicz v. Poland](#), Application no. 20071/07, para. 172; also, para. 173

²³ See Article 3 of the European Convention on Human Rights

²⁴ RoR, Regulation 162bis(1).

detainees may result in a threat to witnesses or the integrity of the proceedings. Ordering the imposition of a situation of *de facto* segregation is a step that should only be taken as a last result, and only in the most compelling of circumstances. The present situation is very far from one presenting such compelling circumstances.

(e) *There is no justification for immediate notification of the VWU of any breach*

37. Finally, there is no reason for the Trial Chamber to go beyond the current regime by which the Registry must inform the Chamber and Defence, on an *ex parte* basis, of any violations of the contact restrictions. There is no justification for immediate notification of the Victim and Witnesses Unit (“VWU”) of any breach. There has been no change of circumstances and no evidence that there is a demonstrably heightened risk requiring anything beyond the obligation of the Registry to inform the Chamber and Defence, on an *ex parte* basis, of any violations.

VI. CONCLUSION

38. For the foregoing reasons, the Chamber should dismiss the Request.

Respectfully submitted,



Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 09 October 2026
at The Hague, The Netherlands