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TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public

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’

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

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Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘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’.

I. Procedural history

1. On 30 December 2019, the Single Judge issued a decision setting up a procedure and relevant time limits concerning the disclosure and re-disclosure of evidence (the ‘Disclosure Decision’).¹ By way of this decision, the Single Judge notably instructed the Prosecution to file, by 10 February 2020, any application required pursuant to Regulation 42 of the Regulations of the Court (the ‘Regulations’).² The deadline initially set for the filing of any such application was later postponed to 10 March 2020.³
2. On 6 January 2020, the Chamber issued a decision setting the commencement date of the trial to 14 July 2020 and adopting a calendar leading up to this date. It notably set 14 April 2020 as the deadline for the Prosecution to finalise its evidence disclosure.⁴ This deadline was later postponed to 12 May 2020.⁵
3. On 10 February 2020, the Single Judge of Trial Chamber VIII, having found that Trial Chamber VIII could not be ‘seized of the proceedings’ for the purposes of Regulation 42(3) of the Regulations, declared Trial Chamber VIII unable to rule on two Prosecution requests under Regulation 42, and considered

¹ Decision on the evidence disclosure protocol and other related matters, ICC-01/12-01/18-546.

² Disclosure Decision, ICC-01/12-01/18-546, para. 21.

³ Decision on Prosecution request for a variation of time limits relating to the disclosure of evidence and scheduling a second status conference, 22 January 2020, ICC-01/12-01/18-558.

⁴ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

⁵ Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677 (the ‘20 March 2020 Decision’).

that ‘any related requests concerning the *Al Mahdi* case record, must instead be brought before Trial Chamber X in the *Al Hassan* case’.⁶

4. On 13 February 2020, the Single Judge of this Chamber found that, pursuant to Regulation 42(3) of the Regulations, and noting the Single Judge of Trial Chamber VIII’s abovementioned finding, she could decide to vary measures ordered for the protection of witnesses in the context of the *Al Mahdi* proceedings.⁷
5. On 5 March 2020, the Prosecution filed an application pursuant to Regulation 42 of the Regulations requesting the Single Judge to maintain protective measures ordered in the *Al Mahdi* proceedings for P-0105, P-0128, P-0129 and P-0154, being the disclosure of anonymous summaries of information provided by those individuals, in lieu of their screening notes and related items (the ‘First Request’).⁸ Although having been screened by the Prosecutor, none of these individuals provided witness statements⁹ and their information was disclosed in anonymous summaries to the Defence as Rule 77 material.¹⁰ The Prosecution submits that the information may bear *de minimis* relevance and materiality to the preparation of the Defence which, on balance, do not justify the risks that disclosure of their identities to the Defence in the Mali situation would entail, having regard to the individuals’ particular circumstances.¹¹
6. Also on 5 March 2020, the Prosecution filed an application pursuant to Regulation 42 of the Regulations (the ‘Second Request’),¹² requesting the

⁶ Decision on Prosecution’s Requests for Variation of Protective Measures, ICC-01/12-01/15-344, para. 9.

⁷ Decision on the variation of protective measures for Witnesses P-0004, P-0113, P-0114, P-0147, and P-0431, ICC-01/12-01/18-586-Conf (a public redacted version was filed on 20 February 2020, ICC-01/12-01/18-586-Red), para. 11 (the ‘13 February 2020 Decision’).

⁸ Prosecution Request to Maintain Protective Measures for Screened Individuals MLI-OTP-P-0105, MLI-OTP-P-0128, MLI-OTP-P-0129 and MLI-OTP-P-0154, ICC-01/12-01/18-627-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; with confidential, *ex parte* Annexes A to I, only available to the Prosecution and the VWU; a confidential redacted version of the main filing was filed on 6 March 2020, ICC-01/12-01/18-627-Conf-Red).

⁹ First Request, ICC-01/12-01/18-627-Conf-Red, paras 18, 28, 39, 49.

¹⁰ First Request, ICC-01/12-01/18-627-Conf-Red, paras 20, 31, 41, 52.

¹¹ First Request, ICC-01/12-01/18-627-Conf-Red, paras 2-3.

¹² Prosecution Request relating to Protective Measures for Screened Individuals MLI-OTP-P-0120 and MLI-OTP-P-0140, ICC-01/12-01/18-628-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; with confidential, *ex parte* Annexes A to E, only available to the

Single Judge to maintain protective measures ordered in the *Al Mahdi* proceedings for P-0120, being the disclosure of an anonymous summary of the information provided by him,¹³ and to determine whether the protective measures ordered in the *Al Mahdi* proceedings for P-0140 - disclosure of an anonymous summary of P-0140's screening notes - should be varied or maintained.¹⁴ Although having been screened by the Prosecutor, neither of these individuals provided witness statements.¹⁵ Their information was disclosed in anonymous summaries to the Defence as Rule 77 material.¹⁶

7. On 9 March 2020, the Prosecution filed an additional submission, providing further information in relation to the First Request, and correcting some information contained therein.¹⁷
8. On 13 March 2020, in line with the direction of the Single Judge,¹⁸ the Defence responded to the First and Second Requests (the 'Defence Response'), requesting the Single Judge to reject the requests to withhold the identities of P-0120 and P-0128 or, in the alternative, order the Prosecution to: (i) disclose lesser redacted summaries and screening notes for these two individuals; and (ii) prepare admissions of fact that fully cover the lines of defence that could have been raised on the basis of the information available to them.¹⁹ The Defence does not make specific submissions on the Prosecution's requests regarding P-0105, P-0129, P-0140 or P-0154.

Prosecution and the VWU; a confidential redacted version of the main filing was filed on 6 March 2020, ICC-01/12-01/18-628-Conf-Red).

¹³ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 15, 50.

¹⁴ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 10, 50.

¹⁵ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 27, 43.

¹⁶ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 27, 43.

¹⁷ Corrigendum and Addendum to "Prosecution Request to Maintain Protective Measures for Screened Individuals MLI-OTP-P-0105, MLI-OTP-P-0128, MLI-OTP-P-0129 and MLI-OTP-P-0154", (ICC-01/12-01/18-627-Conf-Exp), ICC-01/12-01/18-640-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; a confidential redacted version was filed on the same day ICC-01/12-01/18-640-Conf-Red) (the 'Addendum to the First Request').

¹⁸ Emails from the Single Judge to the parties and participants sent on 6 March 2020 at 17:29 and 9 March 2020 at 09:37.

¹⁹ Defence response to the non-disclosure applications set out in ICC-01/12-01/18-627-Conf-Red, ICC-01/12-01/18-628-Conf-Red, and ICC-01/12-01/18-647-Conf-Red, ICC-01/12-01/18-662-Conf-Exp (confidential, *ex parte*, only available to the Defence and Registry; a confidential redacted version was filed on the same day ICC-01/12-01/18-662-Conf-Red), para. 29.

II. Applicable law

9. In addition to Regulation 42 of the Regulations, the Single Judge refers to Articles 54(3)(f), 64(2), 3(c) and (6), 67(1) and 68(1) and (5) of the Statute and Rules 76, 77, 81(2) and (4), and 84 of the Rules of Procedure and Evidence (the ‘Rules’).
10. It is noted that Regulation 42(1) of the Regulations relevantly provides that protective measures in respect of a victim or witness shall continue in full force in other proceedings and after proceedings have been concluded, subject to revision by a Chamber. Regulation 42(4) provides that before making a determination under Regulation 42(3), the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.
11. The Single Judge notes at the outset that in accordance with the well-established case law of the Court, the authorisation of non-disclosure of information shall be viewed as an exception, the overriding principle being that of full disclosure.²⁰
12. Pursuant to Article 68(1) of the Statute, the Chamber shall ensure the safety, physical, and psychological well-being of victims and witnesses. In doing so, the Chamber shall take all appropriate measures to safeguard their privacy and protection, while ensuring that such measures are consistent with the rights of the accused. The rights of the accused are enshrined in Article 67 of the Statute and also reflected in other relevant provisions.
13. Of particular importance is Rule 81(4) of the Rules, which provides that the Chamber, on its own motion or at the request of the Prosecution, must take necessary steps ‘to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of trial’. These protections have been extended by the

²⁰ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 9. *See also* Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Second Decision on the Prosecutor’s requests for redactions, 16 December 2015, ICC-01/12-01/15-61, para. 1 (the ‘*Al Mahdi* Decision’).

Appeals Chamber to all individuals at risk on account of the activities of the Court.²¹ Rule 81(2) provides that the Prosecution may also request non-disclosure of information where necessary to protect future or ongoing investigations.

14. The Single Judge notes further the jurisprudence on the factors that must be addressed when considering whether to authorise the non-disclosure of certain information pursuant to Rule 81(2) and (4) of the Rules: (i) the existence of an ‘objectively justifiable’ risk (would disclosure of the particular information *to the Defence* endanger the person’s security?); (ii) the necessity of the measure (would non-disclosure of the information eliminate or reduce that risk? Is the measure the least intrusive possible?); and (iii) the proportionality of the measure in the light of the rights of the suspect and a fair and impartial trial.²²
15. In addition, the Appeals Chamber has emphasised that relevance of the information to the Defence should be carefully taken into account: if the Chamber concludes that the information concerned is not relevant to the Defence, this is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence; whereas if the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecution, particular care will need to be taken when balancing the interests at stake.²³
16. Further, Article 68(5) of the Statute provides for the disclosure of a summary of information or evidence by the Prosecution, where the disclosure of the information or evidence itself may lead to the grave endangerment of the security of a witness or his or her family. Since anonymous summaries of statements generally deprive the defence of access to more information than do mere redactions (volume of redactions, witness hesitation, overall logic of the

²¹ Appeals Chamber, *The Prosecutor v. Germain 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", 13 May 2008, ICC-01/04-01/07-475 (OA), para. 56 (the ‘*Katanga* Appeals Judgment’).

²² Public redacted version of Decision on the Prosecution Request for Leave Not to Disclose the Identity of Witness MLI-OTP-P-0431, 27 November 2018, ICC-01/12-01/18-88-Red2-tENG (original decision dated 19 July 2018), para. 12 and references cited therein.

²³ *Katanga* Appeals Judgment, ICC-01/04-01/07-475, para. 72(c).

conversation over the course of the interview, etc.), the Chamber must ensure that their use does not disproportionately disadvantage the Defence and that disclosing a summary of the statement is indeed the only way to effectively protect the individual in question.²⁴

17. It is clear from the relevant framework that the Chamber is required to ensure that the interests of the Defence are balanced with those of victims, witnesses, and individuals at risk on account of the activities of the Court. The stage of the proceedings is a key factor to be considered in conducting this assessment.²⁵

III. Analysis

18. At the outset, the Single Judge notes the general Defence argument that the Prosecution has not well substantiated the existence of an objective risk, submitting that standardised justifications, based on generalised security concerns is problematic and insufficient.²⁶ The Prosecution refers to a recent security incident involving the abduction and murder in early February 2020 of an individual following a France24 interview,²⁷ which the Defence submits has no link to Mr Al Hassan, the Defence, the events in 2012, or the allegations in this case.²⁸ In relation to P-0120 and P-0128, the Defence submits specifically that the Prosecution has not established any objective risk arising from disclosure of their identities *to the Defence*.²⁹
19. In assessing the current potential security risks relevant to the determinations in the present decision, the Single Judge has primarily had regard to the information provided recently by the Registry.³⁰ Importantly for the purposes of the present decision, this information indicates that (i) the security situation in

²⁴ Public Redacted Version of Decision on the Prosecution Requests for Authorization to Withhold the Identities of Witnesses P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 and P-0594, 21 November 2019, ICC-01/12-01/18-174-Red2-tENG (original decision dated 6 November 2018), para. 28.

²⁵ 13 February 2020 Decision, ICC-01/12-01/18-586-Red, para. 10.

²⁶ Defence Response, ICC-01/12-01/18-662-Conf-Red, paras 10-11.

²⁷ First Request, ICC-01/12-01/18-627-Conf-Red, paras 15-17.

²⁸ Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 9.

²⁹ Defence Response, ICC-01/12-01/18-662-Conf-Red, paras 16, 22.

³⁰ First Registry Report on the Security Situation in Mali, 31 January 2020, ICC-01/12-01/18-571-Conf (with confidential Annex I and confidential, *ex parte* Annex II, only available to the Registry) (the 'Registry Report').

Mali continues to deteriorate;³¹ (ii) the Malian government, the UN and international forces are themselves regularly targeted by extremist groups;³² (iii) [REDACTED];³³ (iv) Al Qaeda aligned Jama'at Nusrat al-Islam wa al Muslimin ('JNIM') has a well-established history of taking ruthless action [REDACTED];³⁴ (v) risks [REDACTED] in Timbuktu city and the surrounding region,³⁵ and the security situation in the north continues to deteriorate and become increasingly complex;³⁶ (vi) the security situation in Mali has a significant impact on [REDACTED];³⁷ and (vii) the capability of JNIM [REDACTED].³⁸

20. Notwithstanding the Single Judge's confidence that the Defence will adhere to its confidentiality obligations and best practices when carrying out its investigations, the Single Judge considers that disclosure of names of individuals screened by the Prosecution, even to a limited number of people – in this instance to the Defence – inevitably entails the risk that the information will be disseminated more widely. Having regard to the security situation outlined above, the Single Judge considers that the nature and extent of the risks, were identities of such individuals to be disclosed, are such that relying on the confidentiality obligations of the Defence alone may not always be sufficient.³⁹
21. The Single Judge has also taken into consideration the Prosecution's submission that physical harm and/or intimidation to screened persons would in turn prejudice these proceedings, even if the Prosecution does not seek to rely on

³¹ Registry Report, ICC-01/12-01/18-571-Conf, para. 35.

³² Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

³³ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

³⁴ Registry Report, ICC-01/12-01/18-571-Conf, para. 30.

³⁵ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

³⁶ Registry Report, ICC-01/12-01/18-571-Conf, para. 23.

³⁷ Registry Report, ICC-01/12-01/18-571-Conf, para. 23.

³⁸ Registry Report, ICC-01/12-01/18-571-Conf, para. 39.

³⁹ See similarly the conclusions of the Pre-Trial Chamber I Single Judge, Corrected version of the Decision on the Prosecution Requests for Authorization to Withhold the Identities of Witnesses P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 and P-0594, 19 February 2019, ICC-01/12-01/18-174-Conf-Exp-Corr-tENG (confidential, *ex parte*, Prosecution and VWU only; original decision dated 6 November 2018), para. 31.

their evidence, as it would be extremely detrimental to the ability and willingness of other witnesses to cooperate with the Prosecution.⁴⁰

A. P-0105

22. The Single Judge notes that P-0105 was [REDACTED],⁴¹ and that he [REDACTED].⁴² The Prosecution also informs that P-0105 recently refused to consent to the disclosure of his identity, stating his subjective fear that [REDACTED].⁴³ Taking into account the personal circumstances of this individual, in particular his profession, together with the situation in Mali as set out above in paragraphs 19 to 20, the Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence.
23. Next, the Single Judge considers that the information provided by this individual is limited. It relates to witnessing attacks on mausoleums, and awareness of floggings - matters on which the Defence has received similar evidence from other Prosecution witnesses whose identities have been already disclosed,⁴⁴ [REDACTED]⁴⁵ [REDACTED]. Accordingly, the Single Judge agrees with the Prosecution that this information may be of *de minimis* relevance and materiality to the preparation of the Defence,⁴⁶ also noting that the Defence did not challenge these submissions. Taking into account further that the Prosecution does not rely on P-0105's information and will not call him to testify,⁴⁷ the Single Judge also considers that the protective measures already

⁴⁰ First Request, ICC-01/12-01/18-627-Conf-Red, para. 17; Second Request, ICC-01/12-01/18-628-Conf-Red, para. 41.

⁴¹ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 18.

⁴² First Request, ICC-01/12-01/18-627-Conf-Exp, para. 21.

⁴³ Addendum to the First Request, ICC-01/12-01/18-640-Conf-Red, para. 4.

⁴⁴ On the destruction of mausoleums (P-0150, P-0114, P-0004, P-0064, P-0065, and P-0654) and on floggings and religious and gender persecution (P-0557, P-0565, P-0595, and P-0580), see First Request, ICC-01/12-01/18-627-Conf-Red, para. 25 and the materials cited in the footnotes. While the identity of P-0114 was not disclosed to the Defence at the time of the filing of the First Request, on 10 March 2020, the Single Judge ordered that the Prosecution immediately disclose P-0114's identity and, by the deadline for full disclosure, disclose all related material with only standard redactions: see Confidential redacted version of Decision on the Prosecution's request regarding disclosure of Witness P-0114's identity, 10 March 2020, ICC-01/12-01/18-644-Conf-Red.

⁴⁵ First Request, ICC-01/12-01/18-627-Conf-Red, para. 21; ICC-01/12-01/18-627-Conf-Exp-AnxB, P-0105's anonymous summary, MLI-OTP-0031-0074.

⁴⁶ First Request, ICC-01/12-01/18-627-Conf-Red, para. 20.

⁴⁷ First Request, ICC-01/12-01/18-627-Conf-Red, para. 20.

in place are the least intrusive possible. Weighing the risks to the individual which would result from disclosure of his identity to the Defence with the rights of the accused, the Single Judge also considers that the current protective measures are proportional.

24. For these reasons, and further noting that the Defence did not oppose this part of the First Request, the Single Judge considers that the protective measures previously ordered for P-0105 - the provision of an anonymous summary - shall remain in place.

B. P-0120

25. The Single Judge notes the information that P-0120 was [REDACTED].⁴⁸ The Prosecution reports that it recently attempted to contact P-0120 on several occasions but was unsuccessful, and that it is unable to obtain his consent for disclosure.⁴⁹ It states that it appears likely that P-0120 [REDACTED].⁵⁰
26. The Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence, taking into account (i) the personal circumstances of this individual, in particular the likelihood that P-0120 [REDACTED]; (ii) his profile - information suggests that P-0120 was [REDACTED]. Further, [REDACTED]; (iii) the present impossibility to inform P-0120 of any disclosure of his identity or to [REDACTED]; together with (iv) the situation in Mali as set out above in paragraphs 19 to 20.
27. The Prosecution does not rely on P-0120's information and will not call him to testify.⁵¹ Although the Prosecution submits that P-0120's information may bear *de minimis* relevance and materiality to the preparation of the Defence,⁵² the Single Judge agrees with the Defence submission that information he provides appears potentially relevant to the issue of the ability of individuals, who were in Timbuktu in 2012, to identify the hierarchy within the Islamic Police, in an

⁴⁸ Second Request, ICC-01/12-01/18-628-Conf-Exp, para. 43.

⁴⁹ Second Request, ICC-01/12-01/18-628-Conf-Red, para. 47.

⁵⁰ Second Request, ICC-01/12-01/18-628-Conf-Exp, para. 47.

⁵¹ Second Request, ICC-01/12-01/18-628-Conf-Red, para. 46.

⁵² Second Request, ICC-01/12-01/18-628-Conf-Red, para. 48.

accurate manner.⁵³ The Defence submits that it should be disclosed a more detailed screening note of P-0120 so that it can ascertain the full array of issues impacted by this individual's evidence, and propose more specific counter-balancing measures, in the event that disclosure of the individual's identity is not possible.⁵⁴

28. Noting that information provided by P-0120 is of potential relevance and materiality to Defence preparation, but weighing on the other hand the potential risks to the individual and in particular the current impossibility to inform him of any disclosure of his identity or to [REDACTED], the Single Judge considers disclosure of the transcripts of P-0120's recorded screening⁵⁵ to the Defence, with identifying information redacted, is an appropriate measure in the circumstances. The Single Judge also considers that this represents the least intrusive measure available, noting in particular that the current impossibility for the Prosecution to contact P-0120 [REDACTED].
29. In this regard, the Single Judge has also taken into consideration the context in which the protective measures were previously ordered in the *Al Mahdi* proceedings⁵⁶ noting that this was at a pre-trial stage, in a case with significantly narrower charges, which were not contested by the defence in that case.
30. For these reasons, the Single Judge considers that the protective measures previously ordered for P-0120 - the provision of an anonymous summary - should be varied and replaced with the disclosure of the transcripts of P-0120's recorded screening⁵⁷ to the Defence, with identifying information redacted, and applying otherwise only standard redactions. The Single Judge understands that, through disclosing this material, while P-0120's identity will not be revealed, his profile will become known to the Defence. The Prosecution is instructed to bear this in mind when applying redactions. Should any disagreement arise in

⁵³ Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 20.

⁵⁴ Defence Response, ICC-01/12-01/18-662-Conf-Red, paras 23-24.

⁵⁵ MLI-OTP-0069-5759 and MLI-OTP-0069-5768 which are at ICC-01/12-01/18-628-Conf-Exp-AnxC.

⁵⁶ *Al Mahdi* Decision, ICC-01/12-01/15-61.

⁵⁷ MLI-OTP-0069-5759 and MLI-OTP-0069-5768 which are at ICC-01/12-01/18-628-Conf-Exp-AnxC.

relation to the application of specific redactions to identifying information, the parties may return to the Single Judge further on this issue.

C. P-0128

31. The Single Judge notes the information that P-0128 [REDACTED].⁵⁸ P-0128 [REDACTED].⁵⁹
32. The Prosecution also informs that when it recently contacted P-0128 regarding the disclosure of his identity, the individual expressed certain concerns over [REDACTED] he does not consent to the disclosure of his identity to the Defence.⁶⁰ In light of the concerns expressed by P-0128 during his contact with the Prosecution – [REDACTED],⁶¹ [REDACTED]⁶² - in the context of paragraphs 19 to 20 above, the Single Judge accepts the Prosecution's [REDACTED], contrary to the Defence's objection on this point.⁶³
33. The Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence, taking into account (i) the personal circumstances of this individual, in particular, the fact that [REDACTED], (ii) his profile - including the risk that, [REDACTED], and the fact that he [REDACTED],⁶⁴ both factors which may further increase his risk [REDACTED]; (iii) the nature of the security concerns expressed by him; together with (iv) the situation in Mali as set out above in paragraphs 19 to 20. Although the Single Judge notes the information that this person has [REDACTED], there are also indications that at present this individual is subjectively highly concerned for his safety, and [REDACTED].
34. The Prosecution does not rely on P-0128's information and will not call him to testify.⁶⁵ While the Prosecution submits that P-0128's information may bear *de*

⁵⁸ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 28.

⁵⁹ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 34.

⁶⁰ First Request, ICC-01/12-01/18-627-Conf-Exp, paras 32-33.

⁶¹ [REDACTED].

⁶² First Request, ICC-01/12-01/18-627-Conf-Exp, para. 32.

⁶³ Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 16. The Single Judge notes that the details of the concerns expressed were redacted from the Defence.

⁶⁴ ICC-01/12-01/18-627-Conf-Exp-AnxC, p. 4.

⁶⁵ First Request, ICC-01/12-01/18-627-Conf-Red, para. 30.

minimis relevance and materiality to the preparation of the Defence,⁶⁶ the Defence submits the information he provides is directly relevant to its preparation, and should therefore be disclosed in a sufficiently detailed and usable manner so that the Defence can either contact P-0128, or investigate specific matters that he discussed with the Prosecution investigators.⁶⁷ The Defence identifies his information as being potentially relevant to (i) [REDACTED]; (ii) [REDACTED]; (iii) the fact that after the arrival of Ansar Dine, ‘the population became accustomed to the situation’ and that they would debate issues with them; and (iv) cases of rapes committed in Timbuktu.⁶⁸

35. The Single Judge agrees with the Defence that, based on the available information, P-0128 could be in a position to provide information on the specific lines of inquiry identified by the Defence above. The Single Judge also agrees with the Defence that the information that could be provided by P-0128 on such issues appears to be not fully subsumed by other Prosecution evidence identified by the Prosecution in its request.⁶⁹ The Single Judge therefore considers that P-0128’s information is potentially relevant and material to Defence preparations.
36. Notwithstanding, the Single Judge notes that there are particular features of this individual’s profile that [REDACTED] – namely, that he [REDACTED]. In making this assessment the Single Judge has taken into account the other measures in place to safeguard security of potential witnesses and others at risk from the activities of the Court including current restrictions on Mr Al Hassan’s contacts. However the Single Judge considers the circumstances such that these

⁶⁶ First Request, ICC-01/12-01/18-627-Conf-Red, paras 31, 37.

⁶⁷ Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 15.

⁶⁸ Defence Response, ICC-01/12-01/18-662-Conf-Red, paras 13-14

⁶⁹ Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 18; First Request, ICC-01/12-01/18-627-Conf-Red, para. 36 and the material referred to therein. In particular, as the Defence submits, [REDACTED], the Prosecution has pointed towards other Prosecution witnesses who testified in relation to the fact [REDACTED]. Similarly, although the Prosecution has referred to evidence concerning alleged victims of rape and sexual crimes, P-0128’s potential information about [REDACTED] is potentially materially different.

measures do not sufficiently mitigate the relevant risks for this individual. [REDACTED].⁷⁰

37. The Single Judge has also given particular consideration to the reasons the Defence considers information from this person to be of relevance. As described, he is essentially a potential source for further information on [REDACTED] during the relevant period. In sum, the Defence wishes to explore with him potential leads for relevant Defence lines of inquiry. The Single Judge notes the Defence acknowledgment that what is required is disclosure of the information in a sufficiently detailed and usable manner so that it can either contact P-0128, or investigate specific matters that he discussed with the Prosecution investigators.
38. In these particular circumstances, the Single Judge is not convinced at this stage that the balance of the various interests weighs in favour of full disclosure of his identity. The Single Judge considers that a lesser measure than disclosure of P-0128's identity would be more appropriate in the circumstances, especially given the investigative nature of the further information which the Defence is seeking.
39. Having reviewed the relevant material, the Single Judge considers that all relevant information on the points the Defence are interested in which is contained in P-0128's screening note has already been disclosed to the Defence in the anonymous summary.⁷¹ Regarding the Defence request to receive further details concerning [REDACTED] cases of rape,⁷² the Single Judge notes that no such further details are contained in the screening note. Therefore, the lesser measure of disclosing the screening note to the Defence in lieu of the individual's identity is not a suitable remedy in the circumstances.
40. However, another possible option is to restrict disclosure of P-0128's identity to the Defence team and its resource persons only without further disclosure to Mr Al Hassan at this time. This would enable the Defence and its resource persons

⁷⁰ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 28.

⁷¹ See ICC-01/12-01/18-627-Conf-Exp-AnxC and ICC-01/12-01/18-627-Conf-Exp-AnxD.

⁷² Defence Response, ICC-01/12-01/18-662-Conf-Red, para. 19(b).

to investigate specific matters raised in P-0128's summary to determine if he has relevant information to provide and if so, whether that will be in the form of leads only or substantive points that he could attest to directly. With this restriction, this further investigation could be carried out without significantly enhancing the risk to P-0128. The Single Judge emphasises the risk arising from disclosure to Mr Al Hassan does not arise from any supposition about possible impugned conduct on his part but rather from the greater potential for inadvertent error which does not arise with respect to Counsel well familiar with these processes and their responsibility. The Single Judge is minded to adopt this approach but before ruling on the same would like to hear any observations from the Prosecution and Defence on this or any other feasible lesser measures.

D. P-0129

41. The Single Judge notes that P-0129 [REDACTED],⁷³ and that he currently [REDACTED].⁷⁴ The Prosecution also informs that P-0120 recently refused to consent to the disclosure of his identity to the Defence, particularly [REDACTED].⁷⁵
42. The Single Judge notes that this person is already [REDACTED] the situation in Timbuktu and he is [REDACTED].⁷⁶ [REDACTED].⁷⁷ Together with the circumstances set out in paragraphs 19 to 20, the Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence, albeit only limited in comparison to that which already exists.
43. Turning to the nature of this individual's information, the Single Judge highlights that a note on leads provided by this person has already been disclosed to the Defence,⁷⁸ that some of the information he provides is based on hearsay,⁷⁹ and that, in relation to his information on Iyad Ag Ghaly, his role in

⁷³ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 40.

⁷⁴ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 46.

⁷⁵ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 47.

⁷⁶ ICC-01/12-01/18-627-Conf-Exp-AnxE, p. 2.

⁷⁷ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 42; ICC-01/12-01/18-627-Conf-Exp-AnxG.

⁷⁸ First Request, ICC-01/12-01/18-627-Conf-Red, para. 43.

⁷⁹ ICC-01/12-01/18-627-Conf-Exp-AnxE, p. 3, section 3, paras 1-2, 6.

the occupation of Timbuktu and his occasional presence in town, a number of other witnesses whose identities have been disclosed to the Defence provide similar evidence on this matter.⁸⁰ The Single Judge accordingly agrees with the Prosecution that the information provided may be of *de minimis* relevance and materiality to the preparation of the Defence and notes that the Defence did not challenge these submissions. Weighing the potential risks to safety and the nature of the information he can provide, the Single Judge considers that the protective measures already in place are the least intrusive possible in the circumstances. Weighing the risks to the individual which would result from disclosure of his identity to the Defence with the rights of the accused, the Single Judge considers that the current protective measures are proportional.

44. For these reasons, and further noting that the Defence did not oppose this part of the First Request, the Single Judge considers that the protective measures previously ordered for P-0129 - the provision of an anonymous summary - shall remain in place.

E. P-0140

45. The Single Judge notes that P-0140 is [REDACTED].⁸¹ The Prosecution informs that P-0140 recently consented to the disclosure of his identity to the Defence, [REDACTED].⁸² The Single Judge notes the Prosecution's submission that P-0140's identity should not be disclosed to the Defence,⁸³ but defers to the Single Judge's discretion on P-0140, noting that the individual consents to such disclosure.⁸⁴
46. Taking into account the personal circumstances of this individual, in particular his profession, together with the situation in Mali as set out above in paragraphs 19 to 20, the Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence.

⁸⁰ P-0537, P-0150, P-0004, and P-0125: see First Request, ICC-01/12-01/18-627-Conf-Red, para. 44 and the materials cited therein.

⁸¹ Second Request, ICC-01/12-01/18-628-Conf-Exp, paras 28, 37.

⁸² Second Request, ICC-01/12-01/18-628-Conf-Exp, para. 3.

⁸³ Second Request, ICC-01/12-01/18-628-Conf-Red, para. 40.

⁸⁴ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 40-42.

47. The Single Judge nevertheless notes that P-0140 provided a significant amount of incriminatory evidence,⁸⁵ and considers that his information could be as relevant and material to Defence preparations. Further, bearing in mind Regulation 42(4) of the Regulations, the Single Judge notes that the individual has consented to the disclosure of his identity to the Defence.⁸⁶ In these circumstances, notwithstanding P-0140's personal situation, the Single Judge considers that balance of the different interests militates in favour of varying P-0140's protective measures and disclosing his identity to the Defence. In this regard, the Single Judge has also taken into consideration the context in which the protective measures were previously ordered in the *Al Mahdi* proceedings⁸⁷ noting that this was in a case with significantly narrower charges which were not contested by the defence in that case.
48. For these reasons, the Single Judge is minded to vary the protective measures previously ordered for P-0140 - the provision of an anonymous summary - to allow disclosure of his identity to the Defence. [REDACTED].⁸⁸ [REDACTED].⁸⁹

F. P-0154

49. The Single Judge notes that P-0154 was [REDACTED] in Timbuktu during the 2012 occupation⁹⁰ and that he presently [REDACTED].⁹¹ Information before the Single Judge indicates that this person was screened as a potential witness but declined to provide a statement or engage further with the Prosecution due to concerns about his identity being disclosed in judicial proceedings.⁹² It further indicates that when recently contacted, P-0154 specifically instructed the Prosecution not to disclose his identity to the Defence for the sake of his

⁸⁵ Second Request, ICC-01/12-01/18-628-Conf-Red, paras 28-36; ICC-01/12-01/18-628-Conf-Exp-AnxD; ICC-01/12-01/18-628-Conf-Exp-AnxE.

⁸⁶ Second Request, ICC-01/12-01/18-628-Conf-Red, para. 37.

⁸⁷ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Prosecution Requests for Authorisation to Disclose Anonymous Summaries, 22 July 2016, ICC-01/12-01/15-140.

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 49.

⁹¹ First Request, ICC-01/12-01/18-627-Conf-Exp, para. 54.

⁹² First Request, ICC-01/12-01/18-627-Conf-Red, para. 49; ICC-01/12-01/18-627-Conf-Exp-AnxH, pp 3-4.

security, expressing fears of being kidnapped and killed if his identity became known [REDACTED].⁹³

50. The Single Judge notes that although little information has been provided about P-0154's current personal circumstances, noting [REDACTED], together with the specific concerns he raised at the time of screening about disclosure of his identity,⁹⁴ the concerns he recently expressed about the disclosure of his identity to the Defence, and the situation in Mali as set out above in paragraphs 19 to 20, the Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence.
51. The Single Judge notes that the information in P-0154's screening note is limited and general - only broadly indicating topics that he could speak about.⁹⁵ Similar evidence on these topics has been disclosed to the Defence by a number of other witnesses whose identities are known to the Defence.⁹⁶ Although his evidence is generally incriminatory, the Prosecution indicates that it does not rely on P-0154's information and will not call P-0154 to testify.⁹⁷ The Single Judge considers that the information provided may be of *de minimis* relevance and materiality to the preparation of the Defence and notes that the Defence did not challenge these submissions. The Single Judge also considers that the protective measures already in place are the least intrusive possible in the circumstances. Weighing the risks to the individual which would result from disclosure of his identity to the Defence with the rights of the accused, the Single Judge also considers that the current protective measures are proportional.
52. For these reasons, bearing in mind P-0154's expressed unwillingness to have his identity disclosed in judicial proceedings - recently reiterated, and further noting that the Defence did not oppose this part of the First Request, the Single Judge

⁹³ Addendum to the First Request, ICC-01/12-01/18-640-Conf-Red, para. 5.

⁹⁴ ICC-01/12-01/18-627-Conf-Exp-AnxH, pp 3-4.

⁹⁵ ICC-01/12-01/18-627-Conf-Exp-AnxH, p. 4.

⁹⁶ First Request, ICC-01/12-01/18-627-Conf-Red, para. 56 and the materials cited in the footnotes, subject to the correction noted in Addendum to the First Request, ICC-01/12-01/18-640-Conf-Red, para. 7 and ICC-01/12-01/18-644-Conf-Red regarding the disclosure of P-0114's identity.

⁹⁷ First Request, ICC-01/12-01/18-627-Conf-Red, para. 51.

considers that the protective measures previously ordered for P-0154 - the provision of an anonymous summary - shall remain in place.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the First and Second Requests, in part;

MAINTAINS the protective measures previously ordered in relation to P-0105, P-0129 and P-0154;

DEFERS ruling on the Prosecution's request in relation to P-0128 and **DIRECTS** the Prosecution and Defence to make further observations as set out in paragraph 40 above, within 10 days of notification of this decision;

REJECTS all other requests;

VARIES the protective measures previously ordered in relation to P-0120;

ORDERS the Prosecution to disclose the transcripts of P-0120's recorded screening to the Defence, with identifying information redacted, and applying otherwise only standard redactions, in accordance with paragraph 30, within two weeks of notification of this decision;

[REDACTED]; and

VARIES the protective measures previously ordered in relation to P-0140 in accordance with paragraph 48, and **ORDERS** the Prosecution, [REDACTED], to disclose at the earliest opportunity, and at the latest by the deadline for full disclosure, this individual's identity and all related disclosable material, applying only standard redactions.

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

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Friday, 27 March 2020

At The Hague, The Netherlands