

**Cour
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**International
Criminal
Court**

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No. ICC-01/11-01/25

Date: 10 March 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 preliminary consolidated response to Prosecution requests for authorisation to withhold identity of 17 witnesses”,
9 February 2026, ICC-01/11-01/25-65-Conf**

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”) files this preliminary consolidated response to the Prosecution’s three requests for authorisation to withhold the identity of 17 witnesses (“Requests”).¹ The Defence has only been given access to confidential redacted versions of the Requests. These contain at least 452 redactions across the three Requests. At the date of filing, the Defence has been provided with only the barest of factual assertions that purport to underpin the Requests. The Defence has seen almost no evidence to support the Requests. The Defence is asked to make this response in a factual vacuum, inevitably making it an inadequate and incomplete filing.

2. The Defence may be in a position to make a fuller and more meaningful consolidated response if and when it receives greater detail of the factual basis or bases for the proposed measures.

3. The Defence is doubly prejudiced. Firstly, it is prejudiced by having to respond to the very heavily redacted Requests. Secondly, *contra* the Prosecution’s suggestion, granting the proposed measures will cause significant prejudice to the Defence’s ability to investigate and make meaningful submissions during the confirmation of charges hearing in respect of nearly half of the witnesses (17 out of 40) relied on in support of the warrant of arrest.

¹ Confidential Redacted Version of “Prosecution’s request for authorisation to withhold the identity of witnesses P-0342, P-0497, P-0670, P-0719, P-0925, P-0943 and P-1031 upon whose evidence the Prosecution will rely at the confirmation hearing”, ICC-01/11-01/25-55-Conf-Red, 28 January 2026; Confidential Redacted Version of “Prosecution’s request for authorisation to withhold the identity of witnesses P-0568, P-0635, P-0644, P-0872 and P-1046 upon whose evidence the Prosecution will rely at the confirmation hearing”, ICC-01/11-01/25-58-Conf-Red, 29 January 2026; Confidential Redacted Version of “Prosecution’s request for authorisation to withhold the identity of witnesses P-0054, P-0439, P-0551, P-0650 and P-0665 upon whose evidence the Prosecution will rely at the confirmation hearing”, ICC-01/11-01/25-59-Conf-Red, 29 January 2026

II. CLASSIFICATION

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

III. APPLICABLE LAW

5. 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 [...]²

6. The Appeals Chamber has established the criteria against which requests for the non-disclosure of witnesses' identities should be assessed:

71. In the circumstances under consideration in the present case, non-disclosure pursuant to rule 81(4) may only be authorised if, first of all, disclosure of the information concerned would pose a danger **to the particular person**. In such circumstances, the Pre-Trial Chamber should consider the following factors in relation to the alleged risk of danger:

a) the alleged danger must involve an objectively justifiable risk to the safety of **the person concerned**;

b) the risk must arise from disclosing the particular information *to the Defence*, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.

72. If the Pre-Trial Chamber concludes that it has been demonstrated that the risk addressed above in fact exists, it should proceed to assess whether the proposed redactions could overcome or reduce the risk. If not, the redactions should not be granted. If so, the following factors should be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary:

² Emphasis added

- a) the Pre-Trial Chamber should consider **whether an alternative measure short of redaction is available and feasible in the circumstances**. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen;
- b) the Pre-Trial Chamber should bear in mind that the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges. The Appeals Chamber refers, in this context, to paragraph 68 above;
- c) the Pre-Trial Chamber should carefully assess the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. **If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake;**
- d) **if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.**

73. The following additional factors should be taken into account:

- a) in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place **to protect the interests of the suspect** so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms;
- b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence **the greatest possible opportunity to make submissions on the issues involved**, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected;
- c) even if it is determined that certain information should not be disclosed, such determination **should be kept under review by the Pre-Trial Chamber**. It may be necessary to disclose the withheld information subsequently, should circumstances change. The Prosecutor should assist the Pre-Trial Chamber in this regard by bringing to its attention factors that may cause it to reconsider its ruling on nondisclosure.³

³ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475 (“*Katanga* Judgment”), paras 71-73 (emphasis added)

7. In *Lubanga*, the Appeals Chamber emphasised that:

“...protective measures should restrict the rights of the suspect or accused only as far as necessary.” Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.⁴

IV. SUBMISSIONS

(a) The Defence has been prejudiced by the enormous volume of redactions applied to the Requests

8. The Defence reiterates that 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*. But that right must be a meaningful right. The Defence must be able to understand what the factual basis or bases for the Prosecution’s submissions are. In the absence of this knowledge, any response will not be meaningful. The litigation will amount to a mere façade of fairness.

9. In the instant matter, the three Requests are very heavily redacted. Across them are at least 452 redactions. Some redactions may only be a word or two. Many are evidently whole sentences. Often, to all intents and purposes, entire paragraphs are redacted.⁵ The Defence does not, at the date of filing, know the evidence or anything other than the most basic assertions upon which the Requests are based. The Defence has no fair opportunity to make informed and meaningful submissions to correct or contradict the evidence or assertions.

10. The situation that the Defence faces has seriously prejudiced its ability to adequately respond to the Requests. The Defence respectfully requests that the Pre-Trial Chamber (“PTC”) carefully assess the redactions applied to the Requests and determine whether

⁴ *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773 (“*Lubanga* Judgment”), para. 33

⁵ *eg.* ICC-01/11-01/25-55-Conf-Red, paras 11, 13, 15, 16, 17, 18, 25, 27, 28, 29, 30, 31, 36, 37, 41; ICC-01/11-01/25-58-Conf-Red, paras 14, 19, 20, 22, 23, 24, 25, 27, 29, 30, 31, 32, 34, 36, 37, 38, 42, 43; ICC-01/11-01/25-59-Conf-Red, paras 12, 14, 16, 17, 18, 19, 20, 21, 29, 31, 32, 33, 39, 40

the guidance of the Appeals Chamber in the *Katanga* Judgment (“...prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected”) has been respected. If not, the Defence asks that lesser redacted versions of the Requests be filed.

11. The Defence puts the PTC and Prosecution on notice that it will wish to make more concrete and focused supplementary submissions if and when it receives lesser redacted versions of the Requests.

(b) There is no objectively justifiable risk to the safety of the witnesses arising from disclosure of the witnesses’ identities to the Defence

12. The Requests point to risks to the 17 witnesses based on the assertions, *inter alia*, that “Mr EL HISHRI, his associates and SDF/RADA have the capacity and motivation to interfere with and intimidate witnesses” and that “any identities disclosed to Mr EL HISHRI are at risk of becoming known to SDF/RADA”.⁶ These assertions are unfounded. To date, Mr El Hishri has had disclosed to him the identities of 23 witnesses. The first eight were disclosed by 11 December 2025, followed by four more witnesses by 5 January 2026, five by 22 January 2026, and the remaining six on 5 February 2026.

13. The Prosecution’s stated rationale for disclosing these 23 witnesses in phases was “so that, consistent with its obligations under article 68(1), the Prosecution can deploy its protection strategy in this case progressively, [REDACTED]”,⁷ justifying a “highly cautious approach”,⁸ and that “[t]he interval between each disclosure phase

⁶ ICC-01/11-01/25-55-Conf-Red, para. 10; *see also* ICC-01/11-01/25-58-Conf-Red, para. 18; ICC-01/11-01/25-59-Conf-Red, para. 11

⁷ Confidential Redacted Version of “Corrected version of “Prosecution’s application under regulation 35 to extend the disclosure deadline for the arrest warrant materials of 32 witnesses” filed on 9 December 2025, ICC-01/11-01/25-35-Conf-Exp-Corr, ICC-01/11-01/25-35-Conf-Red, para. 8

⁸ ICC-01/11-01/25-35-Conf-Red, para. 10

(approximately, two-three weeks) is reasonable and necessary as a risk mitigation measure.”⁹

14. These concerns have proved to be groundless. The Prosecution has made no report of any of the 23 witnesses complaining that they had been contacted, directly or indirectly, by Mr El Hishri, or by anyone associated with SDF/RADA, or intimidated, or interfered with. Mr El Hishri has demonstrated no motivation and no intention to disclose the identities of any Prosecution witnesses that he learned since being detained at the ICC Detention Centre. He has demonstrated no intention of intimidating or interfering with witnesses. Having been tested over the last two months, it can be shown that there are no objective reasons for fearing Mr El Hishri would in reality seek to intimidate or interfere with these 17 witnesses, or any of them.

15. Indeed, ever since his arrest in Germany on 16 July 2025, there have been no complaints that Mr El Hishri has ever taken steps to intimidate or interfere with potential witnesses.

(c) P-0872, P-1046, P-0551 and P-0439 have not objected to the disclosure of their identities

16. The Prosecution has taken it upon itself to determine that four of the witnesses’ lack of objection to the disclosure of their identities to the Defence should not be accepted by the PTC. This somewhat condescending approach should be rejected. While a witness’s subjective fears may not truly or reasonably reflect objective risk, a witness’s lack of subjective concerns – particularly when the witness is familiar with the day-to-day realities of the circumstances or location in question – is a powerful indicator of the lack of objective risk. P-0872 is described as having “indicated that he had no objection to disclosure”.¹⁰ Taking the contents of the summary of his account at face value,¹¹ he is in a perfectly good position to give informed consent. It seems clear from the Request that

⁹ ICC-01/11-01/25-35-Conf-Red, para. 33

¹⁰ ICC-01/11-01/25-58-Conf-Red, para. 35

¹¹ ICC-01/11-01/25-58-Conf-Red, para. 8(d)

the Prosecution seek an opportunity to meet with the witness to positively, and improperly, persuade him *not* to consent to the disclosure of his identity.

17. The Defence presumes that the redacted paragraphs 36-38 of filing 58 relate to the purported lack of P-1046's informed consent. The Defence is prevented from being able to meaningfully respond to these secret submissions, but would respectfully invite the PTC to assess whether the Prosecution has adopted the same paternalistic approach as it has with regards to P-0872, and to reject that approach if appropriate.

18. The Prosecution has stated that P-0551 "did not expressly refuse consent" but submits that he "could not provide informed consent".¹² Other submissions concerning P-0551's consent have been redacted, but it appears that the Prosecution seek an opportunity to meet with the witness to positively, and improperly, persuade him *not* to consent to the disclosure of his identity. Again, the Defence respectfully invites the PTC to assess the Prosecution's approach, and to reject that approach if appropriate.

19. Finally, as with P-0872, P-0439 "told the Prosecution that he had no security concerns regarding disclosure."¹³ His lack of subjective concern is a powerful indicator of the lack of objective risk. Taking the summary of his account at face value,¹⁴ he too is in a perfectly good position to give informed consent. He has evidently authorised disclosure of his identity to the Defence, but the Prosecution, in essence, suggests that his position should be ignored by the PTC, and that any agency he has vis-à-vis his decision should be removed. This approach is improper, inappropriate, and should be firmly rejected by the PTC.

(d) Less intrusive measures are available and feasible

20. As was made clear in the *Katanga* Judgment, the PTC should consider whether an alternative measure short of redaction is available and feasible in the circumstances. If

¹² ICC-01/11-01/25-59-Conf-Red, para. 34

¹³ ICC-01/11-01/25-59-Conf-Red, para. 35

¹⁴ ICC-01/11-01/25-59-Conf-Red, para. 9(b)

a less restrictive protective measure is sufficient and feasible, that measure should be chosen. If the PTC finds that there are objective grounds for ordering non-disclosure measures, it is submitted that less intrusive measures short of the requested redaction of the 17 witnesses' identities are available and feasible. A precedent is found in the *Al Hassan* case where the Single Judge of Trial Chamber X proposed an alternative measure short of redaction, that is, restriction of the disclosure of the identity of a witness to the Defence team only, without disclosure to the Suspect (at that time).¹⁵ It is submitted that, while far from ideal, this is a feasible alternative measure that would at least allow the Defence to carry out specific investigations into each of the 17 witnesses, and matters raised in their statements. The Defence would still be prejudiced to the extent that no instructions could be taken from Mr El Hishri about these individuals while disclosing that they were witnesses, but the prejudice would be significantly mitigated.

(e) Withholding the identities of the 17 witnesses will be prejudicial to the Defence

21. The Prosecution is wrong to argue that withholding the identities of the 17 witnesses from the Defence would not be prejudicial. It would.

22. The Prosecution argues that confirmation proceedings are of limited scope. The Defence submits that they are, nonetheless, important. They matter.

23. The purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges.¹⁶

¹⁵ *Al Hassan*, Public redacted version of 'Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0128, P-0129, P-0140 and P-0154', ICC-01/12-01/18-684-Red2, para. 40

¹⁶ *Katanga*, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 63

24. The purpose of the confirmation hearing has also been described as limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought, and a means to ensure judicial economy by distinguishing those cases that should go to trial from those that should not.¹⁷

25. It has been described in other terms as being to determine whether the case as presented by the Prosecutor is sufficiently established to warrant a full trial. The Statute mandates that this is decided by answering the question whether there are substantial grounds to believe that the person committed the crimes charged. Therefore, the procedure of confirmation of charges protects the suspect from wrongful and unfounded accusations.¹⁸

26. Were the PTC to confirm the charges against Mr El Hishri, the matter will proceed to trial. However, if the PTC finds that the allegations against him are “wrongful and unfounded”, and built on insufficient evidence, then Mr El Hishri will be entitled to be discharged, released from detention, and allowed to return home to his family. The real-life consequences of the confirmation proceedings should not be underestimated.

27. Whilst acknowledging that the confirmation hearing itself is not a mini-trial, preparations for the hearing are not dissimilar to preparations for a trial. The Defence is in the process of diligently reading and analysing all witness statements and associated material and carefully studying all exculpatory evidence. This process necessarily involves investigations into the matters included in witness statements, as well as the witnesses themselves.

28. A recent example of where this careful Defence work, *inter alia*, resulted in a case not proceeding beyond the confirmation stage is that of Mr Maxime Jeoffroy Eli Mokom

¹⁷ *Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, para. 41

¹⁸ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, para. 16

Gawaka.¹⁹ The evidence collected and presented by the Prosecution at the confirmation hearing was acknowledged as being insufficient to provide a reasonable prospect of conviction, and consequently the Prosecution properly withdrew the charges against Mr Mokom.²⁰

29. It can be seen, therefore, that Defence investigations can have an enormously important impact on whether cases proceed beyond the confirmation stage. But in the instant case, the Prosecution seeks to shield the identities of 42.5% of the witnesses upon whom it will seek to rely during the confirmation process (17 out of 40 witnesses). If the Defence is unable to investigate very nearly half of the Prosecution's witnesses, it will be self-evidently prejudiced, and to a significant extent. This is so even if redacted versions of their statements are disclosed since it is the *witnesses themselves* that cannot be investigated.

30. The Prosecution either fails to acknowledge the prejudice to the Defence that would be caused by the proposed non-disclosure measures,²¹ or downplays the prejudice by referring to the "limited interference with Mr EL HISHRI's fair trial rights".²² The interference with his fair trial rights cannot rationally be described as "limited". They would be substantial and irreparable if one of the consequences of the Defence's inability to properly meet the Prosecution's allegations is a flawed decision confirming the charges against Mr El Hishri, and his wrongfully languishing, potentially for many more years to come, in detention awaiting judgment. It would be hard to think of a more prejudicial outcome.

¹⁹ *Mokom*, Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-275 ("*Mokom* Withdrawal Notice")

²⁰ *Mokom* Withdrawal Notice, para. 5

²¹ See eg. ICC-01/11-01/25-55-Conf-Red, paras 3, 43, 45

²² See eg. ICC-01/11-01/25-55-Conf-Red, para. 46

31. This is a case where non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to Mr El Hishri; as a result the requested redactions should not be authorised.²³

32. Finally, in respect of the proposal that only summaries of the relevant parts of the evidence of P-0342 should be provided to the Defence, it is recalled that any exculpatory material from this witness, or material that could be material for the Defence's preparations, must be disclosed.²⁴

V. CONCLUSION

33. For the foregoing reasons, the Requests should be denied in their entirety, and the 17 witnesses' redacted statements be redisclosed with their identities made fully available to the Defence.

Respectfully submitted,



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Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 10 March 2026

at The Hague, The Netherlands

²³ *per Katanga* Judgment, para. 72(d)

²⁴ *Lubanga*, Decision Concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517, pp 4 and 8