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**International
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Date: **01 March 2021**

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

Public Redacted Version of "Defence Request for leave to appeal the 'Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention' (ICC-01/14-01/18-484-Conf-Exp)", ICC-01/14-01/18-496-Conf-Exp, 28 April 2020

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor

Ms Fatou Bensuoda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Omissé-Namkeamaï
Ms Marie-Hélène Proulx
Ms Sara Pedroso
Ms Chiara Giudici

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Legal Representatives of the Victims

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona (“Defence”) hereby requests Trial Chamber V (“Chamber”) to grant it leave to appeal the “Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention” dated 17 April 2020 (“Decision”), pursuant to article 82(1)(d) of the Rome Statute (“Statute”) and rule 155(1) of the Rules of Procedure and Evidence (“Rules”).¹ Four discrete appealable issues (“Issues”) emanate from the Decision which would significantly affect the fair and expeditious conduct of the proceedings or in the alternative, the outcome of trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

II. PROCEDURAL HISTORY

2. Since his transfer to the Court on 23 January 2019, and at the Prosecution's request,² Mr Ngaïssona has been subject to measures restricting his contacts with the outside world, including active monitoring.³ On 3 February 2020, Pre-Trial Chamber II decided that the restrictions on Mr Ngaïssona's contacts be maintained until the end of the pre-trial proceedings.⁴
3. On 6 March 2020, the Registry filed its “Ninth Registry Report on the Implementation of Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II” (“Ninth Registry Report”).⁵ On 11 March 2020, Pre-Trial Chamber II directed the Prosecution and the Defence to submit their observations on the Ninth Registry Report to the Trial Chamber to be constituted or, pending its constitution, to the Presidency.⁶ On 16 March 2020, the Presidency constituted Trial Chamber V, and referred to it the case.⁷ On 16 March 2020, the Prosecution filed its observations on the Ninth Registry Report.⁸

¹ ICC-01/14-01/18-484-Conf-Exp. A confidential redacted version was filed the same day: ICC-01/14-01/18-484-Conf-Exp-Red.

² ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp.

³ Restrictions were imposed by the following decisions of Pre-Trial Chamber II: ICC-01/14-01/18-98-Conf-Exp; ICC-01/14-01/18-106-Conf-Exp-Red; ICC-01/14-01/18-114-Conf-Exp-Red; ICC-01/14-01/18-137-Conf-Exp; ICC-01/14-01/18-176-Conf-Red; ICC-01/14-01/18-240-Conf-Exp; ICC-01/14-01/18-357-Conf-Exp; ICC-01/14-01/18-374-Conf-Exp; ICC-01/14-01/18-413-Conf-Exp.

⁴ ICC-01/14-01/18-424-Conf-Exp.

⁵ ICC-01/14-01/18-444-Conf-Exp.

⁶ E-mail from Pre-Trial Chamber II to the Defence, 11 March 2020, at 13:26.

⁷ ICC-01/14-01/18-451.

⁸ ICC-01/14-01/18-453-Conf-Exp.

4. On 19 March 2020, the Defence filed its “Defence Observations to the 'Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II”, requesting the Trial Chamber to immediately lift, in practice, the restrictions on Mr Ngaïssona's contacts. In the alternative, the Defence requested the Chamber to urgently examine the matter *de novo*.⁹ On 24 March 2020, the Defence received an email from the Chamber in response to a Prosecution email requesting whether the Chamber had extended the restrictions imposed by the Pre-Trial Chamber, to which the Chamber responded that the restrictions would remain in place while the matter was under examination.¹⁰
5. On 17 April 2020, the Chamber issued its Decision, rejecting the Defence's request and ordering that the restrictions previously imposed by Pre-Trial Chamber II be maintained.¹¹

III. CONFIDENTIALITY

6. In accordance with regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), these submissions are filed “confidential, *ex parte*” as they concern *ex parte* documents. The Defence will file further confidential and public redacted versions.¹²

IV. SUBMISSIONS

7. Pursuant to the cumulative legal criteria set forth in article 82(1)(d) of the Statute, the Chamber may grant leave to appeal if: a) the Decision involves 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.¹³ As demonstrated below, all the requisite criteria have been met.

A. The Decision raises four appealable Issues

⁹ ICC-01/14-01/18-460-Conf-Exp.

¹⁰ Email from the Chamber to the Prosecution and the Defence, 24 March 2020, at 19:46; Decision, para. 19.

¹¹ ICC-01/14-01/18-484-Conf-Exp.

¹² On 24 April 2020, the Single Judge instructed the parties, the participants and the Registry to undertake a review of their *ex parte* filings on the case record and comply with the process set out in paragraph 4 above, by 22 May 2020. ICC-01/14-01/18-492.

¹³ *Situation in the DRC*, 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 (“*DRC Appeals Judgment*”), paras 14-19.

8. As held by the Appeals Chamber, an “issue” is “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, *i.e.* not merely a question over which there is a disagreement or conflicting opinion”.¹⁴ An “issue” must emanate from the relevant decision itself and cannot represent a hypothetical concern or an abstract legal question.¹⁵ The following appealable Issues arise directly from the Decision:

- i)* Whether the Chamber erred in extending the pre-trial restrictions to the trial stage while failing to consider the matter *de novo* despite the clear wording of regulation 101(2) which requires that the Prosecution file a request to the “Chamber seized of the case” (“First Appealable Issue”);
- ii)* Whether the Chamber erred in finding that there were “reasonable grounds to believe” under regulation 101(2) that the lifting of restrictions could prejudice the outcome of the proceedings, namely by negatively impacting on the Prosecution’s ongoing investigations and the protection of victims and witnesses, in a case where none of the alleged violations of the restrictions regime in place related to interference with the Prosecution’s investigations or victims and witnesses (“Second Appealable Issue”);
- iii)* Whether the Chamber erred by failing to assess the cumulative effect of the passage of time and the absence of indications of interference with the proceedings in its assessment of whether there had been a change in circumstances warranting the lifting or the modification of the restrictions (“Third Appealable Issue”);
- iv)* Whether the Chamber erred in determining that the current measures constitute the least restrictive measures available in light of the aim pursued (“Fourth Appealable Issue”).

9. A prompt resolution by the Appeals Chamber of the Issues is essential for the determination of the restrictions imposed on Mr Ngaïssona’s contacts with the outside world, pursuant to regulation 101(2) of the Regulations. The Issues do not merely consist of a disagreement or a conflicting opinion with the Decision. Rather, they each raise fundamental questions of law and fact, namely, with respect to the manner in which the Chamber may consider applying restrictions on Mr Ngaïssona’s contacts and the legal criteria which are applicable in its determination. The Issues emanate

¹⁴ *DRC Appeals Judgment*, para. 9.

¹⁵ *Prosecutor v. Gbagbo*, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, ICC-02/11-01/11-464, 31 July 2013, para. 8; *Prosecutor v. 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 », ICC-01/04-02/06-322, 4 July 2014.

directly from the Decision, as they relate to the manner and scope of the Chamber's findings as to whether restrictions pursuant to regulation 101(2) are warranted. In the alternative, the Defence requests that the Chamber exercise its discretion to reformulate the aforementioned Issues as it deems fit to ensure proper appellate review of the Decision.¹⁶

(i) *First Appealable Issue*

10. The Chamber erred by simply extending pre-trial restrictions to the trial phase, without examining the matter *de novo* based on a renewed request by the Prosecution, contrary to the requirements of regulations 101(2) and (3) of the Regulations. The First Appealable Issue emanates directly from the Decision, particularly paragraphs 19-25 of the Decision. As previously argued,¹⁷ the current restrictions on Mr Ngaïssona's communications lack a legal basis due to (i) the absence of a renewed Prosecution request filed to the "Chamber seized of the case" pursuant to the clear wording of regulation 101(2),¹⁸ and (ii) the expiry of the restrictions imposed by the Pre-Trial Chamber II for the "remainder of the pre-trial proceedings" which were based on considerations inherent to the pre-trial stage.¹⁹ At this new juncture of the case, any discussion concerning restrictions on Mr Ngaïssona's contacts with the outside world must be re-litigated and considered by the Chamber *de novo*.²⁰ However, in its Decision, the Chamber dismissed the Defence arguments merely based on its previous response to a Prosecution query, conveyed by email, indicating that restrictions would remain in place while the matter was under examination.²¹ The Chamber failed to

¹⁶ *Prosecutor v. Ruto et al.*, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817, 18 July 2013, para. 20; *Prosecutor v. Kenyatta*, Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015, para. 9(i), 25.

¹⁷ ICC-01/14-01/18-460-Conf-Exp, paras 2, 15, 32.

¹⁸ See by contrast, the Prosecution's urgent request in the *Prosecutor v. Al Hassan* case, in which it urgently requested the Chamber to (1) maintain restrictions temporarily in the interim upon the constitution of the Trial Chamber to "ensure that there is no gap in continuity in applying the Restrictions" and (2) order, upon receipt of the Defence observations, that a number of restrictions apply to Mr Al Hassan's contacts with the outside world. The Prosecution requested a page extension pursuant to regulation 37 in order to provide inter alia "sufficient factual information about the risks posed to Prosecution witnesses if existing Restrictions are not maintained", Prosecution's urgent application to maintain restrictions on Mr Al Hassan's contacts and access to others whilst in detention, ICC-01/12-01/18-505-Red2, 22 November 2019, para. 11. In the present case, no detailed request was made by the Prosecution.

¹⁹ ICC-01/14-01/18-460-Conf-Exp, paras 2,10, relying on ICC-01/14-01/18-176-Conf-Red, page 14 and ICC-01/14-01/18-413-Conf-Exp, page 23.

²⁰ ICC-01/14-01/18-460-Conf-Exp, para. 17.

²¹ Email from the Chamber to the Prosecution and the Defence, 24 March 2020, at 19:46; Decision, para. 19.

consider the matter *de novo*,²² based on a renewed Prosecution request providing “up to date, concrete and detailed information” and Defence observations thereto.²³

11. The Chamber’s reasons stand in contradiction with the clear wording of regulations 101(2) and (3). The Defence recalls regulation 101(2), which provides that the “Prosecutor may request the Chamber seized of the case [*i.e.* the Chamber] to prohibit, regulate or set conditions for contact (...)” whereas regulation 101(3) explicitly provides that a “detained person shall be informed of the Prosecutor’s request and shall be given the opportunity to be heard or to submit his or her views”.²⁴ By rendering its decision without having been seized by a Prosecution request providing up-to-date and concrete submissions pursuant to regulation 101(2), the Chamber erred as a matter of procedure and law, by disregarding the burden placed on the Prosecution to show “reasonable grounds”, and denying the Defence of its right to be heard and to present its views, under regulation 101(3).²⁵ The Prosecution’s observations to the Ninth Registry Report fall considerably short of providing a legal basis for renewed restrictions and clearly do not amount to providing the “chamber seized of the case” with “up to date, concrete and detailed information”.²⁶ The Defence’s observations to the Ninth Registry Report, which were necessarily limited to responding to the Ninth Registry Report, cannot be deemed as fulfilling the requirement of regulation 101(3)

²² The Chamber erred by basing its Decision on the incorrect premise that it must determine whether the restrictions should be “maintained, modified, or lifted” and erred by limiting the scope of its examination to “considerations by PTC II in its Pre-Trial Decisions, the Registry Report (...) and the parties’ submissions, Decision, para. 20.

²³ Regulation 101(2) and 101(3), Regulations of the Court. See for instance ICC-01/14-01/18-137-Conf-Exp; *Prosecutor v Al Hassan*, Decision on Mr Al Hassan’s restrictions and accesses while in detention, ICC-01/12-01/18-557-Red3, 21 January 2020, para. 11, the Chamber noted that it needed to be “provided with up to date, concrete and detailed information in order to be able to review the measures restricting Mr Al Hassan’s contacts while in detention”, in order for it to “be able to take a fully informed decision on the measures restricting Mr Al Hassan’s contacts while in detention in accordance with the criteria set out above” (of proportionality, necessity and due regard for internationally recognized human rights), para. 10.

²⁴ Emphasis added.

²⁵ *Prosecutor v. Bemba*, Decision on the Prosecutor’s request for the regulation of contacts of Jean-Pierre Bemba Gombo, ICC-01/05-01/08-134, 1 October 2008, para. 32. The Pre-Trial Chamber found that the authorization of redactions of information contained in the fourteen witness statements is an adequate protective measures and noted that Mr Bemba’s communications were being monitored. It concluded that : “in discharging its duties to adequately balance the protection of victims and witnesses and the respect of the rights of the defence, these two latter measures are sufficient considering the information available so far on the capacity of Mr. Jean-Pierre Bemba to intimidate any witness whose identity has been disclosed to him from the Court’s detention centre”, para. 33.

²⁶ The Prosecution’s observations are vague and unsubstantiated by cogent argumentation or evidence, ICC-01/14-01/18-453-Conf-Exp; See *Prosecutor v Al Hassan*, Decision on Mr Al Hassan’s restrictions and accesses while in detention, ICC-01/12-01/18-557-Red3, 21 January 2020, para. 11.

of the Regulations. By basing its decision on the Ninth Report, the Chamber accepted the findings of the Pre-Trial Chamber, and the Registry Reports informing their findings, rather than reviewing the totality of the material, which includes the underlying material used to draft the Registry Reports, without including substantive views of the Defence.²⁷

12. In essence, the legal requirements of regulation 101(2) and 101(3), and the procedural guarantees provided therein were effectively bypassed. The First Appealable Issue therefore does not consist of a mere disagreement with the Decision.

(ii) *Second Appealable Issue*

13. Notwithstanding the First Appealable Issue, the Chamber erred by finding there were “reasonable grounds to believe” that the lifting of restrictions “could prejudice the outcome of the proceedings, namely by negatively impacting the Prosecution’s ongoing investigations and the protection of victims and witnesses”.²⁸ Regulation 101(2) provides an exhaustive list of circumstances which could warrant the setting of restrictions on a detained person’s contacts with any other person. The Chamber not only relied on a flawed interpretation of the alleged “incidents” reported by the Registry, but even if those incidents were to be taken at face value, they lack a logical connection with the grounds provided under regulation 101(2), including, among those grounds, the specific grounds which the Chamber put forward, namely the Prosecution’s ongoing investigations and the protection of victims and witnesses. Thus, they do not present an “objectively justifiable risk” which may warrant the imposition of restrictions.²⁹

14. Given the limited scope of the present request, the Defence shall only briefly address the Chamber’s findings in relation to the Second Appealable Issue. *Firstly*, the Chamber based its Decision *inter alia* on its finding that Mr Ngaïssona used “coded language”.³⁰ However, the Chamber’s determination relied on a Pre-Trial Chamber decision dated 18 September 2019, and failed to consider that the Pre-Trial Chamber’s

²⁷ Decision, para 22.

²⁸ See Decision, paras 20-25.

²⁹ *Prosecutor v. Al Hassan, Decision on Mr Al Hassan’s restrictions and accesses while in detention*, ICC-01/12-01/18-557-Red3, 21 January 2020, para. 10.

³⁰ Decision, para. 22.

decision relied on an incomplete and inaccurate transcript of a conversation had between Mr Ngaïssona and a family member on 18 July 2019.³¹ The complete and corrected transcript, which was only communicated to the Defence on 13 December 2019 by the Registry, at the Defence's request, shows that the conversations the Chamber refers to were entirely benign, did not contain "coded" language. They certainly do not meet the threshold of regulation 101(2) of "reasonable grounds to believe".³² In addition, the Chamber failed to consider the passage of time, namely that the alleged "coded language" incident occurred over eight months ago.³³

15. *Secondly*, the Chamber erred similarly in its determination with respect to Mr Ngaïssona's interaction with an unauthorized individual through speakerphone, notwithstanding previous Defence submissions, by relying on an "incident" which bears no remote link to the grounds provided for in regulation 101(2) and which ignores the context of the alleged incident.³⁴ The Chamber found that "these incidents demonstrate [Mr Ngaïssona's] willingness to disregard the restrictions and to conceal conversations from the Registry and ultimately the Chamber."³⁵ The Chamber did not assess, however, how the incident is linked to one of the grounds of regulation 101(2), in particular, how it meets the "reasonable grounds" threshold to trigger the application of regulation 101(2). In addition, the Chamber did not take into account the fact that Mr Ngaïssona was only informed by the CCO, almost one month *after* the so-called incident, namely on 15 August 2019, by memorandum, of the prohibition to speak with individuals using speakerphone.³⁶ In other words, Mr Ngaïssona held a genuine belief of the propriety of the call at the time he made it, contrary to the Chamber's conclusion that he wilfully disregarded the restrictions.³⁷

³¹ Decision, para. 22, referring to paras 3-4, footnotes 4-7.

³² Decision, para. 22, relying solely on a Pre-Trial Chamber II decision of 18 September 2019. See and compare transcript of 18 July telephone conversation provided by the Registry to the Defence on 13 December. The correct transcript was only provided to the Defence on 13 December 2020 and it apparent from this transcript, which provides the full context of the words spoken by Mr Ngaïssona, that not only that Mr Ngaïssona not use coded language but also that the words spoken bear no link whatsoever with the proceedings or Prosecution investigations and concerned private matters.

³³ ICC-01/14-01/18-357-Conf-Exp, paras 25-27. *See also* ICC-01/14-01/18-413-Conf-Exp-Para 30.

³⁴ Decision, para. 22.

³⁵ Decision, para. 22.

³⁶ *See* ICC-01/14-01/18-397-Conf-Exp-Anx1, pages 36-38; ICC-01/14-01/18-276-Conf-Exp, para 17 ; ICC-01/14-01/18-300-Conf-Exp, para 21.

³⁷ Decision, para. 22.

16. *Thirdly*, the Chamber erred in its determination that Mr Ngaïssona [REDACTED], and in its subsequent reliance on this finding to conclude there are “reasonable grounds” justifying maintaining the restrictions regime.³⁸ [REDACTED]. [REDACTED].³⁹ Moreover, this occurrence bears no factual link to the aims of regulation 101(2), as presented by the Chamber, namely preventing any prejudice on the outcome of the proceedings, by negatively impacting the Prosecution’s ongoing investigations, and the protection of victims and witnesses.

17. The Second Appealable Issue emanates directly from the Decision, specifically paragraphs 20-25. The Chamber erred by basing its determination that the restrictions were justified by irrelevant considerations which bear no link to the legal test established in regulation 101(2), requiring the intervention of the Appeals Chamber.

(iii) Third Appealable Issue

18. Notwithstanding the First Appealable Issue, the Chamber erred by failing to assess the cumulative effect of the passage of time and the absence of “incidents” in its assessment of whether there had been a change in circumstances warranting the lifting or the modification of the restrictions on Mr Ngaïssona's contacts. The issue directly emerges from the Decision, specifically paragraphs 18 and 24 of the Decision. The Chamber noted that the passage of time is a factor that could become more significant as time elapses since the initial imposition of restrictions.⁴⁰ However, in considering whether there had been a change in circumstances warranting the modification of Mr Ngaïssona's contact restrictions, the Chamber noted that it “is not persuaded that the passage of time, without more, leads to the conclusion that the imposed restrictions should be lifted.”⁴¹ While the Chamber did mention the passage of time as a potential factor, it did not substantively engage with it in its evaluation of whether restrictions on Mr Ngaïssona's communications remain warranted.⁴² Indeed, the passage of time should not have been considered in isolation, but rather cumulatively with Mr Ngaïssona's behavior during the relevant period.

³⁸ Decision, para. 22.

³⁹ ICC-01/14-01/18-397-Conf-Exp-Anx1, pages 36-38.

⁴⁰ Decision, para 18.

⁴¹ Decision, para 24.

⁴² Decision, para. 18.

19. In the Decision, the Chamber noted that restrictions had originally been considered necessary by Pre-Trial Chamber II due to “Mr Ngaïssona's important roles in the Anti-Balaka and in the CAR”, which could enable him to interfere with the proceedings.⁴³ While similar abstract reasons may have justified imposing some restrictions at the outset of proceedings, the passage of time, coupled with the absence of indications of interference with the proceedings, should have led the Chamber to conduct a more concrete – and *de novo* – assessment of whether circumstances continued to warrant contact restrictions at the trial stage.
20. The resolution of the Third Appealable Issue is essential for the determination of the matters arising in the judicial cause under examination, as it will clarify which circumstances may justify the maintaining of restrictions, and whether circumstances which are entirely independent of the accused can suffice to reach the conclusion that contact restrictions are warranted, even after a considerable amount of time has gone by and in the absence of any indication of interference with the proceedings.

(iv) *Fourth Appealable Issue*

21. Notwithstanding the First Appealable Issue, the Chamber erred by reaching the determination that less restrictive measures that could have ensured the integrity of the proceedings were not available. While the current restrictions have been put in place by several decisions of Pre-Trial Chamber II, it was through the Decision that the Chamber, at a new juncture of the proceedings, determined that the measures imposed by Pre-Trial Chamber II remained necessary and proportionate to the aim pursued.⁴⁴ Therefore, the current issue arises directly from the Decision, in particular from the Chamber's conclusion at paragraph 25 of the Decision.
22. As acknowledged by the Chamber, the right to privacy and family life is an internationally recognized human right, provided under the Court's statutory framework.⁴⁵ The right to privacy and family life is not absolute and may be interfered with if (i) in accordance with the law; (ii) necessary and (iii) proportionate.⁴⁶ As such,

⁴³ Decision, para 23.

⁴⁴ Decision, para 25.

⁴⁵ Decision, para 16.

⁴⁶ See, *inter alia*, *Messina v. Italy (No.2)*, ECtHR, no. 25498/94, Judgment, 28/09/2000, paras 63-65, and *Khoroshenko v. Russia*, ECtHR, no. 41418/04, Judgment (Grand Chamber), 30/06/2015, paras 123-126.

any limitation thereof should be absolutely necessary to the aim pursued.⁴⁷ Only then will the Chamber fulfil its duty to balance the rights of the accused with the legitimate aims listed at regulation 101(2).⁴⁸

23. The Chamber erred in reaching the conclusion that the current restrictions on Mr Ngaïssona's contacts are the least restrictive measures available in order to protect the integrity of the proceedings. While the Defence maintains that the active monitoring of all of Mr Ngaïssona's contacts with the outside world is a disproportionate measure, given the absence of objective indications that he tried to interfere with the proceedings, the absolute prohibition to have contact with certain family members and friends,⁴⁹ coupled with the existing active monitoring order, constitutes an excessive and unjustified limitation of Mr Ngaïssona's contacts. The Chamber's conclusion that these measures are necessary and proportionate to the aim pursued appears to convey the idea that a balance between Mr Ngaïssona's fundamental right to private and family life and the protection of the integrity of the proceedings can be achieved by simply ensuring that he has *some* family contact. The mere availability of some family contact does not countervail the disproportionality of the restrictions regime, as Mr Ngaïssona's right to private and family life should be infringed *only to the extent absolutely necessary*.

24. The Defence submits that, had the Chamber wanted to ensure that Mr Ngaïssona does not communicate with unauthorised third parties and does not engage in “coded language”, the active monitoring order would have sufficed to allow the Detention Section to timely interrupt calls or visits, had an apparent violation of the restrictions regime taken place.⁵⁰ On the contrary, the nature and scope of the current restrictive

⁴⁷ *Prosecutor v Katanga and Ngudjolo*, Fourth decision on measures of prohibition and restriction of contacts outside and inside the Detention Centre in respect of Mathieu Ngudjolo, ICC-01/04-01/07-1709-tENG-Red, para 18; Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-322, p. 9, quoting ICTY, *The Prosecutor v Slobodan Milosevic* [IT-02-54], Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Council (1 November 2004), para. 17 “any restriction of a fundamental right must be in service of ‘a sufficiently important objective,’ and must ‘impair the right... no more than is necessary to accomplish the objective’”; *Prosecutor v Al Hassan*, Decision on Mr Al Hassan's restrictions and accesses while in detention, ICC-01/12-01/18-557-Red3, 21 January 2020, para 10.

⁴⁸ Decision, para. 17.

⁴⁹ Decision, para 15.

⁵⁰ See, for example, *Prosecutor v Ongwen*, Decision concerning the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-283, 3 August 2015, at paras 13-14, where the Single Judge found that, in order to balance the need to preserve the integrity of proceedings and Mr Ongwen's rights in detention, the result could be

measures on Mr Ngaïssona's contacts is clearly disproportionate to the aim pursued, and unduly infringes on Mr Ngaïssona's right to private and family life. This conclusion further reinforces the Defence's position that the Chamber should have undertaken a *de novo* assessment of whether restrictive measures pursuant to regulation 101(2) were necessary. Had the Chamber done so, rather than simply maintaining all the measures imposed by Pre-Trial Chamber II, the imposition of disproportionate measures may have been avoided.

B. The four appealable Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and an immediate resolution by the Appeals Chamber thereof may materially advance the proceedings

25. The two disjunctive criteria under the second prong of the test of article 82(1)(d) of the Statute are met for each of the four Issues, namely that they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial. *First*, the Issues go to the very heart of fairness. They concern Mr Ngaïssona's due process rights, including his rights to have the restrictions on his contacts with the outside world examined *de novo* by the Chamber, as well as his right to an effective participation at trial, which is hampered by his effective isolation caused by the restrictions regime, fundamentally impacting his well-being.⁵¹ Moreover, the term "proceedings" in article 82(1)(d) includes ancillary matters such as detention conditions.⁵² Although conditions of detention are not *per se* part of the "proceedings", they must be considered as having a "significant impact" on the fairness of the proceedings as they entail consideration of the fundamental human rights of the accused.⁵³ *Second*, the concept of "expeditiousness" must be read as "closely linked to

achieved by imposing measures which enabled the Chamber and/or the Registry to intervene without undue delay "in case of any future information which may lead to a reasonable suspicion concerning attempts to exercise some form of influence on persons who possess information relevant to the case."

⁵¹ The right of an accused to effective participation in his or her criminal trial generally includes, *inter alia*, not only the right to be present, but also to hear and effectively follow the proceedings." ECtHR, *Case of S.C. v The United Kingdom*, no. 609587/00, Judgement, 15 June 2004, para 28, referring to *Stanford v The United Kingdom*, no. 16757/90, Judgement, 11 April 1994. Moreover, Fair trial rights must be practical and effective, and not merely theoretical, see *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.

⁵² *Prosecutor v. Bemba et al.*, Decision on Defence request seeking leave to appeal the 'Decision on request for compensation for unlawful detention,' ICC-01/05-01/13-1893, 13 May 2016."

⁵³ *Prosecutor v. Ntaganda*, Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', ICC-01/04-02/06-1513, 16 September 2016, para. 18

the concept of proceedings ‘within a reasonable time’, (...), without prejudice to the rights of the parties concerned”.⁵⁴ Should leave be granted, it would not delay trial proceedings as appellate proceedings can be held in parallel.⁵⁵ *Third*, in light of the disjunctive nature of article 82(1)(d), were the Chamber to find that the Issues would not significantly affect the fair and expeditious conduct of the proceedings, they would significantly affect the outcome of the trial, warranting the need for their immediate resolution. *Fourth*, it will be shown that an immediate resolution of the Issues may materially advance the proceedings.⁵⁶ Removing doubts about the correctness of the Decision or “mapping a course of action along the right lines provides a safety net for the integrity of proceedings”.⁵⁷ The applicable threshold is not that an interlocutory appeal will materially advance the proceedings but rather, that it *may* do so.⁵⁸ It is important that the Appeals Chamber be given an opportunity to ensure that the correct principles are applied from the outset of trial. An error in this regard could not only taint the proceedings but could also bear severe repercussions on Mr Ngaïssona’s ability to participate in his defence, ultimately affecting the outcome of proceedings.

(i) *First Appealable Issue*

26. *First*, the First Appealable Issue would significantly affect the fair conduct of the proceedings. The Chamber’s extension of the restrictions, which had been applied by the Pre-Trial Chamber specifically for the duration of the pre-trial phase, and in the absence of a renewed application by the Prosecution containing concrete, up-to-date information, is fundamentally unfair. *Firstly*, the error identified under the First Appealable Issue deprives Mr Ngaïssona of the procedural guarantee provided for in regulation 101(2) that an underlying application be made to the “Chamber seized of the case”. The effective bypassing of the requirements of regulation 101(2) is detrimental to the fair conduct of proceedings as it deprives Mr Ngaïssona of the procedural guarantee of having the matter examined and scrutinized *de novo* on the

⁵⁴ *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.

⁵⁵ This is not to mention the Prosecution’s announcement that he would not be ready to start trial this year, ICC-01/14-01/18-474-Conf, paras 13-14.

⁵⁶ Article 82(1)(d), Rome Statute.

⁵⁷ *DRC Appeals Judgment*, paras. 14-15, 18.

⁵⁸ Article 82(1)(d), Rome Statute.

basis of a renewed Prosecution request and Defence submissions thereto.⁵⁹ *Secondly*, the First Appealable Issue would significantly affect the fair conduct of the proceedings as it deprives Mr Ngaïssona of the fundamental procedural guarantee provided in regulation 101(3), that is, the right to be heard or present his substantive views on the grounds provided in regulation 101(2).

27. *Second*, the First Appealable Issue would significantly affect the expeditious conduct of the proceedings. In the absence of a Prosecution renewed request, the current restrictions are based on the outdated Prosecution request made in December 2019 in the context of its request for a warrant against Mr Ngaïssona.⁶⁰ The underlying rationale for the application of the current restrictions no longer finds any objective basis and is not reflective of the inherent characteristics of this new juncture of the proceedings. As such, the resolution of the First Issue by the Appeals Chamber would significantly affect the expeditious conduct of the proceedings because a new assessment would be based on updated information and parties' submissions. A *de novo* assessment would expedite proceedings in that it would avoid extensive litigation on the matter based on an outdated information and pre-trial determinations, which no longer apply.

28. *Third*, the First Issue would significantly affect the outcome of the proceedings. Had the Chamber required the Prosecution to submit a renewed application under regulation 101(2), to which the Defence would have had the opportunity to respond in accordance with regulation 101(3), and had the Chamber examined the matter *de novo* rather than rely on pre-trial determinations, the Chamber would have been able to render a fully informed decision based on concrete up-to-date information and submissions.⁶¹ Considerations which may have justified the maintaining of restrictions at the pre-trial stage no longer apply.⁶² The Prosecution's submissions to the Ninth Registry Report

⁵⁹ See for instance, by contrast, *Prosecutor v. Al Hassan*, Prosecution's urgent application to maintain restrictions on Mr Al Hassan's contacts and access to others whilst in detention, ICC-01/12-01/18-505-Red2, 22 November 2019.

⁶⁰ ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp. The Defence to date still does not have access to the underlying request, as it is *ex parte*.

⁶¹ *Prosecutor v. Al Hassan*, Decision on Mr Al Hassan's restrictions and accesses while in detention, ICC-01/12-01/18-557-Red3, 21 January 2020 para. 11.

⁶² For instance, at this juncture, the Prosecution's investigations and of the fulfilment of its disclosure obligations, should have "largely been completed" and at this stage, the proceedings engaged will likely spawn several years. *Prosecutor v. Mbarushimana*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial

lack cogent argumentation and a demonstration that restrictions are warranted at this stage of the proceedings. The Prosecution's observations are vague and its claims are unsubstantiated by concrete and up-to-date information. Besides, the Prosecution's observations to the Ninth Registry Report cannot be deemed as constituting a renewed request within the meaning of regulation 101(2). In addition, the Prosecution's original application remains *ex parte*, continuing to deprive the Defence of the opportunity to submit its observations thereto. This further strengthens the need for a *de novo* assessment by the "Chamber seized of the case", *i.e.* the Chamber. Without the intervention of the Appeals Chamber, the proceedings would proceed on a faulty legal basis, contrary to the clear wording of regulation 101(2) and (3).

29. *Fourth*, the immediate resolution by the Appeals Chamber of the First Appealable Issue would materially advance the proceedings. The current active monitoring and restrictions regime fundamentally impacts Mr Ngaïssona's day-to-day life and well-being, and therefore, his ability to participate fully in his defence, at a time where his participation is crucial. Resolving the fundamental error identified in the First Appealable Issue would not only curtail undue hardship for Mr Ngaïssona but would lead to more efficient proceedings involving Mr Ngaïssona's participation in the preparation of his defence.

(ii) *Second Appealable Issue*

30. The Chamber's decision is fundamentally flawed, given the absence of a logical connection between the "incidents" relied upon by the Chamber in its determination of "reasonable grounds" and the literal text and spirit of the regulation 101, which provides six exhaustive grounds which may warrant the imposition of restrictions. The "incidents" relied upon by the Chamber in its determination relate, for the most part, to the functioning of the Detention Centre and its rules, rather than to the six grounds provided in regulation 101(2).⁶³

Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 202, ICC-01/04-01/10-514, para. 44; *Prosecutor v. Kenyatta et al.*, Decision on the defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 118-119; *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", ICC-01/04-01/06-568 (OA 3), 13 October 2006, para. 54.

⁶³ By evoking regulation regulations 99 and 100, the Chamber appears to consider or conflate restrictions that may be applied "in the interests of the administration of justice or for the maintenance of the security and good order

31. *First*, the Second Appealable Issue would significantly affect the fair conduct of proceedings given that the Chamber's determinations as to "reasonable grounds" for applying restrictions stand in contradiction of the clear text of regulation 101(2). Given that the Chamber relied on irrelevant considerations, Mr Ngaïssona is placed in a fundamentally unfair and unequal position *vis-à-vis* the Prosecution, whose submissions are taken at face value in the absence of a true and renewed debate at this juncture. In addition, the resolution of the Second Appealable Issue would promote legal certainty, which is a component of fairness. It would, moreover, enhance Mr Ngaïssona's ability to participate effectively in his defence at trial. Currently, he is constantly preoccupied by the restrictions and active monitoring imposed and his mistrust in the administration of justice, given that the restrictions regime appears to be based on extraneous and arbitrary considerations.⁶⁴

32. *Second*, the resolution of the Second Appealable Issue would promote the expeditiousness of the proceedings because a correct application of the standard of "reasonable grounds" in relation to one of the grounds provided for under regulation 101(2) would eliminate irrelevant considerations from the analysis of whether restrictions are warranted in the case at hand. This in turn, would avoid lengthy debates on extraneous determinations, such as communications with unauthorized third parties or the use of alleged "obscure" language, which bear no relation to the protection of the Prosecution's investigations or the integrity of the proceedings or witnesses or victims or any of the aims provided in regulation 101(2).⁶⁵ The resolution of the Second Appealable Issue would render litigation in this respect more focussed on the applicable legal test and for this reason, expedite the proceedings. For instance, had the Chamber considered the fact that [REDACTED],⁶⁶ and that in any event, the conversation bore no relation whatsoever to the grounds provided in regulation 101(2), the debate on the nature and propriety of this conversation, which is likely to arise again, could be considerably shortened. In addition, the recurrent nature of the issue of

of the detention centre", which are irrelevant to a determination pursuant to regulation 101(2), which the issue at hand, see Decision, page 3, and para. 17.

⁶⁴ For instance, it is incomprehensible how a misunderstanding on Mr Ngaïssona's part with respect to the use of a speakerphone in July 2018, has led to the strengthening of the existing restrictions regime, in the absence of witness interference, or any link to the grounds provided under regulation 101(2), See Decision, para. 22.

⁶⁵ Decision, para. 22.

⁶⁶ Decision, para 22. [REDACTED]

the correct applicable legal standard for restrictions could cause unwarranted delay if not authoritatively and promptly resolved.⁶⁷ Therefore, a swift resolution at this stage would significantly expedite the conduct of the proceedings.

33. *Third*, the Issue would affect the outcome of the proceedings. Should the request not be granted, the proceedings could be tainted by the Chamber's application of an incorrect standard to the determination of regulation 101(2) and its inclusion of extraneous considerations. This would affect the outcome of the proceedings by creating additional litigation which would divert the Court's and parties' resources. Moreover, the continued application of strict restrictions to Mr Ngaïssona's communication based on the error identified in the Second Appealable Issue will affect Mr Ngaïssona's well-being and in turn his ability to participate at trial.⁶⁸

34. *Fourth*, the resolution of the Second Appealable Issue would materially advance the proceedings. The Second Appealable Issue requires immediate resolution since it cannot be addressed as part of a final appeal, given that it would be too late to redress the fundamental error. The prompt resolution of the Second Appealable Issue could benefit other trials, as other detainees of the Court are under a restriction on contacts regime. Authoritative guidance from the Appeals Chamber as to the applicable standard pursuant to regulation 101(2) will promote judicial certainty and fairness and benefit this and future cases.

(iii) *Third Appealable Issue*

35. *First*, the Third Appealable Issue similarly affects the fair conduct of the proceedings. Had the Chamber actually engaged with the factor of the passage of time in combination with the absence of any indications of interference with the proceedings, it would have come to the conclusion that there had been a change in circumstances warranting, at least, the modification of the restrictions. On the contrary, the Chamber only relied on factors which are either immutable, such as Mr Ngaïssona's past role in CAR,⁶⁹ or that could only change in a considerable amount of time, such as the stage

⁶⁷ Decision, para. 29; See ICTR *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's motion for certification to appeal the chamber's decision granting Kanyabashi's request to cross-examine Ntahobali using 1997 custodial interviews, Joint Case No. ICTR-98-42-T, 1 June 2006, para. 27.

⁶⁸ ICC-01/14-01/18-420-Conf-Exp, paras 32-36; ICC-01/14-01/18-420-Conf-Exp-AnxI; ICC-01/14-01/18-426-Conf-Exp-Corr, para 25; ICC-01/14-01/18-460-Conf-Exp, paras 11, 24, 30.

⁶⁹ Decision, para 23.

of the proceedings at hand.⁷⁰ In doing so, the Chamber did not re-assess the necessity of restrictions in light of “up-to-date, concrete and detailed information”,⁷¹ thereby rendering the review process illusory.⁷² If circumstances such as Mr Ngaïssona's past role in CAR and his knowledge of the Prosecution's case are sufficient to maintain the restrictions regime unchanged, this effectively amounts to stating that restrictions will remain in place at least until the termination of the Prosecution's case, if not until the end of trial. Rendering the “change of circumstances” criteria effectively moot deprives Mr Ngaïssona of the procedural guarantee that restrictions on communications are to be reviewed periodically and should not be applied indefinitely.⁷³

36. It is the position of the Appeals Chamber that a Chamber ought to “exercise its discretion to broadly interpret the two prongs of article 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under (...) article 21(3) of the Statute”.⁷⁴ As indicated above, the term “proceedings” in article 82(1)(d) should include ancillary matters such as detention conditions, as detention conditions bear upon the fundamental human rights of the accused.⁷⁵ A denial of the procedural guarantee of having the restrictions reviewed will have a serious effect on Mr Ngaïssona's fundamental rights and, as a consequence, on his mental well-being, thereby hampering his capacity to focus on the preparation of his own defence. The Defence incorporates by reference its previous submissions on the serious effect that the current restrictive regime has had on Mr Ngaïssona's well-being.⁷⁶

⁷⁰ Decision, paras 21, 25.

⁷¹ *Prosecutor v Al Hassan*, Decision on Mr Al Hassan's restrictions and accesses while in detention, ICC-01/12-01/18-557-Red3, 21 January 2020, para. 11.

⁷² The Chamber acknowledged its obligation to regularly review the restrictions regime: Decision, para 26. In *Ntaganda*, the Appeals Chamber noted that “the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact. See *Prosecutor v. Ntaganda*, Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016, ICC-01/04-02/06-1817-Red, 8 March 2017, para 72.

⁷³ On the need to carefully review restrictive measures with the passage of time, see: ECtHR, *Baginski v. Poland*, Application no. 37444/97, Judgement of 11 January 2006, para 96; *Piechowicz v Poland*, Application no. 20071/07, Judgement of 17 April 2012, para 220.

⁷⁴ *Prosecutor v. Bemba et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”, ICC-01/05-01/13-1533 (OA 12), 23 December 2015, para. 16.

⁷⁵ *Prosecutor v. Bemba et al.*, Decision on Defence request seeking leave to appeal the ‘Decision on request for compensation for unlawful detention,’ ICC-01/05-01/13-1893, 13 May 2016.

⁷⁶ ICC-01/14-01/18-420-Conf-Exp, paras 32-36; ICC-01/14-01/18-420-Conf-Exp-AnXI; ICC-01/14-01/18-426-Conf-Exp-Corr, para 25; ICC-01/14-01/18-460-Conf-Exp, paras 11, 24, 30.

[REDACTED].⁷⁷ [REDACTED].

37. *Second*, the Third Appealable Issue may materially affect the expeditious conduct of the proceedings. A wrongful assessment of which circumstances warrant modification of the restrictions regime would render the review process inherently flawed, thereby affecting the expeditiousness of the proceedings. This issue has been the object of extensive litigation before the Pre-Trial Chamber, and, if not clarified, will continue to be litigated before the Chamber, thereby only further affecting the expeditious conduct of the proceedings. On the contrary, an immediate resolution of this issue would avoid further litigation on the matter and ensure that the Trial Chamber performs its duty to review the restrictive regime correctly.
38. *Third*, the Issue may affect the outcome of the proceedings. As pointed out above, the current restrictive regime bears upon Mr Ngaïssona's fundamental rights, and seriously affects his mental well-being.⁷⁸ The denial of an effective review process, by way of only taking into account circumstances over which Mr Ngaïssona has no control, would further affect his mental well-being and his ability to engage in the preparation of his defence.
39. *Fourth*, an immediate resolution by the Appeals Chamber of the Third Appealable Issue will materially advance the proceedings. Authoritative guidance on which factors should be taken into account by the Chamber when conducting its review process would ensure that the latter is conducted fairly and in light of concrete and up-to-date information. This would eliminate a potential error that would otherwise directly affect Mr Ngaïssona's fundamental rights in detention. Moreover, it would allow the proceedings to “follow the right course” from the outset of trial.⁷⁹

(iv) *Fourth Appealable Issue*

40. *First*, the Fourth Appealable Issue affects the fair conduct of the proceedings. An erroneous assessment of whether the current measures constitute the least restrictive measures available would lead to an erroneous interpretation of the principle of proportionality, thus a violation of Mr Ngaïssona's human rights, materialized in the

⁷⁷ [REDACTED].

⁷⁸ See above, paras 25.

⁷⁹ *DRC Appeals Judgment*, para 15.

prohibition to communicate with persons, including close family members, without there being a legitimate aim for this limitation. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per articles 64(2) and 67(1) of the Statute.⁸⁰ Pursuant to article 64(2), the Trial Chamber has a duty to ensure that trial is conducted in full respect of the rights of the accused. While the right to private and family life does not constitute *per se* a fair trial right, a breach thereof is apt to seriously affect the fairness of proceedings, as it has an impact on the accused's well-being and his ability to fully and productively engage with the proceedings. Moreover, even if the Chamber was to find this conclusion unsubstantiated, it should still find that the issue affects the fairness of the proceedings, in light of its duty to broadly interpret article 82(1)(d) when it finds it necessary due to human rights considerations.⁸¹

41. *Second*, the Fourth Appealable Issue is apt to affect the expeditious conduct of the proceedings. A disproportionate impact on Mr Ngaïssona's human rights by virtue of the Chamber's inability to strike the necessary balance between Mr Ngaïssona's fundamental rights in detention and the protection of the integrity of proceedings would lead to further, lengthy litigation on this matter. On the contrary, ensuring that Mr Ngaïssona's human rights are only affected to the extent strictly necessary would avoid lengthy debates over whether the removal of friends and family members from Mr Ngaïssona's non-privileged contact list was necessary to ensure the integrity of the proceedings.

42. *Third*, the Fourth Appealable Issue may affect the outcome of the proceedings. The maintaining of disproportionate restrictions on Mr Ngaïssona's contacts, especially the prohibition to communicate with certain family members, may amount to a violation of Mr Ngaïssona's human rights. By its own nature, detention already entails the curtailing of several fundamental rights. Further and unjustified limitations of those rights will have a serious effect on Mr Ngaïssona's mental well-being, and on his ability to effectively participate in the preparation of his defence.⁸² This may ultimately affect

⁸⁰ *DRC Appeals Judgment*, para 11.

⁸¹ *Prosecutor v. Bemba et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015”, 23 December 2015, ICC-01/05-01/13-1533 (OA 12), para. 16.

⁸² See above, para. 25.

the outcome of the proceedings.

43. *Fourth*, the immediate resolution of the Fourth Appealable Issue by the Appeals Chamber will materially advance the proceedings. An authoritative determination of the Fourth Appealable Issue would ensure that the proceedings are not tainted by a disproportionate interference in Mr Ngaïssona's human rights.⁸³ It would remove doubts about whether the Chamber properly exercised its duty to balance between Mr Ngaïssona's fundamental rights and the legitimate aims listed at regulation 101(2). Such an assessment would provide “a safety net for the integrity of the proceedings”, by allowing the rectification of a potential error that would otherwise taint the trial proceedings from their outset.⁸⁴

RELIEF SOUGHT

44. The Defence respectfully requests the Chamber to grant leave to appeal the Decision pursuant to article 82(1)(d) of the Statute.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 01 March 2021,

At The Hague, the Netherlands.

⁸³ *DRC Appeals Judgment*, para 14.

⁸⁴ *Ibid*, para 15.