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Original: **English**

No.**: ICC-01/04-02/06**
Date: **25 October 2016**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public redacted version
With Public Annex A

Public redacted version
of "Prosecution's response to Bosco Ntaganda's appeal against `Decision reviewing the restrictions placed on Mr Ntaganda's contacts'", 24 October 2016, ICC-01/04-02/06-1592-Conf-Exp

Source: **Office of the Prosecutor**

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Introduction

1. The Appeals Chamber should reject Bosco Ntaganda's challenge to the restrictions that the Trial Chamber has imposed on his contacts in the detention centre.[1] Not only are the restrictions lawful, necessary and proportionate in the particular circumstances of the case, Mr Ntaganda's flagrant misconduct itself, violating both the Chamber's orders and the Court's detention centre regulations, has invited—and justified—such restrictions. Indeed, Mr Ntaganda's misconduct, and the continuing threat he poses to the safety of witnesses, confidentiality of information and the integrity of the proceedings, ensure that the restrictions on his contacts are as indispensable today as they were when they were first imposed.

2. Mr Ntaganda's appeal shows no error that warrants the Appeals Chamber's intervention. None of the seven "sub-grounds" reveal that the Chamber erred. Rather, they selectively parse out, and re-interpret *de novo*, the substantive and procedural history of the restrictions-related litigation before the Trial Chamber. Many of the "sub-grounds" are nebulous in nature, and convey no more than Mr Ntaganda's discontent with the restrictions.

3. Nor, absent showing an error, is this appeal the appropriate avenue to negotiate "minimum interim measure[s]".[2] Mr Ntaganda's request to increase his telephone calls to "two hours per week" is bereft of both factual and legal bases, and should be dismissed *in limine.*

Level of Confidentiality

4. The Prosecution files this submission as "Confidential *Ex parte*" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it relates to a confidential *ex*

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[1] [REDACTED]ICC-01/04-02/06-1569-Red OA4 ("Appeal"). *See also* [REDACTED]ICC-01/04-02/06-1494-Red3 ("Decision" or "Decision reviewing restrictions"); [REDACTED] ICC-01/04-02/06-785-Red ("Decision imposing restrictions").
[2] Appeal, paras. 3, 33.

parte decision. The Prosecution will file confidential redacted and public redacted versions. [REDACTED].[3]

Submissions

I. Applicable law

a. Mr Ntaganda fails to discharge his burden on appeal

5. Mr Ntaganda, as the appellant, must set out the grounds or sub-grounds of appeal to trigger the Appeals Chamber's review.[4] Further, Mr Ntaganda is obliged not only to set out the error, but also to demonstrate how the alleged error materially affected the impugned decision.[5] In doing so, he bears the burden to *substantiate* the error, failing which the Appeals Chamber will not consider the merits of the ground of appeal but rather should dismiss it *in limine*.[6]

6. The Appeals Chamber and the Prosecution are hindered in properly considering this Appeal by its lack of clarity.[7] It should be dismissed *in limine*. Rather than discharging the burden on appeal, Mr Ntaganda's Appeal is at times non-committal on the nature of the alleged errors and their purported impact on the Decision.[8] And even where it states error, it does so cursorily—leaving both the Prosecution and the Chamber to second-guess the specifics of Mr Ntaganda's argument. Indeed, although the Appeal refers to "errors of law", it fails to substantiate that the Trial Chamber's interpretation of the law was incorrect and that the decision under review would have been substantially different had it not been for the error.[9] Moreover, although Mr Ntaganda claims—in blanket fashion—a purported lack of the Chamber's reasoning, he fails to acknowledge the legal

[3] [REDACTED].
[4] ICC-01/05-01/13-1964 OA13 ("*Mangenda* AD"), paras. 22-23, 27.
[5] ICC-02/04-01/05-408 OA3("*Kony* AD"), para. 48; ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), para. 30.
[6] *Mangenda* AD, paras. 27-28: the AC will dismiss the ground *in limine*, when the appellant fails to identify an alleged error or to draw a link between the alleged error and its material effect on the impugned decision. *See also* ICC-02/11-01/12-75-Red ("*Simone Gbagbo* AD"), para. 46; *Lubanga* AJ, para. 30.
[7] *Simone Gbagbo* AD, para. 46.
[8] *See e.g.*, Appeal, para. 17: "[the Decision's] vague reference […] reflects either a failure to state reasons or the taking into account of an irrelevant fact."
[9] *Lubanga* AJ, para. 31; *contra* Appeal, paras. 23, 31, 40, 43, 45.

standard on reasoned decisions, or the Chamber's pertinent findings.[10] Rather, the Appeal expresses the Defence's contrary opinions without showing error.

7. Likewise, for the alleged "errors of fact", Mr Ntaganda fails to challenge the Trial Chamber's findings as unreasonable. He merely repeats rejected submissions at trial and interprets the evidence differently.[11] Further, although Mr Ntaganda attempts to dispute the Chamber's procedures, the issues are both unrelated to the current appeal and unsubstantiated in fact and law.[12] And although Mr Ntaganda fleetingly challenges the Trial Chamber's exercise of discretion, he fails to tailor his arguments to show *inter alia* that "[t]he decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'" and that the error materially affected the impugned decision.[13]

b. The law permits restrictions on Mr Ntaganda's contacts

8. Mr Ntaganda's statement of the relevant law is partial and inaccurate.[14] The Trial Chamber properly identified and applied the relevant law to restrict Mr Ntaganda's contacts. As it correctly found,[15] the Trial Chamber could, under regulation 101(2) of the Regulations of the Court, restrict Mr Ntaganda's contacts with other persons (other than his Counsel) if reasonable grounds exist to believe that such contact:

(a) is for the purposes of attempting to arrange the escape of a detained person from the detention centre;

(b) could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;

(c) could be harmful to a detained person or any other person;

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[10] *Contra* Appeal, paras. 17, 26, 32, 34.
[11] *Lubanga* AJ, para. 33; *contra* Appeal, paras. 17, 24, 31,36, 45.
[12] *Lubanga* AJ, para. 32; *contra* Appeal, paras. 38-44.
[13] *Lubanga* AJ, para. 32; ICC-01/09-02/11-1032 OA5, para. 25. *Contra* Appeal, paras. 4, 17, 23, 24, 36, 45.
[14] *Contra* Appeal, paras. 5-9.
[15] *See* regulation 101(2). *See also* [REDACTED]; Decision imposing restrictions, paras. 39-41 (finding that the standard of "reasonable grounds to believe" also applied to the Chamber's assessment"); Decision, para. 16, fn. 35.

(d) could be used by a detained person to breach an order for non-disclosure made by a judge;

(e) is against the interests of public safety; or

(f) is a threat to the protection of the rights and freedom of any person.

Further, even if Mr Ntaganda was entitled to "communicate by letter or telephone with his family and other persons" and "receive visits", such entitlements can be restricted "in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre".[16] In this context, and additionally, the Trial Chamber, under article 68(1) of the Statute, is obliged to appropriately protect witnesses.[17]

9. Moreover, human rights law—which the Chamber properly considered under article 21(3)[18]—further recognises that Mr Ntaganda's right to privacy and family life can be restricted. A public authority may interfere "with the exercise of the right to respect a detained person's private and family life, as well as correspondence", provided the interference is (i) according to the law; (ii) necessary, *inter alia*, for the prevention of disorder and crime and the protection of the rights and freedoms of others; and (iii) proportionate to the legitimate aim pursued.[19] Indeed, the ECtHR has endorsed specific restrictions—similar to the ones placed on Mr Ntaganda's

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[16] Regulations 99(2),100(3); chapter 5, regulations of the Registry (including regulations 174-175, 184-185). *See* [REDACTED]; Decision imposing restrictions, para. 39; Decision, para. 16.

[17] *See* Decision imposing restrictions, para. 41.

[18] ICC-01/04-01/06-772 OA4, para. 36: "[a]rticle 21(3) […] makes the interpretation as well as the application of the law [under the Statute] subject to internationally recognised human rights." *See* [REDACTED]; Decision imposing restrictions, para. 42; Decision, para. 16.

[19] *See* [REDACTED]; Decision imposing restrictions, para. 42; Decision, paras. 16-17, *citing Messina v. Italy*, paras. 59-74 (where the ECtHR found that "a special prison regime which involved restrictions on the number of family visits (not more than two per month) and imposed measures for the supervision of such visits (prisoners were separated from visitors by a glass partition)" did not violate the applicant's right to respect for his family life (article 8, ECHR)); *Van der Ven v The Netherlands*, paras. 64-72 (finding that restrictions (where the applicant's cell was inspected on a daily basis, his correspondence was read, his telephone conversations and conversations with visitors were monitored, he was allowed to associate with only a limited number of fellow prisoners and he was separated from his visitors by a glass partition except for the possibility of one "open" visit per month by members of his immediate family, whose hands he was allowed to shake at the beginning and end of the visit) did not violate article 8. The restrictions were "designed to cut all links between the prisoners concerned and the criminal environment to which they had belonged" and "did not go beyond what was necessary in a democratic society to attain the legitimate aims intended."); *Lavents v. Latvia*, paras. 129, 134-143 (finding an article 8 violation, when no family visits were allowed); *Kornakovs v Latvia*, paras. 131-136 (finding an article 8 violation, when *inter alia* the judge rejected the requests for family visits without reasoning).

contacts—where "[REDACTED] played a crucial role [in committing the crime]", and "the special regime was instrumental in curtailing the contacts of [detainees] with the outside world and preventing them from organising [the crime]."[20]

10. Mr Ntaganda raises no viable challenge to this established legal framework authorising restrictions on detainee contact. Rather, he simply argues that prisoners' human rights "include the rights to privacy and family life."[21] His approach obfuscates the issue on appeal: the pertinent question is not whether Mr Ntaganda has such rights, but whether the restrictions imposed on his contacts, and consequently his rights, are justified. Nor is the legal support he proffers apposite. To the contrary—rule 37 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* further supports the Chamber's analysis: it permits prisoners "to communicate with their family and reputable friends" "*under necessary supervision*".[22] Moreover, the Defence—in claiming "family visitation" as a "right"—selectively relies on the *Body of Principles to protect detained persons*: the cited principle 19 plainly states that "family visits" are "subject to reasonable conditions and restrictions as specified by law or lawful regulations."[23]

11. None of the Defence's cited case-law advances its claim. *First, Khodorkovskiy v. Russia*[24]—a case the Defence cites with favour—is factually inapposite. Not only did it concern a different phase of proceedings (serving of sentences), the issue related to using "very remote" and "deserted" geographical locations in Russia as detention centres/penal colonies to house prisoners, a situation exacerbated by "the realities of the Russian transport system."[25] To the contrary, detention at The Hague can hardly be described as "deserted"; nor is accessing the Netherlands unduly challenging

[20] *See e.g., Moiseyev v. Russia*, para. 254.
[21] Appeal, para. 6.
[22] Rule 37, *UN Standard Minimum Rules for the Treatment of Prisoners*. The Rules also allow "[t]he central prison administration to authorise departures from the rules […]" (emphasis added).
[23] Principle 19, *Body of Principles to protect detained persons*.
[24] *Khodorkovskiy v. Russia*, paras. 321-329, 822-851.
[25] *Ibid*.

from any part of the world.[26] *Second, Moiseyev v. Russia* is distinct from Mr Ntaganda's situation. Not only did the Chamber show flexibility to tailor the restrictions to his particular case; unlike *Moiseyev,* [REDACTED].[27]

12. *Third,* the Defence wrongly suggests that "the passage of time" should automatically lead to the cessation of restrictions. This misstates the case-law. Rather, as *Klamecki v. Poland* states, and as the Chamber found, the passage of time requires "a *careful review* of the necessity of keeping him in a complete isolation from his wife",[28] but not an end to restrictions.[29] Nor has Mr Ntaganda been kept in "complete isolation" from his family. As the relevant decisions show, he is permitted family visits, and contact with his wife, children [REDACTED],[30] and visits with his wife have taken place. *Fourth* and finally, Mr Ntaganda's reliance on the *Ngudjolo* decisions continuing restrictions on detainee contact is unclear. Restrictions are not "one size fits all", and must be determined on a case-by-case basis. Nor does the analogy to the two *Ngudjolo* decisions assist the Defence: both decisions maintained certain restrictions on Mr Ngudjolo's contacts.[31]

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[26] *Compare* Appeal, paras. 7-8 and *Khodorkovskiy v. Russia*, para. 324, where not only did travel to the detention centre take two days, but flights were infrequent, train rides were arduous (including one that lasted 106 hours).
[27] *Contra* Appeal, fn. 9. *Compare Moiseyev v. Russia*, para. 255, noting that the relevant Act did not afford "any degree of flexibility in determining whether such limitations were appropriate or indeed necessary in each individual case" and [REDACTED]; Decision, paras. 16-41 (tailoring the restrictions to Mr Ntaganda) [REDACTED].")
[28] *Klamecki v Poland*, paras. 141-153 (finding an article 8 violation, because of an absolute prohibition of contact, and a failure to give grounds for refusal and to consider alternative means). (emphasis added); Decision, para. 18.
[29] *Gallico v. Italy*, paras. 24-30; *Enea v. Italy*, paras. 125-131, both finding that article 8 was not violated "simply on account of the passage of time".
[30] Decision, para. 35.
[31] *Contra* Appeal, para. 9; *see* ICC-01/04-01/07-1243-tENG-Red, paras. 18-46, pp. 19-20; ICC-01/04-01/07-1709-tENG-Red, paras. 15-25, p. 12.

II. The Appeal fails to show error

13. The Appeal fails to survive scrutiny. None of the seven sub-grounds reveal error—let alone, demonstrate error with a material impact on the Decision.

i. Response to first sub-ground: No error relating to [REDACTED]

14. Mr Ntaganda alleges that the Prosecution's purported failure to complete all its [REDACTED] witness testimony by the time the restrictions were reviewed was a "highly relevant" factor, and the Chamber failed to assess it. He claims further that "[the Decision's] vague reference to [REDACTED] witnesses reflects either a failure to state reasons or the taking into account of an irrelevant fact."[32] These submissions misstate the Decision: not only are the Defence's comments on the Prosecution's conduct inaccurate and irrelevant, they also obfuscate the Chamber's findings on the extent of witness interference in the case and the pertinent procedural history of the restrictions in this case.

15. *First,* by suggesting that the Prosecution's order of witnesses is relevant to the Chamber's analysis, Mr Ntaganda attempts to deflect attention away from his own misconduct. However, the central—indeed only—question in this appeal is squarely focussed on Mr Ntaganda's misconduct and that of his associates, and whether the restrictions on his contacts are warranted in the circumstances. This appeal does not concern incidental logistical matters and trial management, including the Prosecution's scheduling of witnesses. Nor has the Defence, apart from concluding that this was "highly relevant", shown that this factor is pertinent to this appeal.[33] The Defence's mere unsubstantiated opinion cannot affect the course of this appeal.

16. Moreover, the Defence's view is also inaccurate. In speculating "[t]hat the Prosecution has had ample time to call all [REDACTED] witnesses but chose not to do so",[34] the Defence fails to acknowledge that the Prosecution had indeed sought to

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[32] Appeal, paras. 2, 16-17.
[33] *Contra* Appeal, para. 16.
[34] Appeal, para. 2.

change its witness order to accommodate as many [REDACTED] as early as possible.[35]

17. *Second,* the Appeal minimises the gravity and pervasive extent of the alleged witness interference in the case, which led *inter alia* to continuing the restrictions. It wrongly suggests that the Chamber's assessment should have been limited to "[t]he two witnesses [whose identity Mr Ntaganda disclosed] and [who had testified]".[36] Yet, as the Decision makes clear, the witness interference allegations extended far beyond "two witnesses" and affected both Prosecution and Defence witnesses. The Chamber correctly considered—and as the Defence itself had previously noted—[REDACTED][37] had initially been the subject of the alleged interference or potential interference. Moreover, notwithstanding that [REDACTED] had testified, the Chamber properly assessed allegations of witness interference for at least [REDACTED].[38] [REDACTED]. [REDACTED].[39] The Defence does not acknowledge any of these findings. Nor does it show that the Chamber's assessment—that the pending testimony [REDACTED] justified the continued restrictions in these circumstances—was flawed.[40]

18. *Third,* Mr Ntaganda fails to properly convey the procedural history leading up to the Decision.[41] Indeed, [REDACTED] witnesses, the situation was by no means stagnant. Rather, the situation evolved further and information has since revealed significantly more acts of witness interference and coaching justifying the continued restrictions. The Prosecution's recent request to continue restrictions and the Chamber's Decision reflected this truth.[42] Indeed, credible information on "coaching" demanded that the Chamber no longer limit the "risk of potential interference" to

[35] *See e.g.*, ICC-01/04-02/06-630-Red2 (where the Prosecution sought to revise its witness list) [REDACTED].
[36] Appeal, para. 15.
[37] [REDACTED].
[38] [REDACTED].
[39] [REDACTED].
[40] Decision, para. 29; *contra* Appeal, para. 15.
[41] Appeal, paras. 10-14, 17.
[42] *See* Decision, para. 10, noting the Prosecution's submission that "[t]he coaching of potential Defence witnesses justify the continuation of the restrictions [REDACTED] until the end of the Defence case'; para. 30, noting "[t]hat Mr Ntaganda both engaged in witness coaching himself, and directed his interlocutors to do so."

[REDACTED] or even just the Prosecution's witnesses, but rather, consider the Defence witnesses who may be coached.[43] The Chamber clearly identified these facts as relevant to its conclusion.[44] Far from showing that this factor was irrelevant to the Decision, or that the Chamber failed to properly reason, the Defence fails to even show error, let alone an impact on the Decision.

19. For these reasons, the first sub-ground should be dismissed.

ii. Response to second sub-ground: No error relating to the recent incidents of interference

20. Mr Ntaganda claims that the Chamber erred in law when it considered purportedly irrelevant factors such as recent acts of interference [REDACTED]. According to him, since these incidents occurred when he was being actively monitored, they demonstrate that "[he had] no role in such events."[45] He further challenges the Chamber's "reliance on the mere 'risk of potential interference'" as a "facially incorrect" standard.[46] Yet again, the Appeal demonstrates no error. Not only are Mr Ntaganda's submissions mere conjecture, they are also fundamentally factually flawed.

21. *First*, the Chamber correctly considered the recent incidents of alleged interference when it reviewed the restrictions. They were, and remain, highly relevant. Indeed, even though these incidents occurred [REDACTED] (when Mr Ntaganda was first subject to active monitoring), [REDACTED], active monitoring itself has not deterred Mr Ntaganda's misconduct. [REDACTED].[47] [REDACTED]."[48] [REDACTED].[49] Therefore, as the record shows, active monitoring itself did not

[43] Decision, paras. 29-30.
[44] *See* ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para. 30 (a Chamber need not recite each and every factor before it.)
[45] Appeal, paras. 2, 19, 23.
[46] *Ibid*., paras. 2, 22-23.
[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED].

deprive Mr Ntaganda of his ability to breach the conditions on his communication. The Defence's premise that Mr Ntaganda's active monitoring somehow divests the recent interference incidents of relevance is flawed. Nor, contrary to the Appeal, did Mr Ntaganda have to speak directly to these witnesses at the time, for the possibility of interference to exist, when his network was already engaged.[50]

22. *Second,* although the Chamber found that "[t]he recent reported incidents of interference [were] not directly linked to Mr Ntaganda",[51] not only had the Chamber previously found that "Mr Ntaganda both engaged in witness coaching himself and directed his interlocutors to do so[…]",[REDACTED]."[52] The Defence presents no more than its unsubstantiated opinion to challenge the Chamber's findings.[53]

23. *Third,* contrary to the Appeal, the Chamber's use of the phrase "risk of potential interference" in Decision paragraph 29 did not invoke a "legal standard".[54] It was not a term of art, but merely a factual conclusion describing the extent of witness interference in the case. Moreover, that the Chamber consistently applied the proper standard of "reasonable grounds to believe" is amply clear when the Decision is read in its proper context.[55] Mr Ntaganda fails to show that the Chamber was incorrect.

24. For these reasons, the second sub-ground should be dismissed.

iii. Response to third sub-ground: Active monitoring is necessary and proportionate to eliminate the risk of "coaching"

25. In his third sub-ground, Mr Ntaganda isolates "the risk of coaching" from other prohibited acts, and claims that the Chamber erred in finding that active monitoring was the least restrictive way to prevent "the prejudice caused by coaching".[56] Yet

[50] *Contra* Appeal, para. 21; Decision, para. 30.
[51] Decision, para. 29.
[52] [REDACTED].
[53] Appeal, paras. 20-22.
[54] Decision, para. 29: "[t]he Chamber considers that the risk of potential interference is not limited to the Four Witnesses."; *contra* Appeal, para. 22.
[55] Decision, paras. 16-33.
[56] Appeal, paras. 2, 24-27.

again, Mr Ntaganda advances his conjecture and discontent, but fails to show error. Nor is his proposed alternative of "passive-monitoring"[57] a rational or practical solution in the circumstances.

26. *First,* Mr Ntaganda fails to acknowledge that the Chamber meticulously reasoned on the necessity of active monitoring.[58] It found that the "[high] risk of witness interference and witness coaching[…]at the present stage of the proceedings" and "that Mr Ntaganda personally engaged in such contact, and intended and directed others to do so" militated against giving him renewed access to similar modes of communication through which that conduct was originally perpetrated.[59] As the Chamber held, "[t]he fact that restrictive measures have been effective" does not necessarily imply that the restrictions are no longer necessary.[60] Not only did the Chamber conclude that the restrictions remained necessary "to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings", it also considered the Defence's suggestion to dispense with active monitoring, but found it unconvincing.[61] Likewise, the Chamber properly reasoned on the proportionality of the restrictions. It assessed Mr Ntaganda's rights to privacy and family life against the objectives to *inter alia* ensure the integrity of the proceedings. He is allowed contact with his family [REDACTED], and his restrictions will be periodically monitored, and where necessary, reviewed.[62] No error is shown.

27. *Second,* Mr Ntaganda's suggested alternative—passive monitoring *in lieu* of active monitoring—is ineffective. Remedies following passive monitoring can only occur after the fact: they cannot cut the coaching off at source. Rather than being "an equally effective antidote",[63] any such remedies would be futile, logistically difficult

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[57] *Ibid*.
[58] *Contra* Appeal, para. 26.
[59] Decision, para. 31.
[60] *Ibid*., para. 32.
[61] *Ibid*., paras. 33-34.
[62] Decision, paras. 35-37.
[63] *Contra* Appeal, para. 26.

(requiring a post-factum review of every conversation), and unfeasible (as the parties and participants cannot access those conversations for use in court, if at all).

28. For these reasons, the third sub-ground should be dismissed.

iv. Response to fourth sub-ground: No error relating to "witness coaching"

29. Mr Ntaganda alleges that the Chamber erred in law in failing to "define coaching". He also contests the Chamber's interpretation of certain conversations.[64] Yet again, Mr Ntaganda shows no error. Not only does the Appeal disregard the Chamber's assessment of coaching, it also re-interprets evidence without cause.

30. *First,* the Chamber's understanding of "witness coaching" was clear. As it has found, "coaching" is a "form of witness interference and has the potential to severely affect the integrity of the proceedings."[65] The Chamber further described Mr Ntaganda's participation in "coaching" as "[instructing] his interlocutors to coach witnesses, or directly [telling] his interlocutors which story to tell, stressing the need to tell the story in the manner as described by Mr Ntaganda and the necessity of synchronising the stories."[66] Moreover, the Defence has on occasion failed to address the allegations of coaching at trial.[67] It cannot do so for the first time on appeal.

31. The Appeal's conflation of legitimate actions of "witness preparation" with illegitimate acts of coaching is absurd.[68] Witness preparation is authorised by a Chamber and is governed by a Protocol under carefully regulated conditions. It is also conducted by qualified counsel. Witness coaching, as in this case, is illegal, potentially punishable as an article 70 offence, and was covertly conducted by Mr Ntaganda and his unauthorised interlocutors.

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[64] Appeal, paras. 2, 28-31.
[65] Decision imposing restrictions, para. 57.
[66] *Ibid.*; Decision, para. 22.
[67] *Ibid.*, para. 56.
[68] *Contra* Appeal, para. 29.

32. Nor is Mr Ntaganda's attempt to re-interpret certain conversations helpful on appeal.[69] He merely seeks to supplant the Chamber's conclusions with his own speculation, but fails to show that the Chamber's findings were unreasonable.

33. For these reasons, the fourth sub-ground should be dismissed.

v. Response to fifth sub-ground: The restrictions are proportionate

34. Mr Ntaganda appears to challenge the proportionality of the restrictions: he suggests "alternative measures" *in lieu* of the restrictions, and disputes the Chamber's assessment of "the period of time since the transgressions", and "Mr Ntaganda's conduct in the intervening period".[70] None of these claims show error. Rather, Mr Ntaganda disregards the Trial Chamber's findings and seeks to negotiate the terms of his restrictions directly with the Appeals Chamber. This is both unfounded and inappropriate.

35. *First*, in claiming that the Chamber "proceeded without analysis",[71] Mr Ntaganda discounts the very findings that provide such analysis. Indeed, as shown above,[72] the Chamber considered active monitoring of telephone calls and visits to be "least restrictive", bearing in mind that no lesser measure could effectively guard against further misconduct "given that any such conduct could only be ascertained after it had already occurred."[73] The Chamber's findings were reasonable, and the Appeal demonstrates no error.

36. Nor is it appropriate for Mr Ntaganda to negotiate the terms of his restrictions on appeal. Although he speculates that "two more hours per week of telephone conversation subject to immediate passive review […] is a very strong incentive for

[69] *Contra* Appeal, para. 30.
[70] Appeal, paras. 2, 32-37.
[71] Appeal, para. 32.
[72] *See* paras. 25-27.
[73] Decision, para. 34.

Mr Ntaganda not to engage in misconduct whatsoever",[74] the Appeals Chamber should not lightly overturn the Trial Chamber's exercise of discretion.

37. *Second*, regarding the "passage of time", the Appeal depicts a disjointed picture.[75] Yet, the Chamber, in assessing whether to continue the restrictions, properly considered the passage of time since the restrictions were imposed.[76] Moreover, in claiming that the restrictions are permanent,[77] the Defence merely surmises and contradicts the Chamber's findings. Rather, the Chamber rejected the Prosecution's proposal for longer-term restrictions until the end of the Defence case, and preferred to periodically monitor and review them as needed.[78]

38. Further, Mr Ntaganda's claims of his "consistent efforts […] to avoid any communications that could be misinterpreted as misconduct" are unconvincing. As shown above,[79] [REDACTED] coded language. Nor does he show that the Chamber erred when it stated that "[n]ot engaging in misconduct should be the norm [at this Court]", and that the restrictions were still warranted.[80] His reliance on *Ngudjolo* case law on restrictions is cursory, and impedes the *Ntaganda* Trial Chamber's lawful discretion to assess the individual circumstances of the case.[81]

39. For these reasons, the fifth sub-ground should be dismissed.

vi. Response to sixth sub-ground: No procedural errors

40. Mr Ntaganda's sixth sub-ground is unrelated to the scope of the appeal. He appears to dispute "the procedures and standards of proof adopted" and vaguely alleges "unfairness",[82] but fails to show how this relates to the issue on appeal, *i.e.*,

[74] Appeal, para. 33.
[75] Appeal, paras. 33, 34, 36.
[76] Decision, paras. 18, 21 (noting restrictions had been in place for over 12 months, and prior interim measures).
[77] Appeal, para. 34.
[78] Decision, para. 36.
[79] *See* paras. 20-24.
[80] Decision, para. 32; *contra* Appeal, paras. 36.
[81] Appeal, para. 37.
[82] Appeal, paras. 2, 38-44.

whether the continued restrictions are justified. This appeal is not a *carte blanche* to revive failed arguments; extraneous issues should be dismissed *in limine*.

41. Nevertheless, Mr Ntaganda's submissions are hyperbole, inaccurate and fail to show error.

42. *First,* none of the identified Prosecution submissions have remained *ex parte*. [REDACTED].[83] [REDACTED].[84] [REDACTED].[85] [REDACTED].[86] He merely disagrees with the Chamber's approach.[87] Further, Mr Ntaganda's reference to an "*ex parte* hearing of witnesses" is exaggerated and unfounded. [REDACTED][88]—[REDACTED].

43. *Second,* the Chamber's reliance on *inter alia* uncontested summaries and translations does not amount to a "reversal of the burden of proof".[89] Mr Ntaganda was obliged to engage the Chamber on any specific concerns he may have had, and, since he failed to do so despite the opportunity, the Chamber was both reasonable and justified in its approach.

44. *Third*, Mr Ntaganda hypothesises about an "unduly low burden of proof" relating to his prohibited use of codes.[90] He misstates the Chamber's conclusions: contrary to the Appeal, the Chamber did not find "that there was no prohibition on a detainee using coded language during their telephone conversations[…]".[91] Rather, it accepted that there was no such prohibition *per se prior to being ordered to refrain from doing* so.[92] And, it found Mr Ntaganda's explanations for using such codes unconvincing.[93] The Chamber's reasonable reluctance to accept Mr Ntaganda's far-

[83] [REDACTED].
[84] [REDACTED].
[85] [REDACTED].
[86] [REDACTED].
[87] [REDACTED].
[88] [REDACTED].
[89] *Contra* Appeal, para. 41.
[90] *Contra* Appeal, para. 42.
[91] *Ibid*.
[92] Decision imposing restrictions, para. 49 (emphasis added).
[93] *Ibid*., paras. 49-50.

fetched explanations does not show error. Nor, besides repeating failed submissions, has the Defence shown anything beyond mere dissatisfaction with the Decision.

45. *Fourth,* despite Mr Ntaganda's argument with the Chamber's "reliance on these uncertified and incomplete translations [of his conversations]",[94] in practice, the Defence has never concretely challenged their accuracy.[95] Mr Ntaganda's claims remain vague on appeal and fail to show error.

46. For these reasons, the sixth sub-ground should be dismissed.

vii. Response to seventh sub-ground: No error on the impact of restrictions

47. And finally, Mr Ntaganda's challenge to the Chamber's assessment of the impact of the restrictions on his family misapprehends the nature of the restrictions.[96] It wrongly assumes that all contact with his family is prohibited. Nor does it acknowledge the Chamber's conclusion which assessed the impact on his family. Indeed, [REDACTED], Mr Ntaganda may continue to have contact with her, his children [REDACTED]. One other person has been reinstated to his contacts list.[97] Moreover, Mr Ntaganda may only challenge the Chamber's findings in this appeal. In this respect, he fails to argue—let alone demonstrate—that the Chamber erred in law or was unreasonable. If Mr Ntaganda is challenging the various practical intangibles relating to implementing the Decision,[98] these cannot be attributed to the Chamber's function. They lie outside the scope of this appeal.

48. For these reasons, the seventh sub-ground should be dismissed.

[94] *Contra* Appeal, para. 43.
[95] *See e.g.*, ICC-01/04-02/06-1312-Red, paras. 7-11.
[96] *Contra* Appeal, para. 45.
[97] Decision, paras. 35-41.
[98] *See e.g.*, ICC-01/04-02/06-T-128-ENG, p. 14 lns. 20-25 (the Registry submitted that although securing visas and passports for the children was "complicated", it could be resolved by the end of the year.)

Conclusion

49. The Appeal manifestly fails to show error, let alone one that warrants reversal. Not only does the Appeal's unclear pleading preclude its proper consideration, it fails to rise beyond Mr Ntaganda's mere discontent with the restrictions imposed. Nor is it appropriate for Mr Ntaganda to seek to negotiate the terms of his restrictions with the Appeals Chamber. In these circumstances, the Appeals Chamber should reject the Appeal.

Word Count: 5887[99]

Fatou Bensouda, Prosecutor

Dated this 25th day of October 2016

At The Hague, The Netherlands

[99] The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.