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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

PUBLIC REDACTED VERSION

**Fourth Decision on the Measures Restricting Mr Al Hassan's
Non-Privileged Contact**

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

Ms Melinda Taylor

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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

Mr Paddy Craig

**Victims Participation and Reparations
Section**

Other

Judge **Péter Kovács**, 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”),¹ decides the following.

I. Procedural history

1. On 27 March 2018, the Chamber issued a warrant of arrest for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan” and “Warrant of Arrest”) pursuant to article 58 of the Rome Statute (“Statute”).²
2. On 29 March 2018, in anticipation of the potential surrender of Mr Al Hassan to the Court, the Prosecutor filed an application requesting that the Single Judge order the implementation of certain measures to restrict contact between Mr Al Hassan and other persons (“Prosecution Application of 29 March 2018”) upon his arrival at the Court’s Detention Centre in The Hague (“Detention Centre”).³
3. On the same day, the Single Judge granted the Prosecution Application of 29 March 2018 and stated that a written decision would be issued as soon as possible.⁴ [REDACTED] (“Decision of 29 March 2018”).⁵
4. On 31 March 2018, Mr Al Hassan was surrendered to the Court and is currently in custody at the Detention Centre.⁶

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

² “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018, ICC-01/12-01/18-2-tENG.

³ “Prosecution’s urgent application under Article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court”, 29 March 2018, ICC-01/12-01/18-9-Secret-Exp. A confidential version, *ex parte*, Prosecutor and Defence team for Mr Al Hassan, was filed on 31 March 2018.

⁴ Email from Pre-Trial Chamber I on 29 March 2018 at 17.38.

⁵ [REDACTED].

⁶ ICC-01/12-01/18-11-US-Exp.

5. On 4 April 2018, Mr Al Hassan appeared before the Single Judge at the initial appearance hearing, in the presence of his counsel and the Prosecutor.⁷

6. On 5 April 2018, the Single Judge handed down a written decision instructing the Registrar to implement measures – until further notice – restricting Mr Al Hassan’s non-privileged contact while he is in custody at the Detention Centre (“Decision of 5 April 2018”).⁸ Those measures include, *inter alia*: (i) restricting Mr Al Hassan’s phone calls and visitors to a limited list of individuals whose identities and contact details have been duly checked in advance and with whom any discussion of the instant case is prohibited (this restriction does not apply to the persons specified in regulations 97 and 98 of the Regulations of the Court and regulation 174(1) of the Regulations of the Registry); (ii) [REDACTED]; (iii) prohibiting any telephone calls or written correspondence in obscure or coded language; (iv) implementing the active monitoring of telephone calls, all incoming and outgoing written correspondence, and visits (with the exception of the persons identified in regulations 97 and 98 of the Regulations of the Court and regulation 174(1) of the Regulations of the Registry); (v) restricting the language of communication to French and Arabic; and (vi) limiting the duration of non-privileged telephone calls to two hours per week, provided that this does not interfere with the management of the Detention Centre (“Measures Restricting Non-Privileged Contact of 5 April 2018”).⁹

7. On 30 April 2018, granting the request of the Defence for Mr Al Hassan (“Defence”),¹⁰ the Single Judge authorized communication in the Tamasheq language between Mr Al Hassan and his contacts within the framework of the Measures Restricting Non-Privileged Contact of 5 April 2018.¹¹

⁷ Transcript of initial appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-CONF-FRA ET.

⁸ “Decision on the Prosecution’s Application under Regulation 101 of the Regulations of the Court”, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG.

⁹ Decision of 5 April 2018, paras. 17-21.

¹⁰ “Corrected version of ‘Request to allow Mr Al Hassan to communicate in the Tamasheq language’”, dated 20 April 2018 and registered on 24 April 2018, ICC-01/12-01/18-20-Conf-Corr, and its two annexes.

¹¹ “Decision on the ‘Request to allow Mr Al Hassan to communicate in the Tamasheq language’”, 30 April 2018, ICC-01/12-01/18-24-Conf-Exp-tENG.

8. [REDACTED].¹²

9. On 22 May 2018, the Single Judge issued his decision on the Warrant of Arrest.¹³

10. On the same day, the Registrar filed a report on the implementation of the Measures Restricting Non-Privileged Contact of 5 April 2018.¹⁴

11. On 20 July 2018, the Single Judge decided to postpone the date of the confirmation hearing to 6 May 2019. It had initially been scheduled for 24 September 2018.¹⁵

12. That day, the Single Judge decided to maintain the Measures Restricting Mr Al Hassan's Non-Privileged Contact of 5 April 2018 throughout the pre-trial phase of the proceedings ("Second Decision on the Measures Restricting Non-Privileged Contact" or "Decision of 20 July 2018").¹⁶ More specifically, the Single Judge decided to: (i) maintain active monitoring of non-privileged telephone calls as set forth in his Decision of 5 April 2018; (ii) maintain active monitoring of incoming and outgoing mail and packages as ordered in his Decision of 5 April 2018; (iii) maintain active monitoring of non-privileged visits as ordered in his Decision of 5 April 2018; and (iv) [REDACTED].¹⁷ In addition, the Single Judge decided not to allow Mr Al Hassan to receive private visits during the period of execution of this decision.¹⁸ The Single Judge also decided to maintain the above-mentioned measures throughout the pre-trial proceedings and directed the Registrar to make all the necessary arrangements for the regime set out in this decision to be implemented for the duration

¹² [REDACTED].

¹³ "Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red-tENG. A public redacted version was issued that day.

¹⁴ "Registry Report on the Implementation of the Monitoring Measures Ordered by the Single Judge", dated 21 May 2018 and registered on 22 May 2018, ICC-01/12-01/18-34-Conf-Exp.

¹⁵ "Decision Postponing the Date of the Confirmation Hearing", 20 July 2018, ICC-01/12-01/18-94-Conf-Exp-tENG. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-94-Red-tENG.

¹⁶ "Second Decision on the Restrictions on Contact with Other Persons during the Pre-Trial Proceedings", 20 July 2018, ICC-01/12-01/18-93-Conf-Exp-tENG. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-93-Conf-Exp-Red-tENG.

¹⁷ "Second Decision on the Measures Restricting Non-Privileged Contact", p. 32.

¹⁸ "Second Decision on the Measures Restricting Non-Privileged Contact", p. 32.

of the pre-trial proceedings and to keep the Single Judge closely informed of the implementation of the restrictions and of any difficulties that he may encounter during their implementation.¹⁹ [REDACTED] (“Measures Restricting Mr Al Hassan’s Non-Privileged Contact”).²⁰

13. On 19 November 2018, the Single Judge handed down a decision following a report filed by the Registrar²¹ concerning a possible violation of the Measures Restricting Mr Al Hassan’s Non-Privileged Contact (“Decision of 19 November 2018”).²² The Single Judge noted, *inter alia*, that Mr Al Hassan had violated the instructions given in the decisions on the measures restricting his non-privileged contact. Accordingly, the Single Judge ordered him to (i) comply with the aforementioned instructions; (ii) not communicate in a language other than that understood by the interpreter; and (iii) not mention the instant case in any way whatsoever during his non-privileged contact. The Single Judge also warned Mr Al Hassan that, in the event of repeat violations of the measures in place to restrict his non-privileged contact, he could be subject to disciplinary action further restricting his contact with other persons.²³

14. On 22 November 2018, in response to the Defence request of 22 October 2018 (“Defence Request of 22 November 2018”)²⁴ and having considered the observations of the Registry of 2 November 2018 (“Registry Observations of 2 November 2018”),²⁵ the

¹⁹ “Second Decision on the Measures Restricting Non-Privileged Contact”, pp. 32-33.

²⁰ “Third Decision on the Measures to Restrict Contact throughout the Pre-trial Phase of the Proceedings”, 20 July 2018, ICC-01/12-01/18-95-Conf-Exp-tENG, p. 14. A confidential redacted version, for the Defence, was filed that day, ICC-01/12-01/18-95-Conf-Exp-Red-tENG.

²¹ “Registry Report on an incident that occurred during the active monitoring of Mr Al Hassan’s telephone communications”, 25 October 2018, ICC-01/12-01/18-162-Conf-Exp, with three confidential annexes, *ex parte*, Defence and Registry. See also “Defence observations to the Registry report on an incident that occurred during the active monitoring of Mr Al Hassan’s telephone communications”, 5 November 2018, ICC-01/12-01/18-172-Conf-Exp.

²² “*Décision suite au dépôt par le Greffier d’un rapport concernant un incident survenu lors de la surveillance active des communications téléphoniques de M. Al Hassan*”, 19 November 2018, ICC-01/12-01/18-186-Conf-Exp.

²³ Decision of 19 November 2018, p. 14.

²⁴ “Request for the implementation of certain measures relating to Mr Al Hassan’s detention”, 22 October 2018, ICC-01/12-01/18-161-Conf-Exp.

²⁵ [REDACTED].

Single Judge issued a decision ordering the Registrar to provide the Chamber with quarterly reports on the implementation of the measures in effect and instructed him to continue his efforts to enable Mr Al Hassan to make two hours of non-privileged telephone calls per week (“Decision of 22 November 2018”).²⁶

15. On 22 February 2019, in compliance with the instructions of the Single Judge of 22 November 2018, the Registry filed its first report on the implementation of the measures restricting non-privileged contact in effect (“Registry Report of 22 February 2019”).²⁷

16. On 25 February 2019, the Single Judge postponed the confirmation hearing, stating that a new date would be fixed after 15 March 2019 (“Order of 25 February 2019”).²⁸

17. On 28 February 2019, the Defence filed a request to vary the Measures Restricting Mr Al Hassan’s Non-Privileged Contact (“Request”).²⁹

18. On 11 March 2019, the Prosecutor filed a response to the Request (“Response”)³⁰ asking for it to be rejected, but remaining open, subject to certain conditions, to Mr Al Hassan’s being granted permission to receive pre-recorded videos of his children, produced by his family members.³¹ In her Response, the Prosecutor also asked the Single Judge for access to certain documents (“Request for Access to Certain Documents”).³²

²⁶ “Decision on the Defence Request for the Implementation of Certain Measures Relating to Mr Al Hassan’s Detention”, 22 November 2018, ICC-01/12-01/18-189-Conf-Exp-tENG.

²⁷ “Registry Report on the Implementation of the Measures Restricting Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud’s Contact”, 22 February 2019, ICC-01/12-01/18-254-Conf-Exp, and an annex (ICC-01/12-01/18-254-Conf-Exp-Anx).

²⁸ “Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges”, 25 February 2019, ICC-01/12-01/18-255, para. 15.

²⁹ “Request on behalf of Mr Al Hassan to vary the conditions of his detention”, 28 February 2019, ICC-01/12-01/18-260-Conf-Exp. That day, the Defence filed a confidential redacted version, *ex parte*, Prosecutor, Defence and Victims and Witness Unit (ICC-01/12-01/18-260-Conf-Exp-Red).

³⁰ “Réponse à la requête de la Défense intitulée ‘Request on behalf of Mr Al Hassan to vary the conditions of his detention’”, 11 March 2019, ICC-01/12-01/18-271-Conf-Exp with confidential Annex A, *ex parte*, Prosecutor and Victims and Witnesses Section.

³¹ Response, paras. 1, 3, 62-63.

³² Response, paras. 61, 64.

19. On 14 March 2019, the Defence requested leave to reply to the Prosecutor's Response ("Request for Leave to Reply to the Response").³³
20. On 19 March 2019, the Registry filed a report on a potential violation of the measures restricting non-privileged contact in effect ("Registry Report of 19 March 2019").³⁴
21. On 26 March 2019, the Registry filed a second report on a further potential violation of the measures restricting non-privileged contact in effect ("Registry Report of 26 March 2019").³⁵
22. On 1 April 2019, the Defence filed its observations on the Registry Report of 19 March 2019 and the Registry Report of 26 March 2019.³⁶
23. On 12 April 2019, the Registry filed an additional report on the two incidents that occurred during the active monitoring of Mr Al Hassan's telephone non-privileged conversations ("Registry Report of 12 April 2019").³⁷
24. On 18 April 2019, the Single Judge issued a decision instructing the Prosecutor to file the document containing the charges on Wednesday, 8 May 2019 at the latest and setting a new date for the confirmation hearing for Monday, 8 July 2019 ("Decision of 18 April 2019").³⁸

³³ "Defence Request for Leave to reply to the '*Réponse à la requête de la Défense intitulée "Request on behalf of Mr Al Hassan to vary the conditions of his detention"*' ICC-01/12-01/18-271-Conf-Exp-Red, and for the convening of a Status Conference", 14 March 2019, ICC-01/12-01/18-275-Conf-Exp.

³⁴ "Registry Report on an incident that occurred during the active monitoring of Mr Al Hassan's telephone conversation", 19 March 2019, ICC-01/12-01/18-286-Conf-Exp, with two confidential annexes, *ex parte*, Defence and Registry.

³⁵ "Registry Report on a Second Incident Occurred during the Active Monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud's Telephone Conversation", ICC-01/12-01/18-293-Conf-Exp, with two confidential annexes, *ex parte*, Registry and Defence.

³⁶ "Defence observations to the Registry Reports ICC-01/12-01/18-286 and ICC-01/12-01/18-293", ICC-01/12-01/18-301-Conf-Exp.

³⁷ "Registry's additional Report on the two incidents that occurred during the active monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud's telephone conversation", ICC-01/12-01/18-307-Conf-Exp. A confidential redacted version was filed on 3 May 2019.

³⁸ "Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing", 18 April 2019, ICC-01/12-01/18-313-tENG, paras. 18-20.

25. From 19 July 2018 to 1 May 2019, the Chamber granted the Prosecutor's requests not to disclose to the Defence the identities of Witnesses MLI-OTP-P-0431,³⁹ MLI-OTP-P-0113,⁴⁰ MLI-OTP-P-0160,⁴¹ 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-0594,⁴² MLI-OTP-P-0553 and MLI-OTP-P-0574,⁴³ MLI-OTP-P-0114 and MLI-OTP-P-0147,⁴⁴ MLI-OTP-P-0608,⁴⁵

³⁹ "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, accessible to the Defence, ICC-01/12-01/18-88-Conf-Exp-Red-tENG and a public redacted version, ICC-01/12-01/18-88-Red2-tENG, 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*, Prosecution and 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").

⁴⁰ "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 also 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.

⁴¹ "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.

⁴² "Decision on the Prosecution Requests for Authorization to Withhold the Identities of Witnesses P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 and P-0594", 6 November 2018, ICC-01/12-01/18-174-Conf-Exp-tENG. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-174-Conf-Exp-Red-tENG. A corrigendum to the confidential *ex parte* version was filed on 9 November 2018, ICC-01/12-01/18-174-Conf-Exp-Corr-tENG.

⁴³ "Decision on the Prosecutor's Request for Authorization to Withhold the identities of Witnesses P-0553 and P-0574", ICC-01/12-01/18-184-Conf-Exp-tENG. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-184-Conf-Exp-Red-tENG.

⁴⁴ "Decision on the Prosecutor's Motions for Authorization to Withhold the Identities of Witnesses MLI-OTP-P-0114 and MLI-OTP-P-0147", 4 December 2018, ICC-01/12-01/18-198-Conf-Exp-tENG. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-198-Conf-Exp-Red-tENG.

⁴⁵ "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0608, sur la preuve duquel le Procureur entend se fonder à l'audience", 7 December 2018, ICC-01/12-01/18-202-Conf-Exp. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-202-Conf-Exp-Red.

MLI-OTP-P-0146,⁴⁶ MLI-OTP-P-0619 and MLI-OTP-P-0569,⁴⁷ MLI-OTP-P-0570,⁴⁸ MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 and MLI-OTP-P-0537,⁴⁹ MLI-OTP-P-0626 and MLI-OTP-P-0654⁵⁰ and MLI-OTP-P-0520, MLI-OTP-P-0595, MLI-OTP-P-0538, MLI-OTP-P-0542 and MLI-OTP-P-0603.⁵¹

II. Analysis

A. Request

1. Submissions of the parties

26. The Defence requests that Mr Al Hassan's non-privileged telephone calls no longer be actively monitored, and that henceforth these calls be monitored passively;⁵² that Mr Al Hassan's non-privileged telephone calls no longer be restricted to a total of two hours per week;⁵³ that the prohibition on private visits be lifted;⁵⁴ and that it be

⁴⁶ "Décision relative à la requête du Procureur aux fins d'autorisation du maintien de la non-communication de l'identité du témoin MLI-OTP-P-0146, sur la preuve duquel le Procureur n'entend pas se fonder à l'audience", 17 January 2019, ICC-01/12-01/18-218-Conf-Exp. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-218-Conf-Exp-Red.

⁴⁷ "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0619 et MLI-OTP-P-0569, et autres mesures de protection relatives", 17 January 2019, ICC-01/12-01/18-219-Conf-Exp. A confidential redacted version, accessible to the Defence, was filed that day, ICC-01/12-01/18-219-Conf-Exp-Red. A corrigendum to the confidential *ex parte* version, ICC-01/12-01/18-219-Conf-Exp-Corr, and to the confidential redacted version, ICC-01/12-01/18-219-Conf-Exp-Red-Corr, were each filed on 21 January 2019.

⁴⁸ "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0570", 20 February 2019, ICC-01/12-01/18-251-Secret-Exp. That day, the Chamber submitted a redacted secret version of decision ICC-01/12-01/18-251-Secret-Exp-Red into the case record, accessible to the Defence.

⁴⁹ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 et MLI-OTP-P-0537", ICC-01/12-01/18-314-Secret-Exp. A redacted confidential version, accessible to the Defence, was filed that day, ICC-01/12-01/18-314-Secret-Exp-Red.

⁵⁰ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0626 et MLI-OTP-P-0654", ICC-01/12-01/18-315-Secret-Exp. A redacted confidential version, accessible to the Defence, was filed that day, ICC-01/12-01/18-315-Secret-Exp-Red.

⁵¹ "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins MLI-OTP-P-0520, MLI-OTP-P-0595, MLI-OTP-P-0538, MLI-OTP-P-0542 et MLI-OTP-P-0603", 1 May 2019, ICC-01/12-01/18-322-Conf-Exp, and one annex. A redacted confidential version was filed that day.

⁵² Request, paras. 41-42, 45.

⁵³ Request, paras. 41, 45.

⁵⁴ Request, paras. 43, 45.

allowed to show Mr Al Hassan pre-recorded videos of his children filmed by members of his family.⁵⁵

27. In support of its Request, the Defence argues that the circumstances relied upon to justify the Measures Restricting Mr Al Hassan's Non-Privileged Contact have changed and that, consequently, the Single Judge must reconsider the appropriateness of these measures.⁵⁶

28. The Defence emphasizes that the monitoring of Mr Al Hassan while in detention will be further extended, owing to the new postponement of the date for the confirmation of charges hearing.⁵⁷ In this connection, the Defence maintains that Mr Al Hassan should not have to forfeit his rights to privacy and family life because of the multiple delays over the course of the proceedings, attributable to the Prosecutor because of poor time management.⁵⁸ According to the Defence, responsibility for the postponements of the confirmation of charges hearing lies with the Prosecutor. The Defence is of the view that these postponements constitute an inexcusable delay within the meaning of article 60(4) of the Statute, which provides that the suspect shall be released in such a situation. However, the Defence maintains that given the circumstances here, ending the active monitoring is the appropriate redress.⁵⁹

29. Furthermore, the Defence maintains that active monitoring is by its very nature a temporary measure, and that it must be strictly necessary and proportionate to the circumstances of this case.⁶⁰ According to the Defence, the Registry Report of 22 February 2019 reveals that Mr Al Hassan has shown no sign of attempting to hinder the Prosecutor's investigation or to harm the witnesses in this case; nor has he shown any desire to do so.⁶¹ The Single Judge has consistently authorized

⁵⁵ Request, paras. 44-45.

⁵⁶ Request, paras. 1, 25.

⁵⁷ Request, para. 26.

⁵⁸ Request, para. 27.

⁵⁹ Request, para. 28.

⁶⁰ Request, paras. 33, 39.

⁶¹ Request, para. 29.

non-disclosure of the identities of these witnesses to Mr Al Hassan,⁶² even though the active monitoring and the second postponement of the confirmation of charges hearing *sine die* have been detrimental to his mental health.⁶³

30. The Defence takes the view that, when assessing the security risks, the Single Judge must bear in mind that Mr Al Hassan has fully complied with his conditions of detention.⁶⁴ According to the Defence, this militates in favour of an end to active monitoring.⁶⁵

31. Finally, the Defence states that there are no reasonable grounds to believe that ending the active monitoring would lead Mr Al Hassan to abscond, cause prejudice to the proceedings under way, affect the outcome of the proceedings or violate a non-disclosure requirement.⁶⁶ The Defence concludes that Mr Al Hassan does not represent a risk to anyone, be it a victim or a witness in this case, in particular since their identities have not been disclosed to him.⁶⁷ Furthermore, the Defence argues that for a number of years now, Mr Al Hassan has been completely removed from the objectives and interests of the armed groups and is beyond their reach.⁶⁸

32. For these reasons, the Defence argues that the passive monitoring of telephone calls, as provided for in regulation 174 of the Regulations of the Registry, is sufficient under the circumstances. The Defence maintains that additional conditions, such as those described in this regulation, could be imposed if the Single Judge deems them to be necessary.⁶⁹

33. Observing that Mr Al Hassan has been separated from his family for two years, the Defence maintains that there is no justification for prohibiting private visits, since a search could be conducted before and after a visit to reduce all possible risks. The

⁶² Request, para. 30.

⁶³ Request, paras. 31-32.

⁶⁴ Request, para. 34.

⁶⁵ Request, para. 34.

⁶⁶ Request, paras. 35-56.

⁶⁷ Request, paras. 35-36.

⁶⁸ Request, paras. 37-38.

⁶⁹ Request, paras. 41-42.

Defence further maintains that, in view of the logistical and financial constraints, the frequency of private visits and visits from family members will be reduced to the strict minimum.⁷⁰

34. Finally, [REDACTED]. The Defence maintains that it would be both reasonable and entirely feasible to show the suspect pre-recorded videos of his children. [REDACTED]. The Defence states that if Mr Al Hassan could watch the videos of his children, this would lift his spirits considerably. The Defence adds that measures could be implemented to avoid any inappropriate information from being revealed.⁷¹

35. In her Response, the Prosecutor requests that the Single Judge essentially reject the Request and maintain the Measures Restricting Mr Al Hassan's Non-Privileged Contact throughout the entire pre-trial phase of the proceedings.⁷² In the Prosecutor's view, these measures are still proportionate to the aim pursued, which is to ensure the safety of witnesses, preserve evidence and ensure the integrity of the proceedings.⁷³ However, the Prosecutor does not object to Mr Al Hassan's viewing the pre-recorded videos of his children, as long as the Prosecutor's conditions are met; [REDACTED].⁷⁴

36. The Prosecutor maintains that the circumstances justifying the measures restricting Mr Al Hassan's non-privileged contact stem from the security conditions in Mali.⁷⁵ Moreover, she maintains that the Defence has not demonstrated any change whatsoever in these circumstances.⁷⁶ On the contrary, the Prosecutor states that the security situation in Mali remains both dangerous and volatile, owing to the armed groups still active in the region, in particular in and around Timbuktu.⁷⁷ In this regard, the Prosecutor has reminded the Chamber that in previous filings, the Victims and Witnesses Section [REDACTED].⁷⁸ Consequently, according to the Prosecutor, the

⁷⁰ Request, para. 43.

⁷¹ Request, para. 44.

⁷² Response, paras. 1-2, 46, 62.

⁷³ Response, paras. 46-48.

⁷⁴ Response, paras. 3, 26, 63.

⁷⁵ Response, para. 29.

⁷⁶ Response, paras. 24, 46.

⁷⁷ Response, paras. 29, 31-35.

⁷⁸ Response, para. [REDACTED].

risks to potential witnesses or victims that existed when the Single Judge ordered these restrictive measures still exist.⁷⁹

37. As for the Defence's argument that such measures must be strictly justified in relation to the person in question,⁸⁰ the Prosecutor submits that Mr Al Hassan has been linked to armed terrorist groups active in Mali, and that he allegedly conducted operations with them up until the time of his arrest, in particular, operations targeting the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the Malian Armed Forces.⁸¹ [REDACTED].⁸²

38. According to the Prosecutor, the witnesses have not been affected up until now, which demonstrates the efficacy of the measures taken and the ongoing need for them, in particular since the names of some witnesses have already been disclosed to Mr Al Hassan.⁸³

39. In addition, the Prosecutor argues that maintaining the anonymity of some witnesses does not eliminate the risk for those people whose names have been disclosed;⁸⁴ that the suspect himself could try to determine the names of witnesses that have not been disclosed;⁸⁵ [REDACTED] that some motions for non-disclosure of the identities of witnesses to the Defence are still pending;⁸⁶ and argues that any interference with even just one witness could have a devastating effect on the cooperation of all the others.⁸⁷

40. Finally, the Prosecutor states that the possible postponement of the confirmation of charges hearing is due to the large volume of statements that she must process, and that she will not delay the confirmation of charges hearing excessively.⁸⁸

⁷⁹ Response, paras. 24, 36.

⁸⁰ Response, para. 38.

⁸¹ Response, para. 39.

⁸² Response, para. [REDACTED].

⁸³ Response, paras. 42-43.

⁸⁴ Response, paras. 50, 52.

⁸⁵ Response, para. 51.

⁸⁶ Response, para. 53.

⁸⁷ Response, para. 53.

⁸⁸ Response, paras. 58-59.

2. Applicable law and procedure

41. The Single Judge refers to articles 21(1)(a), 21(3), 57(3)(c) and 68 of the Statute, regulations 91, 92, and 99 to 101 of the Regulations of the Court, and regulations 174-175 of the Regulations of the Registry.

42. The Single Judge also refers to his Decision of 20 July 2018, which referenced the applicable law and previous rulings on this matter.⁸⁹

3. Conclusion of the Single Judge

43. As a preliminary matter, the Single Judge notes that the Defence requests leave to file a reply to the Response. The Single Judge considers that the arguments and submissions made in the Request and the Response have exhausted the arguments relating to the issues that he must deal with in this decision, and thus he does not think it would be useful to continue the exchange of views between the two parties. Consequently, the Single Judge rejects the Request for Leave to File a Reply to the Response.

44. As for the merits of the Request, the Single Judge notes that, according to the Defence, the circumstances justifying the restrictive measures have changed, and consequently the Defence is requesting that these measures be varied. The Single Judge recalls that it was against this backdrop that he stated, in his Decision of 20 July 2018, that if the circumstances were to change, he would re-examine the appropriateness of the measures restricting Mr Al Hassan's non-privileged contact.⁹⁰

45. For the following reasons, the Single Judge considers that the circumstances justifying the restrictive measures have not changed, and that they are still justified and proportionate to the legitimate purpose sought.

46. In relation to the Defence's argument that Mr Al Hassan has complied with the Chamber's instructions, the Single Judge recalls that the Registry reported one breach

⁸⁹ Decision of 20 July 2018, paras. 48-63.

⁹⁰ Decision of 20 July 2018, para. 87.

of the Measures Restricting Mr Al Hassan's Non-Privileged Contact, although the Single Judge concluded that nothing proved that this error in judgement had been made in bad faith.⁹¹ The Single Judge also notes that the Registry recently reported two more possible violations of the measures restricting non-privileged contact in effect,⁹² but they will be dealt with in a separate decision.

47. In any event, the Single Judge considers that the fact that no violence against witnesses or intimidation of witnesses has been reported does not mean that the risk for the witnesses has been reduced to zero or that such cases of violence could not occur in the future if information about the identities of the witnesses were to be revealed.

48. The Single Judge further recalls that factors other than Mr Al Hassan's behaviour during detention are useful in his review of possible risks to the witnesses and whether restrictions should be placed on the suspect's non-privileged contact in this context.⁹³

49. In this regard, the Single Judge notes the Prosecutor's new submissions that armed groups such as the *Groupe de soutien à l'islam et aux musulmans* [Group for the Support of Islam and Muslims], an armed group said to be led by Iyadh Ag Ghaly and whose orders Mr Al Hassan allegedly followed during the events that occurred in Timbuktu in 2012-2013,⁹⁴ are still said to be extremely active in the Timbuktu region,⁹⁵ as evidenced by attacks against MINUSMA.⁹⁶ The Single Judge also notes that the Prosecutor mentions an attack in February 2019 upon the Koulikoro camp, where the

⁹¹ Decision of 19 November 2018, p. 14.

⁹² See [REDACTED], [REDACTED] and Registry Report of 12 April 2019.

⁹³ Decision of 20 July 2018, paras. 57-63.

⁹⁴ The Single Judge has already observed previously that there were reasonable grounds to believe that Mr Al Hassan may be linked to armed groups led by Iyadh Ag Ghaly (for example, see the Decision of 22 July 2018, para. 65).

⁹⁵ Response, para. 32, which makes reference to the Secretary General's report on the situation in Mali, United Nations Security Council, 28 December 2018, S/2018/1174 ("Report of the Secretary-General on the situation in Mali"), paras. 23-29, 36, and para. 33, which makes reference to a press article found online.

⁹⁶ Response, para. 32, which makes reference to the report of the Secretary General on the situation in Mali, paras. 23-29, 36.

European Union Training Mission is deployed.⁹⁷ The Single Judge notes that the Prosecutor reiterates that Mr Al Hassan himself is said to have taken part in similar operations – [REDACTED] – before his arrest in April 2017,⁹⁸ [REDACTED].⁹⁹

50. The Single Judge also takes into account the Prosecutor’s claim that the Group for the Support of Islam and Muslims is trying to develop local political coalitions with a number of tribes, particularly around Timbuktu.¹⁰⁰

51. The Single Judge also notes that [REDACTED] the Prosecutor [REDACTED].¹⁰¹ The Single Judge considers that this information indicates that there is a risk to people who are perceived to be cooperating with the Malian authorities.

52. In addition to the aforementioned facts, the Single Judge recalls that, given the extremely violent modus operandi of the armed groups that Mr Al Hassan is allegedly associated with, the Single Judge decided that, as a preventive measure, it was advisable to impose measures restricting Mr Al Hassan’s non-privileged contact, for if such measures were adopted after information about the identities of witnesses is disclosed, it would be too late for the persons in question.¹⁰²

53. The Single Judge also recalls [REDACTED].¹⁰³ The Single Judge further recalls that [REDACTED].¹⁰⁴

54. Consequently, in view of the Prosecutor’s submissions and the supporting evidence, and bearing in mind the observations by the Victims and Witnesses Section¹⁰⁵ as well as his own earlier findings,¹⁰⁶ the Single Judge still considers that he has reasonable grounds to believe that possible contact between Mr Al Hassan and people affiliated with the Ansar Dine armed groups could prejudice or otherwise affect

⁹⁷ Response, para. 35, which makes reference to a press article found online.

⁹⁸ Response, para. 39, which makes reference to [REDACTED].

⁹⁹ Response, [REDACTED].

¹⁰⁰ Response, para. 33, which makes reference to a press article found online.

¹⁰¹ Response, [REDACTED].

¹⁰² Decision of 20 July 2018, para. 70.

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ See, in particular, [REDACTED].

¹⁰⁶ Decision of 20 July 2018, paras. 65-69.

the outcome of the proceedings against Mr Al Hassan and that such contact could be harmful to potential witnesses or could pose a threat to the protection of potential witnesses, within the meaning of regulation 101(2) of the Regulations of the Court.

55. Furthermore, the Single Judge rejects the Defence's argument that ending active monitoring is the appropriate redress under article 60(4) of the Statute. In connection with the new postponement of the confirmation of charges hearing to 8 July 2019, the Single Judge recalls that he has observed that the additional time requested by the Prosecutor did not appear to be unreasonable given the special circumstances of the proceedings under way. He further recalls that he granted the additional time so that the Prosecutor could respond to the procedural requirements he established for the protection of witnesses and victims.¹⁰⁷

56. Although mindful of the fact that the postponement extends the duration of Mr Al Hassan's detention, the Judge considers that this issue must be examined in relation to articles 60(2) and (4) of the Statute, not in relation to regulation 101(2) of the Regulations of the Court, given that release of a suspect or continued detention are separate issues from restricting non-privileged contact.

57. In this instance, at this stage of the proceedings it is imperative to continue to prevent any attack upon potential witnesses. In the light of the foregoing, the Single Judge considers that as it stands, he is not in a position to lift all the restrictions upon Mr Al Hassan's non-privileged contact. By making this determination, the Single Judge considers that he has struck the correct balance between the rights of a detained person to preserve his family life and have contact with the outside world, and the absolute necessity to protect witnesses, preserve evidence and ensure the integrity of the proceedings. The Single Judge is of the view that the measures imposed are the least restrictive possible and are consistent with international case law relating to the right of detained persons to maintain minimum family ties.

¹⁰⁷ Order of 25 February, para. 16.

58. In particular, the Single Judge deems it necessary to continue the active monitoring of Mr Al Hassan's non-privileged telephone calls and visits throughout the pre-trial proceedings.

59. The Single Judge also considers that restricting Mr Al Hassan's non-privileged telephone calls to two hours per week is reasonable and proportionate. This restriction takes into account, on the one hand, the right of Mr Al Hassan to preserve his family life and to have contact with the outside world, and on the other hand, the logistical constraints related to active monitoring of these telephone calls. Consequently, the Single Judge is of the view that this restriction should continue.

60. However, the Single Judge takes note of the Defence's concerns related to the impact of these measures on Mr Al Hassan's mental health and spirits. He reminds the Defence that there is no prohibition on Mr Hassan's receiving visits from his family, but that the visits are subject to active monitoring [REDACTED].¹⁰⁸ The Single Judge invites the Registry [REDACTED].

61. In relation to private visits within the meaning of regulation 185 of the Regulations of the Registry, given that such visits are by their very nature [REDACTED], and considering the high risk faced by potential witnesses in the case, and, in this context, in view of the need to ensure that no identifying information is passed on, the Single Judge decides to continue the prohibition on Mr Al Hassan's receiving private visits.

62. On the other hand, the Single Judge does not object to the possibility of Mr Al Hassan's receiving pre-recorded videos from his family members, including his children and [REDACTED], as long as such videos comply with the measures in place restricting non-privileged contact. To that end, [REDACTED].

63. Finally, with regard to the Defence's argument that the Single Judge has granted all of the Prosecutor's motions for non-disclosure of witnesses' identities to the Defence, and that consequently, the Defence knows the identity of only a limited

¹⁰⁸ [REDACTED].

number of witnesses, the Single Judge considers that maintaining the anonymity of these witnesses¹⁰⁹ at this stage of the proceedings, in conjunction with the measures restricting non-privileged contact currently in place, taken *together*, ensure more effective protection of victims and witnesses.

B. Request for access to certain documents

64. The Prosecutor states that the Defence has made reference to the Defence Request of 22 November 2018 (ICC-01/12-01/18-161-Conf-Exp), the Registry Observations of 2 November 2018 (ICC-01/12-01/18-169-Conf-Exp) and the Decision of 22 November 2018 (ICC-01/12-01/18-189-Conf-Exp), to which the Prosecutor does not have access. Thus, the Prosecutor requests the Single Judge to grant her access to these documents and reserves the right to file an additional reply after she has received these filings.¹¹⁰

65. As the Decision of 22 November 2018 does not contain any information that would justify withholding it from the Prosecutor, the Single Judge considers that the Prosecutor should be given access to these documents. To this end, the Single Judge instructs the Defence and the Registrar to file confidential redacted versions, where necessary, of their respective filings. The Single Judge will issue a confidential redacted version of the Decision of 22 November 2018 on that basis.

¹⁰⁹ See, above, para. 25.

¹¹⁰ Response, paras. 61, 64.

FOR THESE REASONS, the Single Judge

REJECTS the Request for Leave to Reply to the Response;

REJECTS the Request, in part;

DECIDES that the active monitoring of non-privileged telephone calls and visits shall continue throughout the entire pre-trial proceedings;

DECIDES that the prohibition on private visits shall continue throughout the entire pre-trial proceedings;

AUTHORIZES Mr Al Hassan to receive pre-recorded videos of his family members, as provided for in paragraph 62 of this decision;

INSTRUCTS the Registrar to make all necessary arrangements for the measures set out in this decision to be implemented throughout the entire pre-trial proceedings; and

INSTRUCTS the Defence to file, if necessary, a confidential redacted version of the Defence Request of 22 November 2018; and the Registrar, a confidential redacted version of the Registry Observations of 2 November 2018.

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

_____[signed]_____

Judge Péter Kovács

Single Judge

Dated this 9 May 2019

At The Hague, Netherlands