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**International
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TRIAL CHAMBER V

Before: Judge Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

PUBLIC

**With Confidential, EX PARTE, Annex 1, only available to the Registry and the Defence
for Patrice-Edouard Ngaïssona**

**Public redacted version of “Defence Submissions pursuant to Trial Chamber V’s
‘Order Scheduling First Status Conference’ (ICC-01/14-01/18-459)”, ICC-01/14-01/18-
473-Conf, 8 April 2020**

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. Pursuant to Trial Chamber V's ("the Chamber") order dated 19 March 2020 inviting submissions by the parties and participants on the items on the agenda in view of the first status conference, the Defence for Mr Patrice-Edouard Ngaïssona (the "Defence") hereby presents its observations.

II. Confidentiality

2. The Defence files the present submissions confidentially pursuant Regulation 23*bis*(2) of the Regulations of the Court since they refer to the current state of Prosecution disclosure, which is yet to be known to the public, and certain detention related matters. The Defence does not oppose a reclassification to public. The annex to these submissions is currently classified as confidential *ex parte* because it refers to decisions that bare this classification. However, the Defence requests the Chamber to lift this classification, seeing as the Detention conditions at the ICC is a matter of public interest, and the table provides such general information with respect to Mr Ngaïssona's complaints that the reclassification would not constitute a violation of his private life or endanger the security and good order at the Detention Centre.

III. Procedural history

3. On 11 December 2019, Pre-Trial Chamber II issued its "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona", partially confirming the charges against Mr Patrice-Edouard Ngaïssona.¹ On 21 February 2020, the Registry filed the official French translation of the Decision confirming the charges.²
4. On 26 February 2020, the Defence for Mr Ngaïssona informed the Chamber that Mr Ngaïssona would not seek leave to appeal the Decision confirming the charges.³ On 2 March 2020, the Prosecution filed a request for reconsideration or in the alternative, for leave to appeal the Confirmation of charges decision.⁴ On 6 March 2020, the

¹ ICC-01/14-01/18-403-Conf.

² ICC-01/14-01/18-403-tFRA.

³ ICC-01/14-01/18-434.

⁴ ICC-01/14-01/18-437.

Legal Representative for Victims and the Defence for Mr Alfred Yekatom filed their Responses to the Prosecution's request.⁵

5. On 11 March 2020, Pre-Trial Chamber II rejected the Prosecution's request for reconsideration/leave to appeal.⁶ On 13 March, the Registry transmitted the case record to the Presidency.⁷ On 16 March 2020, the Chamber was constituted and the following day, Judge Bertram Schmitt was elected Presiding and Single Judge.⁸
6. On 19 March 2020, the Chamber issued its "Order Scheduling First Status Conference"⁹ (the "Order"), convening status conference scheduled for 21 April 2020 and inviting submissions from the parties, participants and Registry.¹⁰
7. On 26 March 2020, the Chamber ordered the deferral of the status conference hearing, due to the Court's closure in response to the covid-19 pandemic.¹¹

IV. Submissions

8. Despite the unprecedented challenges encountered by the Court due to the Covid-19 pandemic's effect on public health in the Host State, the Defence respectfully submits that Mr Ngaïssona's right to be tried without undue delay pursuant to Article 67(1)(c) should not be impinged as a result. Therefore, the Defence wishes to convey to the Chamber that it would like to proceed to trial swiftly. In order to effectively prepare for trial, the Defence must have proper notice of the Prosecution's case against Mr Ngaïssona, which bears no resemblance to the case the Prosecution sought to commit to trial.
9. The Prosecution painted an erroneous portrait of Mr Ngaïssona, alleging that he was a key member of a strategic common plan to bring François Bozizé back to power by criminal means, namely through the commission of 111 counts with which the Prosecution charged him.¹² Pre-Trial Chamber II unanimously rejected these

⁵ ICC-01/14-01/18-442; ICC-01/14-01/18-443.

⁶ ICC-01/14-01/18-447.

⁷ ICC-01/14-01/18-449.

⁸ ICC-01/14-01/18-454.

⁹ ICC-01/14-01/18-459.

¹⁰ ICC-01/14-01/18-459.

¹¹ ICC-01/14-01/18-464.

¹² ICC-01/14-01/18-282-Conf-AnxB1, paras 34-49, 127-184.

submissions and found that the Prosecution had failed to establish that Mr Ngaïssona had any control over the alleged crimes.¹³ Thus, the Pre-Trial Chamber did not confirm the charges for several locations, thereby greatly reducing the temporal and geographic scope of the present case. Indeed, Pre-Trial Chamber II confirmed 31 of the 111 counts for which the Prosecution sought confirmation. For the alleged crimes that the Pre-Trial Chamber did confirm, it noted the weakness of the Prosecution's evidence when it found that its factual findings were based on second-hand information, inferences, and evidence which lacked detail, and confirmed the charges because it applied a lower standard than beyond a reasonable doubt.¹⁴ The Prosecution did not seek leave to appeal of these findings, thereby conceding to the Pre-Trial Chamber's findings. The Defence submits that Pre-Trial Chamber II in paragraph 102 of the Confirmation Decision foreshadowed the likelihood that the Prosecution will not be able to adduce sufficient evidence to sustain a conviction on any of the charged crimes.¹⁵ Therefore, the Defence wishes to proceed to trial swiftly with a clear overview of the current state of the Prosecution's evidence and case against Mr Ngaïssona in light of the Confirmation Decision. Its submissions to the items listed in the Order therefore center on these aforementioned particularities of the case against Mr Ngaïssona that the Pre-Trial Chamber committed to trial.

A. Commencement date of trial

10. The Defence wishes to proceed to trial as soon as possible which is conditional upon proper notice of the Prosecution's case against Mr Ngaïssona, which includes providing it with a list of evidence, a list of witnesses, and a pre-trial brief, with provisional lists being provided to the Defence if the Prosecution is unable to provide such lists in the near future.

11. The Defence recalls that the Prosecution has already on two occasions requested that the confirmation of charges hearing be postponed in the instant case. The first was in response to the Pre-Trial Chamber's order requesting the feasibility of joinder with

¹³ ICC-01/14-01/18-403-Red, para. 103

¹⁴ ICC-01/14-01/18-403-Red, para. 102

¹⁵ Ibid.

respect to the cases of Mr Ngaïssona and Mr Yekatom.¹⁶ The Defence requested that the confirmation hearing be held in April 2019 in the event the cases were joined whereas the Prosecution submitted that the hearing should take place in June of the same year.¹⁷ After the Pre-Trial Chamber scheduled the confirmation of charges hearing for 18 June 2019, the Prosecution asked for yet another extension submitting that it had [REDACTED] and that the “the immense volume of information collected and the unexpected speed at which the Suspects were arrested has made the completion of disclosure review at this stage virtually impossible.”¹⁸ The Defence submits that when the Prosecution requested that Mr Ngaïssona’s fundamental right to liberty be stripped from him, it should have been ready to proceed with the confirmation of charges hearing and the disclosure review process should have been nearing its completion. The Defence submits that further requests for delays invoking such concerns as the volatile security situation in CAR are not reasonable given that almost all the cases before the Court arise in conflict regions or post-conflict societies. Therefore, such concerns should be foreseen well in advance by the Prosecution. Moreover, the Defence is increasingly concerned by the possibility that the Covid-19 pandemic may further delay the proceedings, or that the Prosecution may make use of it to further justify delays that could have been prevented.

B. Anticipated evidence

12. Given the stage of the proceedings, the Defence is not in a position to provide the Chamber with submissions with respect to its anticipated evidence. Moreover, it is the Defence’s position that there is a likelihood, as Pre-Trial Chamber II anticipated, the Prosecution will be unable to produce sufficient evidence to sustain a conviction against Mr Ngaïssona. Thus, the Defence will request to be allowed to make submissions regarding the appropriateness of the Chamber allowing for a No Case to Answer procedure at the close of the Prosecution’s case. Nevertheless, the Defence wishes to provide the Chamber with respect to the Prosecution’s anticipated evidence

¹⁶ ICC-01/14-01/18-121, para. 5. Indeed, before the joinder of the respective cases of Mr Yekatom and Mr Ngaïssona, Mr Yekatom’s confirmation charges of charges hearing was scheduled to take place on 30 April 2019 whereas Mr Ngaïssona’s hearing was to take place on 18 June 2019. *Ibid.*, para. 3.

¹⁷ *Ibid.*, para. 17.

¹⁸ ICC-01/14-01/18-186-Conf-Red, para. 10.

submissions on the topics mentioned in the Order with a view to contribute to the expeditiousness of the proceedings.

(1) Estimated number of witnesses to be called and estimated hours of in court testimony

13. According to the Defence's information, the Prosecution has disclosed statements related to over 150 witnesses who have been disclosed as INCRIM.¹⁹ As a result of the Confirmation Decision, many of these witnesses' potential testimonies have now become irrelevant to the present proceedings,²⁰ since they concern events that are outside the material, geographical and temporal scope of the charges. Therefore the Defence requests that the Prosecution provide it with an updated list of witnesses and the allegations to which they will testify well in advance to the start of trial, and before the final disclosure deadline. Moreover, the Defence submits that the Prosecution should be able to reduce the scope of its questioning, especially as it relates to certain alleged insiders, since Mr Ngaïssona's role as the official National Coordinator is not relevant to the crimes which were confirmed by the Pre-Trial Chamber.²¹

(2) Use of Expert witnesses

14. The Defence requests that litigation concerning the status of expert witnesses should be done well in advance of the start of trial, which would prevent any delays to the commencement of trial. In order to be able to decide on whether to contest the expert status of a given Prosecution witness, the Defence kindly requests the timely

¹⁹ The Defence made this calculation on the basis of INCRIM packages for which the Prosecution has assigned a witness pseudonym.

²⁰ The Defence submits that witnesses whose potential testimonies relate to attacks in locations, which were not confirmed by the Pre-Trial Chamber with respect to either Mr Ngaïssona or Mr Yekatom are no longer relevant, such as Witness P-0595, Witness P-1962, Witness P-1947, Witness P-0650, Witness P-2444, Witness P-2131, Witness P-2416, Witness P-2325, Witness P-0652, Witness P-1728, Witness P-1500, Witness P-2327. These witnesses are merely provided as examples and are in no way exhaustive of the many witnesses, which no longer bear any relevance to the charges.

²¹ The Pre-Trial Chamber found that the Prosecution's evidence did not show to the requisite standard the link between Mr Ngaïssona's role as National General Coordinator and the Comzones in the field, particularly, the provinces. ICC-01/14-01/18-403-Red, para 170.

disclosure of all information attesting to the expertise of the witness, and all documents underlying or related to the expert's reports.²²

(3) Testimony given by audio or video link

15. The Defence wishes at this juncture to express its strong opposition to witnesses testifying *via* audio or video-link. Article 69(2), which allows such testimony, limits its scope by expressly stating that the use of audio or video link testimony cannot be prejudicial or inconsistent with the rights of the accused. Pursuant to Article 67(1)(e), Mr Ngaïssona has the right to examine the witnesses against him. The physical presence of a witness in a courtroom before the judges who will evaluate their credibility ensures conditions that are conducive for witnesses to tell the truth.

(4) Estimated Volume of documentary and other non-testimonial evidence to be relied upon at trial

16. The Defence respectfully requests that the case record not be flooded by the submission of evidence, which is no longer relevant to the case which has been greatly reduced as a result of the Confirmation Decision. The Defence submits that it should be provided with a provisional list of evidence as soon as possible, which takes into account the reduced scope of the charges. Moreover, the Defence submits that regardless of whether a submission or admission evidentiary regime is adopted, the Prosecution must not submit evidence which is of *de minimus* probative value or does not show sufficient indicia of reliability because it creates an undue burden on the Defence to contest such items, and hinders the expeditiousness of the proceedings since the Chamber must evaluate each item of evidence submitted.

(5) Use of Rule 68

17. The Defence requests that a deadline be set in advance of trial for the Prosecution to submit witness testimony through the use of Rule 68, such that litigation on such items will not delay the commencement of trial.

²² *Prosecutor v. Ayyash et al.*, Decision on Sabra's Seventh Motion for Disclosure – Experts, TL-11-01/PT/PTJ 24 May 2013, paras 6, 12, 27.

C. Agreed facts under Rule 69 of the Rules

18. The Defence is in principle willing to consider agreeing on certain specific statements relating to the background of Mr Ngaïssona or non-contentious events to the extent that for any agreed fact, it will be the precise formulation of that fact which the Defence will be agreeing to. In no event the Defence's agreement should be seen as an agreement of the way the underlying fact may be used in any individual items of evidence the Prosecution might refer to in support of a relevant factual formulation or the context in which it might be used in any filings, such as the Pre-Trial Brief, yet to be provided. Should the statement in question take its source from the Pre-Trial Brief, Mr Ngaïssona should be provided with the official French translation of the whole paragraph or section in which the statement is made before agreeing to that statement. The Prosecution has engaged in very preliminary *inter partes* discussions on Rule 69 as recently as the day before the present submissions. The Defence will be following up with the Prosecution's team in this respect in a manner that is consistent with the above comment.

D. Languages to be used by the parties, participants, and the witnesses the parties intend to call

19. The Defence submits that Mr Ngaïssona fully understands and speaks Sango, and French. He does not speak or understand English under Article 67(1)(a) of the Rome Statute ("Statute"). The Defence for Mr Ngaïssona intends to make submissions in English, and in French.

E. Disclosure of outstanding material in the Prosecution's possession and related issues

(1) *Whether the Prosecution's investigations are still ongoing.*

20. Given the stage of proceedings, the Prosecution's investigations should have "largely been completed" prior to the confirmation of charges hearing.²³ This principle is

²³ ICC-01/14-01/18-163, para. 28, relying on *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 44; *Prosecutor v. Kenyatta et al.*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-

intrinsically linked to the Prosecution's truth-seeking function pursuant to article 54(1)(a), and article 51(1)(c) of the Statute.²⁴ The circumstances in which Chambers have permitted the Prosecution to extend investigations after the confirmation of charges stages are strictly circumscribed.²⁵

21. The confirmation of charges hearing concluded six months ago,²⁶ and the Prosecution has already benefitted from a postponement of the disclosure deadline on two occasions in the case of Mr Yekatom, and once in relation to the charges against Mr Ngaïssona.²⁷ Moreover, in view of the non-confirmation by the Pre-Trial Chamber of 80 of the charges brought by the Prosecution against Mr Ngaïssona, the Prosecution's case has largely been reduced. Thus, the Defence reserves its right to present further submissions at the status conference hearing, should the Prosecution continue its investigations to the detriment of Mr Ngaïssona's fundamental rights.

(2) Timing and volume of disclosure of outstanding evidence pursuant to Article 67(2) of the Statute and Rules 76 and 77 of the Rules

22. Articles 67(1)(b) and 67(2) of the Statute and rules 76 and 77 of the Rules establish that the Defence shall be given sufficient time to prepare for trial.²⁸ It is a fundamental feature of a fair trial.²⁹ As mentioned above, the Prosecution's investigations should have largely been completed. In this vein, in rejecting its request for an extension of time for the start of trial and the disclosure deadline, Trial Chamber X recently

728, paras 118-119; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54.

²⁴ See *Prosecutor v. Kenyatta*, Decision on Defence application pursuant to article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, Concurring opinion of Judge Van den Wyngaert, para. 5.

²⁵ The Prosecution must show, for instance, that the evidence "could not with reasonable diligence have been discovered or obtained prior to confirmation" or that such evidence, "unexpectedly and through no fault of the Prosecution, becomes unavailable for use at trial", *Prosecutor v. Kenyatta*, Decision on Defence application pursuant to article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 120-121. See also *Ibid*, Concurring opinion of Judge Van den Wyngaert, paras 1-5.

²⁶ The confirmation of charges hearings concluded on 11 October 2019, ICC-01/14-01/18-T-011-Conf.

²⁷ ICC-01/14-01/18-121; ICC-01/14-01/18-163, para. 26; ICC-01/14-01/18-199, paras 31, 39.

²⁸ The 2019 *Chambers Practice Manual* indicates that the usual practice regarding "sufficient time" for disclosure is three months before the trial commencement date.

²⁹ It is also a manifestation of equality of arms. See R. Cryer, H. Friman, D. Robinson, E. Wilmschur, *An Introduction to International Criminal Law and Procedure* (2016), Cambridge Press, at 382.

reminded the Prosecution that “at this stage there should not be a significant amount of material which must be addressed to meet the disclosure obligation”.³⁰

23. The Defence therefore requests that the Chamber establish a calendar of rolling disclosure deadlines to ensure the Prosecution meets its disclosure obligations on a timely basis. During the pre-trial phase, the Prosecution waited until the original disclosure deadline of 17 May 2019, and afterwards, to disclose the heart of its evidence, including insider witness statements,³¹ and continued to disclose crucial evidence at the eve of and during the confirmation of charges hearing.³² Moreover, witness testimony was disclosed in a piecemeal and miscellaneous fashion, impeding the Defence’s ability to analyse it in a comprehensive manner and infringing on Mr Ngaïssona’s article 61 and 67 rights.³³ This resulted in material prejudice since piecemeal disclosure of witness statements results in a partial and misleading interpretation of a witness statement.³⁴ It also left the Defence guessing whether transcripts for a specific witness interview were complete or still forthcoming.³⁵ Also,

³⁰ While the Trial Chamber showed some flexibility by urging the Prosecution to “to take all available measures to disclose as much material as possible by the original deadline of 14 April 2020”, it also recalled the Single Judge’s directive “that the disclosure of material must be made on a rolling basis and that the Prosecution is expected to fulfil its disclosure obligations as soon as possible and not to wait until the last minute”, see *Prosecutor v. Al Hassan*, Decision on the Prosecution request for an extension of deadlines relating to the disclosure of evidence and the postponement for the starting date for trial, 20 March 2020, ICC-01/12-01/18-677, paras 10-15.

³¹ The disclosure packages INCRIM packages 10 and 11 were disclosed on the original deadline for disclosure (17 May 2020) and almost one month after that deadline (13 June 2020), respectively, see ICC-01/14-01/18-202-Conf and ICC-01/14-01/18-202-Conf-Anx; ICC-01/14-01/18-221-Conf and ICC-01/14-01/18-221-Conf-Anx.

³² See ICC-01/14-01/18-375-Conf.

³³ For witness P-0952, a first part was disclosed on 9 August 2019, whereas a second batch was disclosed on 29 August 2019. Lesser redacted versions were provided to the Defence on 12 March 2020. Another example is P-0876, whose transcribed witness statements were disclosed to the Defence on 7 and 17 May 2019. Similarly, witness P-2173’s transcribed witness statements were disclosed on 5 and 29 August 2019 and witness P-0487’s transcribed witness statement was disclosed on 7 and 17 May 2019. As held by Judge Van den Wyngaert in the *Kenyatta* case, through the “extremely late and piecemeal disclosure of an inordinate amount of totally new evidence, which was the immediate consequence of the Prosecution’s failure to investigate properly prior to confirmation, the Prosecution has infringed upon the accused’s rights under article 67(1)(a), (b) and (c) as well as article 67(2) of the Statute”, *Prosecutor v. Kenyatta*, Decision on Defence application pursuant to article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728-Anx2, para. 5.

³⁴ See ICC-01/14-01/18-388, para 17: “The witness transcripts of a single witness form a whole that is indivisible with respect to the Prosecution’s disclosure obligations. (...) The witness transcripts form one statement since they consist of a single witness’ account of the events related to the charges. (...)”

³⁵ For example, for the disclosure of the statement of witness P-0446, the annex to the Prosecution communication of disclosure (ICC-01/14-01/18-202-Conf-Anx), indicates the various “tracks” disclosed but does not mention how many days the interview lasted in total, and it is unclear which track corresponds to which day of interview. As an illustration, item CAR-OTP-2105-0326 indicates in its title “Transcription de déposition /CAR-OTP-P-0446 Audio Interview /CAR-OTP-2082-1109 – Track 2” without however, specifying the day of interview, whereas for witness P-0884, the title indicates the day (for instance, 1/6) but does not indicate the total amount of tracks, leaving the Defence to guess whether the transcripts are complete or not. The

it appears that for 46 witnesses, which were assigned a witness pseudonym by the Prosecution, no corresponding witness statement could be located in the Defence's ringtail, hampering the Defence preparations, given that it is unclear which witnesses the Prosecution intends to rely on in its case against Mr Ngaïssona.³⁶ Further, crucial metadata required by the e-Court protocol, such as the "related to witness" field, was not provided until after the confirmation of charges hearing ended.³⁷ The Defence urges the Chamber to order the Prosecution to remedy these shortcomings and to disclose the remainder of its evidence in a timely and diligent manner, in accordance with the rights of the accused, and which avoids a partial interpretation of the evidence. The Defence further requests that the Chamber establish a regime for *inter partes* disclosure requests, whereby each party would have a shortened deadline of five days, pursuant to regulation 35 of the Regulations of the Court, to respond to any request for disclosure.

24. Hitherto, the Prosecution has disclosed approximately [REDACTED] incriminating items, [REDACTED] rule 77 items and [REDACTED] PEXO items, which is a considerable volume of evidence to review, with limited Defence resources.³⁸ Given the volume of evidence disclosed and the changed nature of the case, which results in much of the evidence disclosed being now irrelevant due to the dropped charges, the Defence enjoins the Trial Chamber to set the final disclosure deadline of all evidence, including exculpatory material, including a list of evidence and a definitive witness list, to allow sufficient for the Defence to prepare, before the beginning of trial, and that evidence be disclosed on a rolling basis.³⁹ Should the Prosecution fail to meet its

same can be said of Prosecution certain metadata updates, which often lack transparency and the Defence is left guessing which metadata fields have been updated.

³⁶ The Defence has engaged an *inter partes* exchange with the Prosecution in order to seek clarifications, which are yet to be received. To give but one example, the Defence has located a screening note classified as "INCRIM" for witness P-2378, but has not located a corresponding witness statement. Screening notes for certain witnesses also seem to be missing, such as for witnesses P-0889, P-0808, P-0801, and P-1193.

³⁷ ICC-01/14-01/18-64-Anx, page 13. The "related to witness" metadata field was provided to the Defence on 15 October 2019, for a total of 6614 items.

³⁸ In the *Ongwen* case, the OTP stated that "disclosure review is a slow and labour-intensive exercise. From experience in previous cases, the average time required to review documents [...] is 50 pages per person per day, *Prosecutor v Dominic Ongwen*, Public redacted version of "Prosecution's Application for Postponement of the Confirmation Hearing", 12 February 2015, ICC-02/04-01/15-196-Red2, at para. 4.

³⁹ As recalled by the Single Judge of Pre-Trial Chamber II, "the phrase 'as soon as practicable' within the meaning of article 67(2) of the Statute has been understood as "immediately after having identified any such evidence, unless some justifiable reasons prevent her from doing so". The Single Judge further held that "early initiation of the process of disclosure, as soon as possible after the surrender of the suspect of the Court, better guarantees also the expeditiousness of the proceedings, guided by the overarching principle of fairness. This

disclosure obligations, the Chamber must determine the appropriate remedy for the Prosecution's conduct and the potential prejudice caused to Mr Ngaïssona, such as the exclusion of evidence not disclosed in accordance with the e-Court protocol or which unduly prejudices Mr Ngaïssona's rights to prepare for trial.⁴⁰

25. Furthermore, the Defence suggests that the Trial Chamber order the Prosecution to disclose its evidence via a ringtail link, in order to meet the requirements of *inter partes* disclosure.⁴¹ Disclosures via ringtail are necessary for the Defence to analyse evidence seeing as its administrative privileges are not the same on e-Court. The Defence wishes to inform the Chamber that while it is transitioning towards electronic disclosure, this tool is still not fully available to it.

(3) Transcription and translation issues

26. The Defence requests that all disclosed evidence be provided to the Defence in one of the two working languages of the Court, that all rule 76 material be accompanied by French translations, and that all original-language transcripts of audio/video material, as well as their translations into one of the two working languages of the Court, be provided to the Defence. Transcripts and translations of audio/video evidence form an integral part of the video; when one is missing, the evidence is not complete and it cannot be said that the Prosecution has complied with its disclosure obligations, as well as its obligation pursuant to regulation 39(1) of the Regulations of the Court.⁴²

places an obligation on the Prosecutor, the triggering force of the proceedings, to conduct the review of the evidence as soon as it is collected during the investigation and on an ongoing basis, so as to be ready to comply expeditiously with the disclosure obligations upon surrender of the suspect to the Court", ICC-01/14-01/18-64-Conf, paras 13-14.

⁴⁰ See article 61(1)(b) of the Statute. Any late disclosure must be justified pursuant to regulation 35(2) of the Regulations of the Court, *Prosecutor v. Katanga & Ngudjolo*, Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to Regulation 35 of the Regulations, 23 October 2009, ICC-01/04-01/07-1552, para. 14.

⁴¹ See ICC-01/14-01/18-143-Conf, para. 22. Rule 121(2)(c) of the Rules; See also *Prosecutor v. Al Hassan*, Decision on the evidence disclosure protocol and other related matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 13. Ringtail is the main Defence analysis tool. It allows the Defence to review, search, analyse and compare evidence that has been uploaded into it but not necessarily disclosed yet, to complete the meta-data of the evidence and to annotate the evidence, which is not possible via e-Court. Ringtail and e-Court are complementary instruments for the parties, but they are certainly not substitutable. Further, the Casemap software is not automatically available to the Defence. To obtain the case map software, the Defence must obtain prior authorization and only one may license, for one team member, may be issued.

⁴² The Trial Chamber held that the transcripts and translations are necessary in order to understand the original videos: "(...) a video is only disclosed to the Defence from the moment it can fully understand what its precise content is" and that it will only be possible for the Defence to fully understand the contents of a video after (...) 4) the audible spoken words and visible written texts have, to the extent that they are relevant to the evidence, been translated into one of the working languages of the Court", *Prosecutor v. Katanga*, Decision on the

27. Out of a total of [REDACTED] audio/video items disclosed by the Prosecution, the Defence has located [REDACTED] items which are fully or partially in Sango, representing approximately 25% of all audio/video items. Out of the Sango items, only a few are accompanied by “transcripts”; however, none offer an actual transliteration of their content. Instead, the transcripts merely indicate <SAG> where Sango is spoken.⁴³ Although some Sango items are accompanied by French translations, or “OTP summaries”, these are clearly insufficient to meet the requirements of disclosure, especially given that certain items are only accompanied by draft translations,⁴⁴ and for summaries, given that they were prepared by the Prosecution in the context of its investigations.⁴⁵ Other Sango items classified as “INCRIM” are not accompanied by any transcript, translation or summary, despite, for many, having been in the Prosecution’s custody for over five years.⁴⁶

(4) Protective measures of witnesses (including additional need for redactions, delayed disclosure or referrals to the Court’s witness protection programme)

28. The Prosecution must organise its activities regarding witness protection in such a manner so as to enable it to comply with its disclosure obligations.⁴⁷ As held by the Single Judge of Pre-Trial Chamber II, it is critical to the disclosure of evidence and the expeditiousness of proceedings that the Prosecution finalise its individual risk

"Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336, paras 11-15.

⁴³ See for instance CAR-OTP-2107-6891, where transcript portions of interviewed persons speaking in Sango merely mention <SAG>. The “transcript” accompanying audio file CAR-OTP-2016-1137 (CAR-OTP-2060-0760) is particularly striking for its lack of information. It mostly consists of the following: FB: <SAG>, (Cris de la foule) FB: <SAG>, (Cris de la foule), FB <SAG> (Cris de la foule) etc.

⁴⁴ See for instance CAR-OTP-2107-7016.

⁴⁵ For instance, for CAR-OTP-2000-0603 there is an OTP summary and translation (French) but no original transcript, despite this item having been in the Prosecution’s possession since November 2014. *See also* ICC-01/14-01/18-382-Conf-Corr, para. 48. In the *Katanga* case, the Trial Chamber allowed the Prosecution to submit additional transcripts and translations for videos under regulation 35(2). However, the Trial Chamber noted “with concern that, although the videos were disclosed before the time limit, they were provided to the Defence *without* a transcript or translation. Under these circumstances, the Chamber wonders to what extent the Defence has been able, as the Prosecution alleges, to usefully exploit these videos. In this respect, the Chamber has itself examined a sample of the videos and found it extremely difficult to understand their precise content without the transcript and translation.” The Trial Chamber moreover found that “a persistent lack of resources can never be an excuse for not complying with legal obligations or for not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for preparation and to be tried without undue delay.”, *Prosecutor v. Katanga*, Decision on the “Prosecution’s Urgent Application to be Permitted to Present Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, 27 July 2009, ICC-01/04-01/07-1336, paras 6-9.

⁴⁶ For instance, see CAR-OTP-2000-0476; CAR-OTP-2000-0489; CAR-OTP-2000-0514; CAR-OTP-2000-0540.

⁴⁷ ICC-01/14-01/18-163, para. 28; ICC-01/14-01/18-64-Red, para. 14.

assessments of witnesses and refer witnesses to the Victims and Witnesses Unit (“WVU”) well in advance, “preferably during the investigation”.⁴⁸ The “continued volatility and unpredictability of the security situation in the Central African Republic” is not a valid excuse for the Prosecution’s failure to anticipate that witnesses need to be identified, contacted, and protected in time to disclose their identities to the Defence.⁴⁹

29. As held by the Trial Chamber in the *Laurent Gbagbo and Charles Blé Goudé* case, factors such as “generic references to the social context in [a situation country]”, “speculative and hypothetic scenarios”, “a witness’s personal subjective fears and concerns, or preferences, not substantiated by objective, verifiable circumstances”, and “isolated past episodes, even when serious”, are unsuitable to trigger the application of protection measures pursuant to rule 87 of the Rules.⁵⁰ The Defence thus urges the Chamber provide an update on its protective measures, and to lift all redactions which are not strictly necessary, as soon as possible, and that they be disclosed in a manner which is most conducive to Defence preparation.

30. Further, the Defence wishes to stress the importance of the proceedings being held in public as much as possible, and for them to be broadcasted in CAR, in concordance with the fundamental right to a public hearing enshrined in articles 67(1) and 64(7) of the Statute and regulations 20 and 21 of the Regulations of the Court. This right attaches not only to accused persons but also to the general public, and in particular, to Central Africans who wish to follow the trial and hear the witness testimonies.⁵¹

(5) Disclosure of witnesses’ identities which have been withheld from the Defence

⁴⁸ ICC-01/14-01/18-64-Conf, para. 14. The Prosecution has already provided assurances in December 2018 that it would be able to provide all IRAs for all witnesses by the end of January 2019, ICC-01/14-01/18-40, para. 4.

⁴⁹ See for instance ICC-01/14-01/18-237-Conf-Red, para. 5.

⁵⁰ *Prosecutor v. Gbagbo and Blé Goudé*, Decision on the Prosecution’s application for protective measures for Witness P-0428, 20 April 2018, ICC-02/11-01/15-1155-Red, para. 8. See also, *Prosecutor v. Gbagbo and Blé Goudé*, 17 October 2016, ICC-02/11-01/15-T-86-Red-EN, page 17, line 23 to page 20, line 12.

⁵¹ See Regulation 21(1) of the Regulations of the Court which provides that the publicity of hearings may extend beyond the courtroom. “The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large”, United Nations Human Rights Committee, General Comment No. 32 on Article 14. In the *Gbagbo and Blé Goudé*, for instance, the Single Judge underlined the “paramount” nature of the principle of the publicity of the proceedings, *Prosecutor v. Blé Goudé*, Decision on Defence requests relating to the Prosecutor’s Response to the Defence motions for acquittal and to the scheduling of the hearing to be held on 1 October 2018 (filings no. 1208 and 1211), 21 September 2018, ICC-02/11-01/15-1212, para. 25.

31. The Appeals Chamber has considered that the use of anonymous evidence is “an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed” prior to the confirmation hearing.⁵² As previously argued, evidence from an anonymous witness is the most severe form of non-disclosure.⁵³ The limited scope of the confirmation of charges hearing has consistently been a factor considered by Pre-Trial Chamber II in permitting the *temporary* non-disclosure of witness identities by the Prosecution.⁵⁴ The Pre-Trial Chamber has emphasized that information withheld from the Defence must be kept under review and may be subsequently disclosed, should circumstances change.⁵⁵ Given that the case has entered the trial phase, the Defence requests the Chamber to order the Prosecution to disclose the identity of all witnesses whose identity have been withheld, given that withholding these witness identities is, particularly at this stage, detrimental to the Defence’s ability to prepare for trial and inconsistent with the rights of Mr Ngaïssona under article 67 of the Rome Statute.

(6) Disclosure of material obtained pursuant to Article 54(3)(e) of the Statute.

32. The right to disclosure of potentially exculpatory material is a fundamental component of the right of the accused to a fair trial.⁵⁶ Reliance by the Prosecution on article 53(3)(e) must be “exceptional”⁵⁷ and must be limited for the purpose of generating new evidence.⁵⁸

⁵² *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 1; ICC-01/14-01/18-261-Conf-Red, para. 21.

⁵³ ICC-01/14-01/18-257-Conf, para. 18.

⁵⁴ On 28 June 2019 (made available to the Defence on 5 July 2019), Pre-Trial Chamber II held that the “limited scope” of the confirmation of charges hearing was one of the factors considered in its decision to allow the non-disclosure of the identities of witnesses, ICC-01/14-01/18-232, paras 42, 47, 52 57, 62. See also ICC-01/14-01/18-267, paras 28-29; ICC-01/14-01/18-273, paras 29-30.

⁵⁵ ICC-01/14-01/18-232, para. 23.

⁵⁶ *Prosecutor v. Banda*, Decision on Article 54(3)(e) documents, 23 November 2011, ICC-02/05-03/09-259, para. 14.

⁵⁷ *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 55.

⁵⁸ *Ibid.*, paras 1-3, 41-45. See also, *Prosecutor v. Banda and Jerbo*, Decision on article 54(3)(e) documents, 23 November 2011, ICC-02/05-03/09-25, paras 14-18.

F. Disclosure by the Defence, including whether the Defence intends to advance a defence in accordance with Rules 79 and 80 of the Rules

33. Given the lack of clarity of the Prosecution's case against Mr Ngaïssona in light of the Confirmation Decision reducing the charges, and the extensive redactions applied to Prosecution material, the Defence is not in a position to inform the Chamber as of the date of these submissions as to whether it wishes to raise a defence in accordance with Rules 79 and 80 of the Rules.

G. Provision of a pre-trial brief by the Prosecutor

34. It has been the consistent practice of the Court for the Prosecution to provide the Defence with a pre-trial brief prior to the start of trial in order to ensure that the Defence can effectively prepare for trial.⁵⁹ In the instant case, the provision of such a document is essential seeing as the Pre-Trial Chamber declined to confirm almost 75% of the charges. It also declined to find that Mr Ngaïssona acted as principal and instead found there were substantial grounds to believe that Mr Ngaïssona was an accessory to the alleged charged crimes.

35. The Defence must be apprised sufficiently in advance of trial of the evidence the Prosecution intends to rely on to prove the commission of each of the alleged crimes charged and Mr Ngaïssona's alleged criminal responsibility therein. In other cases before this Court, Trial Chambers have required the Prosecution to provide the Defence with a Pre-Trial Brief between 3 and 4 months before the start of trial.⁶⁰ In light of the Pre-Trial Chamber findings as discussed above to which the Prosecution conceding, the Defence prays the Chamber that the Prosecution be ordered to file its pre-trial brief as soon as possible in order to begin trial as soon as possible.

H. Estimated length of opening statements

⁵⁹ The Chamber Practice Manual, 29 November 2019, para. 75.

⁶⁰ *The Prosecutor v. Dominic Ongwen*, Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, paras 5-8; *The Prosecutor v. Bosco Ntaganda*, Decision on the updated document containing the charges, ICC-01/04-02/06-450 06-02-2015, para.89; *The Prosecutor v. Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud*, Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548 06-01-2020; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Order setting the commencement date for trial, ICC-01/05-01/13-960 22-05-2015, at para 12.

36. The Defence requests that it be allowed to make an opening statement of at least three hours at the commencement of trial.

I. Update and forecast on (additional) applications by victims to participate in the proceedings

37. The Defence submits that as far as Mr Ngaïssona is concerned, this updated number and forecast of participating victims should be factor in the reduction of the temporal, geographical and material scope of the charges as a result of the Confirmation Decision. The Defence also respectfully requests the Chamber to order the Registry to (i) confirm, in the spirit of its decision dated 5 March 2019,⁶¹ that it has informed all victims whose alleged harm has resulted from an incident falling now outside of the charges that they would no longer participate to the proceedings against Mr Ngaïssona and (ii) provide an updated reduced number of participating victims to the Defence reflecting the reduced scope of the charges.

38. Pursuant to article 68(3) of the Statute, the Defence respectfully requests the Chamber to set respective deadlines before the start of the trial (i) for submission of any new applications to the Registry as well as (ii) for the transmission of applications to the Chamber and, as the case may be, to the parties.

J. Additional topics the Defence intends to raise during the status conference

39. The Defence would like to make submissions on Mr Ngaïssona's detention conditions. The Defence respectfully submits that Mr Ngaïssona's detention conditions have become untenable. Since April 2019 as of today, the Defence made use of the complaint procedure under regulation 217 of the Regulations of the Registry ("RoR") in order to address seven different issues arising from Mr Ngaïssona's detention.⁶² Since the CCO found that Mr Ngaïssona's complaints were not justified on nearly every occasion,⁶³ the Defence had to address the Registrar or the Presidency in order to obtain redress of the violations of Mr Ngaïssona's rights. As

⁶¹ ICC-01-14/01-18-141, para. 10.

⁶² The Defence respectfully draws the Chamber's attention to Annex 1, listing all the Complaints and Requests for Review filed by the Defence with respect to Mr Ngaïssona's detention conditions.

⁶³ Ibid.

a consequence, the Defence has made 14 filings with respect to detention conditions in less than one year. As evidenced in Annex I to these submissions, most of Mr Ngaïssona's complaints were ultimately determined to be well-founded.

40. These results could only be obtained with the Defence dedicating considerable time and resources to address these matters. However, they came with a cost, namely the diversion of resources from the preparation of Mr Ngaïssona's defence. Moreover, some of these results were only illusory, in that Mr Ngaïssona's rights were recognized in theory, but not upheld in practice, as the Registrar averred that, in order to address certain matters which raised "important systemic issues", broader inquiries had to be launched, involving consultations with the Host State and the prison authority.⁶⁴ While these inquiries were launched in mid-2019, they will not be completed in the foreseeable future, given that they have been suspended until further notice due to the Covid-19 pandemic.⁶⁵ Moreover, Mr Ngaïssona's ability to follow up and raise further issues concerning his detention has now been seriously affected by the CCO's recent decision to double all the time limits for the complaint procedure.⁶⁶ This decision allows the CCO or the Registrar, as the case may be, to decide on a detention-related complaint within 28 days, rather than the original time limit of 14 days set by regulation 218(5) RoR. Similarly, requests for review addressed to the Registrar or the Presidency under regulations 219 and 220 RoR can now be decided upon within 14 days, rather than the original time limit of 7 days.

41. In addition to straining the Defence's resources, Mr Ngaïssona's detention conditions have seriously affected his well-being. In order to have a full picture of Mr Ngaïssona's detention conditions, the serious violations outlined above should be considered in combination with the restrictions on Mr Ngaïssona's communications with the outside world. Mr Ngaïssona's communications have been restricted since his arrival at the Detention Centre.⁶⁷ Fourteen months later, restrictions remain in place with no end in sight, in spite of the absence of any indication that Mr Ngaïssona may

⁶⁴ See for example, with respect to issue n. 3 of Annex 1, the "Second Decision on Mr Ngaïssona's Complaint to the Registrar received 9 September 2019", 18 November 2019. With respect to issue n. 5 of Annex 1, see "Decision on Mr Ngaïssona's Request for Review addressed to the Registrar received 16 March 2020", 31 March 2020.

⁶⁵ Email of Irinka Dolidze on behalf of Peter Lewis to Chiara Giudici, 4 March 2020, at 16:07.

⁶⁶ Email of Etienne Mbumoko to Defence Counsels, 6 April 2020, at 17:53, transmitting the CCO's decision of 2 April 2020 titled "extension of deadlines for complaints."

⁶⁷ ICC-01/14-01/18-98-Conf-Exp.

try to interfere with the current proceedings or the Prosecutor's investigation.⁶⁸ The ex parte nature of the ongoing litigation on restrictions prevents the Defence from further substantiating its claims with respect to the disproportionality of the restrictions on Mr Ngaïssona's contacts and their effect on his well-being. In this regard, the Defence informs the Chamber that it intends to seek reclassification of the confidential redacted versions of its filings on this issue, so that they may be made public. Moreover, the Defence agrees with the proposal put forth by the Defence of Mr Yekatom that the two defence teams have access to the confidential redacted versions of their respective filings on restrictions.

42. Mr Ngaïssona's detention conditions have had a tremendous impact on the Defence's ability to work effectively with him in order to prepare his defence. Moreover, the Defence's ability to work with Mr Ngaïssona is currently hampered by the measures taken at the ICC Detention Centre against the Covid-19 outbreak, which include the suspension of all legal visits and the prohibition to drop-off case related material.⁶⁹ While Mr Ngaïssona has a computer in his cell to communicate with his defence team, he has never been able to use it. Therefore, the Defence is unable to transmit him case-related documents.

43. The Defence respectfully submits that the above-mentioned information warrants further consultation to ensure that Mr Ngaïssona is able to effectively prepare his defence. Moreover, Mr Ngaïssona would like to address the Chamber on his detention conditions during the upcoming status conference.

K. Defence submissions on the various protocols

44. In the Confirmation Decision, Pre-Trial Chamber II already acknowledged that the witness statements underpinning the core findings against Mr Ngaïssona, upon which all the other findings depend, were "based on second-hand information, consist[ed] of inferences, or omit[ted] to provide specific details" and that while they passed the evidentiary threshold applicable to the pre-confirmation stage of the proceedings, it suggested that it might be different with respect to "the more exacting threshold of the

⁶⁸ ICC-01/14-01/18-460-Conf-Exp, para 29.

⁶⁹ Email of Etienne Mbumoko to Defence Counsels of 19 March 2020, at 15:15, transmitting the CCO's decision titled 'URGENT New Detention Centre Temporary Measures Regarding COVID-10'.

trial stage”.⁷⁰ Therefore, in this regard, it is particularly important that such mechanisms allowing for (i) the possible early termination of the case against Mr Ngaïssona if the “expeditiousness and/or fairness of the trial so warrants”⁷¹ and (ii) the correct filtering of the evidence be appropriately anticipated and that submissions be permitted on these aspects.

45. If allowed by the Chamber, the Defence would like to make timely submissions on the rules to be adopted in relation to the submission and admission of the evidence as well as on the appropriateness of: (i) forbidding the conduct of any form of witness preparation and (ii) allowing the Defence to file a motion of a no case to answer at the end of the presentation of the Prosecution’s evidence, especially in light of the aforementioned findings of the Pre-Trial Chamber in the Confirmation Decision.⁷² Such a motion would expedite proceedings and prevent undue delay in light of the particularities of this case.

46. These three discrete questions are crucial and determinative aspects of the conduct of the proceedings and warrant an involvement of the parties in the discussions in relation thereto.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 5 June 2020,

At The Hague, the Netherlands.

⁷⁰ Confirmation Decision, para. 102.

⁷¹ *Prosecutor v. Bosco Ntaganda*, Decision on Defence request for leave to file a ‘no case to answer’ motion, 1 June 2017, ICC-01/04-02/06-1931, paras 26-27.

⁷² See *Prosecutor v. Bosco Ntaganda*, Decision on the Conduct of Proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 17, where Trial Chamber VI authorised a similar request.