

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/11-01/25
Date: 16 December 2025

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

CONFIDENTIAL

Defence response to "Prosecution's application under regulation 35 to extend the disclosure deadline for the arrest warrant materials of 32 witnesses"

Source: Defence for Mr Khaled Mohamed Ali El Hishri

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I. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri ("Defence") opposes the Prosecution's application under Regulation 35 of the Regulations of the Court ("RoC") for an extension of the deadline for disclosure of materials relating to 32 witnesses ("the 32 Witnesses") supporting the warrant of arrest for Mr El Hishri ("Application").¹

2. The Prosecution has failed make a showing of good cause to justify the Application. The Prosecution had five months to prepare for the prompt disclosure of the 32 Witnesses after Mr El Hishri's inevitable transfer to the custody of the Court. It is evident that the Prosecution did not use these five months expeditiously. There is no good cause to extend the deadline now Mr El Hishri is in The Hague and entitled to the material of the 32 Witnesses.

II. CLASSIFICATION

3. This response is classified as confidential pursuant to Regulation 23*bis*(2) of the RoC because it is responsive to an application filed with the same classification.

III. PROCEDURAL HISTORY

4. On 3 April 2025, the Prosecution filed its application for a warrant of arrest for Mr El Hishri.²

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

¹ Corrected version of "Prosecution's application under regulation 35 to extend the disclosure deadline for the arrest warrant materials of 32 witnesses", ICC-01/11-01/25-35-Conf-Exp-Corr", 9 December 2025

² Prosecution's application under article 58 for a warrant of arrest against Khaled Mohamed Ali EL HISHRI ("Khaled AL HISHRI"), ICC-01/11-172-US-Exp, 3 April 2025; public redacted version filed on 30 July 2025

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

6. On 16 July 2025, Mr El Hishri was arrested in the Federal Republic of Germany.
7. Four-and-a-half months later, on 1 December 2025, Mr El Hishri was surrendered to the custody of the Court.
8. On 3 December 2025, Mr El Hishri had his initial appearance during which the PTC ordered the Prosecution to disclose all information or materials upon which the warrant of issue was issued by 11 December 2025 ("11 December Deadline").⁴
9. On 9 December 2025, the Prosecution filed the Application, initially *ex parte*.
10. On 10 December 2025, the PTC issued by email an order (i) suspending the 11 December Deadline pending adjudication of the Application, (ii) ordering the Prosecution to file a confidential redacted version of the Application forthwith, and (iii) instructing the Defence to provide any response to the Application "within 3 working days of notification of its confidential redacted version" ("Order of 10 December").⁵
11. On 11 December 2025, the Prosecution filed a confidential redacted version of the Application. The Application is very heavily redacted. Three working days from 11 December is 16 December 2025.

IV. APPLICABLE LAW

12. 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 [...]⁶

⁴ T-001, p. 8

⁵ Order communicated by email, subject "[Confidential – 01/11-01/25] Order following notification of Prosecution request 01/11-01/25-35-Conf-Exp-Corr, 10 December 2025 at 14:25

⁶ Added emphasis

13. Regulation 35(2) of the RoC provides, in relevant as follows:

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard.

14. The Prosecution rightly cites Appeals Chamber authority on what amounts to good cause:

[a] cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.⁷

V. SUBMISSIONS

(a) The Defence is prejudiced by the ex parte classification of important information relied upon in the Application

15. A fundamental feature of fairness in judicial proceedings is the right of a party to be heard. It is an essential characteristic of natural justice, encapsulated in the maxim *audi alteram partem*.

16. Regulation 35(2) makes it clear that the respondent party to an application for a variation of a time limit shall be given the opportunity to be heard. However, in order for a respondent to be able to *meaningfully* realise this right, he or she must be able to know what the basis for the request is.

17. In the instant case, the Application is very heavily redacted. The purported risks to prosecution witnesses appear to be recited and discussed at paragraphs 10-12, 14-15, 20-21, 23-25 and 27-33, but the Defence cannot understand the Prosecution's submissions on risk because of the numerous redactions applied to these paragraphs. Some of the paragraphs have been redacted in their entirety. Consequently, the Defence has no

⁷ Application, para. 5, citing *Lubanga*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", ICC-01/04-01/06-834, 21 February 2007

detail about the evidential basis upon which the Application is based. This is important because the Prosecution asserts that the requested extension is *inter alia* reasonable “having in mind the factors outlined above”,⁸ factors that have been redacted. The Defence does not know in any but the most general sense what these factors are, and has no idea why the Prosecution say these factors support its position.

18. The Defence has no fair opportunity to make informed and meaningful submissions to correct or contradict these factors or their factual underpinnings. This has seriously prejudiced its ability to adequately respond to the Application.

(b) The Prosecution does not advance sound reasons that objectively provide justification for its inability to comply with the 11 December Deadline

19. The Prosecution fails to show good cause justifying the Application. No sound reasons have been advanced that objectively provide justification for its inability to comply with the 11 December Deadline. The only explanation – which is a long way from a justification – can be a failure by the Prosecution to exercise proper diligence in the five months since 16 July 2025.

20. The Application was filed on 9 December 2025, nearly five months after Mr El Hishri's arrest in Germany pursuant to an ICC warrant. From the date of arrest, the Prosecution was on notice that Mr El Hishri would sooner or later be transferred to the custody of the Court.

21. The Prosecution refers on several occasions in the Application to the need to adopt a highly cautious approach to the disclosure of witnesses' identities, to the security situation in Libya, and to the purported risks facing victims and witnesses. This did not become news to the Prosecution only after Mr El Hishri's arrest. On 15 May 2025, two months before Mr El Hishri's arrest, the Prosecutor himself briefed the Security Council

⁸ Application, para. 37

on the situation in, and the activities of his Office relating to, Libya.⁹ The Prosecutor referred to the poor security in Libya:

As we have seen in recent days, we also come together clearly at a critical moment for Libya; a significant conflict going on, combined with allegations of serious crimes in Libya that have again gripped Tripoli and other areas of the country.

The Prosecutor referred to challenges in cooperation and attempts to undermine the work of the ICC in Libya:

Challenges in cooperation, challenges in the political and security context in Libya, and attempts to impact the work of the Court more broadly.

The Prosecutor also referred to the vulnerability of victims of crimes committed in detention facilities in Libya:

It is a line of inquiry that demands our collective action, given the gravity and scale of the crimes we allege are being committed, right now, in detention facilities in Libya. There is what can be described as a black box of suffering on the coast of the Mediterranean that nobody has wanted to open. A black box that contains the cries, the ongoing pain, as we speak, of some of the most vulnerable people in both the West and the East of the country.

22. It must have been the Prosecution's position for many years that its witnesses, upon whom it will seek to rely in any criminal proceedings arising out of its investigations in Libya, are vulnerable and will require protection. It must have been the Prosecution's position for many years that it will be necessary to adopt "a highly cautious approach" to the disclosure of witnesses' identities to the Defence.

23. The Prosecution knew, or should have known, from 16 July 2025 that it was practically inevitable that Germany would eventually transfer Mr El Hishri to the custody of the Court. The Prosecution knew, or should have known, that it would be

⁹ Statement of ICC Prosecutor Karim A.A. Khan KC to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011) (<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-united-nations-security-council-situation-libya-0>)

expected to disclose the information and materials upon which the warrant of arrest was issued to the Defence shortly after Mr El Hishri's eventual transfer to the Court.

24. Regarding the proposal to disclose the arrest warrant material relating to 15 witnesses for whom delayed disclosure is not requested in a total of four phases, three of which are after the 11 December deadline, the Defence submits that this is simply unnecessary.¹⁰ Mr El Hishri poses no risk to the safety or security of these or any other witnesses, and the Prosecution has provided the Defence with no evidence that there has been any threats to any witnesses by anyone.

25. Further, the Defence will be prejudiced by the granting of the requested extensions of the time limit. It is proposed that material relating to the final six of these 15 witnesses will not be disclosed until 5 February 2026.¹¹ This amounts to an abridgment of the time the Defence will have to prepare for the confirmation of charges hearing, currently scheduled for the week of 18 May 2026, by nearly two months from the date of Mr El Hishri's initial appearance. It is foreseeable that the only way to mitigate this prejudice will be an adjournment of the start of the confirmation of charges hearing.

26. Regarding the 17 witnesses for whom delayed disclosure will be requested, the Prosecution states in the Application that it "foresees that it will submit requests to the Chamber seeking authorisation for the non-disclosure of the identities" of these witnesses until after any confirmation decision.¹² But it is inconceivable, given its clear and long-standing position about the precarious security situation in Libya, and the vulnerability of its own witnesses, that this is a recent realisation on its part. That being the case, had it been acting conscientiously and diligently, the Prosecution would have started the assessment process in relation to the witnesses it considers most vulnerable

¹⁰ Application, para. 8

¹¹ Application, para. 8

¹² Application, para. 34

on 17 July 2025, or very shortly thereafter, with a view to preparing non-disclosure requests. But the Prosecution did not.

27. The Prosecution offers no explanation or evidence of when it began its assessment of its witnesses as the first part of the process of preparing non-disclosure requests, or why its non-disclosure requests are not ready to be filed now. The contents of paragraph 38 of the Application would tend to suggest that the process only started after Mr El Hishri's initial appearance. What is clear is that some five months after Mr El Hishri's arrest, the process is far from complete. The Prosecution suggests that any non-disclosure requests will only be ready for filing on or around 26 January 2026.¹³

28. Further, the Prosecution's attempts to compare the situation in the instant case with those in the *Duterte* and *Abd-Al-Rahman* cases are inapposite.¹⁴ In neither of these cases was the Suspect held in detention by a domestic judicial authority pursuant to an ICC arrest warrant for any appreciable period of time before transfer. In neither of these cases did the Prosecution have several months to prepare the disclosure of arrest warrant materials to the Defence, or non-disclosure requests.

29. It was objectively foreseeable that the Prosecution would have to disclose the arrest warrant materials to the Defence shortly after Mr El Hishri's arrival in The Hague, or to file non-disclosure requests for those witnesses whose vulnerability was assessed as requiring delayed disclosure. The Prosecution had several months to organise itself to make that disclosure or file those requests. But as a result of its lack of diligence, the Prosecution did not do so.

¹³ Application, para. 36

¹⁴ Application, para. 38

VI. CONCLUSION

30. For the foregoing reasons, it is submitted that the Prosecution has advanced no sound reasons that objectively provide justification for its inability to comply with the 11 December Deadline. The Application should be denied.

Respectfully submitted,



Yasser Hassan
Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 16 December 2025
at The Hague, The Netherlands