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PRE-TRIAL CHAMBER I

Before:

Judge Péter Kovács, 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 Document

**Public Redacted Version of the “Decision on the Defence Request for the Lifting of
Redactions and Additional Disclosure relating to Witnesses P-0005, P-0107, P-0136
and P-0612”**

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

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Judge **Péter Kovács**, having been designated on 28 March 2018 by Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) as Single Judge responsible for carrying out the functions of the Chamber in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (“Al Hassan case”),¹ decides the following.

I. Procedural history

1. On 27 March 2018, pursuant to article 58 of the Rome Statute (“Statute”), the Chamber issued a warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court and he is currently in custody at the Court’s detention centre in The Hague.³
3. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge in the presence of his counsel and the Prosecutor.⁴
4. On 16 May 2018, the Single Judge handed down the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on the Evidence Disclosure Protocol”).⁵
5. [REDACTED].⁶
6. On 22 May 2018, the Single Judge issued his decision on the Warrant of Arrest (“Decision on the Warrant of Arrest”).⁷

¹ “Decision Designating a Single Judge”, dated 28 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG.

² “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, dated 27 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

⁴ Transcript of the initial appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-Red-FRA-ET.

⁵ ICC-01/12-01/18-31.

⁶ [REDACTED].

⁷ “Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red-tENG. A public redacted version was issued the same day.

7. On 4 July 2018, the Single Judge issued the “Decision on the Prosecutors’ Request for Clarification on the Non-Disclosure of Witnesses’ Identities” (“Decision on the Prosecutor’s Request for Clarification”).⁸

8. On 20 July 2018, the Single Judge issued his “Decision Postponing the Date of the Confirmation Hearing”,⁹ setting the date for 6 May 2019.

9. On 5 October 2018, the Chamber issued its “Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges”.¹⁰

10. On 12 February 2019, the Prosecutor filed information concerning the disclosure of evidence and forthcoming requests for redaction, in addition to a request for an extension of time to file the document containing the charges.¹¹

11. On 25 February 2019, the Single Judge issued the “Scheduling Order for the Confirmation of Charges Hearing”, instructing the Prosecutor to file all her applications with a view to submitting the document containing the charges by 15 March 2019, postponing the date of the confirmation hearing and advising that a new date would be set after 15 March 2019.¹²

12. On 14 March 2019, the Defence filed a request for the lifting of redactions and additional disclosure relating to Witnesses MLI-OTP-P-0005 (“Witness P-0005” or “P-0005”), MLI-OTP-P-0107 (“Witness P-0107” or “P-0107”), MLI-OTP-P-0136 (“Witness P-0136” or “P-0136”) and MLI-OTP-P-0612 “Witness P-0612” or “P-0612”) (“Defence Request” or “Request”).¹³

⁸ ICC-01/12-01/18-66-tENG.

⁹ ICC-01/12-01/18-94-Red-tENG.

¹⁰ ICC-01/12-01/18-143-tENG.

¹¹ “*Éléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demande d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*”, 12 February 2019, ICC-01/12-01/18-243-Secret-Exp. The Prosecutor filed a public redacted version of this document on 15 February 2019, ICC-01/12-01/18-243-Red2.

¹² ICC-01/12-01/18-255, para. 15.

¹³ “Defence request for lifting of redactions and additional disclosure related to Exculpatory Witnesses P-0005, P-0107, P-0136 and P-0612”, 14 March 2019, ICC-01/12-01/18-276-Conf-Exp.

13. On 25 March 2019, the Prosecutor filed her response (“Prosecution Response” or “Response”).¹⁴

14. On 18 April 2019, the Single Judge issued a decision in which he instructed the Prosecutor to file the document containing the charges by Wednesday, 8 May 2019, and set the new date for the confirmation hearing for Monday, 8 July 2019.¹⁵

15. On 8 May 2019, the Prosecutor filed the DCC against Mr Al Hassan.¹⁶

16. On 11 May 2019, the Prosecutor filed an amended and corrected version of the DCC against Mr Al Hassan.¹⁷

17. Between 19 July 2018 and 23 May 2019, the Chamber granted the Prosecutor’s requests to withhold from the Defence the identities of Witnesses MLI-OTP-P-0431,¹⁸ MLI-OTP-P-0113,¹⁹ MLI-OTP-P-0160,²⁰ MLI-OTP-P-0100, MLI-OTP-P-0111, MLI-OTP-P-0130, MLI-OTP-P-0576, MLI-OTP-P-0581, MLI-OTP-P-0583, MLI-OTP-P-0589, MLI-OTP-P-0592, MLI-OTP-P-0593 and MLI-OTP-P-0594,²¹ MLI-OTP-P-0553 and MLI-

¹⁴ “Prosecution’s Response to the Defence request for lifting of redactions and additional disclosure”, 25 March 2019, ICC-01/12-01/18-292-Conf-Exp, and its annex ICC-01/12-01/18-292-Conf-Exp-AnxA. The Prosecutor filed a confidential redacted version of this document on 15 April 2019, available to the Defence, ICC-01/12-01/18-292-Conf-Red.

¹⁵ “Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing”, 18 April 2019, ICC-01/12-01/18-313-tENG, paras. 18-20.

¹⁶ ICC-01/12-01/18-335-Conf.

¹⁷ ICC-01/12-01/18-335-Conf-Corr.

¹⁸ “Decision on the Prosecution Request for Leave Not to Disclose the Identity of Witness MLI-OTP-P-0431”, 19 July 2018, ICC-01/12-01/18-88-Conf-Exp-tENG (“Decision of 19 July 2018”). A confidential redacted *ex parte* version, available to the Defence (ICC-01/12-01/18-88-onf-Exp-Red) and a public redacted version (ICC-01/12-01/18-88-Red2) were filed on the same day.

¹⁹ “Decision on the Prosecution Motion for Authorization to File an Anonymous Summary concerning Witness MLI-OTP-P-0113”, 13 September 2018, ICC-01/12-01/18-122-Conf-Exp. A confidential redacted version of the decision was also filed that day (ICC-01/12-01/18-122-Conf-Red) and a public redacted version on 27 September 2018 (ICC-01/12-01/18-122-Red2).

²⁰ “Decision on the Prosecution Request for Authorization to Withhold the Identity of Witness MLI-OTP-P-0160”, 9 October 2018, ICC-01/12-01/18-150-Conf-Exp-tENG (“Decision of 9 October 2018”). A confidential redacted version was also filed on the same day (ICC-01/12-01/18-150-Conf-Red-tENG).

²¹ “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, 6 November 2018, ICC-01/12-01/18-174-Conf-Exp-tENG. A confidential redacted version, available to the Defence, was filed that day, ICC-01/12-01/18-174-Conf-Exp-Red-tENG. A corrected version of the confidential version *ex parte* was filed on 9 November 2018, ICC-01/12-01/18-174-Conf-Exp-Corr-tENG.

OTP-P-0574,²² MLI-OTP-P-0114 and MLI-OTP-P-0147,²³ MLI-OTP-P-0608,²⁴ MLI-OTP-P-0146,²⁵ MLI-OTP-P-0619 and MLI-OTP-P-0569,²⁶ MLI-OTP-P-0570,²⁷ MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 and MLI-OTP-P-0537,²⁸ MLI-OTP-P-0626 and MLI-OTP-P-0654,²⁹ MLI-OTP-P-0520, MLI-OTP-P-0595, MLI-OTP-P-0538, MLI-OTP-P-0542 and MLI-OTP-P-0603,³⁰ MLI-OTP-P-0111 and MLI-OTP-P-0625,³¹ and MLI-OTP-P-0021.³²

²² "Decision on the Prosecutor's Request for Authorization to Withhold the Identities of Witnesses P-0553 and P-0574", 16 November 2018, ICC-01/12-01/18-184-Conf-Exp. A confidential redacted version available to the Defence was filed that day, ICC-01/12-01/18-184-Conf-Exp-Red-tENG.

²³ "Decision on the Prosecutor's Motions for Authorization to Withhold the Identities of Witnesses MLI-OTP-P-0114 and MLI-OTP-P-0147", 4 December 2018, ICC-01/12-01/18-198-Conf-Exp-tENG. A confidential redacted version available to the Defence was filed that day, ICC-01/12-01/18-198-Conf-Exp-Red-tENG.

²⁴ "Confidential Annex to the Decision on the Prosecution's Request for Authorization to Withhold the Identity of Witness MLI-OTP-P-0608, Upon Whose Evidence the Prosecution Intends to Rely at the Hearing", 7 December 2018, ICC-01/12-01/18-202-Conf-Exp-tENG. A confidential redacted version available to the Defence was filed that day, ICC-01/12-01/18-202-Conf-Exp-Red-tENG.

²⁵ "Decision on the Prosecutor's Request for Authorization to Continue Withholding the Identity of Witness MLI-OTP-P-0146, Upon Whose Evidence the Prosecutor Does Not Intend to Rely at the Hearing", 17 January 2019, ICC-01/12-01/18-218-Conf-Exp-tENG. On the same day, a confidential redacted version available to the Defence was filed, ICC-01/12-01/18-218-Conf-Exp-Red-tENG.

²⁶ "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0619 et MLI-OTP-P-0569, et autres mesures de protection relatives", 17 January 2019, ICC-01/12-01/18-219-Conf-Exp. On the same day, a confidential redacted version available to the Defence was filed, ICC-01/12-01/18-219-Conf-Exp-Red. On 21 January 2019, corrected versions of the confidential *ex parte* version, ICC-01/12-01/18-219-Conf-Exp-Corr, and the confidential redacted version, ICC-01/12-01/18-219-Conf-Exp-Red-Corr, were filed.

²⁷ "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0570", 20 February 2019, ICC-01/12-01/18-251-Secret-Exp. On the same day, the Chamber entered into the record a secret redacted version of the decision, available to the Defence, ICC-01/12-01/18-251-Secret-Exp-Red.

²⁸ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 et MLI-OTP-P-0537", 18 April 2019, ICC-01/12-01/18-314-Secret-Exp. On the same day, a secret redacted version available to the Defence was filed, ICC-01/12-01/18-314-Secret-Exp-Red.

²⁹ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0626 et MLI-OTP-P-0654", 18 April 2019, ICC-01/12-01/18-315-Secret-Exp. A secret redacted version available to the Defence was filed that day, ICC-01/12-01/18-174-Secret-Exp-Red.

³⁰ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0520, MLI-OTP-P-0595, MLI-OTP-P-0538, MLI-OTP-P-0542 et MLI-OTP-P-0603", 1 May 2019, ICC-01/12-01/18-322-Conf-Exp. A confidential redacted version available to the Defence was filed on the same day, ICC-01/12-01/18-322-Conf-Exp-Red.

³¹ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0111 et MLI-OTP-P-0625", 21 May 2019, ICC-01/12-01/18-350-Secret-Exp. A secret redacted version available to the Defence was filed on the same day, ICC-01/12-01/18-350-Secret-Exp-Red.

18. On 7 June 2019, the Prosecutor filed the DCC in Arabic.³³

19. On 11 June 2019, the Prosecutor filed the Arabic version of the DCC with the footnotes.³⁴

20. On 4 July 2019, the Defence filed its observations under rule 121(9) of the Rules of Procedure and Evidence (“Rules”).³⁵

II. Applicable law

21. The Single Judge has regard to articles 54, 57(3)(c), 61, 67 and 68 of the Statute, rules 15, 77, 81 and 121 of the Rules, and regulation 42 of the Regulations of the Court.

III. Analysis

A. General submissions of the parties

22. The Defence seeks the lifting of redactions concerning four exculpatory witnesses, namely, P-0005, P-0107, P-0136 and P-0612, and the disclosure of additional documents relating to these witnesses.³⁶

23. First, the Defence asserts that the lifting of the redactions applied to the potentially exculpatory evidence disclosed to the Defence, and the disclosure of additional documents are essential to enable the Defence to prepare for the confirmation of charges hearing and a potential trial.³⁷ The Defence submits that lifting the redactions in those documents could serve as a basis for future investigations and also allow the Defence, if necessary, to present evidence at the

³² “*Décision relative à la requête du Procureur aux fins d’autorisation de la non-communication de l’identité du témoin MLI-OTP-P-0021*”, 23 May 2019, ICC-01/12-01/18-353-Conf-Exp. A confidential redacted version, available to the Defence, was filed that day, ICC-01/12-01/18-353-Conf-Exp-Red.

³³ ICC-01/12-01/18-366.

³⁴ ICC-01/12-01/18-370.

³⁵ ICC-01/12-01/18-394-Conf.

³⁶ Defence Request, paras. 13-14.

³⁷ Defence Request, paras. 13, 36.

confirmation hearing.³⁸ The Defence further submits that the disclosure of potentially exculpatory evidence, redacted and incomplete such that it is rendered incomprehensible and unusable, is in breach of the Prosecutor's disclosure obligations.³⁹

24. The Defence goes on to argue that there is a legitimate forensic purpose to warrant its request.⁴⁰ It contends that the redactions applied in the documents concerning the potentially exculpatory witnesses preclude it from exercising its right to conduct investigations into the content of those documents and deprive Mr Al Hassan of the opportunity to establish his innocence.⁴¹ It is the Defence's view that those redactions are therefore prejudicial and inconsistent with the rights of the accused to a fair and impartial trial.⁴² Lastly, the Defence submits that lifting the redactions would not endanger the safety of the potentially exculpatory witnesses and of the third parties they mention, given that Mr Al Hassan does not represent a risk for those people and that it is also not necessary to protect exculpatory witnesses against the party to the proceedings that they are supporting.⁴³

25. In the main, the Prosecutor argues that to consider Witnesses P-0005, P-0107, P-0136 and P-0612 to be exculpatory witnesses, as the Defence does, is an unnecessary generalization and should not lead to misconceptions about the nature of the information that these witnesses have given, which is not necessarily all exonerating.⁴⁴ In that respect, the Prosecutor states that all the potentially exonerating information contained in the identified documents has already been disclosed to the Defence.⁴⁵ Therefore, the Prosecutor asserts that the Request essentially concerns redactions relating to information which, in and of itself, is not likely to be exculpatory but could lead to the identification of the witnesses, their family

³⁸ Defence Request, paras. 30-31, 35.

³⁹ Defence Request, paras. 32-34.

⁴⁰ Defence Request, paras. 13, 37.

⁴¹ Defence Request, paras. 39-40.

⁴² Defence Request, para. 39.

⁴³ Defence Request, paras. 41-42.

⁴⁴ Prosecution Response, paras. 12-13.

⁴⁵ Prosecution Response, paras. 12-13.

members, innocent third parties or the Prosecutor's sources, in addition to unduly revealing operational information concerning the conduct of the Prosecutor's investigations.⁴⁶

26. The Prosecutor also considers that the request is not supported by the Court's legal framework, fails to comply with the Single Judge's specific instructions and disregards the other competing interests at stake.⁴⁷ First, the Prosecutor contends that the Defence argument that any redactions applied in the documents containing information advantageous to the suspect should be considered inadmissible, is contrary to the Court's established case law and disregards the competing rights that the Court is obliged to protect.⁴⁸ The Prosecutor further submits that this blanket request to have all redactions lifted in the documents, without any particular specification, does not comply with the Single Judge's instructions that the Defence identify the exact redactions it deems unwarranted or should be lifted as a result of a change in circumstances.⁴⁹

27. The Prosecutor argues, furthermore, that the measures requested are the least restrictive possible, given the risk of serious harm that could be caused to individuals cooperating with the Prosecutor.⁵⁰ In this connection, the Prosecutor adverts to the particularly alarming security situation in Mali and submits in general that, given these circumstances, were it to become known that the witnesses were cooperating with the Court, they and their families would be at risk of physical harm and possibly death.⁵¹ The Prosecutor cites numerous examples of targeted attacks and assassinations by AQIM and other "armed groups" throughout Mali and in the Sahel region against individuals suspected of having cooperated with international organizations.⁵² The Prosecutor points out, lastly, that the *Jama'at Nusrat Al-Islam wal-Muslimin* (JNIM) [Group for the Support of Islam and Muslims], created in March

⁴⁶ Prosecution Response, para. 13.

⁴⁷ Prosecution Response, para. 14.

⁴⁸ Prosecution Response, para. 15.

⁴⁹ Prosecution Response, para. 16.

⁵⁰ Prosecution Response, para. 17.

⁵¹ Prosecution Response, para. 17.

⁵² Prosecution Response, para. 18.

2017 and led by Iyad Ag Ghaly, with which Mr Al Hassan was associated until his arrest in April 2017, remains a threat in those regions.⁵³

28. In the light of this heightened risk, the Prosecutor argues that the specific redactions of the identity particulars of witnesses and other individuals who might be at risk do not preclude the Defence from conducting investigations or preparing its strategy, since the underlying content of the potentially exculpatory information has already been disclosed.⁵⁴ The Prosecutor also contends that the redactions concerning the interview locations, the names of the investigators and other operational information relating to the conduct of the Prosecutor's investigations are of little relevance for the Defence and should continue to be redacted to avoid prejudicing the Prosecutor's ongoing or future investigations.⁵⁵

29. Given that the redactions applied are all supported by article 68(1) and rule 81(2) and (4) of the Rules, and are in full compliance with the Redaction Protocol and with the Single Judge's instructions, the Prosecutor submits that they should be maintained.⁵⁶

30. Lastly, the Prosecutor recalls that she has disclosed nearly all of the documents relating to the aforementioned witnesses, [REDACTED].⁵⁷ [REDACTED] the Prosecutor will soon be disclosing a redacted piece of evidence provided by P-0005, containing little relevant information for the Defence; [REDACTED].⁵⁸

B. Specific submissions of the parties

1. Witness P-0005

31. In addition to the general arguments set out above,⁵⁹ the Defence states that the Prosecutor disclosed two documents relating to Witness P-0005: an investigator's

⁵³ Prosecution Response, para. 18.

⁵⁴ Prosecution Response, para. 19.

⁵⁵ Prosecution Response, para. 20.

⁵⁶ Prosecution Response, para. 21.

⁵⁷ Prosecution Response, para. 44.

⁵⁸ Prosecution Response, para. 44.

⁵⁹ See, above, paras. 23-24.

note about a meeting between the Prosecutor and P-0005 in [REDACTED] which reveals little information about the meeting and none about the witness, and an email dated October 2012 which is so heavily redacted that it is incomprehensible and unusable.⁶⁰

32. Because these two documents do not enable the Defence to grasp their context or how they fit together, the Defence seeks the disclosure of Witness P-0005's identity and of any relevant document pertaining to the meeting between the Prosecutor and P-0005 that pre-dates the investigator's note.⁶¹ The Defence also seeks the disclosure of any correspondence or other documents pre-dating or post-dating the email of October 2012 as it is patent from the email that this was not the first contact made between the Prosecutor and Witness P-0005.⁶² Lastly, the Defence seeks the lifting of any other redactions in these documents to be able to investigate the allegations contained in the email and to explore the potentially exculpatory nature of Witness P-0005's evidence.⁶³

33. In addition to the general arguments set out above,⁶⁴ and concerning this witness in particular, the Prosecutor explains that Witness P-0005 [REDACTED].⁶⁵ The Prosecutor states that this witness is [REDACTED] but that she did not obtain an official statement from P-0005 and does not intend to rely on [REDACTED] testimony in the present case.⁶⁶ This witness [REDACTED].⁶⁷ The Prosecutor nevertheless states that the information provided by Witness P-0005 primarily concerns Gao, Kidal and Bamako, and that most of the information provided by P-0005 is therefore not necessary for the preparation of the defence.⁶⁸

⁶⁰ Defence Request, para. 15.

⁶¹ Defence Request paras. 16-17.

⁶² Defence Request para. 18.

⁶³ Defence Request, para. 18.

⁶⁴ See, above, paras. 25-30.

⁶⁵ [REDACTED].

⁶⁶ Prosecution Response, para. 25.

⁶⁷ Prosecution Response, para. 26.

⁶⁸ Prosecution Response, para. 27.

34. The Prosecutor also submits that, were this witness's identity to be known, not only would the witness and the witness's family members be at risk of physical violence or death, but the Prosecutor's ongoing and future investigations would also be prejudiced.⁶⁹ [REDACTED].⁷⁰

35. Turning to the Defence request for access to additional documents, the Prosecutor does not deny that there have been other communications with Witness P-0005 but submits that those are not relevant and, accordingly, need not be disclosed to the Defence.⁷¹

2. Witness P-0107

36. In addition to the general arguments set out above,⁷² the Defence states that the Prosecutor disclosed only a summary of the information provided by Witness P-0107, in which this witness suggests that all the crimes committed by the soldiers and civilians in 2012 in Timbuktu were committed under duress.⁷³ The Defence is of the view that the brevity of the document and the withholding of the witness's identity preclude it from conducting investigations.⁷⁴ The Defence therefore requests access to the full, unredacted evidence relating to this witness.⁷⁵

37. The Defence further states that, although the Prosecutor was granted leave to disclose evidence relating to P-0107 in its current form pursuant to the Single Judge's decision of 16 December 2015 in *The Prosecutor v. Ahmad Al Faqi Al Mahdi* ("Decision of 16 December 2015" and "*Al Mahdi* case"),⁷⁶ the testimony of P-0107 and the withholding of this witness's identity have a more serious impact in this instance,

⁶⁹ Prosecution Response, para. 28.

⁷⁰ [REDACTED].

⁷¹ Prosecution Response para. 43.

⁷² See, above, paras. 23-24.

⁷³ Defence Request, para. 19.

⁷⁴ Defence Request, paras. 19-21.

⁷⁵ Defence Request, paras. 19-21.

⁷⁶ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, "Second Decision on the Prosecutor's requests for redaction", dated 16 December 2015, ICC-01/12-01/15-61, and reclassified as public on 5 December 2016.

given the broader scope and context of the *Al Hassan* case.⁷⁷ Accordingly, the Defence submits that the redactions authorized by the Single Judge in the *Al Mahdi* case are unwarranted in the context of the case at bar.⁷⁸

38. In addition to the general arguments set out above,⁷⁹ and concerning this specific witness, the Prosecutor explains that Witness P-0107 [REDACTED].⁸⁰ The Prosecutor asserts that she spoke with [REDACTED] briefly but obtained no formal statement from [REDACTED].⁸¹ She submits, nonetheless, that the little information that is potentially exculpatory mentioned by P-0107 has been disclosed to the Defence.⁸²

39. The Prosecutor recalls that the Decision of 16 December 2015 in the *Al Mahdi* case granted Witness P-0107 protective measures, namely the redaction of [REDACTED] identity and the disclosure to the Defence of an anonymous summary of the information provided by P-0107.⁸³ In accordance with regulation 42(1) and (2) of the Regulations of the Court, the Prosecutor disclosed evidence relating to Witness P-0107 in the same form as that authorized by the Single Judge in the *Al Mahdi* case.⁸⁴ The Prosecutor argues in that respect that the Defence has failed to advance any argument warranting a departure from the Single Judge's reasoning in the *Al Mahdi* case or the variation of the protective measures ordered.⁸⁵

40. The Prosecutor also informs the Single Judge [REDACTED].⁸⁶ Accordingly, the Prosecutor submits that the interests at stake call for maintaining the redactions of P-0107's identity particulars at this stage [REDACTED].⁸⁷ The Prosecutor however

⁷⁷ Defence Request, para. 22.

⁷⁸ Defence Request, para. 22.

⁷⁹ See, above, paras. 25-30.

⁸⁰ [REDACTED].

⁸¹ Prosecution Response, para. 30.

⁸² Prosecution Response, para. 31.

⁸³ Prosecution Response, para. 32.

⁸⁴ Prosecution Response, para. 33.

⁸⁵ Prosecution Response, para. 35.

⁸⁶ [REDACTED].

⁸⁷ Prosecution Response, para. 36.

states that all the potentially exonerating information from Witness P-0107 has been disclosed to the Defence.⁸⁸

3. Witness P-0136

41. In addition to the general arguments set out above,⁸⁹ the Defence contends that the Prosecutor disclosed only an investigator's note relating to Witness P-0136.⁹⁰ The Defence adds that, at its request, the Prosecutor disclosed a less redacted version of that document which contains two fewer redactions than the version initially disclosed.⁹¹ The Defence submits that this document, still largely redacted and barely comprehensible, does not enable it to conduct investigations.⁹² The Defence therefore seeks access to the entirety of the unredacted evidence relating to P-0136, including any statements, other investigator's notes or associated documents.⁹³

42. In addition to the general arguments set out above,⁹⁴ and concerning this specific witness, the Prosecutor explains that Witness P-0136, [REDACTED].⁹⁵ The Prosecutor adds that she does not intend to rely on this witness and has not obtained a formal statement from P-0136.⁹⁶ The Prosecutor submits that the redactions applied in the investigator's note concerning P-0136 are necessary to protect the safety of the witness and of innocent third parties, and also to obtain other information which, if revealed, could prejudice the Prosecutor's investigations.⁹⁷ The Prosecutor specifies, however, that the redactions applied do not concern potentially exculpatory information.⁹⁸

⁸⁸ Prosecution Response, para. 36.

⁸⁹ See, above, paras. 23-24.

⁹⁰ Defence Request, para. 23.

⁹¹ Defence Request, para. 23.

⁹² Defence Request, para. 24.

⁹³ Defence Request, para. 25.

⁹⁴ See, above, paras. 25-30.

⁹⁵ [REDACTED].

⁹⁶ Prosecution Response, para. 38.

⁹⁷ Prosecution Response, para. 38.

⁹⁸ Prosecution Response, para. 38.

43. The Prosecutor adds that [REDACTED].⁹⁹ Contrary to the investigator's note mentioned in the Defence Request, [REDACTED].¹⁰⁰ [REDACTED].¹⁰¹

4. Witness P-0612

44. In addition to the general arguments set out above,¹⁰² the Defence states that the Prosecutor disclosed three documents relating to Witness P-0612: a letter from P-0612, which contains two redactions of what seem to be the witness's contact details; a statement by P-0612, in which information that could reveal the witness's identity and which seems to make reference to third parties has been redacted; and a sketch made by P-0612 during this witness's interview with the Prosecutor, which contains no redactions.¹⁰³ The Defence submits that, while the documents relating to this witness are not heavily redacted, they obstruct it from conducting any possible investigation.¹⁰⁴

45. Furthermore, while the Prosecutor maintains that the redactions in the evidence relating to P-0612 are necessary for the safety of this witness's family members and other innocent third parties, the Defence contends that those people would not be in danger if the redactions were to be lifted.¹⁰⁵ The Defence therefore seeks access to the complete and unredacted evidence relating to Witness P-0612.¹⁰⁶

46. In addition to the general arguments set out above¹⁰⁷ and as regards this specific witness, the Prosecutor explains that Witness P-0612, [REDACTED], met with the Prosecution after it received an email from this witness containing information favourable to the suspect.¹⁰⁸ This email and the formal statement from

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² See, above, paras. 23-24.

¹⁰³ Defence Request, para. 26.

¹⁰⁴ Defence Request, para. 27.

¹⁰⁵ Defence Request, paras. 28-29.

¹⁰⁶ Defence Request, paras. 28-29.

¹⁰⁷ See, above, paras. 25-30.

¹⁰⁸ Prosecution Response, para. 40.

P-0612, which contains a sketch [REDACTED] made during the interview, were disclosed to the Defence without redacting this person's identity.¹⁰⁹

47. Although Witness P-0612's email and statement contained minimal redactions, the Prosecutor explains that those redactions are both limited and necessary to protect the safety of the family members of P-0612 and of "innocent third parties" and to avoid prejudicing the Prosecutor's investigations.¹¹⁰

48. The Prosecutor further submits that the information disclosed to the Defence, and specifically, the name, occupation and [REDACTED], along with P-0612's barely redacted email and statement, incontrovertibly enable the Defence to understand the content of the evidence relating to P-0612, conduct its investigations and prepare its strategy.¹¹¹

C. Determination of the Single Judge

49. First, the Single Judge recalls that, in the Decision on the Evidence Disclosure Protocol, he established a simplified redaction protocol whereby the Prosecutor need not make any application in order to disclose redacted evidence pursuant to rules 81(2) and (4) of the Rules.¹¹² The Single Judge nevertheless explained that this simplified redaction protocol did not apply to the withholding of witnesses' identities before the commencement of the trial, for which the Prosecutor did have to apply to the Chamber.¹¹³

50. The Single Judge draws attention to his consideration in the Decision on the Prosecutor's Request for Clarification that, when disclosing to the Defence any notes taken during contact or interviews with individuals who have not provided formal statements, the Prosecutor was not required to seek leave of the Single Judge in advance to redact their names.¹¹⁴ The Single Judge also considered that this protocol

¹⁰⁹ Prosecution Response, para. 40.

¹¹⁰ Prosecution Response, paras. 41-42.

¹¹¹ Prosecution Response, para. 42.

¹¹² Decision on the Evidence Disclosure Protocol, paras. 27-32.

¹¹³ Decision on the System of Disclosure, para. 33.

¹¹⁴ Decision on the Prosecutor's Request for Clarification, para. 30.

was not inconsistent with the rights of the Defence in view of the other measures in place, such as:

(i) oversight by the Single Judge, which allows him to verify whether the Prosecution's redaction of evidence is excessive; (ii) on-going verification by the Prosecution that the redaction of information continues to be necessary; and (iii) the possibility for the Defence to request the lifting of redactions, first by contacting the Prosecution, then – in the event of disagreement – by submitting a request to the Chamber.¹¹⁵

51. For the reasons set forth below, the Single Judge notes that for all of the witnesses addressed in this decision, the existence of an “objective” risk has been established insofar as the disclosure of the information in question *to the Defence* could endanger the witnesses concerned or other persons and/or be prejudicial to the Prosecutor's ongoing or future investigations.

52. As stated in previous decisions,¹¹⁶ the Single Judge takes note of the information provided by the Prosecutor attesting to retaliation, including killing, [REDACTED],¹¹⁷ and in that context, the Single Judge finds merit in the Prosecutor's argument that, if Mr Al Hassan were indeed a member of Ansar Dine acting under Iyad Ag Ghaly's orders at the time of his arrest,¹¹⁸ that is a factor to be taken into consideration when assessing the risk entailed by disclosing the witness's identity and other information to the Defence. Moreover, in consideration of the particularly alarming security situation and [REDACTED],¹¹⁹ the Single Judge takes careful note that disclosing witnesses' names or other information to even to a limited number of people – in this instance, to the Defence – inevitably involves the risk of broader dissemination of that information.¹²⁰

¹¹⁵ Decision on the Prosecutor's Request for Clarification, para. 29.

¹¹⁶ Decision of 19 July 2018, para. 33; Decision of 9 October 2018, para. 30.

¹¹⁷ Prosecutor's Response, paras. 17-18. See also, Registry, “Third Registry Report on the Protection of Witnesses”, 29 June 2018, ICC-01/12-01/18-63-Conf-Exp-Red (“Third Report on Witness Protection”), para. 26.

¹¹⁸ See Prosecutor's Response, paras. 17-18, referring to the Decision of 19 July 2018, para 33. See also “Prosecution's motion for authorization to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the prosecution will rely at the confirmation hearing”, 4 June 2018, ICC-01/12-01/18-48-Conf-Exp-Red, para. 39, footnote 35 and references cited.

¹¹⁹ See Third Report on Witness Protection.

¹²⁰ *The Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the Prosecutor's Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305,

53. The Single Judge has also apprised himself of all the redacted documents and compared them to the unredacted documents to ensure that no information which, *prima facie*, could be material to the Defence has been omitted. In the view of the Single Judge, this is the guarantee that the redactions applied are proportional to the rights of the suspect and to the requirement of a fair and impartial trial.

54. At this juncture, the Single Judge considers it appropriate to analyse in turn the motions for the lifting of redactions in the documents relating to Witnesses P-0005, P-0107, P-0136 and P-0612, in order to take into account the specific profile of each witness.

1. Witness P-0005

55. The Single Judge notes that a certain amount of information pertaining to Witness P-0005's specific profile allows the existence of an objective risk to be established: [REDACTED];¹²¹ [REDACTED];¹²² [REDACTED].¹²³

56. The Single Judge is also satisfied that the redactions applied on information which could lead to the identification of the witness or third parties are the least restrictive measure possible in this instance.

57. The Single Judge similarly accepts the Prosecutor's arguments that the redactions applied are relevant under rule 81(2) of the Rules. [REDACTED],¹²⁴ the interruption of Witness P-0005's cooperation with the Office of the Prosecutor could likely prejudice the Prosecutor's ongoing or further investigations.

58. Considering the degree of risk for this witness's safety and the fact that the redactions concern information which could lead to the identification of the witness or third parties, and which, *prima facie*, could not serve the Defence's case, the

DAROTP-WWWW-0306, DAR-OTP-WVVWW-0307, DAR-OTP-VVWWW-0312 and DAR-OTP-WVVWW-0314", 31 August 2009, ICC-02/05-02/09-74, para. 10; *The Prosecutor v. Bahar Idriss Abu Garda*, "Decision on the Prosecutor's Request for Authorisation for Non-disclosure of Witnesses DAR-OTP-WWWW-0433", 31 August 2009, ICC-02/05-02/09-77, para. 4.

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

Single Judge considers that the redactions applied are warranted, bearing in mind the rights of the suspect and the requirement of a fair and impartial trial.

59. Accordingly, the Single Judge is persuaded of the importance of protecting the identity of Witness P-0005 and of the third parties this witness mentions, and considers that the redactions applied by the Prosecutor for that purpose are founded.

60. Lastly, turning to the Defence motion for the disclosure of all relevant documents relating to the meeting between the Prosecutor and P-0005 preceding the investigator's note, in addition to any correspondence or other document pre-dating or post-dating the email of October 2012,¹²⁵ the Single Judge adverts to the Prosecutor's assertion¹²⁶ that most of the information provided by P-0005 does not concern Timbuktu and is therefore unnecessary for the Defence's preparation. Furthermore, the Single Judge explains that he has apprised himself of the documents relating to the exchanges between P-0005 and the Prosecutor, contained in annex B of the Response and accepts the Prosecutor's argument¹²⁷ that those documents are not relevant and do not contain any information which, *prima facie*, could serve the Defence's case.

2. Witness P-0107

61. As regards Witness P-0107, the Single Judge first adverts to regulation 42(1) of the Regulations of the Court, which provides that the protective measures ordered in proceedings in respect of a witness shall continue to have full force and effect in relation to any other proceedings before the Court, subject to revision by a Chamber.

62. The Single Judge notes that, in the *Al Mahdi* case, the Single Judge ruling on the matter ordered protective measures in respect of Witness P-0107 pursuant to rule 81(2) and (4) of the Rules, namely the redaction of that witness's identity, the submission of an anonymous summary into the record of the case and the

¹²⁵ Defence Request, paras. 16-18.

¹²⁶ Prosecutor's Response, para. 27.

¹²⁷ Prosecutor's Response, para. 43.

withholding of certain information relating to that witness.¹²⁸ The Single Judge in that case was satisfied that those measures were necessary and warranted.¹²⁹

63. The Single Judge considers that, although the specific circumstances of the present case differ from those of the *Al Mahdi* case, there is no sustainable reason to depart from the approach that the Single Judge adopted in *Al Mahdi*, as the security situation has not improved. The Single Judge is therefore of the view that the protective measures ordered in respect of Witness P-0107 in the *Al Mahdi* case should continue to have effect *mutatis mutandis* in the *Al Hassan* case.

64. The Single Judge is also persuaded by the Prosecutor's arguments, especially [REDACTED].¹³⁰

65. In that connection, the Single Judge recalls that disclosure of the witness's identity, even to a limited number of people – in this instance, to the Defence – inevitably entails the risk of broader dissemination of that information,¹³¹ [REDACTED].¹³² The Single Judge therefore sees no need to review those protective measures, as the security situation in Mali remains volatile [REDACTED].

66. The Single Judge thus considers that the withholding of the identity of Witness P-0107 from the Defence and the disclosure of an anonymous summary of the information provided by this witness are the least restrictive measures – [REDACTED] – and that they are warranted, bearing in mind the rights of the suspect and the requirement of a fair and impartial trial.

3. Witness P-0136

67. As regards Witness P-0136, the Single Judge notes that a certain amount of information pertaining to the witness's specific profile allows the existence of an objective risk to be established, including [REDACTED].¹³³

¹²⁸ Decision of 16 December 2015, paras. 5, 11-12, p. 8.

¹²⁹ Decision of 16 December 2015, paras. 7-11.

¹³⁰ [REDACTED].

¹³¹ See, above, para. 52.

¹³² [REDACTED].

¹³³ [REDACTED].

68. The Single Judge is satisfied that the redactions applied to information which could lead to the identification of the witness or of third parties, are the least restrictive measures possible in this instance.

69. Moreover, the Single Judge notes that [REDACTED].¹³⁴ [REDACTED].

70. Accordingly, given the risk level for the safety of this witness and that the redactions concern only information that could lead to the identification of the witness or of third parties and, *prima facie*, does not contain any information that could serve the Defence's case, [REDACTED], the Single Judge considers that the redactions applied are warranted, bearing in mind the suspect's rights and the requirement of a fair and impartial trial.

71. The Single Judge is therefore persuaded of the importance of protecting the identity of Witness P-0136 and the third parties this witness mentions, and considers that the redactions applied by the Prosecutor for that purpose are founded.

4. Witness P-0612

72. As regards Witness P-0612, the Single Judge notes that the identity of this witness, along with other personal particulars, have not been redacted in the documents disclosed to the Defence.¹³⁵ The Single Judge therefore notes that, according to the Prosecutor,¹³⁶ the redactions applied concern information relating to P-0612's family members or to third parties whose safety could be jeopardized if information about them were disclosed, and other information that could prejudice the Prosecutor's investigations if disclosed.

73. In that respect, the Single Judge recalls that according to previous Appeals Chambers judgments,¹³⁷ it may be warranted and necessary to withhold certain types

¹³⁴ [REDACTED].

¹³⁵ See MLI-OTP-0060-0369 and MLI-OTP-0061-0960.

¹³⁶ Prosecutor's Response, para. 42.

¹³⁷ 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, para. 56.

of information in order to protect not only witnesses, victims and their family members, but also individuals at risk on account of the activities of the Court.

74. In that respect, the Single Judge is satisfied that the redactions of the information which could result in the identification of third parties and thus jeopardize their safety are the least restrictive measures possible in this particular instance.

75. Moreover, considering that the Defence has knowledge of Witness P-0612's identity, that it can therefore conduct its investigations on the basis of this information and other information provided by this witness, and that the redactions concern only information which could result in the identification of third parties, the Single Judge is of the view that the redactions are warranted, bearing in mind the suspect's rights and the requirement of a fair and an impartial trial.

76. The Single Judge is therefore persuaded of the importance of protecting the identity of the third parties mentioned by P-0612 and considers that the redactions applied by the Prosecutor for that purpose are founded.

FOR THESE REASONS, the Single Judge

REJECTS the Defence Request.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 17 July 2019

At The Hague, Netherlands