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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

Public Document

**Public Redacted Version of the “Decision on the Defence Request
for the Lifting of Redactions”**

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

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**Victims Participation and Reparations
Section**

Other

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

I. Procedural history

1. On 27 March 2018, the Chamber, acting pursuant to article 58 of the Rome Statute (“Statute”), issued a warrant for the arrest of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan” and “Warrant of Arrest”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is currently in custody at its detention centre in The Hague.³
3. On 4 April 2018, the first appearance hearing was held; Mr Al Hassan appeared before the Single Judge, in the presence of his counsel and the Prosecutor.⁴
4. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on Disclosure Protocol”).⁵
5. On 22 May 2018, the Single Judge issued his decision on the Warrant of Arrest (“Decision on Warrant of Arrest”).⁶
6. On 20 July 2018, the Single Judge decided to postpone until 6 May 2019 the confirmation hearing originally scheduled for 24 September 2018.⁷

¹ “Decision Designating a Single Judge”, 28 March 2018, 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 ICC-01/12-01/18-11-US-Exp.

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

⁵ ICC-01/12-01/18-31-tENG-Corr.

⁶ “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 delivered on the same day.

⁷ “Decision Postponing the Date of the Confirmation Hearing”, 20 July 2018, ICC-01/12-01/18-94-Conf-Exp-tENG. A confidential redacted version available to the Defence was added to the record on the same day (ICC-01/12-01/18-94-Red-tENG).

7. On 14 February 2019, the Prosecutor submitted particulars regarding the disclosure of evidence and forthcoming redaction requests, along with an application for an extension of time to file the document containing the charges against Mr Al Hassan (DCC).⁸

8. On 25 February 2019, the Single Judge deferred the date of the confirmation hearing and advised that it would be rescheduled after 15 March 2019.⁹

9. On 18 April 2019, the Single Judge directed the Prosecutor to file the document containing the charges by Wednesday, 8 May 2019 and rescheduled the confirmation hearing for Monday, 8 July 2019 (“Decision of 18 April 2019”).¹⁰

10. On 8 May 2019, the Prosecutor filed the DCC against Mr Al Hassan.¹¹

11. On 11 May 2019, the Prosecutor filed an amended and corrected version of the DCC against Mr Al Hassan.¹²

12. Between 19 July 2018 and 23 May 2019, the Chamber granted the Prosecutor’s applications for leave to withhold from the Defence the identities of Witnesses MLI-OTP-P-0431,¹³ MLI-OTP-P-0113,¹⁴ MLI-OTP-P-0160,¹⁵ MLI-OTP-P-0100, MLI-OTP-P-0111, MLI-OTP-P-0130, MLI-OTP-P-0576, MLI-OTP-P-0581, MLI-OTP-

⁸ “*Éléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demande d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*”, 12 February 2019, ICC-01/12-01/18-243-Secret-Exp. The Prosecutor submitted a public redacted version on 15 February 2019 (ICC-01/12-01/18-243-Red2).

⁹ “*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.

¹⁰ “*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.

¹¹ ICC-01/12-01/18-335-Conf.

¹² ICC-01/12-01/18-335-Conf-Corr.

¹³ “*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. A confidential redacted version, *ex parte* 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 filed on the same day.

¹⁴ “*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. A confidential redacted version was filed on the same day (ICC-01/12-01/18-122-Conf-Red-tENG), and a public redacted version was filed on 27 September 2018 (ICC-01/12-01/18-122-Red2-tENG).

¹⁵ “*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. A confidential redacted version was filed on the same day (ICC-01/12-01/18-150-Conf-Red-tENG).

P-0583, MLI-OTP-P-0589, MLI-OTP-P-0592, MLI-OTP-P-0593 and MLI-OTP-P-0594,¹⁶ MLI-OTP-P-0553 and MLI-OTP-P-0574,¹⁷ MLI-OTP-P-0114 and MLI-OTP-P-0147,¹⁸ MLI-OTP-P-0608,¹⁹ MLI-OTP-P-0146,²⁰ MLI-OTP-P-0619 and MLI-OTP-P-0569,²¹ MLI-OTP-P-0570,²² MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 and MLI-OTP-P-0537,²³ MLI-OTP-P-0626 and MLI-OTP-P-0654,²⁴ MLI-OTP-

¹⁶ “*Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 et P-0594*”, 6 November 2018, ICC-01/12-01/18-174-Conf-Exp. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-174-Conf-Exp-Red-tENG). A corrected version of the confidential *ex parte* decision was filed on 9 November 2018, ICC-01/12-01/18-174-Conf-Exp-Corr-tENG.

¹⁷ “Decision on the Prosecutor’s Request for Authorization to Withhold the Identities of Witnesses P-0553 and P-0574”, 16 November 2018, ICC-01/12-01/18-184-Conf-Exp-tENG. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-184-Conf-Exp-Red-tENG).

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

¹⁹ “Decision on the Prosecutor’s Request for Authorization to Withhold the Identity of Witness MLI-OTP-P-0608, Upon Whose Evidence the Prosecutor Intends to Rely at the Hearing”, 7 December 2018, ICC-01/12-01/18-202-Conf-Exp-tENG. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-202-Conf-Exp-Red-tENG).

²⁰ “Decision on the Prosecutor’s Request for Authorization to Continue Withholding the Identity of Witness MLI-OTP-P-0146, Upon Whose Evidence the Prosecutor Does Not Intend to Rely at the Hearing”, 17 January 2019, ICC-01/12-01/18-218-Conf-Exp-tENG. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-218-Conf-Exp-Red-tENG).

²¹ “*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 available to the Defence was filed on the same day (ICC-01/12-01/18-219-Conf-Exp-Red). Corrected versions of the confidential *ex parte* decision (ICC-01/12-01/18-219-Conf-Exp-Corr) and of the confidential redacted decision (ICC-01/12-01/18-219-Conf-Exp-Red-Corr) were filed on 21 January 2019.

²² “*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. A secret redacted version available to the Defence was filed by the Chamber in the record of the case on the same day (ICC-01/12-01/18-251-Secret-Exp-Red).

²³ “*Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins MLI-OTP-P-0605, MLI-OTP-P-0004, MLI-OTP-P-0065, MLI-OTP-P-0582 et MLI-OTP-P-0537*”, 18 April 2019, ICC-01/12-01/18-314-Secret-Exp. A secret redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-314-Secret-Exp-Red).

²⁴ “*Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins MLI-OTP-P-0626 et MLI-OTP-P-0654*”, 18 April 2019, ICC-01/12-01/18-315-Secret-Exp. A secret redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-174-Secret-Exp-Red).

P-0520, MLI-OTP-P-0595, MLI-OTP-P-0538, MLI-OTP-P-0542 and MLI-OTP-P-0603,²⁵ MLI-OTP-P-0111 and MLI-OTP-P-0625,²⁶ and MLI-OTP-P-0021.²⁷

13. On 31 May 2019, the Defence filed a request for the lifting of redactions (“Defence Request”).²⁸

14. On 7 June 2019, the Prosecutor filed the DCC in Arabic.²⁹

15. On 11 June 2019, the Prosecutor filed the DCC in Arabic with the footnotes.³⁰

16. On 12 June 2019, the Prosecutor filed her response to the Defence Request (“Prosecutor’s Response”).³¹

17. On 17 June 2019, the Defence filed an application for leave to reply to the Prosecutor’s Response (“Application for Leave to Reply to the Response”).³²

18. On 4 July 2019, the Defence lodged its submissions under rule 121(9) of the Rules of Procedure and Evidence.³³

²⁵ “*Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins MLI-OTP-P-0520, MLI-OTP-P-0595, MLI OTP-P-0538, MLI-OTP-P-0542 et MLI-OTP-P-0603*”, 1 May 2019, ICC-01/12-01/18-322-Conf-Exp. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-322-Conf-Exp-Red).

²⁶ “*Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins MLI-OTP-P-0111 et MLI-OTP-P-0625*”, 21 May 2019, ICC-01/12-01/18-350-Secret-Exp. A secret redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-350-Secret-Exp-Red).

²⁷ “*Décision relative à la requête du Procureur aux fins d’autorisation de la non-communication de l’identité du témoin MLI-OTP-P-0021*”, 23 May 2019, ICC-01/12-01/18-353-Conf-Exp. A confidential redacted version available to the Defence was filed on the same day (ICC-01/12-01/18-353-Conf-Exp-Red).

²⁸ “Defence request for lifting of redactions”, ICC-01/12-01/18-361.

²⁹ ICC-01/12-01/18-366.

³⁰ ICC-01/12-01/18-370.

³¹ “*Réponse à la requête de la Défense aux fins de levée d’expurgations*”, ICC-01/12-01/18-371-Conf-Exp.

³² “Defence Request for Leave to reply to the ‘*Réponse à la requête de la Défense aux fins de levée d’expurgations*’ (ICC-01/12-01/18-371-Conf-Exp)”, ICC-01/12-01/18-377-Conf-Exp.

³³ ICC-01/12-01/18-394-Conf.

II. Analysis

A. Submissions of the parties

1. The Defence

19. In its Request, the Defence moves the Chamber to direct the Prosecutor to lift the redactions of the dates of interviews with her witnesses, irrespective of the format in which each interview was submitted for the purposes of the confirmation hearing.³⁴

20. In the Defence's view, the redactions are neither necessary nor proportionate.³⁵ Furthermore, the withholding of the interview dates is unduly prejudicial to the Defence insofar as it is thereby prevented from undertaking any analysis as to the manner in which the Prosecutor conducted her investigations.³⁶ Therefore, the Defence argues, disclosure should be made forthwith.³⁷

21. The Defence points out that the Prosecutor has either omitted or redacted the dates on which the witness interviews took place.³⁸ It goes on to say that, where the date is omitted, the Prosecutor has not provided any explanation, and, where the date is redacted, the Prosecutor has applied codes A.1 or A.8, or code F, which is not a code used in the case at bar.³⁹

22. The Defence also claims that the discrete nature of the information requested, *viz.* the dates of witness interviews, makes it impossible to ascertain an objective basis for maintaining the redactions or withholding the information sought.⁴⁰

23. Lastly, in the Defence's view, the withholding of the interview dates does not, on the criteria set out by the Appeals Chamber, fall within the ambit of the exception

³⁴ Defence Request, paras. 1, 10.

³⁵ Defence Request, para. 2.

³⁶ Defence Request, para. 2.

³⁷ Defence Request, para. 3.

³⁸ Defence Request, para. 4.

³⁹ Defence Request, para. 4.

⁴⁰ Defence Request, para. 7.

to the general rule of full disclosure.⁴¹ Specifically, the Defence submits that the dates of the interviews do not reveal the locations or identities of witnesses.⁴² The Defence goes on to say that hypothetical security concerns cannot outweigh its right to analyse the credibility and consistency of allegations made at different junctures.⁴³

2. The Prosecutor

24. In her Response, the Prosecutor objects to the Defence Request for the lifting of all redactions concerning the dates of interviews with her witnesses.⁴⁴ The Prosecutor agrees, however, to the lifting of such redactions from the statements of witnesses whose identities have been disclosed to the Defence, since this would not compromise the safety of those witnesses or the Prosecutor's investigations.⁴⁵ The Prosecutor therefore agrees to lift the redactions of the interview dates from the statements of Witnesses P-0125 and P-0151.⁴⁶

25. The Prosecutor points out, first, that the Defence is making a blanket request that does not specify the particular witnesses, statements or transcripts concerned.⁴⁷ The Prosecutor argues that in so doing the Defence does not seek the lifting of a particular redaction,⁴⁸ which runs counter to the principles governing the evidence redaction regime.⁴⁹

26. Second, the Prosecutor submits that the information that has been redacted is capable of leading to the identification of the witnesses – potentially negating the effect of redacting their identities – which represents a danger to the witnesses and their families.⁵⁰ In the Prosecutor's view, the interview dates give an indication

⁴¹ Defence Request, paras. 8-9.

⁴² Defence Request, para. 9.

⁴³ Defence Request, para. 9.

⁴⁴ Prosecutor's Response, para. 1.

⁴⁵ Prosecutor's Response, paras. 4, 18, 20.

⁴⁶ Defence Request, paras. 18, 20.

⁴⁷ Prosecutor's Response, para. 7.

⁴⁸ Prosecutor's Response, para. 7.

⁴⁹ "Decision on the Evidence Disclosure Protocol and Other Related Matters", 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 31.

⁵⁰ Prosecutor's Response, para. 9.

[REDACTED].⁵¹ The Prosecutor goes on to say that the witnesses and their families remain at risk and that the security situation in Mali at this time is particularly deleterious.⁵²

27. The Prosecutor further argues, with regard to the redactions of interview dates under code F, that the Single Judge made a finding of objectively justifiable risk, and points out that the Defence did not appeal the decisions authorizing such redactions.⁵³

28. Hence, the Prosecutor submits, there has been no change of circumstances capable of warranting variation of the measures in place.⁵⁴ Between the deleterious security situation in Mali and the protection challenges on the ground, the Prosecutor contends that measures to safeguard the anonymity, and thereby the safety, of witnesses must be taken to the fullest extent.⁵⁵ The Prosecutor adds that disclosure of the redacted information would also prejudice her investigation activities.⁵⁶

29. Lastly, the Prosecutor claims that the redactions do not prejudice the Defence.⁵⁷ Specifically, the redactions do not concern any substantive aspect of the case, and the information needed by the Defence, regarding the manner in which the Prosecutor conducts her investigations, is available.⁵⁸ Nor, in the Prosecutor's view, do the redactions preclude the Defence from analysing the credibility and consistency of the witnesses' allegations, particularly as each witness's statements and transcripts are marked with ascending ERNs and so can be put in chronological order.⁵⁹ This means that the sequence of interviews can be ascertained from the unredacted interview dates in the statements of the 17 witnesses whose identities the Defence knows.⁶⁰

⁵¹ Prosecutor's Response, para. 10.

⁵² Prosecutor's Response, para. 11.

⁵³ Prosecutor's Response, para. 12.

⁵⁴ Prosecutor's Response, paras. 2, 13.

⁵⁵ Prosecutor's Response, paras. 13-14.

⁵⁶ Prosecutor's Response, paras. 2, 15.

⁵⁷ Prosecutor's Response, para. 16.

⁵⁸ Prosecutor's Response, para. 16.

⁵⁹ Prosecutor's Response, para. 16.

⁶⁰ Prosecutor's Response, para. 16.

B. Applicable law and procedure

30. The Single Judge has regard to articles 54, 57(3)(c), 61, 67 and 68 of the Statute and rules 15, 76, 77, 81 and 121 of the Rules of Procedure and Evidence.

C. Determination of the Single Judge

31. As a threshold matter, the Single Judge notes that the Defence seeks leave to reply to the Response. The Single Judge first wishes to remind the Defence not to introduce new arguments in such an application, which must be confined to the grounds for leave to reply. As to the application itself, the Single Judge is of the view that the submissions advanced in the Defence Request and the Prosecutor's Response exhaust the arguments on the issues with which he must deal in this decision. The Single Judge therefore sees no need to pursue the discussion between the parties any further and denies the Application for Leave to Reply to the Response.

32. Turning to the merits of the Request, the Single Judge recalls that, in the Decision on Disclosure Protocol, he set up a streamlined redaction regime under which the Prosecutor may disclose evidence with redactions pursuant to rule 81(2) and (4) of the Rules without having to apply for leave.⁶¹ The Single Judge made clear that the streamlined redaction regime did not apply to the withholding of witnesses' names before the commencement of trial and that in such cases the Prosecutor was to seek the Chamber's leave.⁶² The Single Judge also determined, having regard to the previous decision of the Appeals Chamber concerning the requisite judicial oversight of redactions,⁶³ that it rested with him to keep under review the necessity of the Prosecutor's redactions of evidence and to check the extent and validity of those redactions.⁶⁴

⁶¹ Decision on Disclosure Protocol, paras. 27-32.

⁶² Decision on Disclosure Protocol, para. 33.

⁶³ Appeals Chamber, *The Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 14 May 2008, ICC-01/04-01/07-475, paras. 66, 71-73.

⁶⁴ Decision on Disclosure Protocol, para. 32.

33. Firstly, the Single Judge notes that the Prosecutor, as announced in her Response,⁶⁵ has disclosed less-redacted statements for Witnesses P-0125 and P-0151,⁶⁶ in which the redactions of the dates of their interviews with her have been lifted. That being the case, the Single Judge sees that that aspect of the Defence Request is irrelevant and so the Request now concerns only the interview dates of the witnesses whose identities the Defence does not know.

34. In this regard, the Single Judge recalls that he has ruled, in several decisions, on redactions applied by the Prosecutor in relation to witnesses whose identities it was sought not to disclose.⁶⁷ In those decisions, the Single Judge found that there was an “objectively justifiable” risk in the instances at hand, in that disclosure of the information in question *to the Defence* might endanger the witnesses. The Single Judge also determined that the measures sought were the least restrictive that could be taken to ensure the witnesses’ safety and were proportional as regards the rights of the suspect and the requirement of a fair and impartial trial. The Single Judge recalls that in so doing he read all of the documents in question and directed the Prosecutor, where necessary, to amend the summaries and proposed redactions to afford better protection of the witnesses’ identities or, conversely, greater disclosure to the Defence.

35. Furthermore, bearing in mind the individual analysis which the protection of each witness demands, the Single Judge considers the Defence Request⁶⁸ to be too broad and unfocused. The Single Judge notes that the dates of the interviews may give an indication, as the Prosecutor submits,⁶⁹ [REDACTED]. The Single Judge considers that lifting the redactions of the interview dates of all the witnesses may thus have the consequence of divulging some of their identities. The Single Judge is therefore of the view that the question whether to lift the redactions of interview

⁶⁵ Prosecutor’s Response, paras. 4, 18, 20.

⁶⁶ “*Quarantième communication du Bureau du Procureur concernant la divulgation d’éléments de preuve à charge*”, 25 June 2019, ICC-01/12-01/18-389.

⁶⁷ See, above, para. 12.

⁶⁸ Defence Request, para. 10.

⁶⁹ Prosecutor’s Response, para. 10.

dates cannot be entertained in a blanket manner, as the Defence requests,⁷⁰ but falls to be examined on a case-by-case basis according to the individual circumstances of each witness.

36. Lastly, the Single Judge finds that, as the Prosecutor submits,⁷¹ no change of circumstances warranting variation of the protective measures has occurred since the decisions referred to above were handed down, regard being had to the current security situation in Mali, which gives particular cause for concern, and [REDACTED].⁷² Accordingly, the Single Judge determines that the Prosecutor's redactions, in particular those pertaining to the dates of witness interviews, remain justified and must be maintained.

⁷⁰ Defence Request, paras. 1, 10.

⁷¹ Prosecutor's Response, para. 13.

⁷² See, in particular, the Prosecutor's "*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-Red, paras. 31-35.

FOR THESE REASONS, the Single Judge

DENIES the Application for Leave to Reply to the Response;

DETERMINES that the Defence Request is of no relevance to Witnesses P-0125 and P-0151; and

DENIES the remainder of the Defence Request.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 16 July 2019

At The Hague, Netherlands