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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Kimberly Prost

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 request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603’

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

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TRIAL CHAMBER X (the ‘Chamber’) 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 request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603’.

I. Procedural history

1. Between 19 July 2018 and 10 October 2019, the Single Judge of Pre-Trial Chamber I (‘PTC I’) granted motions from the Office of the Prosecutor (the ‘Prosecution’) to withhold from the Defence the identities of a number witnesses, including notably P-0553 and P-0574,¹ P-0570,² and P-0538, P-0542 and P-0603.³
2. On 30 December 2019, the Single Judge of this Chamber rendered a decision setting up a procedure and relevant time limits concerning the disclosure and re-disclosure of evidence (the ‘Disclosure Decision’).⁴ By way of this decision, the Single Judge notably instructed the Prosecution to file any application to seek authorisation to delay the disclosure of the identity of a witness by 10 February 2020.⁵ This deadline was later postponed to 10 March 2020.⁶
3. On 6 January 2020, the Chamber issued a decision setting the commencement date of the trial to 14 July 2020 and adopting a calendar leading up to this date.

¹ Decision on the Prosecution’s Request for Authorization to Withhold the Identities of Witnesses P-0553 and P-0574, 25 February 2019, ICC-01/12-01/18-184-Conf-Exp-tENG (confidential *ex parte*, only available to the Prosecution and the VWU; original dated 16 November 2018; confidential *ex parte* redacted version available to the Defence was filed on the same day).

² 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 (secret *ex parte*, only available to the Prosecution and the VWU with a secret *ex parte* annex, only available to the Prosecution and the VWU; a secret *ex parte* redacted version available to the Defence was filed on the same day).

³ 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 (confidential *ex parte*, only available to the Prosecution and the VWU with a confidential *ex parte* annex, only available to the Prosecution and the VWU; a confidential *ex parte* redacted version available to the Defence was filed on the same day).

⁴ Decision on the evidence disclosure protocol and other related matters, ICC-01/12-01/18-546.

⁵ Disclosure Decision, ICC-01/12-01/18-546, para. 20.

⁶ Decision on Prosecution request for a variation of time limits relating to the disclosure of evidence and scheduling a second status conference, 22 January 2020, ICC-01/12-01/18-558.

It notably set 14 April 2020 as the deadline for the Prosecution to finalise its evidence disclosure.⁷ This deadline was later postponed to 12 May 2020.⁸

4. On 10 March 2020, the Prosecution filed a request seeking the authorisation to temporarily withhold from disclosure to the Defence the identities and identifying information of six witnesses, namely P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603 (together, the ‘Witnesses’), and to continue to temporarily maintain the redactions to their associated material and non-disclosure of certain documents, until 45 days before their testimony (the ‘Prosecution Request’).⁹
5. On 20 March 2020, pursuant to instructions from the Single Judge,¹⁰ the Victims and Witnesses Unit (the ‘VWU’) submitted its observations on the Prosecution Request.¹¹
6. On 25 and 26 March 2020, pursuant to instructions from the Single Judge,¹² the Prosecution¹³ and the VWU¹⁴ submitted complementary information in relation to the Prosecution Request.
7. On 26 March 2020, the Defence filed its response, opposing the Prosecution Request (the ‘Defence Response’).¹⁵

⁷ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

⁸ Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677.

⁹ Prosecution’s request for delayed disclosure for MLI-OTP-P-0538, MLI-OTP-P-0542, MLI-OTP-P-0553, MLI-OTP-P-0570, MLI-OTP-P-574 and MLI-OTP-P-0603, ICC-01/12-01/18-646-Conf-Exp (*ex parte* Prosecution and VWU only; with *ex parte* Prosecution and VWU only Annexes A to F; a confidential redacted version of the request was filed on 13 March 2020, ICC-01/12-01/18-646-Conf-Red).

¹⁰ Email from the Chamber to the parties and participants, 13 March 2020, at 15:59.

¹¹ Email from the VWU to the Chamber, 20 March 2020, at 11:28.

¹² Email from the Chamber to the Prosecution and the VWU, 23 March 2020, at 16:12.

¹³ Email from the Prosecution to the Chamber, 25 March 2020, at 15:56.

¹⁴ Email from the VWU to the Chamber, 26 March 2020, at 15:52.

¹⁵ Defence response to ‘Confidential redacted version of the “Prosecution’s request for delayed disclosure for MLI-OTP-P-0538, MLI-OTP-P-0542, MLI-OTP-P-0553, MLI-OTP-P-0570, MLI-OTP-P-574 and MLI-OTP-P-0603”, 10 March 2020, ICC-01/12-01/18-646-Conf-Exp’, ICC-01/12-01/18-683-Conf (with confidential *ex parte* Defence and Registry only Annexes A and B).

II. Arguments of the parties and participants

8. The Prosecution seeks delayed disclosure of the identities of six witnesses until 45 days before their testimony. These are all crime-base witnesses, on whom the Prosecution intends to rely at trial.¹⁶
9. First, the Prosecution submits that rolling disclosure until 45 days before the Witnesses' testimony is justified because there is an objectively justifiable risk to the Witnesses' safety, and to the current proceedings, arising from disclosing the Witnesses' identities to the accused.¹⁷ The Prosecution argues that the disclosure of the Witnesses' identities to the Defence would expose them to a risk of physical harm or death, should the armed groups become aware of their cooperation with the Court, whether through advertent or inadvertent disclosure of information provided to the Defence.¹⁸ Any interference with the Witnesses would in turn risk prejudicing the current proceedings, if they or other witnesses decline further cooperation with the Court out of fear of suffering the same treatment.¹⁹
10. Concerning the existence of an objectively justifiable risk, the Prosecution submits that the Witnesses all fall under the category of vulnerable witnesses, are all women and, except for P-0603, are all named victims of sexual violence and gender-based crimes ('SGBC'), which places them at risk of psychological harm arising from the high risk of stigmatisation [REDACTED].²⁰ The Prosecution further submits that the Witnesses [REDACTED].²¹
11. The Prosecution explains that the situation of other witnesses [REDACTED] for whom delayed disclosure has not been requested can be distinguished from the Witnesses' situation, notably as the Witnesses [REDACTED].²²

¹⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 2. The Chamber nonetheless notes the Prosecution's submission that part of the evidence provided by P-0603 directly implicates the accused (see Prosecution Request, ICC-01/12-01/18-646-Conf-Red, paras 4, 50-51, 73).

¹⁷ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, paras 25, 54-63.

¹⁸ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, paras 3, 54, 57-61.

¹⁹ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, paras 3, 57.

²⁰ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 3, 55.

²¹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 3, 54, 63.

²² Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 23.

12. Second, the Prosecution submits that rolling disclosure of the Witnesses' identities is the least restrictive measure available in the circumstances to mitigate the identified risks, by minimising the amount of time and opportunity for interference in advance of their testimony.²³ Particularly, the Prosecution submits that, [REDACTED].²⁴
13. Third, the Prosecution submits that rolling disclosure will not unduly prejudice the accused's fair trial rights, since (i) the Defence received redacted versions of the Witnesses' statements and associated materials before the confirmation hearing and the redactions applied do not hinder the understanding of the statements in terms of the substance of the Witnesses' accounts; (ii) the evidence provided by the Witnesses is crime-base evidence and, except for P-0603, does not directly implicate the accused; and (iii) the number of witnesses for whom rolling disclosure is sought is limited.²⁵ The Prosecution further submits that it will state sufficiently in advance the order in which its witnesses will be called and the expected duration of their testimony.²⁶
14. The VWU generally [REDACTED].²⁷ Particularly, concerning [REDACTED], the VWU explains that [REDACTED] and awaits [REDACTED].²⁸ Moreover, concerning [REDACTED], the VWU explains [REDACTED].²⁹
15. The Defence opposes the Prosecution Request and argues that it is legally problematic, advancing the position that 'rolling disclosure' of witness identities after the start of trial is not permissible under the Court's legal texts or appellate case law.³⁰
16. Further, the Defence submits that the Prosecution has failed to adduce an exceptional evidential foundation for deviating from the principle of full

²³ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 4, 25, 64-66.

²⁴ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 67.

²⁵ Prosecution Request, ICC-01/12-01/18-646-Conf- Red, paras 4, 24-25, 72-75.

²⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 75.

²⁷ Email from the VWU to the Chamber, 20 March 2020, at 11:28, paras 6-8.

²⁸ Email from the VWU to the Chamber, 20 March 2020, at 11:28, paras 4, 7.

²⁹ Email from the VWU to the Chamber, 20 March 2020, at 11:28, para. 5.

³⁰ Defence Response, ICC-01/12-01/18-683-Conf, paras 2, 5-10.

disclosure prior to the commencement of the trial.³¹ Instead, it argues that the Prosecution has relied on generic security reasons to justify this exceptional measure and has not adduced any specific and concrete grounds for concluding that disclosure to the Defence, or Mr Al Hassan, would constitute a specific risk to these particular individuals.³² In addition, the Defence submits that the Prosecution has not explained how the requested measure would reduce this risk, as delayed disclosure does not change the fact that the Defence will eventually receive these identities and investigate these individuals, but only hinders the Defence from being able to investigate effectively and in a timely manner.³³

17. Finally, the Defence submits that the requested delayed disclosure would be contrary to fundamental fair trial rights.³⁴ Indeed, the fact that certain victims do not name or adduce specific evidence concerning Mr Al Hassan does not lessen the potential impact that this evidence could have as concerns his responsibility.³⁵ The Defence adds that it is essential that it has the means to identify any potential linkages between witnesses, victims, NGOs and local actors before the start of trial, and to submit any requests for disclosure or assistance to national authorities that might be necessary.³⁶ The Defence further argues that, bearing in mind the limited resources of Defence teams, it is not feasible to conduct certain investigations while trial hearings are ongoing and temporary breaks would have the adverse consequence of prolonging the overall duration of the trial.³⁷

III. Analysis

A. Applicable law

18. In rendering the present decision, the Chamber finds it appropriate to refer to Articles 43(6), 54(3)(f), 64(2), 3(c) and (6), 67, and 68(1) and (4) of the Statute,

³¹ Defence Response, ICC-01/12-01/18-683-Conf, paras 2, 11-17.

³² Defence Response, ICC-01/12-01/18-683-Conf, paras 12-13.

³³ Defence Response, ICC-01/12-01/18-683-Conf, paras 2-3, 14.

³⁴ Defence Response, ICC-01/12-01/18-683-Conf, paras 2, 18-20.

³⁵ Defence Response, ICC-01/12-01/18-683-Conf, para. 18.

³⁶ Defence Response, ICC-01/12-01/18-683-Conf, para. 19.

³⁷ Defence Response, ICC-01/12-01/18-683-Conf, para. 20.

as well as to Rules 76, 81(4), and 84 of the Rules of Procedure and Evidence (the ‘Rules’).

19. In examining the Prosecution Request, the Chamber recalls that it must balance its mandate under Article 68(1) of the Statute to take all appropriate measures to safeguard the safety, well-being and privacy of witnesses, with the rights of the accused under Article 67 of the Statute, in particular his right to have adequate time and facilities for the preparation of his defence.
20. Under Article 64(3)(c) of the Statute, the Chamber shall, ‘subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial’. The Prosecution’s duty of disclosure to the Defence is further elaborated upon in Article 67(2) of the Statute and Rules 76 and 77 of the Rules. In particular, Rule 76(1) requires the Prosecution to provide the Defence with the names of witnesses it intends to call at trial and copies of any prior statements made by those witnesses ‘sufficiently in advance to enable the adequate preparation of the defence’. As set out in Rule 76(4), this is nonetheless subject to the protection and privacy of victims and witnesses as provided for in the Statute and Rules 81 and 82 of the Rules.
21. Of particular importance is Rule 81(4) of the Rules, which provides that the Chamber must take necessary steps ‘to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of trial’.
22. The Chamber notes that delayed disclosure of witness identities is established in the jurisprudence of the Court,³⁸ which has consistently held that, in order to

³⁸ See for instance Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of ‘Decision on Prosecution application for delayed disclosure’, 2 April 2015, ICC-01/04-02/06-537-Red2 (hereinafter: ‘*Ntaganda* Decision on Delayed Disclosure’), paras 38-39, 47; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Confidential redacted version of ‘Decision on first prosecution application for delayed disclosure of witness identities’, 4 January 2013, ICC-01/09-01/11-531-Red (reclassified as public) (hereinafter: ‘*Ruto and Sang* Decision on Delayed Disclosure’), paras 48, 54, 65, 76; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on prosecution’s ‘Urgent request for

justify restrictions on disclosure, the Prosecution must show: (i) the existence of an ‘objectively justifiable’ risk to the safety of the person concerned (would disclosure of the particular information *to the Defence* endanger the person’s security?); (ii) the necessity of the measure (would the delayed disclosure of the information eliminate or reduce that risk? Is the measure the least restrictive possible?); and that (iii) the measure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.³⁹

23. The Chamber finds that the appropriate timing for disclosure of the identity of a witness depends on the circumstances of each case and can include rolling disclosure. In particular, contrary to the Defence argument that such a measure is not founded in the Court’s legal framework,⁴⁰ the Chamber is of the view that delayed disclosure of witness identities after the commencement of trial is a permissible measure of protection within the discretion of the Trial Chamber. The Defence argument focuses primarily on the reference in Rule 81(4) of the Rules to non-disclosure of identity information ‘prior to the commencement of trial’. The Chamber finds that read in its entirety Rule 81(4) provides only that *as a general rule*, non-disclosure should not be maintained beyond the trial commencement date. In particular, the use of the word ‘including’ prior to the phrase, leaves room for the Chamber to adopt other measures, including non-disclosure beyond the start of trial. This interpretation is also consistent with the hierarchical structure introduced by Article 51(5) of the Statute from which it follows that ‘a provision of the Rules cannot be interpreted in such a way as to

reconsideration pursuant to Trial Chamber V’s “Decision on the second and third Prosecution requests for delayed disclosure of witness identities”, 30 January 2013, ICC-01/09-01/11-578-Red; 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) (hereinafter: ‘*Muthaura and Kenyatta* Decision on Delayed Disclosure’), para. 37, 44-45, 51; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 31 December 2009, ICC-01/04-01/07-1179-tENG (original dated 28 May 2009) (hereinafter: ‘*Katanga and Ngudjolo* Decision on Rolling Disclosure’), para. 44.

³⁹ See *Ntaganda* Decision on Delayed Disclosure, ICC-01/04-02/06-537-Red2, para. 16; *Ruto and Sang* Decision on Delayed Disclosure, ICC-01/09-01/11-531-Red, para. 28; *Muthaura and Kenyatta* Decision on Delayed Disclosure, ICC-01/09-02/11-580-Red2, para. 31; *Katanga and Ngudjolo* Decision on Rolling Disclosure, ICC-01/04-01/07-1179-tENG, para. 34.

⁴⁰ Defence Response, ICC-01/12-01/18-683-Conf, paras 2, 5-10.

narrow the scope of an article of the Statute’.⁴¹ If rolling disclosure after the start of trial is the *only* means available to effectuate the Chamber’s obligation under Article 68 of the Statute, Rule 81(4) cannot not be read as excluding such measures.

24. As to the applicable jurisprudence, the Chamber observes that this measure has been previously authorised both by this Court⁴² and the *ad hoc* Tribunals,⁴³ when the exceptional situation of a witness justified it.
25. The Chamber considers that it has discretion to authorise a measure such as delayed disclosure after the commencement of trial when exceptional circumstances justify it, after a careful weighing of the competing interests involved. It notably refers to the findings of Trial Chamber V that ‘such an exceptional step can be taken when the risks to the security of a witness are such

⁴¹ Pre-Trial Chamber III, *Situation in the Republic of Burundi*, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 9 November 2017, ICC-01/17-9-Red (original dated 25 October 2017), para. 9; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Public Redacted Version of Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tENG-Corr, para. 47.

⁴² See *Katanga and Ngudjolo* Decision on Rolling Disclosure, ICC-01/04-01/07-1179-tENG, para. 48. The Chamber notes that, contrary to the Defence’s submissions (Defence Response, ICC-01/12-01/18-683-Conf, para. 8), which cite to paragraph 47 of the decision and a different witness, Trial Chamber II did authorise the delayed disclosure of the identity of one witness, referenced in paragraph 48, until 45 days prior to their testimony. The Chamber further observes that the other decisions referred to by the Defence in paragraph 8 of its Response did not deal with the legality of delayed disclosure after the start of trial as such.

⁴³ See, in particular, IRMCT, Appeals Chamber, *The Prosecutor v. Radovan Karadžić*, Judgement, 20 March 2019, MICT-13-55-A (hereinafter: ‘*Karadžić Appeals Judgment*’), paras 234-235; ICTY, Appeals Chamber, *The Prosecutor v. Vojislav Šešelj*, Decision on Vojislav Šešelj’s Appeal Against the Trial Chamber’s Oral Decision of 7 November 2007, 24 January 2008, IT-03-67-AR73.6 (hereinafter: ‘*Šešelj Appeals Decision*’), paras 15-16; ICTY, Trial Chamber, *The Prosecutor v. Slobodan Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, IT-02-54-T.

The Chamber particularly notes the Defence’s reliance on the *Bagosora et al.* Judgment from the ICTR Appeals Chamber, which overturned a decision authorizing delayed disclosure of witness identities until 35 days prior to the testimony of these witnesses (ICTR, Appeals Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Judgement, 14 December 2011, ICTR-98-41-A, paras 83-85, hereinafter: ‘*Bagosora et al. Appeals Judgment*’). In this regard, the Chamber refers to the *Karadžić Appeals Judgment*, in which the IRMCT Appeals Chamber found that the *Bagosora et al.* Appeals Judgment had not overruled the *Šešelj Appeals Decision* on the point of delayed disclosure after the start of trial and that ‘[w]hile the ICTR Appeals Chamber stated that a trial chamber’s discretion to order protective measures is constrained by the scope of the Rules, which provided that such disclosure be made “prior to the trial”, it did not rule out a deviation from this requirement for the purposes of a more restrictive disclosure schedule required for the protection of witnesses’ (*Karadžić Appeals Judgment*, para. 235).

that even delaying disclosure until shortly before the commencement of trial would not sufficiently mitigate them'.⁴⁴

26. While the Chamber considers that delayed disclosure after the start of trial may be authorised, it is – as noted – an exceptional measure, the use of which must be very limited and justified by the circumstances of the individual witness. In assessing whether to authorise this form of delayed disclosure, the Chamber shall therefore examine the specific circumstances of each witness, taking into account the potential for interference and intimidation once disclosure is made to the Defence. In this regard, the Chamber notes that the subjective fear of each witness may be taken into consideration, but is not determinative.⁴⁵
27. The Chamber shall also duly consider the impact that any delayed disclosure may have on the Defence's preparation for trial, particularly in view of the right of the accused to have adequate time and facilities for the preparation of his defence. In its assessment, the Chamber shall notably take into account the cumulative impact of the measure where delayed disclosure is requested for a number of witnesses, and consider the availability and appropriateness of any mitigating measures to diminish any prejudicial impact on the Defence.

B. Delayed disclosure of the identities of P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603

28. Prior to assessing the security situation of each individual witness, the Chamber refers to the information provided recently by the Registry concerning the general situation in Mali.⁴⁶ Importantly for the purposes of the present decision, this information indicates that (i) the security situation in Mali continues to deteriorate;⁴⁷ (ii) the Malian government, the UN and international forces are themselves regularly targeted by extremist groups;⁴⁸ (iii) [REDACTED];⁴⁹ (iv)

⁴⁴ *Ruto and Sang* Decision on Delayed Disclosure, ICC-01/09-01/11-531-Red, para. 29.

⁴⁵ *Ntaganda* Decision on Delayed Disclosure, ICC-01/04-02/06-537-Red2, para. 17; *Ruto and Sang* Decision on Delayed Disclosure, ICC-01/09-01/11-531-Red, para. 30; *Muthaura and Kenyatta* Decision on Delayed Disclosure, ICC-01/09-02/11-580-Red2, para. 31.

⁴⁶ First Registry Report on the Security Situation in Mali, 31 January 2020, ICC-01/12-01/18-571-Conf (with confidential Annex I and confidential, *ex parte* Annex II, only available to the Registry) (the 'Registry Report').

⁴⁷ Registry Report, ICC-01/12-01/18-571-Conf, para. 35.

⁴⁸ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

Al Qaeda aligned Jama'at Nusrat al-Islam wa al Muslimin ('JNIM') has a well-established history of taking ruthless action [REDACTED];⁵⁰ (v) risks [REDACTED] in Timbuktu city and the surrounding region,⁵¹ and the security situation in the north continues to deteriorate and become increasingly complex;⁵² (vi) the security situation in Mali has a significant impact on [REDACTED];⁵³ and (vii) the capability of JNIM [REDACTED].⁵⁴

29. Notwithstanding the Chamber's confidence that the Defence will adhere to its confidentiality obligations and best practices when carrying out its investigations, the Chamber considers that disclosure of names of Prosecution witnesses, even to a limited number of people – in this instance to the Defence – inevitably entails the risk that the information will be disseminated more widely. Having regard to the security situation outlined above, the Chamber considers that the nature and extent of the risks, were identities of such individuals to be disclosed, are such that relying on the confidentiality obligations of the Defence alone may not always be sufficient.⁵⁵
30. The Chamber has also taken into consideration the Prosecution's submission that physical harm and/or intimidation to Prosecution witnesses would in turn prejudice these proceedings, as it would be extremely detrimental to the ability and willingness of other witnesses to cooperate with the Prosecution.⁵⁶

1. Individual assessments of P-0542, P-0570 and P-0603

a. P-0542

31. The Chamber notes the Prosecution's submission that P-0542, an alleged victim of rape charged as a crime of persecution, as well as of the crimes of outrages

⁴⁹ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

⁵⁰ Registry Report, ICC-01/12-01/18-571-Conf, para. 30.

⁵¹ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

⁵² Registry Report, ICC-01/12-01/18-571-Conf, para. 23.

⁵³ Registry Report, ICC-01/12-01/18-571-Conf, para. 28.

⁵⁴ Registry Report, ICC-01/12-01/18-571-Conf, para. 39.

⁵⁵ See similarly the conclusions of the PTC I Single Judge, ICC-01/12-01/18-184-Conf-Exp-tENG, para. 34.

⁵⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, paras 3, 57.

upon personal dignity and unlawful passing of sentences, [REDACTED].⁵⁷
[REDACTED].⁵⁸ [REDACTED].⁵⁹ The Prosecution further submits that
[REDACTED].⁶⁰

32. The Chamber is satisfied that there is an objective risk to this individual's safety linked to the immediate disclosure of her identity to the Defence, taking into account (i) the personal circumstances of this individual, in particular, the fact that she [REDACTED] and [REDACTED], being [REDACTED];⁶¹ (ii) her specific profile, in particular factors which fall within the provisions of Article 68(1) of the Statute, such as the nature of the crimes allegedly committed against her, [REDACTED], [REDACTED], as well as the risk of stigmatisation that exists [REDACTED]; (iii) the specific concerns she expressed about testifying; together with (iv) the situation in Mali as set out above in paragraphs 28 to 29.

33. The Chamber notes that, [REDACTED].⁶² Accordingly, the Chamber finds it appropriate to postpone any determination on delayed disclosure of this witness's identity until such time as [REDACTED].

b. P-0570

34. The Chamber notes the Prosecution's submission that P-0570 is an alleged victim of rape charged as a crime of persecution, as well as of the crimes of outrages upon personal dignity and unlawful passing of sentences.⁶³ The Prosecution also submits that [REDACTED].⁶⁴

35. The Chamber is satisfied that there is an objective risk to this individual's safety linked to the immediate disclosure of her identity to the Defence, taking into account (i) the personal circumstances of this individual, in particular, the fact

⁵⁷ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 31.

⁵⁸ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 33.

⁵⁹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 33.

⁶⁰ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 34.

⁶¹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 33, 56.

⁶² Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 35.

⁶³ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 41.

⁶⁴ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 46.

that she [REDACTED] and [REDACTED], being [REDACTED];⁶⁵ (ii) her specific profile, in particular factors which fall within the provisions of Article 68(1) of the Statute, such as [REDACTED], the nature of the crimes allegedly committed against her, as well as the risk of stigmatisation that exists [REDACTED] – notably in light of the information before the Chamber indicating that P-0570 [REDACTED]; (iii) the specific concerns she expressed about disclosure of her identity in relation to the proceedings in this case;⁶⁶ together with (iv) the situation in Mali as set out above in paragraphs 28 to 29.

36. The Chamber notes that, [REDACTED].⁶⁷ However, noting [REDACTED],⁶⁸ the Chamber finds it appropriate to postpone any determination on delayed disclosure of this witness's identity until such time as [REDACTED].

c. P-0603

37. The Chamber notes the Prosecution's submission that P-0603 is a crime-base witness who provides some evidence regarding the role of the accused, which has been partly redacted from the version of the statement disclosed to the Defence as it was considered identifying.⁶⁹
38. The Chamber is satisfied that there is an objective risk to this individual's safety linked to the immediate disclosure of her identity to the Defence, taking into account her personal circumstances, in particular, the fact that she [REDACTED] and [REDACTED], being [REDACTED],⁷⁰ together with the situation in Mali as set out above in paragraphs 28 to 29.
39. The Chamber notes that [REDACTED].⁷¹ However, noting [REDACTED],⁷² the Chamber finds it appropriate to postpone any determination on delayed disclosure of this witness's identity until such time as [REDACTED].

⁶⁵ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 43, 55-56.

⁶⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 45.

⁶⁷ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 44.

⁶⁸ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 46.

⁶⁹ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 50.

⁷⁰ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 52, 55-56.

⁷¹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 53; Email from the VWU to the Chamber, 20 March 2020, at 11:28, paras 2-3, 6.

d. [REDACTED] with P-0542, P-0570 and P-0603

40. The Chamber notes that both the Prosecution and the VWU have expressed the view that [REDACTED].⁷³ However, the Chamber urges the Prosecution and the VWU to consider all available means that would make it possible to [REDACTED] as early as possible, including [REDACTED]. The Chamber finds this approach necessary in view of the extraordinary situation arising from the COVID-19 pandemic and the resulting restrictions on travel, noting that an exception to standard practices is required. The Chamber further directs the Prosecution to provide an update on the situation of P-0542, P-0570 and P-0603 at the earliest opportunity, and at the latest by 4 May 2020. In the event that [REDACTED], the Prosecution shall, in this update, indicate whether it reiterates its request to disclose the witnesses' identities 45 days before their testimony or whether it requires additional time in the form of delayed disclosure [REDACTED].

2. Individual assessments of P-0538, P-0553 and P-0574

a. P-0538

41. The Chamber notes the Prosecution's submission that P-0538 is an alleged victim of the crimes of other inhumane acts in the form of forced marriage, sexual slavery and rape.⁷⁴
42. The Chamber is satisfied that there is an objective risk to this individual's safety linked to the immediate disclosure of her identity to the Defence, taking into account (i) the personal circumstances of this individual, in particular, the fact that she [REDACTED], where she [REDACTED], and [REDACTED], being [REDACTED];⁷⁵ (ii) her specific profile, in particular factors which fall within the provisions of Article 68(1) of the Statute, such as the nature of the crimes allegedly committed against her, as well as the risk of stigmatisation that exists

⁷² Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 53.

⁷³ Email from the VWU to the Chamber, 20 March 2020, at 11:28, para. 4; Email from the Prosecution to the Chamber, 25 March 2020, at 15:56.

⁷⁴ Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 28.

⁷⁵ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 29, 56.

[REDACTED]; together with (iii) the situation in Mali as set out above in paragraphs 28 to 29.

43. The Chamber further notes that, [REDACTED].⁷⁶ In this regard, the Chamber takes note of [REDACTED].⁷⁷ However, the Chamber notes the Prosecution's submissions that [REDACTED]⁷⁸ and that [REDACTED],⁷⁹ as well as the VWU's submission that [REDACTED].⁸⁰
44. The Chamber is satisfied that delayed disclosure until 45 days before her testimony is a necessary measure. In so finding, the Chamber recognizes that the Defence will ultimately receive the identity of this witness and investigate such that the measure will not eliminate the risk. However, the Chamber is of the view that disclosure of her identity as late as possible during the current proceedings would contribute to reducing the overall risk by minimising her exposure in advance of her testimony.
45. Further, the Chamber finds that there are no less restrictive measures available which would respond effectively to the risk P-0538 faces, taking particularly into account [REDACTED].
46. Regarding the potential prejudice to the rights of the accused, the Chamber takes note of the Prosecution's submission that this witness does not directly implicate the accused in the commission of the crimes and that the substance of her statement is already available to the Defence, despite the redactions applied to her identifying information,⁸¹ which was also previously noted by PTC I.⁸² The Chamber is of the view that, given these particular circumstances, the Defence already has some information it can investigate with regard to the potential evidence of this witness thereby reducing any potential prejudice from the delayed disclosure requested.

⁷⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 29.

⁷⁷ Annex A to the Prosecution Request, ICC-01/12-01/18-646-Conf-Exp-AnxA, p. 3.

⁷⁸ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 62.

⁷⁹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 67.

⁸⁰ Email from the VWU to the Chamber, 20 March 2020, at 11:28, para. 6.

⁸¹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 27, 72.

⁸² ICC-01/12-01/18-322-Conf-Exp, para. 73.

47. Weighing all of the particular circumstances of this witness and any potential prejudice to the ability of the accused to prepare his defence, the Chamber is satisfied that this is an exceptional situation that justifies the delayed disclosure of the identity of P-0538 until 45 days prior to her testimony. In the view of the Chamber, this measure strikes an appropriate balance between the rights of the accused and the need to ensure the safety of this witness.

b. P-0553 and P-0574

48. Considering the similarity of the profiles of Witnesses P-0553 and P-0574, the Chamber deems it appropriate to consider them together.
49. The Chamber notes the Prosecution's submission that P-0553, an alleged victim of the crimes of other inhumane acts in the form of forced marriage, sexual slavery and rape, [REDACTED].⁸³ The Prosecution further explains that, [REDACTED].⁸⁴ The Prosecution adds that [REDACTED].⁸⁵
50. The Chamber notes the Prosecution's submission that P-0574, an alleged victim of rape charged as a crime of persecution, as well as of the crimes of torture, other inhumane acts, cruel treatment, outrages upon personal dignity and unlawful passing of sentences, [REDACTED].⁸⁶ The Prosecution adds that [REDACTED].⁸⁷
51. The Chamber is satisfied that there is an objective risk to these two individuals' safety linked to the immediate disclosure of their identities to the Defence, taking into account (i) the personal circumstances of these individuals, in particular, the fact that they both [REDACTED] and [REDACTED], being [REDACTED];⁸⁸ (ii) their specific profiles, in particular factors which fall within the provisions of Article 68(1) of the Statute, such as the nature of the alleged crimes committed against them, [REDACTED] and, for P-0553,

⁸³ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 37.

⁸⁴ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 39.

⁸⁵ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 38.

⁸⁶ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 48.

⁸⁷ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 49.

⁸⁸ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 39, 49, 55-56.

[REDACTED], as well as the risk of stigmatisation that exists [REDACTED]; together with (iii) the situation in Mali as set out above in paragraphs 28 to 29.

52. The Chamber further notes that [REDACTED].⁸⁹ In this regard, the Chamber takes notes of [REDACTED].⁹⁰ However, the Chamber notes the Prosecution's submissions that [REDACTED],⁹¹ that [REDACTED],⁹² and that, [REDACTED].⁹³
53. The Chamber is again satisfied that delayed disclosure until 45 days before their testimony is a necessary measure which will reduce risk by minimizing the exposure of these witnesses prior to their testimony.
54. Further, the Chamber also finds that with these two witnesses there are no less restrictive measures available which would respond effectively to the risk they face, taking particularly into account [REDACTED].
55. Regarding the potential prejudice to the rights of the accused, again neither P-0553 nor P-0574 directly implicate the accused in the commission of the crimes and the Defence already has the substance of their statements, despite the redactions applied to their identifying information,⁹⁴ which was also previously noted by PTC I.⁹⁵ Once more, in these circumstances, the potential prejudice to Defence preparations is reduced as there is already substantive information available to investigate.
56. Weighing the risks to P-0553 and P-0574 in their particular circumstances and the potential prejudice to Defence preparations, the Chamber is satisfied that the situation for both is exceptional such that the delayed disclosure of their identities until 45 days prior to their testimony is appropriate and would strike

⁸⁹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 39, 49; Email from the VWU to the Chamber, 26 March 2020, at 15:52.

⁹⁰ Annex C to the Prosecution Request, ICC-01/12-01/18-646-Conf-Exp-AnxC, p.3; Annex E to the Prosecution Request, ICC-01/12-01/18-646-Conf-Exp-AnxE, p.3.

⁹¹ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 62.

⁹² Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, para. 67.

⁹³ Email from the VWU to the Chamber, 26 March 2020, at 15:52.

⁹⁴ Prosecution Request, ICC-01/12-01/18-646-Conf-Exp, paras 36, 47, 72.

⁹⁵ ICC-01/12-01/18-184-Conf-Exp-tENG, para. 36.

an appropriate balance between the rights of the accused and the need to ensure the safety of these witnesses.

c. Conclusion regarding P-0538, P-0553 and P-0574

57. In view of the exceptional situations of these witnesses, where the risks linked to their specific profiles are such that even delaying disclosure until shortly before the commencement of trial would not sufficiently mitigate them, the Chamber finds it necessary to authorise delayed disclosure of the identities of P-0538, P-0553 and P-0574 until 45 days prior to their testimony.
58. The Chamber is nonetheless aware that this is an exceptional measure, which has the potential to impact Defence preparation. In this regard, and in order to ensure full disclosure to the Defence at the earliest opportunity, the Prosecution shall, to the extent possible, attempt to schedule the testimony of these three witnesses as early as possible after the start of trial. Further, in order to mitigate any prejudice to the Defence arising from the delayed disclosure authorised, the Chamber finds that, in scheduling the testimony of these witnesses, the Prosecution should consult with the Defence. In this regard, the Chamber notes the undertaking of the Prosecution that these witnesses will not be called at the same time. The Chamber also emphasises that it is prepared to consider any application from the Defence at a later stage should it become apparent that it requires additional time to complete its relevant investigations.
59. In accordance with the above, the Chamber authorises the Prosecution to temporarily continue withholding from disclosure to the Defence the identities and identifying information of P-0538, P-0553 and P-0574, and maintaining the redactions to their associated material and non-disclosure of certain documents, until 45 days before their respective testimony. In this regard, the Chamber reminds the Prosecution that it is under an obligation to review such redactions on an on-going basis and ensure they are no more than strictly necessary to conceal the identity of the witnesses, and to proceed with disclosure at the earliest opportunity should the above measure no longer be warranted.

FOR THESE REASONS, THE CHAMBER HEREBY

POSTPONES any determination of the Prosecution Request for P-0542, P-0570 and P-0603, [REDACTED], and instructs the Prosecution to provide the update requested above at paragraph 40, by 4 May 2020;

GRANTS the Prosecution request for delayed disclosure of the identities and identifying information of P-0538, P-0553 and P-0574 until 45 days before their testimony; and

DIRECTS the Prosecution and Defence to file public redacted versions of the Request and the Response as soon as practicable.

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

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this Wednesday, 15 April 2020
At The Hague, The Netherlands