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**International
Criminal
Court**

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Date: 18 April 2019

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public Redacted

**Public Redacted Version “Ngaïssona Defence Request for Leave to Appeal the
Second Decision on Disclosure and Related Matters”, 15 April 2019, ICC-01/14-
01/18-177-Conf**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence of Patrice-Edouard Ngaïssona (“the Defence”) hereby respectfully requests Pre-Trial Chamber II (“the Chamber”) to be granted leave to appeal the Second Decision on Disclosure and Related Matters (“the Impugned Decision”) issued on 5 April 2019.¹

II. Confidentiality

2. Pursuant to regulation 23*bis* of the Regulations of the Court, the Defence requests that this filing be received by the Chamber as “confidential” as it contains information that is subject to the same classification. A public redacted version will be filed in due time.

III. Procedural History

3. On 14 December 2018, in *Yekatom*, the Single Judge issued the “Decision Seeking Observations” for the purpose of establishing a disclosure calendar.²
4. On 21 December 2018, the Prosecution submitted the “Prosecution’s Request for a Protocol on Redactions”³ and the “Prosecution’s Observations pursuant to Decision ICC-01/14-01-18-33” (“the Prosecution’s Observations”);⁴ the same day, the Registry also submitted the “Registry’s Observations pursuant to ICC-01/14-01/18-33”.⁵
5. On 28 December 2018, the Defence for Alfred Rombhot Yekatom (“the Yekatom Defence”) submitted the “Observations on behalf of Mr. Yekatom pursuant to ‘Decision Seeking Observations’”.⁶
6. On 2 January 2019, the Yekatom Defence requested, on an expedited basis, that it be allowed to submit its response to the Prosecution’s Proposed Redaction Protocol on 7 January 2019,⁷ which was granted by the Single Judge the same day *via* email.⁸

¹ ICC-01/14-01/18-163.

² ICC-01/14-01/18-33.

³ ICC-01/14-01/18-39 with one public annex.

⁴ ICC-01/14-01/18-40-Conf, with one confidential annex.

⁵ ICC-01/14-01/18-38-Conf-Exp.

⁶ ICC-01/14-01/18-45-Conf.

7. On 7 January 2019, the Yekatom Defence responded to the Prosecution's Proposed Redaction Protocol.⁹
8. On 10 January 2019, the Prosecution requested leave to reply on discrete issues emanating from the Yekatom Defence Response to the Prosecution's Proposed Redaction Protocol,¹⁰ which was rejected on 11 January 2019.¹¹
9. On 23 January 2019, the Single Judge issued the First Decision on Disclosure.¹²
10. On 28 January 2019, the Yekatom Defence filed the "Request on behalf of Mr. Yekatom seeking leave to appeal 'Decision on Disclosure and Related Matters'",¹³ seeking leave to appeal the Decision on Disclosure.
11. On 30 January 2019, the Prosecution filed the "Prosecution's Response to 'Request on behalf of Mr. Yekatom seeking leave to appeal 'Decision on Disclosure and Related Matters''" (ICC-01/14-01/18-68)".¹⁴
12. On 4 February 2019, the Prosecution issued the "Prosecution's Provisional Schedule for the Disclosure of Evidence Prior to the Confirmation Hearing".¹⁵
13. On 8 February 2019, the Chamber rejected the Yekatom Defence Leave to Appeal.¹⁶
14. On 20 February 2019, the Chamber issued the "Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters" ("the Joinder Decision"),¹⁷ and invited the Defence to present observations on the Decision on Disclosure "*in order to safeguard Ngaïssona's right to be heard on the issue.*"¹⁸

⁷ ICC-01/14-01/18-46.

⁸ Email dated 2 January 2019 at 12:12 from the Senior Legal Adviser of the Pre-Trial Division to the Defence.

⁹ ICC-01/14-01/18-47 with one public annex.

¹⁰ ICC-01/14-01/18-53.

¹¹ ICC-01/14-01/18-55.

¹² ICC-01/14-01/18-64-Conf with one public annex; a public redacted version is available, see ICC-01/14-01/18-64-Red.

¹³ ICC-01/14-01/18-68.

¹⁴ ICC-01/14-01/18-74.

¹⁵ ICC-01/14-01/18-77-Conf.

¹⁶ ICC-01/14-01/18-79.

¹⁷ ICC-01/14-02/18-34.

¹⁸ *Ibid.*, para. 21.

15. On 11 March 2019, the Defence filed the “Ngaïssona Defence Observations on Disclosure and Related Matters (ICC-01/14-01/18-64-Conf)” requesting several amendments of the First Decision on Disclosure.¹⁹
16. On 21 March 2019, the Prosecution filed the “Prosecution’s Response to ‘Ngaïssona Defence Observations on Disclosure and Related Matters (ICC-01/14-01/18-64-Conf)’ (ICC-01/14-01/18-143-Conf)”.²⁰
17. On 5 April 2019, the Chamber issued the Impugned Decision.

IV. Applicable law

18. The Defence recalls Articles 21(3), 67(1)(a), 67(1)(b), 67(2) and 82(1)(d) of the Rome Statute (“the Statute”), Rules 155(1) and 76(3) of the Rules of Procedure and Evidence (“the Rules”) and Regulation 65 of the Regulations of the Court.

V. Submissions

19. The Defence hereby submits that the Impugned Decision meets all of the following cumulative legal criteria as set forth in article 82(1)(d) of the Statute:
 - a. The Impugned Decision involves four appealable issues,
 - b. Which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,
 - c. And for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
- a. The Impugned Decision raised four appealable issues (the “Issues”)
20. The Appeals Chamber of the Court has ruled that an “issue” is “*a subject the resolution of which is essential for the determination of matters arising in the judicial*

¹⁹ ICC-01/14-02/18-143-Conf; a public redacted version is available, see ICC-01/14-02/18-143-Red.

²⁰ ICC-01/14-01/18-155-Conf; a public redacted version is available, see ICC-01/14-01/18-155-Red.

cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion".²¹ An "issue" must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.²²

21. The Impugned Decision raises Issues, which clearly do not merely consist of a disagreement or a conflicting opinion. Rather, they raise fundamental questions of law, namely, with respect to the scope of Mr Ngaïssona's core procedural guarantees such as his right to be heard, particularly in the context of a joinder request and to be informed promptly about the nature, cause and content of the charges against him, in a language he fully understands and speaks, as provided for in Article 67(1)(a) and (b) of the Statute and international human rights law as provided for in Article 21(3) of the Statute.

a. Whether the Chamber erred by refusing to examine requests for reconsideration of the First Disclosure Decision, whereas the Single Judge, in the Katanga-Ngudjolo case, found that, in case of a joinder, the Defence must have an opportunity to request reconsideration, and alternatively, leave to appeal of those decisions issued in the case against the person co-prosecuted, where it can be shown that the interest of the Defence are affected.

22. On 23 January 2019, Patrice-Edouard Ngaïssona was transferred to the seat of the Court. On the same day, in the *Yekatom* case, the Single Judge adopted the First Decision on Disclosure.²³ The Defence is mindful that, at that time, it was temporally, legally and materially impossible for the Single Judge to receive Mr Ngaïssona's observations on disclosures and other related matters, whereas the *Yekatom* case was independent from the *Ngaïssona* case. However, the outcome of this situation remains that the First Decision on Disclosure was issued without receiving the views of Mr Ngaïssona.

23. Taking the above-mentioned situation into account, the Chamber, in the Joinder Decision, invited the Defence to make observations on the First Decision on

²¹ ICC-01/04-168, para. 9.

²² Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014 », 4 July 2014, ICC-01/04-02/06-322.

²³ ICC-01/14-01/18-64-Conf with one public annex.

Disclosure “*in order to safeguard Ngaïssona’s right to be heard on the issue*”,²⁴ which the Defence did on 11 March 2019.²⁵

24. However, in the Impugned Decision, regarding the Defence’s request to amend Categories A.8 and B.5 of the redaction regime, the Chamber ruled that the Defence’s arguments “*amount[ed] to a request for reconsideration of the First Disclosure Decision [...]*”.²⁶ The Chamber also considered that a request for reconsideration is not permitted by the legal texts of the Court.²⁷

25. The Defence does not dispute the fact that requests for reconsideration have not been foreseen by the legal texts of the Court. The Defence however submits that the legal texts of the Court do not preclude parties from seeking reconsideration of decisions. Besides, a ruling has already been made on requests for reconsideration in the specific situation of a joinder of cases.

26. In *Katanga and Ngudjolo*, the Single Judge decided that, in the situation of a joinder of cases, the Defence of each Accused “*must have an opportunity to request reconsideration, and alternatively, leave to appeal of those decisions in the case against the person co-prosecuted, where it can be shown that the interests of the respective Defences are affected*”.²⁸

27. Moreover, in the same decision, the Single Judge held that:²⁹

In relation to requests for reconsideration, the Chamber has already stated that such requests are to be confined to exceptional circumstances because “in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion of reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single judge”.³⁰

28. In the instant case, after having been invited by the Chamber to make observations on disclosure and other related matters, the Defence sought the adoption of amendments, some of them amounting to requests for reconsideration as authorized since the

²⁴ ICC-01/14-02/18-34, para. 21.

²⁵ ICC-01/14-02/18-143-Conf; a public redacted version is available, see ICC-01/14-02/18-143-Red.

²⁶ The Impugned Decision, para. 34.

²⁷ *Ibid.*

²⁸ ICC-01/04-01/07-259, p. 5.

²⁹ *Ibid.*

³⁰ Emphasis added; citing in footnotes: “ICC-01/04-01/06-123, issued on 23 May 2006, page 3; and Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, issued on 23 June 2006, ICC-01/04-01/06-166, para. 10”.

above-mentioned *Katanga and Ngudjolo* precedent. The Defence also submits that the opportunity for the Defence to seek reconsideration, and alternatively, leave to appeal of those decisions adopted in the co-Suspect's case stands as the only remedy able to reconcile the necessity for a Chamber to issue decisions in a single case and to allow a co-Suspect, after a joinder, to actively and fairly participate to the debate that led to the issuance of such decisions.

29. Finally, given the importance of the redaction regime in a criminal trial, to the extent that it directly affects the Defence's investigations and the Defence's ability to challenge the Prosecution's evidence, the Defence submits that, by essence, the redaction regime affects the interests of the Defence.

b. Whether the Chamber erred by considering that the Defence made requests for clarification of the First Decision on Disclosure whereas the Defence expressly submitted requests for amendments of the First Decision on Disclosure, so as to add substance to the latter for the purpose of rendering it more precise and concise, with a view to increase legal certainty for the parties.

30. On 11 March 2019, the Defence presented the Observations, specifically requesting amendments to the First Decision on Disclosure. However, in the Impugned Decision, the Chamber characterized two of the amendments proposed as requests for clarification.³¹

31. The Chamber also held, in the Impugned Decision, that “*nothing in the legal texts of the Court allows the parties to seek clarification of a decision*”.³²

32. First, the Defence submits that it did not present requests for clarification of the First Decision on Disclosure, but requests for amendments of the said decision. The first amendment was proposed for the purpose of clarifying the parties' obligations regarding disclosures of evidence but did not consist in a request for clarification of the First Decision on Disclosure.³³ A request for clarification indeed consists in

³¹ The Impugned Decision, paras 22 and 32.

³² The Impugned Decision, para. 22. Footnotes omitted.

³³ The Defence's Observations, para. 25.

seeking clarification, or an explanation, of a decision – or portion of a decision – issued by a Chamber, whereas, in the instant case, the Defence sought the implementation of further rules related to disclosure of evidence that would ultimately clarify the parties’ obligations to disclose evidence loyally and with courtesy. In other words, a request for clarification does not purport the addition of substance to a decision already issued, whereas a request to amend directly seeks the addition of substance, through the proposed amendments. The Defence respectfully submits that the Chamber hence erred in considering the Defence’s amendments as requests for clarification.

33. The same can be reiterated for the second amendment considered as a request for clarification by the Chamber. The Defence specifically requested the Chamber to “*define the term ‘leads’ [in Category A.6 of the Redaction Regime] so as to protect the parties from any unnecessary redactions*”.³⁴ The Defence therefore requested the Chamber to add substance to Category A.6. of the Redaction Regime by circumscribing the term “leads”. Once again, such a proposed amendment goes beyond the simple clarification of the original Category A.6. of the Redaction Regime.

c. *Whether the Chamber erred by rejecting the Defence’s request to order the Prosecution to provide French translations of all the evidence it intends to rely on at the Confirmation Hearing, with the exception of the statements of the Prosecutor’s witnesses, as provided for by Rule 76(3) of the Rules, whereas so far, in the instant case, [REDACTED], which renders it necessary for Mr Ngaïssona to receive French translations of [REDACTED], in order to be informed promptly and in detail of the nature, cause and content of the charges, pursuant to Article 67(1)(a) of the Statute.*

34. The Defence recalls Article 67(1)(a) of the Statute and Rule 76(3) of the Rules.

35. In the Impugned Decision, the Chamber noted and reiterated that “*the suspects do not have an absolute right to have all documents translated into a language which they fully understand and speak*”.³⁵ It also observed that, “*except for the translation of the*

³⁴ The Defence’s Observations, para. 32.

³⁵ The Impugned Decision, para. 38. Footnote omitted.

*statements of Prosecution witnesses pursuant to rule 76(3) of the Rules, the legal texts of the Court do not vest the suspect with the right to receive translations of all the evidence disclosed”.*³⁶

36. However, the Defence submits that not only the legal texts of the Court, especially Article 67(1) of the Statute, do not preclude the Chamber to go beyond the requirement set out in Rule 76(3) of the Rules, but the Defence has not requested the translation of all documents into French.

37. The Defence has indeed limited its proposed amendment to the evidence that the Prosecution intends to rely upon at the Confirmation Hearing and the evidence that may be material to the Defence, namely exculpatory evidence and evidence collected pursuant to Rule 77 of the Rules.³⁷ So far, the Defence has not requested the translation of all the filings and does not intend to make systematic requests for translations of all the filings and decisions included in the case record.

38. Besides, the Defence reiterates that, in the First Decision on Disclosure, the Single Judge specifically reminded the parties that:

only such evidence is disclosed which is of true relevance to the case and apt to support a particular factual allegation underlying the requisite legal elements. As previously held, the Prosecutor should not ‘disclose the greatest volume of evidence, but [...] disclose the evidence, which is of true relevance to the case, whether that evidence be incriminating or exculpatory’.³⁸

39. On 21 December 2018, the Prosecution announced that [REDACTED].³⁹ To date, the Prosecution has already [REDACTED],⁴⁰ which already significantly exceeds [REDACTED].

40. Moreover, the Defence notes that amongst these [REDACTED], only [REDACTED].⁴¹ It hence appears clearly that the Prosecution intends to rely on a significant amount of [REDACTED]. Rule 76(3) of the Rules has been conceived under the assumption that [REDACTED]. However, [REDACTED], it is no longer

³⁶ *Ibid.*

³⁷ The Defence’s Observations, para. 41.

³⁸ The First Decision on Disclosure, para. 18. Footnotes omitted.

³⁹ The Prosecution’s Observations, para. 4.a.i.

⁴⁰ See ICC-01/14-01/18-105, ICC-01/14-01/18-122 and ICC-01/14-01/18-159.

⁴¹ See [REDACTED].

the case and the right to a Suspect to “*be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks*” cannot be conceived in light of the sole [REDACTED]. Rather, it must be conceived primarily on the basis of [REDACTED]. In this regard, the legal texts of the Court do not preclude a Chamber to order the Prosecution to provide translations of [REDACTED].

- d. *Whether the Chamber erred by imposing on the Defence the burden to request, on an ad hoc basis, the translation by the Prosecution of specific items considered to be essential for the preparation of the defence, and, in the event of a disagreement, to apply to the Chamber for a ruling, whereas Article 67(1)(a) of the Statute sets out as a “minimum guarantee” the right to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the Accused fully understands and speaks.*

41. Article 67(1)(a) of the Statute contains one of the most fundamental “guarantees” provided to an Accused – and by extension, a Suspect – before the Court. This guarantee has been construed to protect the Suspect from any misunderstandings of the charges brought against him or her by the Prosecution. Article 67(1)(a) of the Statute hence benefits the Suspect and binds the Prosecution. It entails that the Prosecution should guarantee that the Suspect will receive prompt and detailed information on the nature, cause and content of the charges, in a language the Suspect fully understands and speaks, and not that the Defence should request the Prosecution to enforce such a guarantee that is already binding pursuant to Article 67(1)(a) of the Statute. Therefore, the guarantee enshrined in Article 67(1)(a) of the Statute primarily weighs on the Prosecution to disclose the evidence it intends to rely on at the Confirmation Hearing promptly and in a language the Suspect understands and speaks, i.e. French in the instant case.

42. Besides, considering that items of alleged incriminating evidence on which the Prosecution intends to rely at the Confirmation Hearing are also essential material to the Defence, only the Prosecution may identify these items and determine that they must be translated into a language the Suspect fully understands and speaks.

43. This concern is reinforced by the imminence of the Confirmation Hearing, which is likely to make it impossible for the Defence to engage in *inter partes* discussions to obtain translations of items of [REDACTED], to apply to the Chamber for a ruling, in the event of a disagreement, to obtain a ruling and, ultimately, to obtain the requested translations in due time to properly prepare for the hearing, whereas Article 67(1)(a) of the Statute provides that the Accused – and by extension, the Suspect – must be informed promptly.

44. In light of the above, the four Issues are “appealable” in that their resolution is essential for the determination of matters arising in the case and do not consist of mere disagreements or differences of opinions. Moreover, the Issues arise directly from the Impugned Decision, as they arise directly from the Chamber’s findings. Therefore, the requirements of the first prong of Article 82(1)(d) are satisfied.

b. The Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

45. The two disjunctive criteria under the second prong of the test provided under Article 82(1)(d) of the Statute are met for each of the four Issues, namely that their resolution would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial.

46. *First*, the four Issues go to the very heart of fairness since they concern Mr Ngaïssona’s due process rights, including his right to be heard and to be informed of the evidence and charges against him in a language that he understands. Fairness is preserved when “*a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.⁴² Adversarial proceedings and equality of arms are central features of a fair trial.⁴³ The right to a fair trial and the

⁴² Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para.14.

⁴³ Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 14.

right to be heard should be practical and effective⁴⁴ and extend to investigations and pre-trial proceedings.⁴⁵

47. Furthermore, the concept of “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.⁴⁶

48. *Second*, in light of the disjunctive nature of Article 82(1)(d), were the Chamber to find that the resolution of the Issues would not significantly affect the fair and expeditious conduct of the proceedings, the Defence submits that they would significantly affect the outcome of the trial, warranting the need for their immediate resolution.

49. The resolution of the four Issues will shape to a large extent the conduct proceedings and safeguard Mr Ngaïssona’s rights as guaranteed by the Statute.

(i) First Appealable Issue

50. The resolution of the first appealable Issue as to whether the Chamber erred by refusing to entertain Defence requests for reconsideration of the First Disclosure Decision, would significantly affect the fair and expeditiousness of proceedings.

51. *First*, the resolution of the first Issue would significantly affect the fairness of proceedings, in that the Impugned Decision fails to consider the jurisprudence of the Court, which dictates that Defence teams in the case of a joinder “*must have an opportunity to request reconsideration, and alternatively, leave to appeal of those decisions issued in the case against the person co-prosecuted, where it can be shown that the interests of the respective Defences are affected.*”⁴⁷

52. By dismissing Mr Ngaïssona’s views on the basis that they amount to “requests for reconsideration” which in the Chamber’s view are not permitted by the legal texts of

⁴⁴ Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 22.

⁴⁵ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

⁴⁶ Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 17.

⁴⁷ *Katanga & Ngudjolo*, ICC-01/04-01/07-259, p. 5.

the Court,⁴⁸ in the context of a joinder, Mr Ngaïssona was not granted an effective opportunity to present his views relating to the modalities and parties' obligations relating to disclosure. This denial is particularly striking in light of the central role of disclosure in the criminal trial and in particular, to the preparation of the Confirmation Hearing.⁴⁹ As a result, the Defence was put in a clear and substantial disadvantage *vis-à-vis* the Prosecution, which will taint future proceedings. Thus, the resolution of the First Issue goes to the very heart of a fair trial.

53. *Second*, the resolution of the First Issue would also affect the expeditiousness of the proceedings in that it would resolve any doubt as to the correct interpretation of the right of suspects to seek reconsideration of decisions rendered at the pre-joinder phase in relation to another a co-suspect, or at the very least, to appeal such decisions. Its resolution would positively affect expeditiousness as it would prevent further litigation on the propriety of disallowing reconsideration in situations where cases are joined. The Chamber's approach of denying the Defence's right to seek reconsideration in the context of a joinder, which is at odds with the Single Judge's findings in *Katanga & Ngudjolo*, contributes to legal uncertainty, which could significantly affect the expeditiousness of proceedings.

54. *Third*, should the Chamber find that the First Issue would not affect the fair and expeditious conduct of proceedings, the Defence submits that had the Chamber considered the relevant *Katanga & Ngudjolo* precedent of the Court in the Impugned Decision, which is analogous to the case at hand, this would have affected its ultimate findings, which in turn, would affect the outcome of trial.

55. Evidence disclosure and redaction regimes play a central role in pre-trial and trial proceedings. They are decisive to the protection of the fair trial rights provided in Article 67(1), read in conjunction with Article 67(2) of the Statute. The non-resolution of the First Issue would impact almost every aspect of the Defence's preparation for the Confirmation Hearing, including strategies and investigations, which would affect the outcome of trial and ultimately, the assessment of Mr Ngaïssona's individual criminal responsibility.

⁴⁸ *Ibid.*

⁴⁹ Prosecutor v. Lubanga, Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006, para. 66.

(ii) Second Appealable Issue

56. The resolution of the Second Issue – whether the Chamber erred by considering that the Defence made requests for clarification of the First Decision on Disclosure – would affect the fair and expeditious conduct of proceedings.
57. *First*, the Defence respectfully submits that this was an erroneous interpretation of the Defence’s submissions, which requested amendments of the said Decision, *for the purpose of* clarifying the parties’ disclosure obligations.
58. Given that the Defence’s requests were dismissed by the Chamber on the basis that they were considered “requests for clarification”,⁵⁰ the Defence’s views and submissions were not fully appraised by the Chamber. The Defence was in effect deprived of its right to be heard and to present its full views on core aspects of disclosure obligations. The Second Issue directly engages the right to a fair trial.
59. *Second*, the resolution of the Second Issue would affect the expeditiousness of proceedings. The apparent misinterpretation of the Defence’s requests for amendments as requests for “clarification” should be resolved immediately in order to dispel any doubts or misunderstandings as to the Defence’s submissions. Denial of leave to appeal of the Second Issue would contribute to a climate of uncertainty as to the relief sought by the Defence, and would risk leading to future litigation on the matter, which would affect expeditiousness.
60. *Third*, should the Chamber find that the Second Issue did not affect the fair and expeditious conduct of proceedings, the Defence submits that its resolution would affect the outcome of trial. Mr Ngaïssona’s right to have his views considered and to challenge the modalities of disclosure is fundamental. The non-resolution of the Second Issue would affect almost every aspect of the pre-trial proceedings.

(iii) Third and Fourth Appealable Issues

⁵⁰ Second Decision on Disclosure, paras 22 and 32.

61. The resolution of the Third and Fourth Issues – whether the Chamber erred by rejecting the Defence’s request to order the Prosecution to provide French translations of all the evidence it intends to rely on at the Confirmation Hearing, and whether the Chamber erred by placing the burden on the Defence to request from the Prosecution that individual items of evidence be translated – would affect the fair and expeditious conduct of proceedings.
62. *First*, the Third and Fourth Issues would affect the fair conduct of proceedings in that they directly engage the minimum guarantees provided for under Article 67(1)(a) of the Statute, of an accused’ right to be “*informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks*”. By placing the burden on the Defence of requesting translations – to which, in the Defence’s view, Mr Ngaïssona is entitled under the Statute – significantly impairs Mr Ngaïssona’s exercise of his rights under Article 67(1)(a) of the Statute, which affect both fairness and expeditiousness.
63. Mr Ngaïssona’s right to be informed of the charges against him in a language he understands is fundamental to the fairness of the trial. In the context of disclosure, Article 67(1)(a) clearly places the responsibility on the Prosecution of ensuring that Mr Ngaïssona can read and understand the evidence against him. This is the only way in which Mr Ngaïssona’s right to be fully informed of the nature and content of the charges can be given meaning in practice. By reversing the burden on the Defence of requesting such documents on an *ad hoc* basis significantly hampers and, in light of the upcoming Confirmation Hearing and likelihood that the Prosecution will disclose most of its evidence only one month before the Hearing, contravenes Mr Ngaïssona’s protected rights.
64. *Second*, the Chamber’s findings which form the basis of the Third and Fourth Issues, namely, that the Prosecution is not obliged to provide translations of the evidence upon which it intends to rely at the Confirmation Hearing and that it is the Defence’s responsibility to request translations *inter partes* on an *ad hoc* basis,⁵¹ can be perceived as a considerably cumbersome and lengthy procedure, which would undoubtedly affect the expeditiousness of proceedings. Moreover, the Chamber’s finding that disagreements between the parties should be resolved by bringing the

⁵¹ Second Decision on Disclosure, para. 38.

matter before the Chamber for a ruling further affects the expeditiousness of the conduct of proceedings.

65. *Third*, similarly to the First and Second Issues, the resolution of the Third and Fourth Issues, which concern a core aspect of pre-trial proceedings, namely, the disclosure regime, would directly affect the outcome of trial, within the meaning of Article 82(1)(d) of the Statute.

c. The four appealable Issues require an immediate resolution by the Appeals Chamber in order to materially advance the proceedings

66. The Appeals Chamber has held that for leave to appeal to be granted, the issue must be such “*that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial*”.⁵²

67. Given that the Issues directly concern Mr Ngaïssona’s right to a fair trial, his right to seek reconsideration of decisions which were rendered before the joinder, based on the *Katanga & Ngudjolo* precedent, and that there appears to have been some misapprehension of the requests made by the Defence in relation to the First Decision on Disclosure, the immediate resolution of the four Issues by the Appeals Chamber will materially advance the proceedings by “[r]emoving doubts about the correctness of [the] decision” which may later “*unravel the judicial process*”.⁵³

68. If leave to appeal were to be denied, the Impugned Decision could taint the most significant aspects of the case going forward, namely the parties’ disclosure obligations and Mr Ngaïssona’s rights to be informed of the charges against him. An eventual determination that the Chamber did not adequately assess the potential

⁵² Situation in the Democratic Republic of Congo, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

⁵³ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, paras 14-20; *See also*, Prosecutor v. Bemba, *Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure*, ICC-01/05-01/08-75, 25 August 2008, para. 20.

serious prejudice caused by the Impugned Decision could jeopardize the integrity of the entire proceedings. The resolution of the Issues at this stage would remove doubts about the “correctness of [the] decision or mapping a course of action along the right lines,”⁵⁴ would ensure that proceedings “*follow the right course*”, and provide “*a safety net for the integrity of the proceedings*”.⁵⁵

RELIEF SOUGHT

69. In light of the foregoing, the Defence respectfully requests the Chamber to:

- **GRANT** to the Defence leave to appeal the Impugned Decision.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 18 April 2019,

At The Hague, the Netherlands

⁵⁴ Situation in the Democratic Republic of Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.

⁵⁵ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.