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TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

Public

Public redacted version of ‘Decision on the Prosecution requests concerning the variation of protective measures for non-trial witnesses P-0107, P-0121, P-0123, P-0128, P-0357 and P-0523’

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

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Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on the Prosecution requests concerning the variation of protective measures for non-trial witnesses P-0107, P-0121, P-0123, P-0128, P-0357 and P-0523’.

I. Procedural history

1. The Single Judge incorporates by reference the procedural history set out in her Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0128, P-0129, P-0140 and P-0154, issued on 27 March 2020.¹ This decision relates to the same subject matter as the present decision, namely applications pursuant to Regulation 42 of the Regulations of the Court (the ‘Regulations’) to maintain or vary protective measures ordered previously by Trial Chamber VIII in the *Al Mahdi* proceedings.
2. On 10 March 2020, the Prosecution filed an application requesting the Single Judge to maintain protective measures ordered in the *Al Mahdi* proceedings for P-0123 and P-0523 - being the disclosure of anonymous summaries of information provided by those individuals in lieu of their statements and related items - and to allow the Prosecution to disclose an anonymous addendum to P-0123’s summary (the ‘First Request’).² The Prosecution submits that both P-0123 and P-0523 provided statements to the Prosecution which contain essentially incriminatory information and that, while P-0123’s statement contains some information that may be deemed material to the preparation of the Defence under Rule 77 of the Rules of Procedure and Evidence (the

¹ Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0128, P-0129, P-0140 and P-0154, ICC-01/12-01/18-684-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; a confidential redacted version was filed simultaneously, ICC-01/12-01/18-684-Conf-Red) (the ‘27 March 2020 Decision’), paras 1-4.

² Prosecution Request to Maintain Protective Measures for Witnesses MLI-OTP-P-0123 and MLI-OTP-P-0523, ICC-01/12-01/18-641-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; with confidential, *ex parte* Annexes A to F, only available to the Prosecution and the VWU; a confidential redacted version of the main filing was filed on 12 March 2020, ICC-01/12-01/18-641-Conf-Red).

‘Rules’), P-0523’s statement has minimal value under Rule 77.³ The Prosecution submits that maintaining the abovementioned protective measures is necessary having regard to the individuals’ particular circumstances, and would not prejudice the Defence.⁴

3. Also on 10 March 2020, the Prosecution filed an application pursuant to Regulation 42 of the Regulations requesting the Single Judge, in relation to protective measures ordered in the *Al Mahdi* proceedings, to: (i) vary protective measures for P-0107 so as to be authorised to disclose his identity and identifying information to the Defence; (ii) vary protective measures for P-0121 so as to be authorised to provide a redacted version of his statement and accompanying annex to the Defence; and (iii) maintain protective measures for P-0357 (the ‘Second Request’).⁵ The Prosecution recalls that anonymous summaries of these individuals’ material have previously been disclosed to the Defence under Rule 77 of the Rules or Article 67(2) of the Statute.⁶ The Prosecution also sought that the abovementioned measure in relation to P-0121 be granted on an interim basis to facilitate the preparation of a redacted version of the Second Request available to the Defence.⁷
4. On the same day, the Single Judge granted by email the interim measure sought by the Prosecution in relation to P-0121 so as to enable timely access by the Defence to a redacted version of the Second Request, noting that reasons for the decision would follow.⁸ By way of this decision, the Single Judge instructed the Registry to reclassify to ‘confidential’ Annex D to the Second Request, thereby giving the Defence access to a redacted version of P-0121’s statement and its accompanying annex.

³ First Request, ICC-01/12-01/18-641-Conf-Red, para. 1.

⁴ First Request, ICC-01/12-01/18-641-Conf-Red, paras 5-6, 10-11.

⁵ Prosecution’s submissions regarding existing protective measures for MLI-OTP-P-0107, MLI-OTP-P-0121 and MLI-OTP-P-0357, ICC-01/12-01/18-645-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; with confidential, *ex parte* Annexes A to D, only available to the Prosecution and the VWU; a confidential redacted version of the main filing was filed on 12 March 2020, ICC-01/12-01/18-645-Conf-Red; Annex D was reclassified to confidential on 10 March 2020).

⁶ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 2.

⁷ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 7.

⁸ Email from the Single Judge to the parties and participants sent on 10 March 2020 at 16:22.

5. On 23 March 2020, the Defence responded to the First Request, submitting that the withholding of the identities of these individuals is unnecessary and disproportionately prejudicial, and requesting the Single Judge to reject the First Request, or alternatively order the Prosecution to prepare, in consultation with the Defence, admissions of fact as concerns the exculpatory issues identified by the Defence (the ‘First Defence Response’).⁹
6. On 26 March 2020, the Defence responded to the Second Request, requesting the Single Judge to reject the Prosecution’s request to withhold the identity of P-0121, or alternatively order the Prosecution to prepare, in consultation with the Defence, admissions of fact as concerns the evidence that could otherwise have been obtained from P-0121 (the ‘Second Defence Response’).¹⁰ The Defence does not make specific submissions on the Prosecution’s requests regarding P-0107 or P-0357.
7. On 27 March 2020, the Single Judge issued her abovementioned decision on the Prosecution requests concerning the variation of protective measures for six screened individuals including P-0128.¹¹ Relevantly, the Single Judge deferred ruling on the Prosecution’s request to maintain protective measures ordered in the *Al Mahdi* proceedings for P-0128, being the disclosure of an anonymous summary (the ‘Prosecution’s Request in relation to P-0128’).¹² In doing so, the Single Judge indicated that she was minded to restrict disclosure of P-0128’s identity to the Defence team and its resource persons only, without further disclosure to Mr Al Hassan at this time, but that she would like to hear any observations from the Prosecution and Defence on this or any other feasible lesser measures, before so ruling.¹³

⁹ Defence response to “Prosecution Request to Maintain Protective Measures for Witnesses MLI-OTP-P-0123 and MLI-OTP-P-0523” (ICC-01/12-01/18-641-Conf-Exp), ICC-01/12-01/18-679-Conf.

¹⁰ Defence response to the applications regarding existing protective measures set out in ICC-01/12-01/18-645-Conf-Red, ICC-01/12-01/18-681-Conf.

¹¹ 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red.

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

¹³ 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, para. 40, p. 21.

8. On 6 April 2020, the Prosecution filed its further observations on P-0128 (the ‘Prosecution Further Observations’).¹⁴ It submits that the proposal to restrict disclosure of P-0128’s identity to the Defence team and its resource persons only (and not Mr Al Hassan) does not sufficiently mitigate the risks to P-0128’s safety and security.¹⁵ While the Prosecution states that it does not question the Defence team’s adherence to its confidentiality obligations, it submits that their eventual contact with P-0128 through resource persons or intermediaries will attract attention [REDACTED],¹⁶ and that the proposed approach cannot preclude wider dissemination of P-0128’s identity.¹⁷ The Prosecution instead proposes to contact P-0128 and inquire whether he is amenable to speaking directly to Defence counsel over the phone; if yes, P-0128’s name would thereby only be provided to Defence counsel, but not to the Defence resource persons or intermediaries.¹⁸ [REDACTED].¹⁹
9. On 8 April 2020, the Defence filed its further observations on P-0128 (the ‘Defence Further Observations’).²⁰ The Defence notes that Mr Al Hassan plays a central role in Defence investigations, in particular as concerns the ability of the Defence to identify the reliability and veracity of information provided by certain individuals or sources.²¹ It notes, however that there are a range of preliminary inquiries and investigations that could be carried out without disclosing P-0128’s name or identifying information to Mr Al Hassan.²² For the specific purpose of conducting such preliminary inquiries, the Defence states that it would accept the disclosure of P-0128’s identity and unredacted materials, on the condition that it would not share the name or any identifying information with Mr Al Hassan without first obtaining prior authorisation from

¹⁴ Further Prosecution Observations regarding MLI-OTP-P-0128, ICC-01/12-01/18-729-Conf-Exp (confidential, *ex parte*, Prosecution and VWU only; a confidential redacted version was filed on 14 April, ICC-01/12-01/18-729-Conf-Red).

¹⁵ Prosecution Further Observations, ICC-01/12-01/18-729-Conf-Red, paras 4, 13, 17, 21.

¹⁶ Prosecution Further Observations, ICC-01/12-01/18-729-Conf-Exp, paras 5, 13-14.

¹⁷ Prosecution Further Observations, ICC-01/12-01/18-729-Conf-Red, paras 13.

¹⁸ Prosecution Further Observations, ICC-01/12-01/18-729-Conf-Red, paras 7, 20, 22.

¹⁹ Prosecution Further Observations, ICC-01/12-01/18-729-Conf-Exp, para.23.

²⁰ Defence Observations Concerning the Disclosure of the Identity of P-0128, ICC-01/12-01/18-731-Conf.

²¹ Defence Further Observations, ICC-01/12-01/18-731-Conf, para. 2.

²² Defence Further Observations, ICC-01/12-01/18-731-Conf, para. 2. The Defence also submits that Under the Code of Conduct, it would also be appropriate for the Defence to call a certain individual (such as P-0128) as a witness, without first obtaining instructions from the client (para. 3).

the Single Judge or the Chamber.²³ However, if a scenario arises where it appears necessary to disclose P-0128's name to Mr Al Hassan in order to further Defence investigations or preparation for trial, the Defence submits that: (i) it should be entitled to seise the Single Judge with a request to lift any conditions imposed by the Chamber; (ii) such a request would not amount to a request for 'reconsideration' if it is based on considerations arising from preliminary Defence inquiries/investigations; and (iii) the burden of justifying the continued application of the conditions/non-disclosure order vis-à-vis Mr Al Hassan would continue to rest with the Prosecution.²⁴

10. On 14 April 2020, the Defence sought, by email, leave to reply to the Prosecution's proposals in the Prosecution Further Observations, namely (i) that disclosure of P-0128's identity should be restricted to Defence counsel only (the 'First Proposal'); and that (ii) the Prosecution should first contact P-0128 to establish whether P-0128 would consent to the disclosure of his name to Defence counsel (the 'Second Proposal').²⁵ The Defence submits that these proposals deviate from the procedure suggested by the Single Judge, and were not raised at a prior point of the proceedings, and that the Defence therefore had no previous opportunity to comment on them ('Defence Request for Leave to Reply').
11. On 15 April 2020, the Single Judge granted the Defence leave to reply on the First Proposal and noted that she would not be assisted by submissions on the Second Proposal.²⁶
12. On 16 April 2020, in accordance with the deadline set by the Single Judge, the Defence filed its reply in relation to the First Proposal, submitting that the proposal is both unnecessary and highly prejudicial (the 'Defence Reply').²⁷

²³ Defence Further Observations, ICC-01/12-01/18-731-Conf, para. 4.

²⁴ Defence Further Observations, ICC-01/12-01/18-731-Conf, para. 3.

²⁵ Email from the Defence to the Chamber received on 14 April at 19:02.

²⁶ Email from the Single Judge to the parties and participants sent on 15 April at 12:31.

²⁷ Defence Reply to Prosecution's further Observations Concerning the Disclosure of the Identity of MLI-OTP-P-0128, ICC-01/12-01/18-749-Conf.

II. Applicable law

13. The Single Judge incorporates by reference the applicable law and principles set out in her decision of 27 March 2020.²⁸

III. Analysis

14. At the outset, the Single Judge notes that the Defence has repeated threshold arguments about the lack of individualised security concerns.²⁹ In this regard, the Single Judge incorporates the relevant findings in her decision of 27 March 2020.³⁰ Accordingly, in the present decision, and in conducting her assessment of potential security risks, the Single Judge, has examined on a case by case basis, and against the relevant background, the security concerns of the specific individuals.
15. The Defence also highlights the importance of the Prosecution's disclosure duties in light of the 'likely difficulties that the Defence will face in the coming months as concerns the possibility of conducting independent Defence investigations'.³¹ The Single Judge has had careful regard to these submissions in her determination of the issues below, most notably when assessing the proportionality of the non-disclosure orders sought.
16. The Single Judge has also taken into consideration the Prosecution's general submission that physical harm and/or intimidation to screened individuals would in turn prejudice the proceedings, even if the Prosecution does not seek to rely on their evidence, as it would be extremely detrimental to the ability and willingness of other individuals to cooperate with the Prosecution.³²

A. P-0107

17. The Single Judge notes the information that P-0107 is [REDACTED], who was allegedly [REDACTED] in Timbuktu during its occupation by Ansar

²⁸ 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 9-17.

²⁹ First Defence Response, ICC-01/12-01/18-679-Conf, para. 2; Second Defence Response ICC-01/12-01/18-681-Conf, paras 6-8.

³⁰ 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 18-20.

³¹ First Defence Response, ICC-01/12-01/18-679-Conf, para. 3.

³² First Request, ICC-01/12-01/18-641-Conf-Red, para. 37; Second Request, ICC-01/12-01/18-645-Conf-Red, para. 35.

Dine/AQIM and was reportedly [REDACTED].³³ The Prosecution indicates that P-0107 was [REDACTED] a potential witness; [REDACTED]; and has not been reached since.³⁴ It is thought that P-0107 [REDACTED].³⁵ The Prosecution informs that it has been unable to contact P-0107 to ascertain if he consents to disclosure of his identity to the Defence.³⁶ The Single Judge notes the Prosecution's submission that P-0107's identity should be disclosed to the Defence.³⁷

18. The Single Judge notes: (i) the indications that at least as of 2018, P-0107 was [REDACTED],³⁸ and (ii) information that a [REDACTED].³⁹
19. The Single Judge considers that an objective risk to this individual's safety and privacy exists [REDACTED]. Contrary to the Prosecution's assertion that, *inter alia*, P-0107's profile - [REDACTED] - and [REDACTED], make it unlikely that he would face security risks as a result of disclosure of his identity to the Defence,⁴⁰ the Single Judge considers the opposite to be true. Indeed, although P-0107 had [REDACTED]⁴¹ [REDACTED] provided potentially exonerating information,⁴² the Single Judge considers that this [REDACTED], which rather increases the risk of reprisals against him.
20. The Single Judge notes, however, that P-0107 is [REDACTED], [REDACTED]. Further, the information he provided has been highlighted by the Defence as being of particular importance to it, including in respect of

³³ ICC-01/12-01/18-645-Conf-Exp-AnxA, p. 2; Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version of the decision was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red), [REDACTED].

³⁴ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 12.

³⁵ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 20; ICC-01/12-01/18-645-Conf-Exp-AnxA, p. 2.

³⁶ Second Request, ICC-01/12-01/18-645-Conf-Exp, para. 21; ICC-01/12-01/18-645-Conf-Exp-AnxA, pp 2-3.

³⁷ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 4.

³⁸ ICC-01/12-01/18-645-Conf-Exp-AnxA, pp 2-3; MLI-OTP-0065-0833-R02, p. 0848.

³⁹ ICC-01/12-01/18-645-Conf-Exp-AnxA, pp 2-3.

⁴⁰ Second Request, ICC-01/12-01/18-645-Conf-Red, paras 4, 22.

⁴¹ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 12.

⁴² Second Request, ICC-01/12-01/18-645-Conf-Red, para. 42. P-0107 told the Prosecution that any lawyer or intellectual would understand that whatever was done—by soldiers and civilians—during the occupation was done under duress, in that they did not have any choice: see MLI-OTP-0031-0076.

potential grounds for excluding criminal responsibility under Article 31 of the Statute.⁴³ Accordingly, although giving due regard to the fact that the Prosecution has been unable to contact P-0107 to seek his consent to disclosure, the Single Judge considers that the balance of the different interests militates in favour of varying P-0107's protective measures and disclosing his identity to the Defence in this particular instance. In this regard, the Single Judge has also taken into consideration the context in which the protective measures were previously ordered in the *Al Mahdi* proceedings,⁴⁴ but notes that the relevant decision was issued at the pre-trial stage, in a case with significantly narrower charges which were not contested by the defence in that case.

21. For these reasons, the Single Judge finds it appropriate to vary the protective measures previously ordered for P-0107 - the provision of an anonymous summary⁴⁵ – and therefore orders the disclosure of his identity, as well as relevant material, to the Defence.

B. P-0121

22. The Single Judge notes the information that P-0121 is [REDACTED],⁴⁶ and that he presently [REDACTED].⁴⁷ The Prosecution reports that P-0121 has expressed, on a number of occasions including recently, a firm preference for his collaboration to remain completely anonymous.⁴⁸ He has also expressed fear about him or his family becoming the targets of retaliation by the armed groups.⁴⁹
23. The Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence, taking into account (i) the personal circumstances of this individual, in particular, the fact

⁴³ Second Defence Response, ICC-01/12-01/18-681-Conf, para. 22, footnote 33.

⁴⁴ Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Second Decision on the Prosecutor's requests for redactions, 16 December 2015, ICC-01/12-01/15-61, para. 1 (the '16 December 2015 *Al Mahdi* Decision').

⁴⁵ 16 December 2015 *Al Mahdi* Decision, ICC-01/12-01/15-61.

⁴⁶ Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁴⁷ Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁴⁸ Second Request, ICC-01/12-01/18-645-Conf-Red, paras 27-29.

⁴⁹ Second Request, ICC-01/12-01/18-645-Conf-Exp, paras 27-29.

that [REDACTED]; (ii) his profile - including the risk that, [REDACTED],⁵⁰ and [REDACTED],⁵¹ [REDACTED], and the fact that he [REDACTED]⁵² and [REDACTED]⁵³ both factors which may further increase his risk of being targeted; (iii) the nature of the security concerns expressed by him; together with (iv) the general security situation in Mali.⁵⁴

24. Notwithstanding however, the Single Judge considers that the risks which would arise from disclosure of his identity to the Defence are relatively limited compared to those which already exist, independent of the individual's interaction with the Prosecution. This is notably because, in addition to his profile, information indicates that P-0121 [REDACTED],⁵⁵ including [REDACTED].⁵⁶ As noted by the Defence⁵⁷ therefore, P-0121's [REDACTED]. The Single Judge also notes that [REDACTED].⁵⁸
25. Turning to the nature of the information provided by P-0121, the Single Judge notes that P-0121's statement is lengthy and detailed, and that he provides nuanced information, both incriminatory and exculpatory. As highlighted by both parties, the information contained therein relates to a number of matters which are considered to fall under Article 67(2) of the Statute or Rule 77 of the Rules.
26. In particular, as noted by the Defence,⁵⁹ P-0121 provides potentially exculpatory information regarding sexual violence crimes, namely the alleged forced marriages in Timbuktu in 2012 – stating that marriages in general were not forced⁶⁰ - and rapes allegedly attributed to the MNLA.⁶¹ P-0121 further provides potentially exculpatory or relevant information in relation to the

⁵⁰ Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵¹ Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵² Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵³ Second Request, ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵⁴ As set out the 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 19-20.

⁵⁵ ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵⁶ See Second Defence Response, ICC-01/12-01/18-681-Conf, para. 16, [REDACTED]

⁵⁷ Second Defence Response, ICC-01/12-01/18-681-Conf, para. 16.

⁵⁸ ICC-01/12-01/18-645-Conf-Exp-AnxC, p. 2.

⁵⁹ Second Defence Response, ICC-01/12-01/18-681-Conf, paras 10-11.

⁶⁰ ICC-01/12-01/18-645-Conf-AnxD, para. 117.

⁶¹ ICC-01/12-01/18-645-Conf-AnxD, paras 26, 70.

[REDACTED],⁶² the hierarchy within the Islamic groups,⁶³ and the alleged existence of several armed groups at the same time in Timbuktu.⁶⁴ In addition, the Defence identifies information P-0121 provides as being potentially relevant for duress as a ground for excluding criminal responsibility under Article 31 of the Statute.⁶⁵

27. Next, while the Prosecution submits that material and potentially exculpatory information provided by P-0121 can ‘mostly’ be found in alternative sources disclosed to the Defence,⁶⁶ the Single Judge notes, as submitted by the Defence,⁶⁷ that the information provided by P-0121 is not fully subsumed by other material disclosed. In particular, the Single Judge notes [REDACTED] is not fully subsumed by the NGO and Malian national reports cited by the Prosecution.⁶⁸ Further, the Defence identifies that P-0121’s statement regarding [REDACTED] is material to the preparation of the Defence and appears to be the only source of this information.⁶⁹ Furthermore, in fact, P-0121’s statement seemingly contradicts the evidence provided by a Prosecution witness on one important issue: P-0121’s evidence in relation to [REDACTED] appears inconsistent with that of trial witness P-0582.⁷⁰
28. The Single Judge therefore considers that P-0121’s information is material and unique on a number of discrete subjects of relevance to the Defence. In light also of the Chamber’s recent decision authorising delayed disclosure in relation

⁶² ICC-01/12-01/18-645-Conf-AnxD, paras 96, 171.

⁶³ ICC-01/12-01/18-645-Conf-AnxD, para. 39.

⁶⁴ ICC-01/12-01/18-645-Conf-AnxD, para. 40.

⁶⁵ Second Defence Response, ICC-01/12-01/18-681-Conf, para. 22. The Defence notes that P-0121 [REDACTED] leaving the group was difficult to do: ICC-01/12-01/18-645-Conf-AnxD, para. 116). It submits that this information is relevant to the Defence and must be investigated in order to obtain a comprehensive portrait of the situation of the groups’ members, and possible issues of duress.

⁶⁶ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 24.

⁶⁷ Second Defence Response, ICC-01/12-01/18-681-Conf, para. 17.

⁶⁸ See Second Request, ICC-01/12-01/18-645-Conf-Red, para. 53 (second bullet point), and the sources cited in footnotes 71-72; Second Defence Response, ICC-01/12-01/18-681-Conf, para. 19. As noted by the Defence, since P-0121 was living in Timbuktu at the time his account of [REDACTED] has a higher probative value than information in the reports.

⁶⁹ ICC-01/12-01/18-645-Conf-AnxD, para. 106; Second Defence Response, ICC-01/12-01/18-681-Conf, para. 21.

⁷⁰ The Prosecution recalls that P-0582 testified that [REDACTED]: ICC-01/12-01/18-645-Conf-Red, para. 53 (seventh bullet point), whereas P-0121 gives details to the effect that [REDACTED]. See Second Defence Response, ICC-01/12-01/18-681-Conf, paras 17-18.

to three alleged victims of sexual violence crimes,⁷¹ the Chamber considers it additionally important for the Defence to have access to other sources of information material to its preparation, notably alternative leads, which could assist in the conduct of its investigation prior to the start of trial.

29. Moreover, examining the redactions currently applied to identifying information contained in P-0121's statement, the Single Judge considers, as argued by the Defence,⁷² that they substantially impact on the Defence's ability to rely on the relevant information in its investigation. For example, the information regarding [REDACTED] is partially redacted, including on P-0121's basis of knowledge.⁷³ Further, the excerpts containing the information the Defence identifies as being potentially relevant under Article 31 is also extensively redacted, including as to the source of the relevant statement.⁷⁴ The Single Judge therefore considers that the lesser measure of disclosing P-0121's statement with redactions to identifying information is not an appropriate protective measure in the circumstances, notably in light of the impact it has on the Defence's rights.
30. Weighing therefore the relevance and materiality of the information provided by P-0121 with the limited risks arising from disclosure of his identity to the Defence, the Single Judge considers that the balance of the various interests militates in favour of disclosure of P-0121's identity to the Defence in this particular case. The Single Judge has taken full regard of the individual's personal circumstances and to the fact that P-0121 did not consent to his identity being disclosed to the Defence.⁷⁵ The Single Judge has also taken into

⁷¹ Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603, 15 April 2020, ICC-01/12-01/18-741-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; a confidential redacted version was filed simultaneously, ICC-01/12-01/18-741-Conf-Red) (the 'Delayed Disclosure Decision').

⁷² Second Defence Response, ICC-01/12-01/18-681-Conf, para. 12.

⁷³ ICC-01/12-01/18-645-Conf-AnxD, para. 93. See also Second Defence Response, ICC-01/12-01/18-681-Conf, paras 17-18.

⁷⁴ ICC-01/12-01/18-645-Conf-AnxD, para. 116. See also Second Defence Response, ICC-01/12-01/18-681-Conf, para. 22.

⁷⁵ The Single Judge recalls that while the subjective fear of the individual is of relevance considering whether an objectively justifiable risk exists, it is not, in itself, determinative: *see* Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 3 February 2017, ICC-01/09-02/11-580-Red2 (original dated 21 December 2012), para. 31.

consideration the context in which the protective measures were previously ordered in the *Al Mahdi* proceedings,⁷⁶ but notes that the relevant decision was taken at a pre-trial stage, in a case with significantly narrower charges, which were not contested by the defence in that case.

31. Furthermore, the Single Judge notes that the Defence has provided an undertaking to consult with the VWU as concerns the modalities of any potential contact with P-0121.⁷⁷ The Single Judge considers that proceeding in this way will contribute to mitigating the existing risks. Finally, the Single Judge notes the advice from VWU that the [REDACTED].⁷⁸
32. For these reasons, the Single Judge varies the protective measures previously ordered for P-0121 – first the provision of an anonymous summary⁷⁹ and later the provision of a redacted statement and annex – and orders disclosure of his identity, as well as relevant material, to the Defence. [REDACTED]. The Single Judge also directs the Defence, in accordance with its undertaking, to consult with the VWU as concerns any potential contact with P-0121.

C. P-0123

33. The Single Judge notes the information that P-0123 [REDACTED],⁸⁰ and that he [REDACTED].⁸¹ The Prosecution reports that after providing a statement, P-0123 [REDACTED]. The Prosecution [REDACTED],⁸² [REDACTED].⁸³
34. The Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence, taking into account (i) the fact that [REDACTED]; (ii) his profile - including the risk that,

⁷⁶ 16 December 2015 *Al Mahdi* Decision, ICC-01/12-01/15-61.

⁷⁷ Second Defence Response, ICC-01/12-01/18-681-Conf, para. 16.

⁷⁸ Second Request, ICC-01/12-01/18-645-Conf-Red, para. 37.

⁷⁹ 16 December 2015 *Al Mahdi* Decision, ICC-01/12-01/15-61.

⁸⁰ First Request, ICC-01/12-01/18-641-Conf-Exp, para. 2; ICC-01/12-01/18-641-Conf-Exp-AnxA, [REDACTED].

⁸¹ First Request, ICC-01/12-01/18-641-Conf-Exp, para. 4.

⁸² First Request, ICC-01/12-01/18-641-Conf-Exp, paras 3, 38.

⁸³ First Request, ICC-01/12-01/18-641-Conf-Exp, paras 4, 38.

[REDACTED], and (iii) [REDACTED]; together with (iv) the general security situation in Mali.⁸⁴

35. The Prosecution submits that P-0123's statement contains some information that may be deemed relevant and material to the preparation of the Defence under Rule 77 of the Rules.⁸⁵ It has also identified additional such information that has not yet been disclosed to the Defence in the anonymous summary, and proposes to reflect this information in an anonymous addendum to P-0123's existing summary.⁸⁶ The Defence submits that the majority of this additional information is of an exculpatory nature,⁸⁷ and that the Prosecution's failure to summarise the exculpatory aspects of P-0123's evidence calls into question the methodology used by the Prosecution to prepare summaries, and the fairness of the confirmation stage.⁸⁸ The Defence further identifies additional exculpatory information that P-0123 would appear to have evidence on.⁸⁹
36. In relation to the Defence submissions regarding late disclosure, the Single Judge notes that this additional relevant information from P-0123 has been identified by the Prosecution before the final disclosure deadline set prior to the start of trial, but recalls her directive that the Prosecution is expected to fulfil its disclosure obligations as soon as possible and not to wait until the last minute.⁹⁰
37. The Single Judge considers that information provided by P-0123 is of potential relevance and materiality to Defence preparation, in particular noting the

⁸⁴ As set out the 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 19-20.

⁸⁵ First Request, ICC-01/12-01/18-641-Conf-Red, para. 1.

⁸⁶ First Request, ICC-01/12-01/18-641-Conf-Red, paras 40-41.

⁸⁷ Namely the following: (i) Because there was no army left in Timbuktu, there was no return of fire to the attack; (vii) Shortly after Timbuktu was occupied, people reported that Ansar Dine handed out papers with a phone number that could be called to report if property had been stolen; (iii) The Islamic police and Hesbah members did not wear uniforms, such that P-0123 was unable to distinguish them from other Islamists on the street; (iv) The Islamic police was chaotic, with not much work going on and with many men with weapons just sitting around; (v) The situation was very chaotic; (vi) The *Comité de crise* conducted extensive discussions on the destruction of monuments of religious heritage in Timbuktu but did not raise the matter with the Islamists; (vii) Women were already dressed conservatively and [REDACTED]: *see* First Defence Response, ICC-01/12-01/18-679-Conf, para. 6.

⁸⁸ First Defence Response, ICC-01/12-01/18-679-Conf, paras 7, 10.

⁸⁹ Namely, that (i) the Malian Government armed Arab militia in advance of 2012; (ii) Arab militia and MNLA looted the military camp, government buildings and banks; and (iii) The MNLA and Arab militia remained in town throughout 2012: *see* First Defence Response, ICC-01/12-01/18-679-Conf, para. 8.

⁹⁰ ICC-01/12-01/18-546, para. 8.

potentially exculpatory nature of some of the information he provides, as identified by the Defence. Although, as the Prosecution notes, evidence analogous to some of the information contained in P-0123's anonymous summary is available from other witnesses whose identities have or will be made available to the Defence,⁹¹ the Single Judge notes that P-0123's statement is lengthy and detailed, covering a number of matters, including personal contact with Mr Al Hasan.⁹² The Single Judge therefore considers that a less restrictive protective measure should be considered, where it is feasible and sufficient to mitigate the existing risks.

38. Weighing on the other hand, however, the potential risks to the individual – and in particular [REDACTED], the Single Judge is not convinced that the balance of the various interests weighs in favour of disclosure of P-0123's identity. Accordingly, the Single Judge considers disclosure of P-0123's statement to the Defence, with identifying information redacted, is an appropriate measure in the circumstances.
39. For these reasons, the Single Judge considers that the protective measures previously ordered for P-0123 – the provision of an anonymous summary⁹³ – should be varied and replaced with the disclosure of P-0123's statement to the Defence, with identifying information redacted, and applying otherwise only standard redactions. The Single Judge understands that, through disclosing this material, while P-0123's identity will not be revealed, his role – [REDACTED] – will become known to the Defence. The Prosecution is instructed to bear this in mind when applying redactions. Should any disagreement arise in relation to the application of specific redactions to identifying information, the parties may return to the Single Judge further on this issue.

D. P-0128

40. The Single Judge has considered the further observations from the parties on the alternative proposal to restrict disclosure of P-0128's identity to the Defence

⁹¹ First Request, ICC-01/12-01/18-641-Conf-Exp, para. 39.

⁹² See e.g. ICC-01/12-01/18-641-Conf-Exp-AnxA, pp 19-20, paras 92-97.

⁹³ 16 December 2015 *Al Mahdi* Decision, ICC-01/12-01/15-61.

team only (including resource persons)⁹⁴ and not Mr Al Hassan at this stage. Noting the general acceptance of the Defence of this approach, and notwithstanding the submissions to the contrary from the Prosecution, the Single Judge decides to adopt the proposed approach.

41. In rejecting the alternate proposals of the Prosecution on this issue, the Single Judge is fully persuaded by the Defence's submissions that (i) sharing P-0128's identity within the Defence team and with resource persons may lead to more effective investigation and may indeed *eliminate* the need to conduct further inquiries with third persons;⁹⁵ and (ii) it would be prejudicial to deprive Defence counsel of the assistance of Defence team members and resource persons in conducting investigations, including from the perspective of being able to conduct analysis across multiple languages⁹⁶ and benefit from expertise and insight on cultural, social, political, religious, and geographical issues related to Timbuktu and its environs.⁹⁷ As noted by the Defence, its members are bound by Court orders and confidentiality obligations.⁹⁸ In addition, Defence practice is to inform its resource persons of the identities of witnesses only on a strictly need to know basis, and even then, disclosure does not imply that the resource person will conduct further enquiries.⁹⁹
42. At the same time the Chamber notes [REDACTED].
43. For completeness, the Single Judge reiterates that she considered this exceptional approach to disclosure appropriate in these specific circumstances, noting the particular features of P-0128's profile that place him at a heightened risk of reprisals, and the investigative nature of the further information being

⁹⁴ As noted by the Defence, it does not consider intermediaries to fall within the definition of the 'Defence' (Defence Reply, ICC-01/12-01/18-749-Conf, para. 4). The Single Judge notes that intermediaries are not included in the notion of 'Defence team' for the purpose of this order.

⁹⁵ Defence Reply, ICC-01/12-01/18-749-Conf, paras 4-6.

⁹⁶ Defence Reply, ICC-01/12-01/18-749-Conf, para. 5.

⁹⁷ Defence Reply, ICC-01/12-01/18-749-Conf, paras 7-10.

⁹⁸ Defence Reply, ICC-01/12-01/18-749-Conf, para. 3. The Single Judge further notes that Defence counsel has a professional duty to supervise the work of her assistants and other staff, including investigators, to ensure that they comply with the Code of Professional Conduct for counsel (Code of Professional Conduct for counsel, Article 7(4)).

⁹⁹ Defence Reply, ICC-01/12-01/18-749-Conf, para. 4. *See also* ICC-01/12-01/18-T-011-CONF-ENG, page 43, lines 11-17.

sought by the Defence. The Single Judge reiterates her previous observations that the risk arising from disclosure to *Mr Al Hassan* does not arise from any supposition about possible impugned conduct on his part.¹⁰⁰

44. For these reasons, the Single Judge varies the protective measures previously ordered for P-0128 – the provision of an anonymous summary – and orders disclosure of his identity, as well as relevant material, to the Defence team only and not Mr Al Hassan at this time. [REDACTED]. Should it so require, the Defence may seize the Single Judge with a further request on the issue of P-0128's identity.¹⁰¹

E. P-0357

45. The Single Judge notes the information that P-0357 appears to [REDACTED],¹⁰² and that he presently [REDACTED].¹⁰³ Information before the Single Judge indicates that when recently contacted, P-0357 refused consent to disclosure of his identity to Mr Al Hassan and the Defence, expressing the fear that to do so would to put his life at risk, [REDACTED].¹⁰⁴
46. The Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence. This is taking into consideration: (i) [REDACTED]; (ii) his profile – in particular noting that [REDACTED] puts P-0357 at particular risk of retaliation from the armed groups; (iii) the concerns he recently expressed about the disclosure of his identity to the Defence, noting also that [REDACTED];¹⁰⁵ and (iv) the general security situation in Mali.¹⁰⁶

¹⁰⁰ 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 36-40.

¹⁰¹ The Single Judge refers in this regard to the procedure set out in the Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 31. The Single Judge notes that, pursuant to this procedure, the onus of justifying the continued application of the non-disclosure order vis-à-vis Mr Al Hassan would continue to rest with the Prosecution.

¹⁰² ICC-01/12-01/18-645-Conf-Exp-AnxB, p. 2.

¹⁰³ Second Request, ICC-01/12-01/18-645-Conf-Exp, para. 20.

¹⁰⁴ Second Request, ICC-01/12-01/18-645-Conf-Exp, para. 30.

¹⁰⁵ ICC-01/12-01/18-645-Conf-Exp-AnxB, p. 2.

¹⁰⁶ As set out the 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 19-20.

47. The Single Judge notes that the information provided by P-0357 is limited in scope and general - only broadly indicating potential topics he would be able to offer further information on, the majority of which topics amount to incriminatory information.¹⁰⁷ [REDACTED].¹⁰⁸ Accordingly, the Single Judge considers that the information provided may be of *de minimis* relevance and materiality to the preparation of the Defence and notes that the Defence did not challenge these submissions.
48. Having reviewed P-0357's screening note,¹⁰⁹ the Single Judge is additionally satisfied that the protective measures already in place are the least intrusive possible in the circumstances. Weighing the high risks to the individual which would result from disclosure of his identity with the rights of the accused, the Single Judge also considers that the current protective measures are proportional.
49. For these reasons, and further noting that the Defence did not oppose this part of the First Request, the Single Judge considers that the protective measures previously ordered for P-0357 - the provision of an anonymous summary¹¹⁰ - shall remain in place.

F. P-0523

50. The Single Judge notes the information that P-0523 is [REDACTED].¹¹¹ Further, information indicates that he [REDACTED]¹¹² and that he presently [REDACTED].¹¹³ The Prosecution indicates that when P-0523 provided a statement, he expressed a concern that [REDACTED] could not be made public,¹¹⁴ and that, when recently contacted, P-0523 refused consent to

¹⁰⁷ Second Request, ICC-01/12-01/18-645-Conf-Red, paras 23, 45-48.

¹⁰⁸ [REDACTED].

¹⁰⁹ The screening note was provided by the Prosecution by email, upon request, on 15 April 2020 at 09:55.

¹¹⁰ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Prosecution Requests for Authorisation to Disclose Anonymous Summaries, 22 July 2016, ICC-01/12-01/15-140 (the '22 July 2016 *Al Mahdi* Decision').

¹¹¹ First Request, ICC-01/12-01/18-641-Conf-Exp, paras 7, 43, 45-46.

¹¹² First Request, ICC-01/12-01/18-641-Conf-Exp, paras 7, 43.

¹¹³ First Request, ICC-01/12-01/18-641-Conf-Exp, para. 9.

¹¹⁴ First Request, ICC-01/12-01/18-641-Conf-Exp, paras 8, 44; ICC-01/12-01/18-641-Conf-Exp-AnxD, p. 4.

disclosure of his identity, specifying that were his identity to be disclosed, [REDACTED].¹¹⁵

51. The Single Judge also notes the Defence submission that the Prosecution has not identified any concrete security risks that would arise as a result of disclosure of P-0523's identity to the Defence (as opposed to third parties, or the general public).¹¹⁶ Having reviewed all of the information provided, including information that was redacted from the Defence, the Single Judge is satisfied that an objective risk to this individual's safety and privacy exists were his identity to be disclosed to the Defence. This is taking into consideration: (i) his profile – in particular noting that [REDACTED] and puts P-0523 at particular risk of retaliation from the armed groups; (ii) [REDACTED]; (iii) the concerns he expressed regarding disclosure of his identity; and (iii) the general security situation in Mali.¹¹⁷
52. While the Prosecution submits that P-0523's statement has minimal relevance and materiality to the preparation of the Defence,¹¹⁸ the Defence submits that P-0523 appears to possess information that is directly relevant to its preparation, including that P-0523 knew from other people that the Islamists were from three or four different groups: Al Qaida au Maghreb, Ansar Dine, Ansar al Sharia and Al Mourabitoune; and that it was difficult to distinguish them because they all used the same black flag.¹¹⁹ The Defence notes that the anonymous summary does not cite P-0523's sources for this information, and submits that it cannot use this information unless it can conduct further enquiries with P-0523 as concerns the identity of these sources and the basis for their knowledge.¹²⁰
53. The Single Judge has reviewed the material and considers that evidence analogous to the centrally relevant aspects of P-0523's statement are available

¹¹⁵ First Request, ICC-01/12-01/18-641-Conf-Exp, paras 9, 47. The Single Judge notes the Defence's submission on this point (First Defence Response, ICC-01/12-01/18-679-Conf, para. 13), but accepts as accurate the information as reported by the Prosecution. It is noted in this regard that part of these information was redacted from the Defence, which may have caused the misunderstanding.

¹¹⁶ First Defence Response, ICC-01/12-01/18-679-Conf, para. 13.

¹¹⁷ As set out the 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 19-20.

¹¹⁸ First Request, ICC-01/12-01/18-641-Conf-Red, paras 1,

¹¹⁹ First Request, ICC-01/12-01/18-641-Conf-Red, para. 49; ICC-01/12-01/18-641-Conf-Exp-AnxE, [REDACTED].

¹²⁰ First Defence Response, ICC-01/12-01/18-679-Conf, para. 13.

from other Prosecution witnesses whose identities have been or, in the case of one witness, will eventually be disclosed to the Defence.¹²¹ As to the issue of composition of the Islamists and identification of perpetrators, the Single Judge notes that the information on this point in P-0523's statement is of a vague and hearsay nature: P-0523 stated that he knew the Islamists were from three or four different named groups, including Ansar al Sharia and Al Mourabitoun because '[TRANSLATION] everybody said so'.¹²² In addition, the Single Judge notes that various Prosecution witnesses discuss the key figures from Ansar Dine and AQMI in the context of the occupation of Timbuktu and their respective roles.¹²³

54. Noting his profile, the Single Judge agrees with the Prosecution¹²⁴ that disclosing this individual's identity is exceptionally risky. Weighing on the one hand the high risks posed to this individual were his identity to be disclosed to the Defence, with the general nature of the matter of particular interest to the Defence which, in addition, is not unique to this individual but on which many individuals can testify, the Single Judge considers that the balance of the relevant interests militates against disclosure. In this particular instance, the Single Judge considers that the current protective measures are proportional to the rights of the accused, and are the least intrusive possible in the circumstances.
55. For these reasons, the Single Judge considers that the protective measures previously ordered for P-0523 - the provision of an anonymous summary¹²⁵ - shall remain in place.

¹²¹ ICC-01/12-01/18-641-Conf-Exp-AnxE; ICC-01/12-01/18-641-Conf-Exp-AnxF; First Request, ICC-01/12-01/18-641-Conf-Red, paras 49, 51 and the materials cited in the footnotes therein. In relation to the disclosure to the identity of P-0538, *see* Delayed Disclosure Decision, ICC-01/12-01/18-741-Conf-Red).

¹²² ICC-01/12-01/18-641-Conf-Exp-AnxE, [REDACTED]; *see also* ICC-01/12-01/18-641-Conf-Exp-AnxF, p. 2.

¹²³ Including P-0150, P-0004, P0099, and P-0537, *see* First Request, ICC-01/12-01/18-641-Conf-Red, para. 51 (first bullet point) and the materials cited in the footnotes therein.

¹²⁴ First Request, ICC-01/12-01/18-641-Conf-Red, para. 48.

¹²⁵ 22 July 2016 *Al Mahdi* Decision, ICC-01/12-01/15-140.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the First and Second Requests, in part;

PLACES on the record the reasons for granting the interim request in relation to P-0121 referred to in paragraph 4;

MAINTAINS the protective measures previously ordered in relation to P-0357 and P-0523;

VARIES the protective measures previously ordered in relation to P-0107 and **ORDERS** the Prosecution to disclose the identity of P-0107, within one day of notification of this decision, and all related disclosable material, applying only standard redactions, within two weeks of notification of this decision;

REJECTS all other requests, including the Prosecution's Request in relation to P-0128;

VARIES the protective measures previously ordered in relation to P-0121 and **ORDERS** the Prosecution to disclose at the earliest opportunity, and at the latest by the deadline for full disclosure, this individual's identity and all related disclosable material, applying only standard redactions;

VARIES the protective measures previously ordered in relation to P-0128 and **ORDERS** the Prosecution to disclose at the earliest opportunity, and at the latest by the deadline for full disclosure, this individual's identity and all related disclosable material, applying only standard redactions. The disclosure of P-0128's identity and identifying information shall be restricted to the Defence team only (including resource persons) and shall not include to Mr Al Hassan at this time; and

VARIES the protective measures previously ordered in relation to P-0123 and **ORDERS** the Prosecution to disclose P-0123's statement to the Defence, with identifying information redacted, and applying otherwise only standard redactions, in accordance with paragraph 39, within two weeks of notification of this decision.

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

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

Judge Kimberly Prost, Single Judge

Dated this Friday, 17 April 2020

At The Hague, The Netherlands