Cour
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Court

Original: **English** No.**: ICC-01/04-02/06**
Date: **9 November 2016**

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
Public Redacted Version of the Response of the Common Legal Representative of the Victims of the Attacks to "Bosco Ntaganda's Appeal against 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" of 24 October 2016

Source: **Office of Public Counsel for Victims (CLR2)**

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby submits his response to "Bosco Ntaganda's Appeal against 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" filed on 6 October 2016, whereby Mr Ntaganda (the "Appellant") requests that the Appeals Chamber reverse the "Decision reviewing the restrictions placed on Mr Ntaganda" (the "Impugned Decision"), remand the issue to Trial Chamber VI (the "Chamber"), and order an interim measure.[1]

2. The matter concerns restrictions placed on the accused as a necessary and proportionate measure to safeguard the integrity of the proceedings in which the victims participate. Accordingly, the Legal Representative respectfully submits the following response.

II. CONFIDENTIALITY

3. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court (the "Regulations"), the present submissions are classified as "confidential" as they refer to submissions with the same classification.

III. PROCEDURAL BACKGROUND

4. On 18 August 2015, the Chamber ordered that, subject to periodic review, certain restrictions previously placed on the Appellant's communications were to remain in place (the "Decision on Restrictions").[2]

5. On 7 September 2016, the Chamber issued the "Public redacted version of 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" (the

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[1] "Bosco Ntaganda's Appeal against 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'", No, ICC-01/04-02/06-1569-Conf, 6 October 2016 ("Document in Support of Appeal").

[2] "Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts" (Trial Chamber VI), No. ICC-01/04-02/06-785-Red, 18 August 2015, ("Decision on Restrictions"), para. 60.

"Impugned Decision"),[3] whereby it decided that other than reinstating one individual to the Appellant's list of non-privileged contacts, the measures previously imposed were to remain in place subject to periodic review.[4]

6. On 13 September 2016, the Appellant filed a request for leave to appeal, which was granted on 16 September 2016 by Majority of the Chamber, Judge Chung dissenting, in respect of a single "issue", namely whether the Chamber "erred in determining that the continued restrictions are necessary and proportionate to the objectives being served, including in respect of Regulation 101(2) of the Regulations of the Court".[5]

7. On 28 September 2016, the Appeals Chamber partially granted the Appellant's request for extension of time for the filing of the Document in Support of the Appeal.[6] It further directed the Prosecution and participating victims to file their respective responses no later than 24 October 2016.[7]

8. On 6 October 2016, the Appellant filed his Document in Support of the Appeal.[8]

III. SUBMISSIONS

9. The Legal Representative submits that the Appellant fails to demonstrate that the Chamber erred in fact or in law or took a manifestly unreasonable decision. The

[3] "Public redacted version of 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" (Trial Chamber VI), No. ICC-01/04-02/06-1494-Red3, 7 September 2016 ("Impugned Decision").
[4] *Idem*, para. 41.
[5] "Decision on Defence Request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'" (Trial Chamber VI), No. ICC-01/04-02/06-1513, 16 September 2016, paras. 6, and 18-19.
[6] "Decision on the 'Urgent request on behalf of Mr Ntaganda seeking an extension of time limit to submit the Document in Support of the Appeal'" (Appeals Chamber), No. ICC-01/04-02/06-1549, 28 September 2016, para. 1.
[7] *Idem*, para. 2.
[8] "Bosco Ntaganda's Appeal against 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'", No. ICC-01/04-02/06-1569-Conf, 6 October 2016 ("Document in Support of the Appeal").

Impugned Decision should therefore be upheld and the Appellant's appeal dismissed in its entirety.

A. THE APPELLATE STANDARD

10. The Appellant's main challenge to the Impugned Decision concerns two alleged errors of law, namely (i) the misappreciation of Regulation 101 of the Regulations in light of international human rights law on the necessity and proportionality of restrictions and (ii) the use of erroneous procedures and standards in assessing the seriousness of the consequences of the restrictions on the Appellant's rights. [9] The explicitly identified seven alleged errors[10] (the "Seven Alleged Errors") in turn pertain to alleged errors of fact and/or abuses of the Trial Chamber's discretion. While some of the Seven Alleged Errors relate to aspects of the allegations of legal errors,[11] the Appellant fails to show how the Seven Alleged Errors relate to the main challenges – and formulation of the issue certified for appeal – and merely submits that "*these errors individually and cumulatively, materially and substantially affected the Impugned Decision.*"[12]

11. As a decision pertaining to restrictions imposed on an accused is a discretionary one, evident from the plain language of the Regulation, namely that a Chamber *may* order restrictions,[13] the Appellant must demonstrate that the Impugned Decision was (i) based on an erroneous interpretation of the governing law; (ii) it was based on a patently incorrect conclusion of fact; (iii) or the Impugned Decision was so unfair or unreasonable as to amount to an abuse of the trial

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[9] *Idem*, paras. 1-2.
[10] *Ibid.*, para. 2.
[11] *Ibid.*, para. 23. In particular, the Appellant contends that "[t]*he Chamber's reliance on these events was an irrelevant consideration and its invocation of the 'risk of potential interference' standard was an error of law.*" (Emphasis added). Also, also in para. 38, the Appellant alleges that the Chamber applied an incorrect burden of proof.
[12] *Ibid.*, para. 3.
[13] Regulation 101 of the Regulations. A teleological reading of the provision as a whole suggests that discretionary powers referred to explicitly in paragraph 1 extend to the whole provision which is further illustrated by the fact that paragraph 3 applies to both paragraph 1 and 2.

chamber's discretion.[14] Even if the Appellant were to establish that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the Impugned Decision.[15]

12. As regards errors of law, it is for the Appellant to demonstrate the Chamber's erroneous interpretation of the law and that the purported error materially affected the Impugned Decision.[16] It is submitted that the Appellant, in the present case, fails to do so and his appeal must therefore be dismissed.

13. As regards errors of fact or abuse of discretion, the Appellant likewise fails to demonstrate discernible errors in the Impugned Decision. The Appellant fails to show that the Chamber committed any of the Seven Alleged Errors by either failing to give sufficient or any weight to relevant considerations, or giving weight to irrelevant facts.

B. THE LAW

14. Regulation 101 of the Regulations confers upon the Chamber the discretionary power to "*prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel* […]".[17] This discretionary power, as correctly pointed out by the Appellant, is subject to Article 21(3) of the Rome Statute, which sets out that the "*application and interpretation of the law* […] *must be consistent with internationally recognized human rights*".[18] Accordingly, the Chamber, in exercising its

[14] "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" (Appeals Chamber), No. ICC-01/09-02/11-1032, 19 August 2015 ("*Kenyatta* Judgment"), para. 22 (Internal citations omitted). Also ICTR, *The Prosecutor v. Jean Uwikindi*, Case No. ICTR-01-75-AR72(C), *Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment*, 16 November 2011, para. 6; ICTY, *The Prosecutor v. Naser Orić*, Case No. MICT-14-79, *Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015*, 17 February 2016, para. 6.
[15] *Kenyatta* Judgment, *supra* note 14, para. 22 (Internal citations omitted).
[16] "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 1 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (Appeals Chamber), No. ICC-02/11-01/12-75-Red, 27 May 2015, paras. 40-41 (Internal citations omitted).
[17] Regulation 101(2) of the Regulations.
[18] Article 21(3) of the Rome Statute.

discretionary powers, was under the statutory obligation to apply internationally recognised human rights law in considering the necessity and proportionality of the on-going restrictive measures imposed pursuant to that regulation.

15. In order to demonstrate that the Chamber erred in its interpretation or appreciation of the applicable law, the Appellant must show that the Chamber (i) failed to take into account international human rights law standards on restrictions on the contacts of detained persons, or (ii) erroneously applied the body of that law. It is submitted that the Appellant fails to show either.

C. THE CHAMBER CORRECTLY APPLIED THE LAW

16. In the Impugned Decision, the Chamber recalled the law it had previously applied when it imposed restrictions on the Appellant's contacts.[19] It, *inter alia*, referred to its Decision on Restrictions, in which it explicitly recalled the rights to privacy and family life enshrined in international human rights instruments and the rights of detained persons as regards contact with family and other persons.[20] It also stressed that "[t]*hese entitlements are not absolute and are subject to 'any restrictions necessary in the interests of the administration of justice* […]".[21]

17. The Chamber, likewise, set out that in its analysis of whether the continuation of the restrictions it had imposed and/or additional restrictions were necessary and proportionate to the aim of ensuring the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings, it was guided by jurisprudence of the European Court of Human Rights (the "ECtHR").[22]

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[19] Impugned Decision, *supra* note 3, para. 16, referring *inter alia* to the Decision on Restrictions, paras. 39-42.
[20] Decision on Restrictions, *supra* note 2, para. 42.
[21] *Idem*, para. 39.
[22] Impugned Decision, *supra* note 3, paras 16-18, referring to ECtHR, *Bagiński v. Poland*, Application No. 37444/97, 11 October 2005 ("*Bagiński v. Poland*"), para. 96; *Piechowicz v. Poland*, Application No. 20071/07, 17 April 2012, para. 220; *Messina v. Italy (No. 2)*, Application No. 25498/94, 28 September 2000 ("*Messina v. Italy*"), paras. 59-74; and *Enea v. Italy*, Application No. 74912/01, 17 September 2009 ("*Enea v. Iraly*").

18. The relevant international jurisprudence sets out that the imposition of restrictions on contacts while in detention does not *per se* violate the human rights of an accused person.[23] However, the measures and restrictions adopted must be necessary for, *inter alia*, the protection of the rights and freedoms of others and must be proportionate to the legitimate aim pursued.[24] The Appellant argues that the Impugned Decision infringes the Standard Minimum Rules for Treatment of Prisoners 1977 (the "Minimum Standards"),[25] failing to take into account that these rules are outdated and did not intend to prescribe a detailed model system of penal institutions;[26] they merely seek to set out universally accepted practices of treatment. Furthermore, according to Part II of the Minimum Standards invoked by the Appellant, an "*untried prisoner* […] *shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice*".[27] The Appellant further omits to mention that principle 19 of The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment of 1988 sets out that the right to be visited by and correspond with, in particular, members of his family, is "*subject to reasonable conditions and restrictions as specified by law or lawful regulations*".[28]

19. Additionally, given that the Appellant is being tried for the most serious international crimes, the Legal Representative submits that more rigorous international standards such as the European Prison Rules[29] should be applicable to

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[23] See in more detail *infra*.
[24] *Messina v. Italy*, *supra* note 22, para. 65.
[25] Document in Support of the Appeal, *supra* note 8, para. 6, referring to the Standard Minimum Rules for Treatment of Prisoners of 1957, UN Doc. E/5988 (1977), article 92 (the "Minimum Standards").
[26] The Updated Standards were adopted in the year 2015: http://issat.dcaf.ch/content/download/100229/1769019/file/UN%20Standard%20Minimum%20Rules%20for%20the%20Treatment%20of%20Prisoners_Nelson%20Mandela%20Rules.pdf. See also the Minimum Standards, *supra* note 25, article 92.
[27] *Idem*. (Emphasis added).
[28] The Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment, A/RES.43/173 of 9 December 1988, Principle 19: http://www.un.org/documents/ga/res/43/a43r173.htm.
[29] European Prison Rules adopted by the Committee of Ministers of the Council of Europe on 11 January 2006 at the 952nd meeting of the Ministers' Deputies:

him. Rule 24.2 of these Rules stipulates that "*communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.*" This Rule "*recognises that communication of all kinds can be restricted and monitored* […]. *It may also be necessary to limit communication in order to meet the needs of continuing criminal investigations, to prevent the commission of further crime and to protect victims of crime.*"[30] The continued limitation of the Appellant's communications to a minimum level of contact and actively monitoring these communications was thus, as such, in conformity with internationally recognised detention standards. This is further supported by case law of the International Criminal Tribunals for the former Yugoslavia (the "ICTY") and Rwanda (the "ICTR").

20. In particular, ICTY detainees are subject to the Regulations on Detainee Communications (the "ICTY Regulations"),[31] Regulations 20 of which grants the Registrar the discretion to record or monitor detainee's non-privileged conversations as a safeguard against attempts to commit offences, including interference with or intimidation of witnesses and interference with the administration of justice.[32] Similarly, ICTR detainees were subject to the applicable regulations of that tribunal, pursuant to which the Registrar could also order the monitoring of communications,

http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/European-Prison-Rules_978-92-871-5982-3.pdf.

[30] Commentary on the European Prison Rules, page 52: http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/European-Prison-Rules_978-92-871-5982-3.pdf.

[31] Regulations to Govern the Supervision of Visits to and Communications with Detainees issued in accordance with the Rules Governing the Detention of Persons awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("ICTY Regulations").

[32] ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, *Decision on Request for Reversal of Decision to Monitor Telephone Calls* (President), 21 April 2011, ("*Karadžić* Decision"), paras. 16-17.

restrictions of contacts, and supervision of visits, as illustrated in the *Ndindiliyimana*[33] and *Ntagerura*[34] cases.

21. Furthermore, the Appellant's reliance on the jurisprudence of the ECtHR[35] is, at most, unsuitable to his claim that the Chamber acted in breach of internationally recognised human rights standards when it ordered the continuation of the restrictive measures. In particular, the Appellant referred to the case of *Khodorkovskiy and Lebedev v. Russia*,[36] arguing that the physical remoteness of the detention on a prisoner's rights to family and private life was in breach of the European Convention of Human Rights.[37] However, the Appellant omits to mention that, in that case, the violation was not found to be solely based on the fact that the accused were detained far away from their families, but rather due to the fact that Russia did not correctly apply domestic law according to which a detainee should, as a matter of principle, serve his sentence in the place where he was convicted, or, in case of no physical places available, in the nearest or next nearest region.[38] Given the particularity of the International Criminal Court's detention regime, the detention facilities in The Hague are the only possible place of detention.[39] Furthermore, the Appellant's wife was not, as such, or by virtue of the Impugned Decision barred from visiting him in detention. Rather, the practical obstacles to her visiting the Appellant stemmed from difficulties in obtaining a visa and financial and logistical support from the Court's Registry. Visits were in principle allowed under the restrictions regime, albeit monitored visits only.

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[33] ICTR, *The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-2000-56-T, *The President's Decision on a Defence Motion to reverse the Prosecutor's request for prohibition of contact pursuant to Rule 64* (President), 25 November 2002, para. 12.
[34] ICTR, *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10A-T, *The President's Decision on the Defence Application made pursuant to Rule 64 of the Rules of Detention,* (President), 21 May 2002: http://www.worldcourts.com/ictr/eng/decisions/2002.05.21_Prosecutor_v_Ntagerura.pdf.
[35] Document in Support of the Appeal, *supra* note 8, paras. 9-10.
[36] ECtHR, *Khodorkosvkiy and Lebedev v. Russia*, Application Nos. 11082/05 and 13772/05, 25 July 2013 (*"Khodorkosvkiy and Lebedev v. Russia"*).
[37] Document in Support of the Appeal, *supra* note 8, para. 7.
[38] *Khodorkosvkiy and Lebedev v. Russia*, *supra* note 36, para. 840, 847 and 849.
[39] ABELS (D.), *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunal*, T.M.C. Asser Press, The Hague, 2012, pp. 523-524.

22. As regards the Appellant's reliance on the case of *Klamecki v. Poland,*[40] the Appellant fails to add that the ECtHR found that the interferences with the applicant's rights under Article 8 of the ECHR, namely the restrictions and limitations put on the number of family visits as well as the supervision of such visits, "[were] *not, by themselves, in breach of* [Article 8 of the ECHR]."[41] Rather, the ECtHR stressed that the Polish district court erred in failing to articulate the grounds for any but the first and last of numerous decisions refusing the applicant to see his wife.[42] Nor did the district court consider any alternative means of ensuring that their contact would not lead to any collusive action, or give consideration to other restrictions pertaining to nature, frequency or duration of contact.[43] Contrary to the *Klamecki* case, family visits and contact with his wife and children have not entirely been restricted in the Appellant's case. These were precisely measures akin to those the ECtHR found the Polish authorities should have considered in the *Klamecki* case cited by the Appellant.

23. Similarly, the *Bagiński v. Poland*[44] and *Enea v. Italy*[45] cases are distinguishable from the Appellant's case as the Appellant was not completely isolated from his wife. In *Bagiński,* the ECtHR found that there had been a legal basis for the interference; however, the ECtHR considered that with the passage of time and the complete prohibition on the applicant receiving visits from his mother, the domestic authorities had failed to consider any alternative means of ensuring their contact did not lead to collusive action.[46] In *Enea,* the restrictive measures were not found to violate the prisoner's right to family life as the ECtHR found that it could not be said that the restrictions placed on visits and accompanying controls were

[40] ECtHR, *Klamecki v. Poland* (No. 2), Application No. 31583/96, 3 April 2003 ("*Klamecki v. Poland*").
[41] *Idem*, paras 62-63. A similar decision was taken in ECHR, *X. v. The United Kingdom*, Application No. 8065/77, Commission Decision of 3 May 1978, Decisions and Reports 14 ("*X. v. The United Kingdom*"), p. 246 at para. 144.
[42] *Klamecki v. Poland*, *supra* note 40, para. 151; *X. v. The United Kingdom*, *supra* note 41, para. 152.
[43] *Idem*, para. 151, and para. 152 respectively.
[44] *Bagiński v. Poland*, *supra* note 22.
[45] *Enea v. Italy*, *supra* note 22.
[46] *Bagiński v. Poland*, *supra* note 22, paras. 93, 96-98.

disproportionate to the legitimate aims pursued.[47] The ECtHR further specifically highlighted that the restrictions imposed had been eased over time.[48] The court concluded that the restrictions on the applicant's right to respect for his private and family life did not go beyond what was necessary in the circumstances of that particular case.[49]

24. Finally, in a more recent decision in *Khoroshenko v. Russia*,[50] the Grand Chamber of the ECtHR stressed that

> "*regarding visiting rights, it is an essential part of a prisoner's right to respect for family life that the prison authorities enable him, or, if need be, assist him, to maintain contact with his close family. At the same time, it has to be recognised that some measure of control of prisoner's contacts with the outside world is called for and is not of itself incompatible with the Convention. Such measures could include the limitations imposed on the number of family visits, supervision over those visits*".[51]

25. A review of the applicable case law of the ECtHR thus shows that restrictions are not in and of themselves in breach of a detained person's rights to privacy and family life. The restrictions maintained by virtue of the Impugned Decision were aimed at preventing interference with Prosecution witnesses and coaching Defence witnesses. As such, the restrictions were imposed to achieve a legitimate aim. They were necessary and proportionate in the interests of the administration of justice and to protect witnesses and were lawfully imposed in accordance with the statutory framework of the Court.

26. Accordingly, the Chamber applied the correct legal standard in assessing "*whether the continuation of current restrictions and/or additional restrictions are necessary and proportionate to the aim previously identified* […], *namely 'to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings.'*"[52]

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[47] *Enea v. Italy*, *supra* note 22, para. 126.
[48] *Idem*, para. 128.
[49] *Ibid*., para. 131.
[50] ECtHR, *Khoroshenko v. Russia*, Application No. 41418/04, 30 June 2015.
[51] *Idem*, para. 123 (Internal citations omitted).
[52] Impugned Decision, *supra* note 3, para. 17.

D. THE APPELLANT MISREPRESENTS THE IMPUGNED DECISION

27. The Appellant misconstrues the Impugned Decision. Neither did the Chamber decide that the restrictive measures were to remain in place "*indefinitely*", nor did it subject them to review at "*some unspecified time*".[53] Rather – and in accordance with international human rights standards – the Chamber decided to extend the restrictive measures subject to ongoing periodic review.[54]

28. As set out *supra*, the Appellant continues to be authorised to have regular contact with [REDACTED], albeit monitored contact only.[55]

29. Moreover, it is to be underscored that the Chamber also stressed that "[a]*lthough the Prosecution has requested that the Restrictions remain in place until the end of the Defence case, the Chamber* *instead* *considers it appropriate to: (i) continue to* *periodically monitor* *the Restrictions; and,* *where necessary*, *(ii)* *conduct an* ad hoc *review* *if compelling reasons arise, as per its Decision on Restrictions.*"[56]

30. Finally, the reinstatement of a named individual to the Appellant's list of authorised contacts further contradicts the Appellant's assertion that the original restrictive measures were indefinitely extended.[57] In fact, such variation demonstrates that the restrictions imposed are relative and may be lifted or varied at any time.

E. NO ERROR OF LAW OR FACT

31. As set out above, the Chamber did not err in law by finding that the Appellant's right to privacy was appropriately balanced with the objectives of the legitimate aim it had identified as being achieved by further extending the restrictions on the Appellant's contacts. The imposition and extension of such

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[53] Document in Support of the Appeal, *supra* note 8, para. 1.
[54] Impugned Decision, *supra* note 3, para. 36.
[55] See *supra*, para. 21.
[56] Impugned Decision, *supra* note 3, para. 36 (Emphasis added).
[57] *Idem*, para. 41.

measures is foreseen in Regulation 101 of the Regulations, and, as set out above, they are in conformity with international human rights instruments that allow restrictions on contact and communications of detained persons where necessary and proportionate to the legitimate aim of preventing interference with the administration of justice or witnesses.

i. First Alleged Error

32. The Appellant argues that the Chamber erred in that it failed to consider a highly relevant fact, namely that the Prosecution had ample time to call [REDACTED] witnesses.[58] The Legal Representative submits that it is not for the Defence nor the Chamber to manage the order in which the Prosecution calls its witnesses. Furthermore, non-interference with *any* witness should be the norm.[59] Thus, the order of witnesses is in any event irrelevant to the consideration of measures of restriction to prevent interference of any kind. The Chamber was therefore not obliged to take this fact into account.

ii. Second Alleged Error

33. The Appellant argues that the alleged recent incidents of witness interference were irrelevant and that the Chamber erred in taking them into account.[60] He argues that the Chamber erroneously relied on unsubstantiated suggestions that his associates were implicated in these incidents, given in particular that they allegedly occurred when he was already subject to stringent limitations of his contacts.[61]

34. In the Impugned Decision, the Chamber recalled the Decision on Restrictions in which it had stressed that "*the fact that restrictive measures have been effective does not necessarily lead to the conclusion that the need to continue these measures has diminished or*

[58] Document in Support of the Appeal, *supra* note 8, paras. 2 and 16.
[59] "Public Redacted Version of Judgment Pursuant to Article 74 of the Statute"(Trial Chamber VII), No. ICC-01/05-01/13-1989-Red, 19 October 2016, para. 15.
[60] Document in Support of the Appeal, *supra* note 8, paras. 2 and 19.
[61] *Idem*.

disappeared".[62] Taking into account allegations of the alleged interferences may have been relevant to the Chamber's assessment if these were related to conduct previously found to necessitate restrictions. As the Legal Representative is not aware of the content of the reviewed material, he is unable to make any further submissions on the relevance or not of the facts taken into account. However, even if the Chamber erred, it is submitted that this error would not materially affect the Impugned Decision warranting appellate correction.

iii. Third Alleged Error

35. The Appellant argues that the restrictions are neither a necessary nor proportionate means to counteract the risk of coaching and that the Chamber erred in relying on the "risk" of witness coaching as a justification for active monitoring.[63] He further submits that the Chamber failed to give reasons for its finding that active monitoring was the least restrictive measure available.[64]

36. The Legal Representative submits that while a trial chamber must provide reasoning in support of its findings on substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.[65] At the outset, the Chamber recalled its previous findings that there are reasonable grounds to believe that Mr Ntaganda, *inter alia*, "*instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner described by him and the necessity of synchronising the stories.*"[66] It further stated that it considered that these findings continued to stand and underscored both the gravity and on-going impact on both witnesses and the case as a whole.[67]

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[62] Impugned Decision, *supra* note 3, para. 32, *referring to* Decision on Restrictions.
[63] Document in Support of the Appeal, *supra* note 8, paras. 2 and 24.
[64] *Idem*, para. 26.
[65] ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, *Appeals Judgment*, 14 December 2015 (*"Nyiramasuhuko et al."*), para. 105.
[66] Impugned Decision, *supra* note 3, para. 22.
[67] *Idem*.

37. Although the Legal Representative is not privy to specific information as regards monitored conversations,[68] it is submitted that, based on how the Chamber proceeded in its analysis in the Impugned Decision, it is apparent that the Chamber carefully considered all material before it. The factors the Chamber considered, in its view, militated against granting the Appellant renewed access to the same or similar modes of communication previously available to him.[69] This approach is entirely consistent with the jurisprudence of the ECtHR discussed *supra*, in particular the *Klamecki* case, where the ECtHR regarded active monitoring as one of the least restrictive measures the court in that case should have considered.[70]

iv. Fourth Alleged Error

38. The Appellant submits that the Chamber erred (i) finding that there were reasonable grounds to believe that Mr Ntaganda engaged in witness coaching, (ii) in failing to define the concept of witness coaching, and (iii) relying on an erroneous definition of the term "witness coaching".[71]

39. The Fourth Alleged Error demonstrates a mere disagreement with the Chamber's decision. Although the Legal Representative is not aware of the contents of the reviewed material, he submits that, first, the finding of coaching, and thus the interpretation of the concept was made in a previous decision and does therefore not arise from the Impugned Decision. Second, the Appellant did not challenge the earlier decision in which the Chamber allegedly erroneously interpreted the concept, and is barred from raising it at this stage. Third, appellate correction of the Chamber's finding is only warranted if, on the facts, the Chamber's finding was so

[68] These matters were dealt with on an *ex parte* basis.
[69] Impugned Decision, *supra* note 3, para. 31.
[70] See *supra* paras 21-25.
[71] Document in Support of the Appeal, *supra* note 8, para. 2 and 28.

manifestly unreasonable that no reasonable trier of fact could have come to the same conclusion.[72] The Appellant fails to demonstrate this.

v. Fifth Alleged Error

40. The Appellant argues that the Chamber erred in failing to give any consideration to less intrusive restrictions, and the period of time since the transgressions or his conduct in the intervening period.[73] In this regard, the Appellant further refers to the case of *Katanga and Ngujdolo* (the "*Ngudjolo* Decision"),[74] and argues that the Chamber in that case relaxed the restrictions based on an awareness of the impropriety of maintaining restrictions on family relationships for too long.[75]

41. As regards the failure to give consideration to less restrictive measures, the Chamber emphasised that in reaching the conclusion that the measures imposed were the least restrictive measures available, it had expressly considered and rejected the Defence suggestion that it could dispense with the active monitoring of telephone calls or visits, as it considered that doing so would not adequately guard against the potential of further conduct listed in Regulation 101(2) of the Regulations.[76] It also made express reference to the fact that it was not in possession of any information which suggested that the Appellant had either directly or indirectly attempted to further disclose confidential information or interfere with witnesses since the issuance of its Decision on Restrictions,[77] but found that the continuation of the restrictions nevertheless remained necessary.[78] The Appellant therefore fails to show that the Chamber "*failed to give adequate or any consideration to alternative control*

[72] *Nyiramasuhuko et al.*, *supra* note 65, para. 32. *See also* ICTY, *The Prosecutor v. Radislav Krstić,* Case No. IT-98-33-A, *Appeals Judgement*, 19 April 2004, para. 40.
[73] Document in Support of the Appeal, *supra* note 8, paras. 2 and 32.
[74] *Idem*, para. 37 *referring to The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-1966-tEng-Red, "Decision on the Registrar's report on the monitoring of some of Mathieu Ngudjolo's conversations following the Registrar's decision on monitoring dated 22 January 2010", 16 March 2010, para. 16.
[75] *Ibid*., para. 37.
[76] Impugned Decision, *supra* note 3, para. 34.
[77] *Idem*, para. 28.
[78] *Ibid*., para. 33.

measures"[79] or failed to consider his conduct during the review period preceding the Impugned Decision.

42. Likewise, the Chamber expressly stated that it considered and balanced the Appellant's right to private and family life with the objectives of protecting witnesses, preventing breaches of confidentiality and ensuring the integrity of the proceedings.[80]

43. Finally, the Appellant's reference to the *Ngudjolo* Decision is inapposite. As a decision imposing, relaxing, or rescinding restrictive measures on a detained accused is a discretionary one to be taken on a case-by-case basis, the Chamber was under no obligation to follow the *Ngudjolo* Decision. Additionally, even if the facts of that case had been the same or similar, it must equally be recalled that two reasonable triers of facts may reach different but equally reasonable conclusions.[81] An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way.[82]

vi. Sixth Alleged Error

44. The Appellant contends that the procedures and standards of proof adopted were not commensurate with the serious consequences for him.[83] He argues that the Chamber erred in various aspects of the procedure adopted and the burden of proof applied to those factual determinations.[84] He further submits that the Chamber erred in effectively denying him an opportunity to be heard.[85]

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[79] Document in Support of the Appeal, *supra* note 8, para. 2.
[80] Impugned Decision, *supra* note 3, para. 35.
[81] ICTY, *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, *Appeals Judgment*, 4 December 2012, para. 396.
[82] *Idem*. Also ICTY, *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, *Appeals Judgment*, 17 September 2003, para. 12.
[83] Document in Support of the Appeal, *supra* note 8, paras. 2 and 38.
[84] *Idem*.
[85] *Ibid*., paras. 38-39.

45. As addressed *supra*,[86] the Chamber applied the correct standard of proof and adequately balanced the Appellant's rights with the safety of witnesses and interests of justice. As regards the opportunity to be heard, the Legal Representative submits that Regulation 101(3) also provides for the possibility of the detained person being informed of a request for an order under that regulation *ex post factum*, "*as soon as practicable*".[87] Being informed on the general nature of material would have been sufficient in the circumstances, given the security implications for third parties as assessed by the Chamber.[88] In any event, even if the Chamber committed a procedural error in keeping parts of the material from the Defence, such an error would have no material impact on the correctness of the Chamber's decision, more so given that the applicable legal standard of Regulation 101 is one of "reasonable grounds to believe", the lowest standard within the statutory framework of the Court.[89]

vii. Seventh Alleged Error

46. The Appellant submits that the Chamber failed to address the impact of the indefinitely continued restrictions on him.[90]

47. As set out *supra*,[91] the Appellant misconstrues the temporal scope of the restrictions imposed. Furthermore, the Appellant fails to demonstrate that the Chamber took into account the impact of the continued restrictions on his private and family life. Contrary to the Appellant's argument, the Chamber expressly acknowledged the impact of the continuation of the restrictions on his rights in this regard and proceeded to state that it had appropriately balanced them against the interests of their legitimate aim.[92] A Chamber is not obliged to articulate every step of

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[86] See *supra*, para. 26
[87] Regulation 101(3) of the Regulations.
[88] *Karadžić* Decision, *supra* note 32, para. 23.
[89] TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observers Notes, Article by Article,* 3rd edition, C.H. Beck, München, 2016, p. 1445, footnote 31.
[90] Document in Support of the Appeal, *supra* note 8, paras. 2 and 45.
[91] See *supra*, para. 27.
[92] Impugned Decision, *supra* note 3, para. 35.

its reasoning.[93] There is nothing in its decision that suggests that it failed to consider the impact of continued restrictions on the Appellant's rights.

F. CONCLUSION

48. The Legal Representative submits that the Appellant fails to demonstrate that the Chamber committed a discernible error in the Impugned Decision. The Appeal must therefore be dismissed in its entirety.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Appeals Chamber

DISMISS the Appeal in its entirety.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 9th Day of November 2016

At The Hague, The Netherlands

It is hereby certified that the present submissions contain a total of 5993 words.

[93] *Nyiramasuhuko et al.*, *supra* note 65, para. 105.