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Date of the decision: **6 November 2018**

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**28 January 2019**

**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 REDACTED VERSION**

**with One Confidential Annex, *EX PARTE* the Prosecution and the Victims and  
Witnesses Section**

**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**

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

**Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

**Counsel for the Defence**

Mr Yasser Hassan

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**States' Representatives**

**Office of Public Counsel for the  
Defence**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Péter Kovács**, having been designated 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”) on 28 March 2018,<sup>1</sup> hereby renders this decision.

## 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”).<sup>2</sup>
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.<sup>3</sup>
3. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge in the presence of his counsel and the Prosecution.<sup>4</sup>
4. [REDACTED].<sup>5</sup> [REDACTED].
5. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on the Evidence Disclosure Protocol”).<sup>6</sup>
6. [REDACTED].<sup>7</sup>

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

<sup>2</sup> “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.

<sup>3</sup> ICC-01/12-01/18-11-US-Exp.

<sup>4</sup> Transcript of the first appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-CONF-FRA ET.

<sup>5</sup> [REDACTED].

<sup>6</sup> ICC-01/12-01/18-31-tENG-Corr.

<sup>7</sup> [REDACTED].

7. On 19 July 2018, the Single Judge granted the Prosecution's motion and authorized the Prosecution to withhold the identity of Witness MLI-OTP-P-0431 ("Decision of 19 July 2018").<sup>8</sup>

8. On 6 September 2018, the Prosecution filed a request for authorization to withhold the identity of Witness MLI-OTP-P-0111 ("Witness P-0111" or "P-0111"), upon whose evidence the Prosecution does not intend to rely at the confirmation hearing ("Request concerning P-0111").<sup>9</sup> On 17 September 2018, the Defence filed a response to the Request concerning P-0111 ("Response concerning P-0111").<sup>10</sup>

9. On 13 September 2018, the Single Judge granted the Prosecution's motion and authorized it to file an anonymous summary concerning Witness MLI-OTP-P-0113 ("Decision of 13 September 2018").<sup>11</sup>

10. On 17 September 2018, the Prosecution filed a motion for authorization to disclose a redacted version of the statement of Witness MLI-OTP-P-0100 ("Witness P-0100" or "P-0100"), upon whose evidence the Prosecution does not intend to rely

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<sup>8</sup> "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. On the same day, a confidential redacted *ex parte* version of the Decision of 19 July 2018, available to the Defence (ICC-01/12-01/18-88-Conf-Exp-Red), and a public redacted version (ICC-01/12-01/18-88-Red2) were also filed. See also "Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the Prosecution will rely at the confirmation hearing", dated 4 June 2018 and registered on 5 June 2018, ICC-01/12-01/18-44-Conf-Exp and its six annexes classified as confidential *ex parte* the Prosecution and the Victims and Witnesses Section; "Amended Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the Prosecution will rely at the confirmation hearing", dated 11 June 2018 and registered on 12 June 2018, ICC-01/12-01/18-48-Conf-Exp and its annex ICC-01/12-01/18-48-Conf-Exp-Anx ("Motion of 11 June 2018").

<sup>9</sup> "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation hearing", 6 September 2018, ICC-01/12-01/18-117-Conf-Exp, and its Annexes A-E. On the same day, the Prosecution filed a confidential version, *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-117-Conf-Exp-Red.

<sup>10</sup> "Response to the Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation hearing", 17 September 2018, ICC-01/12-01/18-125-Conf-Exp.

<sup>11</sup> "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-tENG. On the same day, a confidential redacted version of the Decision of 13 September 2018 was filed (ICC-01/12-01/18-122-Conf-Red-tENG), and on 27 September 2018 a public redacted version was filed (ICC-01/12-01/18-122-Red2-tENG).

at the confirmation hearing (“Motion concerning P-0100”).<sup>12</sup> On 28 September 2018, the Defence filed a response to the Motion concerning P-0100 (“Response concerning P-0100”).<sup>13</sup>

11. On 18 September 2018, the Prosecution filed a motion for authorization to disclose summaries of the statements of Witnesses MLI-OTP-P-0583 (“Witness P-0583” or “P-0583”), MLI-OTP-P-0589 (“Witness P-0589” or “P-0589”) and MLI-OTP-P-0593 (“Witness P-0593” or “P-0593”), upon whose evidence the Prosecution does not intend to rely at the confirmation hearing (“Motion concerning P-0583, P-0589 and P-0593”).<sup>14</sup> On 1 October 2018, the Defence filed a response to the Motion concerning P-0583, P-0589 and P-0593 (“Response concerning P-0583, P-0589 and P-0593”).<sup>15</sup>

12. On 27 September 2018, the Prosecution filed a motion for authorization to withhold the identity of Witness MLI-OTP-P-0130 (“Witness P-0130” or “P-0130”), upon whose evidence the Prosecution does not intend to rely at the confirmation hearing (“Motion concerning P-0130”).<sup>16</sup> On 8 October 2018, the Defence filed a response to the Motion concerning P-0130 (“Response concerning P-0130”).<sup>17</sup>

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<sup>12</sup> “Prosecution motion for authorisation to disclose a redacted statement of Witness MLI-OTP-P-0100, whose evidence will not be relied upon at the confirmation hearing”, dated 14 September 2018 and registered 17 September 2018, ICC-01/12-01/18-124-Conf-Exp, and its Annexes A and B, available only to the Prosecution and the Victims and Witnesses Section. On the same day, the Prosecution filed a confidential version, *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-124-Conf-Exp-Red.

<sup>13</sup> “Defence response to the Prosecution’s motion for authorisation to withhold the identity of Witness MLI-OTP-P-0100”, 28 September 2018, ICC-01/12-01/18-138-Conf-Exp.

<sup>14</sup> “Prosecution’s motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593, upon whose evidence the Prosecution will not rely at the confirmation hearing”, 18 September 2018, ICC-01/12-01/18-129-Conf-Exp, and its Annexes A-H, available only to the Prosecution and the Victims and Witnesses Section. On the same day, the Prosecution filed a confidential version, *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-129-Conf-Exp-Red.

<sup>15</sup> “Defence response to the Prosecution’s motion for authorisation to disclose anonymous summaries of the statements of Witnesses MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593”, 1 October 2018, ICC-01/12-01/18-140-Conf-Exp.

<sup>16</sup> “Prosecution’s motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130 upon whose statement the Prosecution will not rely at the confirmation hearing”, dated 26 September 2018 and registered on 27 September 2018, ICC-01/12-01/18-136-Conf-Exp, and its Annexes A-E, available only to the Prosecution and the Victims and Witnesses Section. On the same

13. On 8 October 2018, the Prosecution filed a motion for authorization to disclose summaries of the statements of Witnesses MLI-OTP-P-0581 (“Witness P-0581” or “P-0581”), MLI-OTP-P-0592 (“Witness P-0592” or “P-0592”) and MLI-OTP-P-0594 (“Witness P-0594” or “P-0594”), upon whose evidence the Prosecution does not intend to rely at the confirmation hearing (“Motion concerning P-0581, P-0592 and P-0594”).<sup>18</sup> On 19 October 2018, the Defence filed a response to the Motion concerning P-0581, P-0592 and P-0594 (“Response concerning P-0581, P-0592 and P-0594”).<sup>19</sup>

14. On 9 October 2018, the Single Judge granted the Prosecution’s request and authorized the Prosecution to withhold the identity of Witness MLI-OTP-P-0160 (“Decision of 9 October 2018”).<sup>20</sup>

15. On 10 October 2018, the Prosecution filed a request for authorization to withhold the identity of Witness MLI-OTP-P-0576 (“Witness P-0576” or “P-0576”), upon whose evidence the Prosecution does not intend to rely at the confirmation

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day, the Prosecution filed a confidential version, *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-136-Conf-Exp-Red.

<sup>17</sup> “Defence response to the Prosecution’s motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130”, 8 October 2018, ICC-01/12-01/18-147-Conf-Exp.

<sup>18</sup> “Prosecution’s motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0581, MLI-OTP-P-0592 and MLI-OTP-P-0594, upon whose evidence the Prosecution will not rely at the confirmation hearing”, dated 5 October 2018 and registered 8 October 2018, ICC-01/12-01/18-145-Conf-Exp, and its Annexes A-I, available only to the Prosecution and the Victims and Witnesses Section. On the same day, the Prosecution filed a confidential version *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-145-Conf-Exp-Red.

<sup>19</sup> “Defence response to the Prosecution’s motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0581, MLI-OTP-P-0592 and MLI-OTP-P-0594”, 19 October 2018, ICC-01/12-01/18-159-Conf-Exp.

<sup>20</sup> “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. On the same day, a confidential redacted version of the Decision of 9 October 2018 was also filed (ICC-01/12-01/18-150-Conf-Red-tENG).

hearing (“Request concerning P-0576”).<sup>21</sup> On 22 October 2018, the Defence filed a response to the Request concerning P-0576 (“Response concerning P-0576”).<sup>22</sup>

## II. Analysis

### A. General arguments of the parties

16. The Prosecution states that it does not intend to rely on the evidence relating to Witnesses P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 and P-0594 at the confirmation hearing but that it is required to disclose it under rule 77 of the Rules.<sup>23</sup>

17. To demonstrate that there is an objectively identifiable risk of danger, the Prosecution refers to the particularly alarming general security situation in Mali and in the Sahel region.<sup>24</sup> The Prosecution emphasizes that a coalition of armed jihadist groups, including Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) with which Mr Al Hassan was associated, continue to represent a threat in these areas.<sup>25</sup> The Prosecution also refers to *Jama’at Nusrat Al-Islam wal-Muslimin* ([Group for the Support of Islam and Muslims], “JNIM”), established in March 2017 and led by Iyad Ag Ghaly.<sup>26</sup> The Prosecution cites numerous examples of targeted attacks

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<sup>21</sup> “Prosecution’s Request for authorisation to withhold the identity of Witness MLI-OTP-P-0576 upon whose evidence the Prosecution will not rely at the Confirmation of Charges Hearing”, 10 October 2018, ICC-01/12-01/18-151-Conf-Exp, and its Annexes A-C, available only to the Prosecution and the Victims and Witnesses Section. On the same day, the Prosecution filed a confidential version, *ex parte* the Defence, the Prosecution and the Victims and Witnesses Section, ICC-01/12-01/18-151-Conf-Exp-Red.

<sup>22</sup> “Defence response to the Prosecution’s request for authorisation to withhold the identity of Witness MLI-OTP-P-0576”, 22 October 2018, ICC-01/12-01/18-160-Conf-Exp.

<sup>23</sup> Motion concerning P-0130, para. 1; Motion concerning P-0583, P-0589 and P-0593, para. 3; Motion concerning P-0583, P-0589 and P-0593, para. 4; Motion concerning P-0100, para. 6; Request concerning P-0576, para. 3; Request concerning P-0111, para. 3.

<sup>24</sup> Request concerning P-0576, paras. 17-25; Motion concerning P-0581, P-0592 and P-0594, paras. 31-42; Motion concerning P-0130, paras. 22-28; Motion concerning P-0583, P-0589 and P-0593, paras. 30-39; Request concerning P-0111, paras. 23-36. The Prosecution makes reference to, among other things: [REDACTED]; the Motion of 11 June 2018; [REDACTED].

<sup>25</sup> Request concerning P-0576, paras. 20-22; Motion concerning P-0581, P-0592 and P-0594, paras. 29-34; Motion concerning P-0130, paras. 21-24; Motion concerning P-0583, P-0589 and P-0593, paras. 29-33; Request concerning P-0111, paras. 26-30.

<sup>26</sup> Motion concerning P-0581, P-0592 and P-0594, para. 32; Motion concerning P-0583, P-0589 and P-0593, para. 32; Motion concerning P-0130, para. 24.

and assassinations by AQIM and other armed groups which took place throughout Mali and in the Sahel region and which targeted individuals suspected of having cooperated with international and foreign organizations.<sup>27</sup> The Prosecution maintains generally that, against this backdrop, were the witnesses' cooperation with the Court to be revealed, they and their families would be exposed to a risk of physical retaliation or even death.<sup>28</sup>

18. The Prosecution states that members of the armed groups could become aware of the witnesses' cooperation with the Court through intentional or inadvertent disclosure of the information by the Defence and that, if the Defence [REDACTED], it will be difficult for it not to draw attention to the witnesses in question – even if this is not intentional – and to operate discreetly [REDACTED].<sup>29</sup> The Prosecution affirms that the Defence's confidentiality obligations are thus insufficient to ensure the witnesses' full protection.<sup>30</sup>

19. The Prosecution claims that the measures requested are the least intrusive available on account of the risk of physical attack with no prior threat or warning, [REDACTED].<sup>31</sup> The Prosecution submits that the measures will not be prejudicial to the Defence, in particular because the non-disclosure of the witnesses' identities, the redactions and the summaries produced are intended only to prevent the witnesses

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<sup>27</sup> Motion concerning P-0581, P-0592 and P-0594, para. 31; Request concerning P-0111, para. 28; Motion concerning P-0130, para. 23; Motion concerning P-0583, P-0589 and P-0593, para. 31.

<sup>28</sup> Request concerning P-0576, para. 20; Motion concerning P-0581, P-0592 and P-0594, para. 31; Motion concerning P-0130, para. 23; Motion concerning P-0583, P-0589 and P-0593, para. 31; Request concerning P-0111, para. 28.

<sup>29</sup> Request concerning P-0576, paras. 24-25; Motion concerning P-0581, P-0592 and P-0594, para. 38; Motion concerning P-0130, para. 27; Motion concerning P-0583, P-0589 and P-0593, para. 37; Request concerning P-0111, para. 35.

<sup>30</sup> Request concerning P-0576, paras. 24, 25; Motion concerning P-0581, P-0592 and P-0594, para. 38; Motion concerning P-0130, para. 27; Motion concerning P-0583, P-0589 and P-0593, para. 37; Request concerning P-0111, para. 35.

<sup>31</sup> Request concerning P-0576, paras. 27, 29; Motion concerning P-0581, P-0592 and P-0594, paras. 43-47; Motion concerning P-0130, para. 32; Motion concerning P-0583, P-0589 and P-0593, paras. 40-44; [REDACTED].



from being identified and do not prevent the substance of the testimonies from being understood.<sup>32</sup>

20. With the exception of Witness P-0576, the Prosecution also submits that the requested non-disclosure is also necessary under rule 81(2) of the Rules because disclosure could prejudice further or ongoing investigations, in particular because there is an objectively identifiable risk of witness interference.<sup>33</sup> The Prosecution explains that such interference could result not only in the cessation of cooperation with the witnesses concerned but could also discourage other witnesses or potential witnesses from cooperating with the Office of the Prosecutor.<sup>34</sup>

21. The Defence responds that the Prosecution has not demonstrated that non-disclosure is necessitated by the existence of an objective risk to the safety of the witnesses concerned.<sup>35</sup> The Defence emphasizes that the Prosecution submits that the security situation in Mali favours non-disclosure without explaining how the situation could be at all affected by disclosure *to the Defence* and not the general public.<sup>36</sup>

22. Furthermore, the Defence alleges that the Prosecution's assertions regarding links between Mr Al Hassan and members of armed groups in Mali or an intention to disclose confidential information are unfounded and should be rejected.<sup>37</sup> The Defence submits that the Prosecution makes reference to JNIM's inclusion on the

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<sup>32</sup> Request concerning P-0576, para. 30; Motion concerning P-0581, P-0592 and P-0594, paras. 48-50, 56; Motion concerning P-0130, paras. 34-36, 42; Request concerning P-0583, P-0589 and P-0593, paras. 45-48, 52; Motion concerning P-0100, paras. 37-39; Request concerning P-0111, paras. 39, 40, 51.

<sup>33</sup> Motion concerning P-0581, P-0592 and P-0594, paras. 54, 55; Motion concerning P-0130, paras. 39, 40; Motion concerning P-0583, P-0589 and P-0593, paras. 50, 51; Motion concerning P-0100, paras. 40, 41; Request concerning P-0111, paras. 46-47.

<sup>34</sup> Motion concerning P-0581, P-0592 and P-0594, para. 55; Motion concerning P-0130, para. 40; Motion concerning P-0583, P-0589 and P-0593, para. 51; Motion concerning P-0100, para. 40; Request concerning P-0111, para. 47.

<sup>35</sup> Response concerning P-0576, paras. 2, 7-15; Response concerning P-0581, P-0592 and P-0594, paras. 2, 7-8; Response concerning P-0130, paras. 3, 13-14; Response concerning P-0583, P-0589 and P-0593, paras. 2, 7-8; Response concerning P-0100, paras. 3, 8.

<sup>36</sup> Response concerning P-0581, P-0592 and P-0594, para. 8; Response concerning P-0583, P-0589 and P-0593, para. 8; Response concerning P-0100, paras. 3, 8.

<sup>37</sup> Response concerning P-0581, P-0592 and P-0594, paras. 9-10; Response concerning P-0583, P-0589 and P-0593, para. 11; Response concerning P-0100, paras. 10, 12.

US State Department's list of terrorist organizations despite there being no proof of the alleged connections between Mr Al Hassan and this group, and that the suspect's right to access crucial information concerning his case should not be limited by the highly political decisions of the US State Department to designate such and such a group as a "terrorist" organization.<sup>38</sup> Lastly, the Defence points out that Mr Al Hassan is merely a suspect who has been in detention since April 2017, that up to this point he has complied with all of the Chamber's instructions, and that he has shown no intention of interfering with the ongoing proceedings or of harming witnesses or contacting members of armed groups.<sup>39</sup>

### **B. Applicable law and previous decisions**

23. The Single Judge refers to articles 21, 54, 57(3)(c), 61, 67 and 68 of the Statute and to rules 15, 76, 77, 81(2), 81(4) and 121 of the Rules of Procedure and Evidence ("Rules").

24. The Single Judge also refers to his first decision in the current case concerning the non-disclosure of the identity of a witness, which referenced the applicable law and previous decisions on the matter,<sup>40</sup> and the Decision of 13 September 2018, in which he referenced previous decisions concerning, more specifically, the disclosure of anonymous summaries of statements during the pre-trial phase of the proceedings.<sup>41</sup>

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<sup>38</sup> Response concerning P-0130, para. 14.

<sup>39</sup> Response concerning P-0576, para. 8; Response concerning P-0581, P-0592 and P-0594, para. 9; Response concerning P-0583, P-0589 and P-0593, para. 9; Response concerning P-0100, paras. 10-12.

<sup>40</sup> "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-Red2-tENG, paras. 10-18.

<sup>41</sup> See Decision of 13 September 2018, paras. 30-39.

## C. Conclusions of the Single Judge

### 1. General observations

25. Before analysing the individual profiles of the witnesses whose identities the Prosecution seeks to withhold, the Single Judge will make several observations in response to some of the parties' overall arguments.

26. With regard to the Prosecution's argument<sup>42</sup> that the protective measures are not prejudicial to the Defence because the Prosecution does not intend to rely on the evidence to which they relate at the confirmation hearing, the Single Judge wishes to qualify this statement. The Defence maintains that the evidence disclosure protocol is at the heart of the right to a fair trial and that it is incumbent on the Chamber to ensure that non-disclosure does not result in the confirmation hearing as a whole being unfair.<sup>43</sup> The Defence emphasizes that the Prosecution has submitted more requests for authorization to withhold information that is material for the Defence as the disclosure process has progressed; the scope of that information is increasingly difficult for the Defence to gauge. Furthermore, not having access to the information in question, the Defence is not in a position to determine the extent to which it is disadvantaged.<sup>44</sup>

27. The Defence maintains in this regard that the Prosecution's disclosure obligations under rule 77 of the Rules or other provisions are not connected to the Prosecution's decision as to whether or not to rely on a piece of evidence for the confirmation hearing or at trial.<sup>45</sup> The Defence also reiterates the right of the suspect to have adequate facilities for the preparation of his defence, and the right to raise defences and to present other evidence, respectively guaranteed under article 67(1)(b) and 67(1)(e) of the Statute.<sup>46</sup> The Defence submits that withholding

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<sup>42</sup> Motion concerning P-0130, para. 35; Motion concerning P-0583, P-0589 and P-0593, para. 46; Motion concerning P-0581, P-0592 and P-0594, para. 49; Motion concerning P-0100, para. 37.

<sup>43</sup> Response concerning P-0130, paras. 11-12. See also Response concerning P-0576, para. 15.

<sup>44</sup> Response concerning P-0130, paras. 8, 12. See also Response concerning P-0576, para. 15.

<sup>45</sup> Motion concerning P-0130, para. 9; Motion concerning P-0100, para. 16.

<sup>46</sup> Motion concerning P-0100, para. 14.

the source of material evidence, including that disclosed under rule 77 of the Rules, which could prove to be exculpatory in nature or otherwise relevant to the preparation of the defence, impedes the suspect's ability to exercise the above rights and prevents the Defence from preparing its case.<sup>47</sup>

28. The Single Judge notes that the Court's legal framework, under article 54(1)(a) of the Statute, provides that the Prosecutor must investigate incriminating and exonerating circumstances. Disclosure to the Defence by the Prosecution of evidence or any other context pertaining to exonerating information is therefore essential within such a framework so that the Defence may fulfil its duty, which is to assist the suspect in the preparation of his defence. In order to rule on a request to withhold the identity of a witness, the Chamber must strike a balance between the rights of the Defence and the need to protect the witnesses. Regarding anonymous summaries of witness statements, which generally deprive the defence of access to more information than do mere redactions (volume of redactions, witness hesitation, overall logic of the 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 witness.

29. The Single Judge has, therefore, read all of the documents concerned and hereby requests that the Prosecution make modifications, where this proves to be necessary, to the proposed summaries or redactions so as to ensure better protection of the witness's identity or, conversely, make more information available to the Defence.

30. For the reasons set out in more detail below, the Single Judge considers all of the Prosecution's requests to be well founded.

31. The Single Judge notes that for all of the requests addressed in this decision, the existence of an "objective" risk has been established in the sense that the

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<sup>47</sup> Motion concerning P-0100, para. 14.

disclosure of the information in question *to the Defence* could endanger the witnesses concerned. As stated in previous decisions,<sup>48</sup> the Single Judge takes note of the information provided by the Prosecution attesting to retaliation, including killing, against persons suspected of collaborating with foreign forces in Mali,<sup>49</sup> and, in that context, the Single Judge accepts the Prosecution's argument that, if Mr Al Hassan was indeed a member of Ansar Dine acting under Iyad Ag Ghaly's orders at the time of his arrest,<sup>50</sup> that is a factor to be taken into consideration when assessing the risk of disclosing the witness's identity to the Defence. Moreover, in a particularly worrying security situation [REDACTED],<sup>51</sup> the Single Judge points out that disclosure of witnesses' names, 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,<sup>52</sup> even without the Defence's knowledge.<sup>53</sup>

## 2. Witness P-0111

32. In addition to the general arguments set out above,<sup>54</sup> and concerning this witness in particular, the Prosecution explains that P-0111 [REDACTED].<sup>55</sup> P-0111 [REDACTED].<sup>56</sup> [REDACTED].<sup>57</sup> [REDACTED].<sup>58</sup>

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<sup>48</sup> Decision of 19 July 2018, para. 33; Decision of 9 October 2018, para. 30.

<sup>49</sup> Motion concerning P-0581, P-0592 and P-0594, para. 31; Request concerning P-0111, para. 28; Motion concerning P-0130, para. 23; Motion concerning P-0583, P-0589 and P-0593, para. 31. See also [REDACTED].

<sup>50</sup> See Motion concerning P-0130, para. 21, 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, [REDACTED].

<sup>51</sup> See [REDACTED].

<sup>52</sup> Pre-Trial Chamber I, *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, DAROTP-WWWW-0306, DAR-OTP-WVWW-0307, DAR-OTP-VVWWW-0312 and DAR-OTP-WVWW-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.

<sup>53</sup> See Request concerning P-0576, para. 24; Motion concerning P-0581, P-0592 and P-0594, para. 38; Motion concerning P-0130, para. 27; Motion concerning P-0583, P-0589 and P-0593, para. 37; Request concerning P-0111, para. 35.

<sup>54</sup> See above, paras. 17-20.

33. P-0111's testimony concerns everyday life in Timbuktu before the arrival of the Islamist groups, the takeover of the city by those groups, [REDACTED], the Islamic regime and the composition and [REDACTED] of the Islamic institutions.<sup>59</sup>

34. Regarding the existence of an objectively identifiable risk of danger, the Prosecution [REDACTED].<sup>60</sup> The Prosecution adds that it does not intend to rely on the witness's evidence [REDACTED],<sup>61</sup> but that pursuant to rule 77 of the Rules the Prosecution is required to disclose the evidence to the Defence.<sup>62</sup>

35. The Prosecution explains that [REDACTED], specific information on this contact would exacerbate the risk.<sup>63</sup> The Prosecution adds that P-0111 [REDACTED].<sup>64</sup>

36. The Prosecution also submits that [REDACTED].<sup>65</sup> [REDACTED].<sup>66</sup>

37. Furthermore, the Prosecution claims that the measures requested are the least intrusive measures available for the witness and members of his family and are the most practical and reasonable solution.<sup>67</sup> In this regard, the Prosecution states that [REDACTED].<sup>68</sup>

38. The Prosecution further maintains that the measures requested will not prejudice the Defence, in particular because the redactions made are only to information that could enable the identification of the Witness, not to information relevant to the Defence; other similar evidence will be disclosed; and P-0111

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<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].

<sup>57</sup> [REDACTED].

<sup>58</sup> [REDACTED].

<sup>59</sup> Request concerning P-0111, para. 22.

<sup>60</sup> [REDACTED].

<sup>61</sup> [REDACTED].

<sup>62</sup> Request concerning P-0111, paras. 3, 12.

<sup>63</sup> Request concerning P-0111, paras. [REDACTED] 32.

<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

<sup>66</sup> [REDACTED].

<sup>67</sup> Request concerning P-0111, paras. 37-38.

<sup>68</sup> [REDACTED].

provides little information about Mr Al Hassan.<sup>69</sup> The Prosecution adds that the non-disclosure of entire documents is necessary in that the documents are of a nature that would enable the identification of the witness.<sup>70</sup>

39. Moreover, the Prosecution submits that the requested non-disclosure of information is also necessary under rule 81(2) of the Rules because disclosure could prejudice further or ongoing investigations, owing in particular to the existence of an objectively identifiable risk for him and his family.<sup>71</sup> The Prosecution explains that disclosing the identity of every person [REDACTED] who provides information to the Prosecution could not only result in the cessation of cooperation with the witness but could also hamper the Prosecution's work.<sup>72</sup>

40. Consequently, in accordance with rule 81(2) and 81(4) of the Rules, the Prosecution requests that it be authorized: (i) not to disclose the identity of the witness and any information that could identify him; (ii) to file an anonymous redacted version of the witness's statements and its annexes; (iii) not to disclose entire documents provided in Annexes B and C to the Request concerning P-0111; and (iv) to redact any information that could identify the witness from the metadata of the documents that will be disclosed.<sup>73</sup>

41. The Single Judge notes that the Defence does not, at this stage, oppose the non-disclosure of the identity of Witness P-0111 and reserves the right to address the Chamber anew once it has apprised itself of the content of the witness's testimony and its potential relevance to the Defence's case.<sup>74</sup>

42. The Single Judge is persuaded that there exists an "objective" risk in this instance in that disclosing the information in question to the Defence would endanger the individual concerned. The Single Judge notes that the existence of a

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<sup>69</sup> Request concerning P-0111, paras. 39-42.

<sup>70</sup> Request concerning P-0111, para. 43 and Annexes B and C.

<sup>71</sup> Request concerning P-0111, para. 48.

<sup>72</sup> Request concerning P-0111, para. 48.

<sup>73</sup> Request concerning P-0111, para. 52.

<sup>74</sup> Response concerning P-0111, paras. 5-6.

risk in this instance is related in particular to the specific circumstances of the witness's personal situation: [REDACTED].<sup>75</sup> Furthermore, [REDACTED]<sup>76</sup> [REDACTED]. [REDACTED].<sup>77</sup>

43. Furthermore, the Single Judge notes that [REDACTED],<sup>78</sup> and that the non-disclosure of his identity is, therefore, the least restrictive measure possible. Consequently, the non-disclosure of his identity to the public and to the Defence would appear to be the sole measure which would allow for his effective protection.

44. The Single Judge also considers the requested measure to be proportional in regard to the rights of the suspect and a fair and impartial trial. In particular, the Single Judge notes that the measure is requested during the pre-trial stage of the proceedings and that the Prosecution will not rely on P-0111's statement for the confirmation hearing.<sup>79</sup>

45. The Single Judge is also persuaded by the Prosecution's arguments that the measure requested is relevant under rule 81(2) of the Rules. The cessation of a witness's cooperation with the Prosecution as a result of threats or interference could in all likelihood prejudice further or ongoing investigations; it could also discourage other witnesses (or potential witnesses) from cooperating for fear of being subjected to the same treatment.

46. Accordingly, given [REDACTED] that the Prosecution does not intend to rely on the evidence relating to this witness for the confirmation hearing and that the present request is made during the pre-trial stage of the proceedings, the Single Judge considers it appropriate to grant the Prosecution's request.

47. Nonetheless, the Single Judge instructs the Prosecution to make the modifications indicated for this witness and provided in the annex to the present

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<sup>75</sup> [REDACTED].

<sup>76</sup> [REDACTED].

<sup>77</sup> [REDACTED].

<sup>78</sup> [REDACTED].

<sup>79</sup> See Request concerning P-0111, paras. 3, 24, 37.



decision, or to inform the Single Judge as to why it considers this modification inappropriate.

48. Lastly, the Single Judge accepts the Prosecution's arguments regarding its request for the non-disclosure of entire documents included in Annexes B<sup>80</sup> and C<sup>81</sup> of its Request in that the content of these documents could easily lead to the identification of the witness.<sup>82</sup>

### 3. Witness P-0100

49. In addition to the general arguments set out above,<sup>83</sup> and concerning this witness in particular, the Prosecution explains that P-0100 is [REDACTED].<sup>84</sup> [REDACTED].<sup>85</sup> P-0100, [REDACTED], gives an account of what she saw and heard while living in Timbuktu [REDACTED], in particular about the rules imposed on the people – especially women – by the jihadists.<sup>86</sup> P-0100 refers to the existence of a prison for women, the amputation of the hand of a thief and the stoning of two couples outside the city, which she had heard about.<sup>87</sup> P-0100 affirms that, to her knowledge, the jihadists did not engage in torture or rape but were seeking to re-establish security and enforce the laws of Islam.<sup>88</sup> Lastly, the Witness recounts [REDACTED].<sup>89</sup>

50. The Prosecution maintains that [REDACTED], the risk she faces “cannot be totally excluded” and that [REDACTED].<sup>90</sup> The Prosecution submits that the risk of danger could increase all the more [REDACTED].<sup>91</sup>

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<sup>80</sup> Annex B to the Request concerning P-0111, ICC-01/12-01/18-117-Conf-Exp-AnxB.

<sup>81</sup> Annex C to the Request concerning P-0111, ICC-01/12-01/18-117-Conf-Exp-AnxC.

<sup>82</sup> See Request concerning P-0111, paras. 9, 44.

<sup>83</sup> See above, paras. 17-20.

<sup>84</sup> [REDACTED].

<sup>85</sup> [REDACTED].

<sup>86</sup> See Motion concerning P-0100, paras. 21-23.

<sup>87</sup> See Motion concerning P-0100, para. 24.

<sup>88</sup> See Motion concerning P-0100, para. 21.

<sup>89</sup> [REDACTED].

<sup>90</sup> Motion concerning P-0100, para. 28.

51. Consequently, in accordance with rule 81(2) and 81(4) of the Rules, the Prosecution requests that it be authorized: (i) not to disclose the identity and any information that could identify Witness P-0100; (ii) to file an anonymous redacted version of Witness P-0100's statement, provided in annex A to the Motion concerning P-0100; (ii) [REDACTED].<sup>92</sup>

52. The Defence requests that the Single Judge dismiss the Prosecution's motion.<sup>93</sup> The Defence responds that the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is necessary in this instance.<sup>94</sup> In addition to the general arguments set out above,<sup>95</sup> the Defence maintains that the Prosecution's argument that the witness [REDACTED] is not sufficient to demonstrate the existence of an objective risk.<sup>96</sup> The Defence adds that Mr Al Hassan is at present a suspect and the Prosecution's speculation as to inadvertent or intentional disclosure of confidential information by Mr Al Hassan – despite the absence of any proof to the contrary – does not demonstrate an objective risk to P-0100, but leads to a reversal of the presumption of innocence to which the suspect is entitled and punishes him by limiting access to relevant material in his case.<sup>97</sup> Specifically, the Defence submits that P-0100's testimony concerns the behaviour of "jihadist groups" following their arrival in Timbuktu, one of these groups being that to which Mr Al Hassan is suspected of having belonged,<sup>98</sup> and that in her testimony the Witness compares these groups to the MNLA, which preceded them and whose members are suspected of having committed crimes such as rape and murder.<sup>99</sup> The Defence, therefore, claims that this witness may have information that can help distinguish between the conduct of these various actors present in Timbuktu

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<sup>91</sup> [REDACTED].

<sup>92</sup> Motion concerning P-0100, para. 43. [REDACTED].

<sup>93</sup> Response concerning P-0100, paras. 3, 18.

<sup>94</sup> Response concerning P-0130, para. 3.

<sup>95</sup> See above, paras. 21-22.

<sup>96</sup> See Response concerning P-0100, [REDACTED].

<sup>97</sup> Response concerning P-0100, para. 12.

<sup>98</sup> Response concerning P-0100, para. 15.

<sup>99</sup> Response concerning P-0100, para. 15.

between 2012 and 2013.<sup>100</sup> The Defence also alleges that P-0100 refers to someone known as Mohamed Moussa [REDACTED].<sup>101</sup>

53. The Single Judge does not consider that the Prosecution's conjectures about the witness's possible future place of residence or travel, which are not based on any concrete evidence,<sup>102</sup> should be taken into consideration in the present instance by the Judge when determining the appropriateness of a protective measure.

54. On the other hand, the Single Judge notes that P-0100 [REDACTED]. Given [REDACTED]<sup>103</sup> [REDACTED]. Furthermore, the Prosecution points out that [REDACTED].<sup>104</sup>

55. The Single Judge shares the Prosecution's view that the risk that P-0100 would be the target of intimidation "cannot be totally excluded" if her identity were made known, [REDACTED]. Furthermore, the Single Judge is also persuaded that this is the least restrictive measure possible in the present instance. Lastly, considering that the Prosecution will not rely on P-0100's statement for the confirmation hearing and that, moreover, only the information that could lead to her identification is redacted – whereas the substantive content of her statement will be available to the Defence – the Single Judge considers this measure to be proportional in regard to the rights of the suspect and a fair and impartial trial.

56. Consequently, and considering in particular that P-0100 [REDACTED], and that the present request is made during the pre-trial stage of the proceedings, the Single Judge considers it appropriate to grant the Prosecution's request.

#### **4. Witnesses P-0581, P-0583, P-0589, P-0592, P-0593, P-0594**

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<sup>100</sup> Response concerning P-0100, para. 15.

<sup>101</sup> Response concerning P-0100, para. 15.

<sup>102</sup> [REDACTED].

<sup>103</sup> [REDACTED].

<sup>104</sup> [REDACTED].

57. The Single Judge notes that, unlike its requests concerning other witnesses addressed in this decision, the Prosecution requests that it be authorized to disclose anonymous summaries of the statements of Witnesses P-0581, P-0583, P-0589, P-0592, P-0593 and P-0594.<sup>105</sup>

58. In addition to the general arguments set out above,<sup>106</sup> and concerning these witnesses in particular, the Prosecution explains [REDACTED]<sup>107</sup> and [REDACTED].<sup>108</sup> The Prosecution states that [REDACTED].<sup>109</sup> The Prosecution emphasizes that [REDACTED]<sup>110</sup> and [REDACTED].<sup>111</sup>

59. The Prosecution affirms that it will not rely on the statements of these witnesses for the confirmation hearing. Nonetheless, under rule 77 of the Rules, it is required to disclose them to the Defence because they were present in Timbuktu at the time of the events, or because of the information they provide regarding the suspect, or because [REDACTED].<sup>112</sup>

60. The Prosecution maintains that the disclosure of redacted versions of the statements rather than anonymous summaries would not be a sufficient protective measure because it would still be possible [REDACTED] to identify the witnesses.<sup>113</sup>

61. Consequently, in accordance with rule 81(2) and 81(4) of the Rules, the Prosecution requests that it be authorized: (i) not to disclose the identities of these witnesses and any information that could lead to their identification; (ii) to file anonymous summaries of these witnesses' statements; (iii) to redact any information that could lead to the identification of these witnesses from the metadata of certain

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<sup>105</sup> Motion concerning P-0581, P-0592 and P-0594, para. 57; Motion concerning P-0583, P-0589 and P-0593, para. 53.

<sup>106</sup> See above, paras. 17-20.

<sup>107</sup> See [REDACTED].

<sup>108</sup> [REDACTED].

<sup>109</sup> [REDACTED].

<sup>110</sup> [REDACTED].

<sup>111</sup> [REDACTED].

<sup>112</sup> Motion concerning P-0581, P-0592 and P-0594, para. 4; Motion concerning P-0583, P-0589 and P-0593, para. 8.

<sup>113</sup> See Motion concerning P-0581, P-0592 and P-0594, para. 45; Motion concerning P-0583, P-0589 and P-0593, para. 42.

documents; and (iv) not to disclose entire documents provided in Annex 1 to the Motion concerning P-0581, P-0592 and P-0594.<sup>114</sup>

62. The Defence requests that the Single Judge dismiss the Prosecution's motions<sup>115</sup> or, at the very least, authorize the disclosure only of redacted versions of the statements but not of summaries.<sup>116</sup> In addition to the general arguments set out above,<sup>117</sup> the Defence responds that the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is necessary in this instance.<sup>118</sup> The Defence submits that P-0581 and P-0592 appear to have [REDACTED]. As such, they may be persons of interest to the Defence and their identities should be disclosed to it.<sup>119</sup>

63. The Defence maintains that the Prosecution does not demonstrate the need for anonymous summaries in lieu of redacted versions of the statements.<sup>120</sup> The Defence requests that the Prosecution file a less redacted version of its Motion concerning P-0583, P-0589 and P-0593, and that it provide additional information to the Defence concerning the testimony of P-0594, about which the Defence has no information to date, so that the Defence may in particular have access to the content of the witnesses' testimonies and be able to assess their materiality to the Defence's case.<sup>121</sup>

64. To begin, the Single Judge dismisses the Defence's request to have access to a less redacted version of the Motion concerning P-0583, P-0589 and P-0593. The Single Judge, who has access to the non-redacted version of the Prosecution's motion, considers the redactions and the confidential classification of some of the documents

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<sup>114</sup> Motion concerning P-0581, P-0592 and P-0594, para. 57; Motion concerning P-0583, P-0589 and P-0593, para. 53.

<sup>115</sup> Response concerning P-0581, P-0592 and P-0594, paras. 2, 20; Response concerning P-0583, P-0589 and P-0593, paras. 2, 21.

<sup>116</sup> Response concerning P-0583, P-0589 and P-0593, para. 22.

<sup>117</sup> See above, paras. 21-22.

<sup>118</sup> Response concerning P-0583, P-0589 and P-0593, paras. 2, 4.

<sup>119</sup> Response concerning P-0581, P-0592 and P-0594, para. 15.

<sup>120</sup> Response concerning P-0581, P-0592 and P-0594, para. 13; Response concerning P-0130, paras. 17-18; Response concerning P-0583, P-0589 and P-0593, paras. 13-15.

<sup>121</sup> Response concerning P-0581, P-0592 and P-0594, para. 16; Response concerning P-0583, P-0589 and P-0593, para. 19.

made by the Prosecution to be necessary, especially to prevent the potential identification of the witness in question, which would defeat the very purpose of the motion.

65. The Single Judge is of the view that [REDACTED]. The Single Judge notes that the existence of an objective risk in this instance stems [REDACTED]; that they may [REDACTED]<sup>122</sup> [REDACTED].<sup>123</sup> The Single Judge notes that [REDACTED], and that the non-disclosure of their identities is therefore the least restrictive measure possible.

66. The Single Judge is also persuaded by the Prosecution's arguments that the measures requested are relevant under rule 81(2) of the Rules. The cessation of a witness's cooperation with the Prosecution as a result of threats or interference could in all likelihood prejudice further or ongoing investigations; it could also discourage other witnesses (or potential witnesses) from cooperating for fear of being subjected to the same treatment.

67. Lastly, the Single Judge has apprised himself of the full statements and compared them to the proposed summaries to ensure that no information of use *prima facie* to the Defence has been omitted from the summaries. In the view of the Single Judge, this guarantees that the measures requested are proportional to the rights of the suspect and a fair and impartial trial.

68. Consequently, and considering in particular [REDACTED] and [REDACTED], that the Prosecution does not intend to rely on the evidence relating to these witnesses for the confirmation hearing and that the present request is made during the pre-trial stage of the proceedings, the Single Judge considers it appropriate to grant the Prosecution's request, contingent upon the modifications to the statement summaries requested by the Single Judge and provided in the annex of the present decision.

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<sup>122</sup> [REDACTED].

<sup>123</sup> [REDACTED].

## 5. Witness P-0130

69. In addition to the general arguments set out above,<sup>124</sup> and concerning this witness in particular, the Prosecution maintains that were the witness's cooperation with the Court to be revealed, he and his family would be exposed to a risk of physical violence or even death and that, furthermore, that would prejudice further or ongoing investigations.<sup>125</sup>

70. The Prosecution explains that P-0130 [REDACTED].<sup>126</sup> [REDACTED].<sup>127</sup> [REDACTED].<sup>128</sup> [REDACTED].<sup>129</sup> P-0130 [REDACTED].<sup>130</sup> The Prosecution states that [REDACTED].<sup>131</sup>

71. The Prosecution also explains that this witness's testimony concerns, among other things, [REDACTED] and a description of the events – including crimes – during the period of the jihadists' "occupation" of the city.<sup>132</sup>

72. The Prosecution maintains that, because of the specific profile of this witness, [REDACTED], he is at a particularly high risk of danger.<sup>133</sup> The Prosecution submits that, owing to [REDACTED], the measures requested are the least restrictive possible. Furthermore, because the redactions concern only the information that could identify the witness, the rights of the Defence will not be prejudiced.<sup>134</sup>

73. The Prosecution maintains that the requested non-disclosure of information is also necessary under rule 81(2) of the Rules, because disclosure of the information could prejudice further or ongoing investigations, especially owing to the existence

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<sup>124</sup> See above, paras. 17-20.

<sup>125</sup> Motion concerning P-0130, para. 2.

<sup>126</sup> [REDACTED].

<sup>127</sup> [REDACTED].

<sup>128</sup> [REDACTED].

<sup>129</sup> [REDACTED].

<sup>130</sup> [REDACTED].

<sup>131</sup> [REDACTED].

<sup>132</sup> [REDACTED].

<sup>133</sup> [REDACTED].

<sup>134</sup> [REDACTED].

of an objectively identifiable risk of interference with the witness.<sup>135</sup> The Prosecution explains that this interference could result not only in the cessation of cooperation with the witness but could also discourage other witnesses or potential witnesses from cooperating with the Office of the Prosecutor.<sup>136</sup>

74. Consequently, in accordance with rule 81(2) and 81(4) of the Rules, the Prosecution requests that it be authorized: (i) not to disclose the identity of the witness and any information that could lead to his identification; (ii) to file an anonymous redacted version of the Witness's statements and the annexes thereto; (iii) not to disclose entire documents, including one document provided in Annex 1 to his statement and again in Annex A to the present request, [REDACTED]; (iii) to redact any information that could lead to the identification of the witness from the metadata of his statement and of other documents, including one document provided in Annex 2 to his statement and again in Annex B to the present request [REDACTED], on which the Prosecution intends to rely as incriminatory evidence for the confirmation hearing.<sup>137</sup>

75. The Defence requests that the Single Judge dismiss the Prosecution's motion.<sup>138</sup> The Defence responds that the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is necessary in this instance.<sup>139</sup> In addition to the general arguments set out above,<sup>140</sup> the Defence submits that in the present instance, and contrary to the Prosecution's assertion, the proposed measures would prejudice Mr Al Hassan<sup>141</sup> because P-0130 testifies and [REDACTED] about the settling of armed groups in Timbuktu and about alleged acts of whipping, torture and arbitrary detention – information which, in the Defence's view, is

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<sup>135</sup> Motion concerning P-0130, paras. 39-40.

<sup>136</sup> Motion concerning P-0130, para. 40.

<sup>137</sup> Motion concerning P-0130, paras. 10, 43. See also paras. 6, 13, 18.

<sup>138</sup> Response concerning P-0130, paras. 3, 21.

<sup>139</sup> Response concerning P-0130, paras. 3, 5.

<sup>140</sup> See above, paras. 21-22.

<sup>141</sup> Response concerning P-0130, para. 8.



critically important for it because it is at the core of the Prosecution's theory.<sup>142</sup> [REDACTED].<sup>143</sup> The Defence maintains that [REDACTED]. The Defence alleges that if the Single Judge grants the Prosecution's request, these questions will remain unanswered, thus prejudicing the Defence's ability to test the reliability of the material on which the Prosecution will rely at the confirmation hearing.<sup>144</sup>

76. The Defence maintains that the Prosecution's argument that it will not rely on the evidence from this witness for the confirmation hearing should not be a factor in the Single Judge's analysis specifically for this reason: the issue at hand is the reliability [REDACTED] which will constitute incriminating evidence on which the Prosecution will rely at the confirmation hearing.<sup>145</sup> The Defence states that the Prosecution sets the bar so low when it comes to risk assessment that the identity of anyone in Mali who has been in contact with the Prosecution could be withheld from the Defence.<sup>146</sup> The Defence also requests that the Single Judge grant it access to Annex D of the Prosecution's motion so that it can make an accurate assessment of the proposed measures.<sup>147</sup>

77. The Single Judge notes that a significant amount of information pertaining to the witness's specific profile allows the existence of an objectively identifiable risk to be established: [REDACTED];<sup>148</sup> [REDACTED];<sup>149</sup> [REDACTED]<sup>150</sup> and [REDACTED];<sup>151</sup> [REDACTED];<sup>152</sup> [REDACTED].<sup>153</sup> Lastly, the Single Judge notes

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<sup>142</sup> Response concerning P-0130, para. 9.

<sup>143</sup> [REDACTED].

<sup>144</sup> Response concerning P-0130, para. 10.

<sup>145</sup> Response concerning P-0130, para. 18.

<sup>146</sup> Response concerning P-0130, para. 16.

<sup>147</sup> Response concerning P-0130, para. 22.

<sup>148</sup> [REDACTED].

<sup>149</sup> [REDACTED].

<sup>150</sup> [REDACTED].

<sup>151</sup> [REDACTED].

<sup>152</sup> [REDACTED].

<sup>153</sup> [REDACTED].

that [REDACTED] [REDACTED] the risk of physical violence to P-0130 was “very high”.<sup>154</sup>

78. The Single Judge notes, moreover, that P-0130 [REDACTED]<sup>155</sup> and that [REDACTED].<sup>156</sup> Consequently, the non-disclosure of his identity seems to be the least restrictive measure possible in the present instance.

79. Considering the heightened security risk to this witness, that his statement will nevertheless be available to the Defence and that the redactions concern only information that could lead to the identification of this witness and, *prima facie*, no information that could serve the Defence’s cause, the Single Judge considers the requested measures to be proportional in regard to the rights of the suspect and a fair and impartial trial.

80. The Single Judge is also persuaded by the Prosecution’s arguments that the measures requested are necessary under rule 81(2) of the Rules. The cessation of a witness’s cooperation with the Prosecution as a result of threats or interference could in all likelihood prejudice further or ongoing investigations; it could also discourage other witnesses (or potential witnesses) from cooperating for fear of being subjected to the same treatment.

81. Consequently, the Single Judge is convinced of the importance of protecting the identity of witness P-0130 and that the measures requested by the Prosecution to this end are well founded, contingent upon the modifications requested in the annex to the present decision. The Single Judge also dismisses the Defence’s request to be granted access to Annex D of the Prosecution’s motion because access by the Defence to this information would defeat the very purpose of the motion.

## 6. Witness P-0576

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<sup>154</sup> See Motion concerning P-0130, paras. 22-23 [REDACTED].

<sup>155</sup> [REDACTED].

<sup>156</sup> [REDACTED].

82. In addition to the general arguments set out above,<sup>157</sup> and concerning this witness in particular, the Prosecution explains that P-0576's testimony is about her abduction in Timbuktu in 2012.<sup>158</sup> P-0576 claims [REDACTED].<sup>159</sup> [REDACTED]<sup>160</sup> [REDACTED];<sup>161</sup> from this the Prosecution concludes that it would probably not have been Ansar Dine or AQIM,<sup>162</sup> the two groups with which Mr Al Hassan was associated, according to the Prosecution.<sup>163</sup> P-0576 claims to have witnessed, on more than one occasion, men forcibly taking girls to rooms where they were assaulted and raped.<sup>164</sup>

83. The Prosecution maintains that, although P-0576 [REDACTED].<sup>165</sup> Under the circumstances, if her cooperation with the Court were to be revealed, she [REDACTED] would be at high risk of physical violence.<sup>166</sup> In this regard the Prosecution states that although P-0576's testimony does not appear to concern Ansar Dine or AQIM, the risk presented by these groups and their affiliates is based on mere cooperation with an international organization and not the specific content of a person's testimony.<sup>167</sup>

84. The Prosecution states [REDACTED]<sup>168</sup> [REDACTED].<sup>169</sup> The Prosecution alleges that the measures requested are the least intrusive available for the witness and the members of her family and that they are the most practical and reasonable solution.<sup>170</sup> The Prosecution affirms that members of the armed groups could become

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<sup>157</sup> See above, paras. 17-20.

<sup>158</sup> Request concerning P-0576, paras. 12-14.

<sup>159</sup> [REDACTED].

<sup>160</sup> [REDACTED].

<sup>161</sup> [REDACTED].

<sup>162</sup> Request concerning P-0576, para. 23.

<sup>163</sup> Request concerning P-0576, para. 31.

<sup>164</sup> Request concerning P-0576, para. 14.

<sup>165</sup> [REDACTED].

<sup>166</sup> Request concerning P-0576, paras. 4, 18, [REDACTED].

<sup>167</sup> Request concerning P-0576, para. 23.

<sup>168</sup> [REDACTED].

<sup>169</sup> [REDACTED].

<sup>170</sup> Request concerning P-0576, paras. 26-27.

aware of P-0576's cooperation with the Court through intentional or inadvertent disclosure by the Defence.<sup>171</sup>

85. The Prosecution also maintains that the measures requested will not prejudice the Defence, especially because the redactions it has made do not prevent an understanding of the substance of the testimony and, in any event, her statement concerns only her abduction, which in all likelihood was not carried out by Ansar Dine or AQIM.<sup>172</sup>

86. Bearing in mind the nature of P-0576's evidence, the limited scope of the confirmation hearing, the potential security risks to her and her family and the especially vulnerable profile of the witness, who is a victim of sexual crimes, the Prosecution requests the non-disclosure of information that could lead to the identification of this witness in accordance with article 68(1) of the Statute and rule 81(4) of the Rules.<sup>173</sup>

87. Consequently, the Prosecution requests that it be authorized: (i) not to disclose the identity and any information that could lead to the identification of Witness P-0576; (ii) to file an anonymous redacted version of P-0576's statement and its annexes; (ii) to redact any information that could lead to the identification of this witness from the metadata of these documents.<sup>174</sup>

88. The Defence requests that the Single Judge dismiss the Prosecution's request.<sup>175</sup> In addition to the general arguments set out above,<sup>176</sup> the Defence responds that the Prosecution submits that although the crimes reported by the witness have no connection with AQIM or Ansar Dine, there is nonetheless a real risk of retaliation because the fear of retaliation is not based on the content of the testimony but rather on mere cooperation with the Court.<sup>177</sup> According to the

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<sup>171</sup> Request concerning P-0576, para. 24.

<sup>172</sup> Request concerning P-0576, para. 31.

<sup>173</sup> Request concerning P-0576, paras. 11, 26.

<sup>174</sup> Request concerning P-0576, para. 32.

<sup>175</sup> Response concerning P-0576, para. 17.

<sup>176</sup> See above, paras. 21-22.

<sup>177</sup> Response concerning P-0576, para. 8.

Defence, in this way the Prosecution sets the bar so low when it comes to risk assessment that the identity of anyone in Mali who has been in contact with the Prosecution could be withheld from the Defence.<sup>178</sup>

89. The Defence submits that although P-0576's status as a victim of sexual violence makes her a vulnerable witness, which could justify not disclosing her identity to the general public, that in and of itself does not demonstrate an objective risk of harm from disclosure *to the Defence* – an important participant in the proceedings.<sup>179</sup> In the view of the Defence, the Prosecution fails to substantiate its claim that disclosure to the Defence could adversely affect P-0576's safety, physical and psychological well-being, dignity and privacy.<sup>180</sup>

90. The Defence argues that knowing the identity of the witness would conversely allow it to better observe its obligations under the Protocol on the Handling of Confidential Information adopted in this case.<sup>181</sup> The Defence adds that in the absence of an objective risk to P-0576's safety from disclosure of her identity to the Defence, the Prosecution's proposed measures cannot be considered to be proportionate to the prejudice arising to Mr Al Hassan and the infringement of his right to present evidence and raise defences.<sup>182</sup>

91. The Single Judge notes that the witness's inconsistency on the question of whether she personally was or was not a victim of sexual violence<sup>183</sup> is insufficient to rule out that she was and that her hesitation on this matter may be a form of denial resulting from a psychological defence mechanism or the desire to avoid social stigma.

92. The Single Judge reiterates that, pursuant to article 68(1) of the Statute, the Court is required to take "appropriate measures to protect the safety, physical

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<sup>178</sup> Response concerning P-0576, para. 8.

<sup>179</sup> Response concerning P-0576, para. 10.

<sup>180</sup> Response concerning P-0576, para. 10.

<sup>181</sup> Response concerning P-0576, para. 12.

<sup>182</sup> Response concerning P-0576, para. 16.

<sup>183</sup> Compare [REDACTED].

and psychological well-being, dignity and privacy of victims and witnesses". Furthermore, the Single Judge notes that under article 68(2) of the Statute victims of sexual violence must receive specific, heightened protection during proceedings before the Court. The Single Judge further notes that [REDACTED] P-0576 clearly stated that she did not wish her identity to be disclosed to either the public or the Defence.<sup>184</sup>

93. Consequently, in this specific instance and considering P-0576's particular status as a potential victim of sexual violence, or at the very least as a vulnerable witness, her clearly expressed wish that her identity not be disclosed to the Defence, the fact [REDACTED], that the Prosecution does not intend to rely on the evidence relating to this witness for the confirmation hearing, that the witness's statement concerns events unrelated to Mr Al Hassan – as the Prosecution itself has stated – and that the present request is made at the pre-trial stage of the proceedings, the Single Judge considers it appropriate to grant the Prosecution's request in order to protect the witness's safety, physical and psychological well-being, dignity and privacy. The Single Judge requests, however, that the Prosecution make the modification for this witness set out in the annex to the present decision, or inform the Single Judge as to why it considers this modification inappropriate.

### III. Confidentiality

94. The Single Judge notes that the annex to the present decision – classified as confidential *ex parte* the Prosecution and the Victims and Witnesses Section – will not be available to the Defence because it contains the Single Judge's requests for modifications to the redactions proposed by the Prosecution.

95. Lastly, the Single Judge instructs the parties to file a public redacted version of all of their motions/requests and responses referred to in the present decision so that, on this basis, a public redacted version of the decision may be filed. The Single

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<sup>184</sup> [REDACTED].

Judge considers that that is essential so as to ensure the public character of the proceedings. The Single Judge notes that he has already requested the parties to do so for all motions/requests for authorization not to disclose witnesses' identities filed in the present case.<sup>185</sup> The Single Judge requests that the parties *systematically* file public redacted versions of their submissions when they concern requests for authorization not to disclose witnesses' identities.

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<sup>185</sup> See Decision of 9 October 2018, para. 43; Decision of 13 September 2018, para. 51.

**FOR THESE REASONS, the Single Judge**

**DECIDES** to authorize the Prosecution not to disclose to either the Defence or the public the identities of Witnesses 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 and to continue using these pseudonyms in further proceedings;

**DECIDES** to authorize the Prosecution to implement all other measures requested to protect the identities of these witnesses, contingent upon the modifications proposed by the Single Judge;

**ORDERS** the Prosecution to make all redaction modifications that appear in the annex to the present decision and concern Witnesses MLI-OTP-P-0111, MLI-OTP-P-0589, MLI-OTP-P-0593, MLI-OTP-P-0130, MLI-OTP-P-0581, MLI-OTP-P-0592, MLI-OTP-P-0594 and MLI-OTP-P-0576, or to inform the Single Judge as quickly as possible as to why it considers any of these modifications inappropriate;

**INSTRUCTS** the parties to file a public redacted version of their submissions and to submit to the Single Judge proposed redactions within 20 days of the notification of the present decision.

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

[signed]

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**Judge Péter Kovács**

**Single Judge**

Dated this 28 January 2019

At The Hague, Netherlands