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No.: **ICC-01/04-02/06**
Date: **20 October 2016**

APPEALS CHAMBER

Before: **Presiding Judge Howard Morrison**
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Piotr Hofmanski
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 "Bosco Ntaganda's Appeal against 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts'", 6 October 2016, ICC-01/04-02/06-1569-Conf

Source: **Defence Team of Mr Bosco Ntaganda**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence
Me Stéphane Bourgon
Me Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

INTRODUCTION

1. Bosco Ntaganda has, since 13 March 2015, been limited to one hour of telephone contact with the outside world per week, actively monitored, restricted to [REDACTED]. Conjugal and family visits without active monitoring are prohibited. Mr Ntaganda is detained so far from home that family visits are difficult to arrange and rare; none of his co-detainees speak his mother tongue; and no psychological or medical support has been provided in his own language. The Trial Chamber ("Chamber") nevertheless decided on 7 September 2016 that these restrictions – which have now been in place for 18 months – should be extended indefinitely, subject to further review at some unspecified time.[1]

2. The continuation of restrictions is not "necessary and proportionate" to the Chamber's stated objectives of "'ensur[ing] the safety of witnesses, prevent[ing] breaches of confidentiality and ensur[ing] the integrity of proceedings.'"[2] **First**, the Chamber failed to consider that the Prosecution has had ample time to call all insider witnesses but chose not to do so. **Second**, allegations by witnesses that they were intimidated long after Mr Ntaganda was subject to the active monitoring are not indicative of "reasonable grounds" for continued restrictions. **Third**, the Chamber erred in failing to distinguish between the measures necessary to prevent interference with Prosecution witnesses as opposed to measures necessary to prevent coaching of Defence witnesses. **Fourth**, the Chamber erred in finding that there were any reasonable grounds to conclude that there was any prospect of witness coaching at Mr Ntaganda's instigation. **Fifth**, the Chamber failed to give adequate or any consideration to alternative control measures, to the length of time since any of the

[1] Confidential, *ex parte*, redacted version of 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', ICC-01/04-02/06-1494-Conf-Exp-Red2, 7 September 2016 ("Impugned Decision"). The present filing is confidential in accordance with Regulation 23*bis*(2) of the Regulations of the Court (RoC), and is filed pursuant to leave granted by the Chamber: ICC-01/04-02/06-1513.
[2] Impugned Decision, para.17; ICC-01/04-02/06-1513, paras.6,17 (certifying the issue as whether the Trial 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.")

alleged transgressions, and Mr Ntaganda's conduct in the intervening time. **Sixth**, the factual findings underlying the Impugned Decision were tainted by: substantial *ex parte* submissions; *ex parte* witness hearings; unsigned or unsworn statements; reversals of the burden of proof; an inappropriately low standard of proof; incomplete or unofficial translations; and a failure to take into account mitigating facts. The procedure adopted and standards applied were not commensurate with the seriousness of the consequences for Mr Ntaganda's rights and, on the contrary, have undermined the fairness of the proceedings**. Seventh**, the Chamber failed to give adequate – or any – weight to the seriousness of the infringement of Mr Ntaganda's rights in assessing "proportionality".

3. These errors, individually and cumulatively, materially and substantially affected the Impugned Decision. The Appeals Chamber is requested to reverse the Impugned Decision and, as a minimum interim measure, order that Mr Ntaganda's allotment of telephone calls per week – still subject to active monitoring – be increased the two hours per week. The Appeals Chamber is further requested to remand the evaluation of restrictions to the Chamber for further consideration.

STANDARD OF REVIEW

4. A correctness standard of appellate review applies to issues of law.[3] Factual findings may also be overturned where a clear error arises from misappreciating the facts, taking irrelevant facts into account or failing to take relevant facts into account.[4] Even if an error of law or of fact has not been identified, reversible abuse of discretion arises when the decision is so unfair or unreasonable as to "force the

[3] *See Lubanga*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para.18; *Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Red ("*Gbagbo* Decision") para.40.
[4] *Katanga and Ngudjolo*, "Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07 (OA 4), para.25; *Gbagbo* Decision, para.38.

conclusion that the Chamber failed to exercise its discretion judiciously."[5] Procedural errors may also be a basis for overturning a decision below.[6] One or more of these errors may lead to reversal of the decision below where they "materially affected the determination."[7]

APPLICABLE LAW

5. Regulation 101(2) of the RoC permits the Prosecutor to request restrictions on "contact between a detained person and any other person." The threshold for such a request is "reasonable grounds to believe" that such contacts could, *inter alia*, "prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation"; "be harmful to […] any other person"; or "be used by a detained person to breach an order for non-disclosure made by a judge."

6. Article 21(3) of the Statute requires that any law applied by the Court "be consistent with internationally recognized human rights." Those rights include the rights to privacy and family life. Rule 37 of the United Nations *Standard Minimum Rules for Treatment of Prisoners*, elucidating these rights in the detention context, provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."[8] Principle 19 of *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* elevates family visitation to a "right" in itself: "A detained or imprisoned person shall have the *right* to be visited by and to correspond with, in particular, members of his family."[9]

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[5] *Kenyatta*, "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" 19 August 2015", 19 August 2015, ICC-01/09-02/1 (OA 51), para.25.
[6] *Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para.80.
[7] *Banda*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest", 3 March 2015, ICC- 02/05-03/09-632-Red (OA 5), para.30
[8] *Standard Minimum Rules for Treatment of Prisoners* of 1957, U.N. Doc. E/5988, (1977).
[9] *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* of 1988, U.N. Doc.A/45/49(1990) (italics added). *See*, ECtHR, *Moiseyev v. Russia*, 62936/00 (2008), para.255

7. A prisoner's rights to family and private life may be impacted by the physical remoteness of detention. Mikhail Khodorkovskiy's detention two days' travel from his family residence was found to violate his right to family life.[10] As the ECtHR found in such circumstances, "it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family."[11]

8. The duration and degree of restrictions that impede contact with family members, even if temporarily justified on security grounds, is highly relevant to the necessity and proportionality of their continuation.[12] A prisoner, particularly when detained far from home, needs to be able to communicate with family members to sustain his family life. The ECtHR has found that restrictions on contacts between husband and wife, though justified for a limited time because of the needs of an ongoing investigation, must eventually give way to the right to family and private life:

> [W]ith the passage of time and given the severity of the measures, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife.[13]

The ECHR, "having regard to the duration and nature of the restrictions", declared the continuation of the initially justified restrictions to be a violation of the right to family life.[14]

9. The *Katanga* Trial Chamber, applying these principles in the unique circumstances of detention imposed by the ICC, has required that any restrictions on

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(finding a violation where the detainee was limited to a maximum of two family visits per month, and was otherwise unable to have any family visits at all for two periods of eight months, and for two periods of one-month each, over a total of three years).

[10] ECtHR, *Khodorkovskiy and Lebedev v. Russia*, 11082/06 and 13772/05 (2013), paras.324, 823.

[11] *Id*. para.836.

[12] ECtHR, *Klamecki v. Poland (No 2)*, 31583/96 (2003), paras.150-151; ECtHR, *Baginski v. Poland*, 37444/97, 11 October 2005, para.96; ECtHR, *Enea v. Italy*, Application no 74912/01, 17 September 2009, paras.127-128.

[13] *Klamecki v. Poland (No 2)*, 31583/96 (2003), paras.150-151.

[14] *Id*. para.152.

detainee communications not only have a "legitimate aim" but that they be "*absolutely necessary*."[15] Extensions of any measures must, likewise, "*continue* […] to be absolutely necessary."[16]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

10. The Chamber, based on Prosecution allegations, [REDACTED].[17] The conversations of alleged concern [REDACTED]. Summaries and one transcript of these conversations, [REDACTED], were shared with the Prosecution and the Chamber.[18]

11. The purpose of the restrictions as originally sought by the Prosecution was the protection of its *own* witnesses from interference.[19] Hence, the remedy requested, despite a brief mention of suspicions of coaching of potential Defence witnesses,[20] was restrictions "*until the conclusion of the testimony of the Prosecution's insider witnesses*."[21]

12. Mr Ntaganda acknowledged that he had disclosed the identity of [REDACTED] Prosecution witnesses.[22] He explained, however, that his perception was that his interlocutors already knew that they were witnesses; that they had been discussed previously prior to being designated as witnesses; and that one of these witnesses was [REDACTED] whose previous involvement with the Court was well-

[15] *Katanga*, "Decision on request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre", 24 June 2009, ICC-01/04-01/07-1243-tENG-Red, para.25 (italics added).
[16] *Katanga*, "Fourth decision on measures of prohibition and restriction of contacts outside and inside the Detention Centre in respect of Mathieu Ngudjolo", 4 Dec 2009, ICC-01/04-01/07-1709-tENG-Red, para.18 (italics added).
[17] [REDACTED].
[18] First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda, 10 March 2015, ICC-01/04-02/06-504-Conf-Exp ("First Report"); Addendum to the "First Report on the *post-factum* review of the phone conversations made by Mr Ntaganda" (ICC-01/04-02/06-504-Conf-Exp), 20 April 2015, ICC-01/04-02/06-563-Conf-Exp ("Addendum to First Report").
[19] Confidential Redacted version of "Prosecution request for further restrictions to the Accused's communications", 9 June 2015, ICC-01/04-02/06-635-Conf-Red, paras. 1,6,28,41,44.
[20] ICC-01/04-02/06-738, paras.30-33.
[21] *Id*. para.43 (italics added).
[22] ICC-01/04-02/06-759-Conf-Exp ("First Defence Submissions"), paras.51-57.

known [REDACTED].[23] The Chamber did not reject the Defence's submission[24] that discussions about a protected witness were not prohibited as long as the accused did not, directly or indirectly, reveal that person's status as a witness.[25] This raised an ambiguity as to how Mr Ntaganda should have reacted when an interlocutor referred to a particular person with an apparent awareness that that person is a witness.[26] The Chamber, however, did not consider such circumstances, or Mr Ntaganda's candid acknowledgement of the disclosures that had occurred, in mitigation or in assessing the presence (or absence) of malicious intent.[27] The Chamber made no finding, contrary to the Prosecution's allegations, that Mr Ntaganda had disclosed the identity of any other protected witness.[28]

13. The Chamber also expressed "grave concern" and found "deeply troubling" two passages from amongst Mr Ntaganda's numerous hours of conversations to establish "good cause" to impose restrictions.[29] The former was a passage from an otherwise summarized conversation of Mr Ntaganda [REDACTED], but everything will collapse if they don't show up."[30] The second was as follows:

> [REDACTED].[31]

The latter, according to the Chamber, gave rise to "a reasonable belief that Mr Ntaganda, through the relevant interlocutor, intended to engage in a serious form of witness interference."[32]

14. [REDACTED] days after these conversations, and 544 days after restrictions were first imposed, the Chamber decided to maintain all restrictions (subject to one

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[23] *Id*.
[24] *Id*. para.21.
[25] ICC-01/04-02/06-785-Conf-Exp, ("First Decision"), para.52. The Chamber incorporated by reference the findings in the First Decision in the Impugned Decision at paragraph 22.
[26] First Defence Submissions, para.22.
[27] First Decision, para.55.
[28] Cf. ICC-01/04-02/06-635, paras. 32, 35 (alleging that Mr Ntaganda had disclosed the identities [REDACTED]).
[29] First Decision, paras.52,55; Impugned Decision, para.22.
[30] First Decision, para.52; ICC-01/04-02/06-504-Conf-Exp, p.33.
[31] [REDACTED]
[32] Impugned Decision, para.22; First Decision, para.55.

minor variation) on the basis that: (i) the Prosecution had not yet called all of its insider witnesses; and (ii) alleged indications of "witness coaching" of potential *Defence* witnesses that had allegedly occurred [REDACTED] years before.[33]

SUBMISSIONS

(i) The imposition of restrictions is neither "necessary" nor "proportionate" to protect "insider" witnesses, all of whom could have previously completed their testimony

15. The two witnesses whose identity was disclosed by Mr Ntaganda have long since testified. The Chamber nevertheless justifies prolonging restrictions because the Prosecution has not yet chosen to call [REDACTED] have not yet testified.[34]

16. The Prosecution has now had ample time in the 400 days since the start of trial to call all insider witnesses. The Chamber did not even mention the Prosecution's failure to have done so. This was a failure to take into account a fact highly relevant to the justifiability of continued restricting.

17. The Chamber now for the first time, also mentions [REDACTED] witnesses,[35] without, however, expressly stating that this is a basis for continued restrictions. The Defence is not aware of any allegations of intimidation against [REDACTED] witnesses, let alone any allegations of such intimidation by anyone associated with Mr Ntaganda, and still less of any allegations that he had any involvement, direct or indirect, in any such intimidation. The Impugned Decision's vague reference to [REDACTED] witnesses reflects either a failure to state reasons or the taking into account of an irrelevant fact.

18. These errors in assessing the facts manifestly and materially affect the Chamber's reasoning, warranting reversal.

(ii) Alleged recent incidents of interference are an irrelevant consideration

[33] Impugned Decision, para.30.
[34] [REDACTED].
[35] *Id*.

19. The Trial Chamber erred in relying upon alleged recent acts of interference of Prosecution witnesses [REDACTED] to prolong restrictions.[36] These "reported incidents" in respect of [REDACTED] occurred in [REDACTED][37] and [REDACTED],[38] respectively. Mr Ntaganda, by the time of the first incident, had been subject to active monitoring for [REDACTED] months. The Chamber nevertheless relied on these "allegations" as establishing "risk of potential interference" by Mr Ntaganda.[39] The reliance on these allegations, even assuming the unsubstantiated suggestion that the *malfaiteurs* are "associates" of Mr Ntaganda, is not relevant to the necessity or proportionality of continuing the existing restrictions on Mr Ntaganda. If anything, these events demonstrate that Mr Ntaganda has no role in such events, from which it must follow that the restrictions as they currently exist are neither proportionate nor necessary to the stated objectives of preventing witness interference.

20. [REDACTED] has been making sundry complaints dating back to [REDACTED], starting [REDACTED].[40] [REDACTED]. Once again, Mr Ntaganda had long been subject to active monitoring by the time of these alleged telephone calls.

21. Any implied connection between these events and Mr Ntaganda's conduct is unfounded not only because of the duration since Mr Ntaganda could have said one word to anyone about these witnesses, but also because there are other individuals who may have been the source of the disclosure of these witnesses' identities. The Defence believes that it is widely known, for example, that [REDACTED], long before being designated as a witness, was [REDACTED] and criticized for his participation in this case. [REDACTED][41] – long before he was a witness in this case,

[36] *Id*.
[37] [REDACTED]
[38] [REDACTED]
[39] Impugned Decision, fn.63.
[40] [REDACTED]
[41] [REDACTED]

and long before Mr Ntaganda uttered the quotations around the time of [REDACTED] that the Chamber found to be "troubling".

22. No evidential or rational basis exists to connect these reports of recent intimidation to the "reasonable grounds to believe" standard of Regulation 101(2). Moreover, the Chamber's reliance on the mere "risk of potential interference"[42] is facially incorrect. The issue is not whether there is an abstract risk of potential interference, but rather whether there are "reasonable grounds to believe" that the *accused* will engage in one of the prohibited forms of prejudicial conduct.

23. The 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. These errors materially affected the core justification for prolonging the restrictions on Mr Ntaganda, and warrant reversal.

(iii) The restrictions are neither a necessary nor a proportionate means to counteract the risk of coaching

24. The Chamber erred in relying upon the risk of "witness coaching" as a justification for active monitoring.[43] In particular, the Trial Chamber erred in finding that active monitoring is the "least restrictive means" to achieve the objective.[44]

25. The prejudice to trial proceedings arising from intimidation is that the witness does not appear to testify. Coaching, however, creates a different kind of prejudice: false testimony by a witness who does appear. Coaching is, accordingly, usually an offence committed with one's own witnesses. Hence, the Chamber tied the need for continued restrictions to the fact that "preparations for any defence case should currently be actively underway."[45]

[42] Impugned Decision, para.29.
[43] *Id*. para.31.
[44] *Id*. para.34.
[45] *Id*. para.30.

26. The Chamber erred, however, by assuming without giving any reasons that active monitoring is the least restrictive way of preventing the prejudice caused by coaching. An equally effective antidote to coaching, however, is for the Registry to disclose any passively-monitored examples of alleged coaching to the Trial Chamber and, if warranted, to the parties. Any such indications can then be put to the witness. Any legitimate indications of coaching could have a devastating impact on any Defence witness's credibility which, in turn, damages Mr Ntaganda's own Defence case.

27. Active monitoring, accordingly, is neither necessary nor the "least restrictive" means of preventing this form of prejudice to the integrity of the proceedings. This error, which concerns the alleged ongoing and future need for maintaining restrictions, materially affected the Impugned Decision.

(iv) The Chamber did not define, and appears to have applied an erroneous concept of, "witness coaching"

28. The Impugned Decision incorporates by reference the Chamber's previous finding that Mr Ntaganda "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 as described by [him] and the necessity of synchronizing the stories.'"[46]

29. The Chamber, despite finding that Mr Ntaganda "coached" witnesses, has never defined this term. ICTR caselaw confirms that an interviewer may urge a witness to be more forthcoming about information favourable to an accused.[47] The Prosecution has previously advocated that it be permitted to review "*likely topics of cross-examination*";[48] "clarify *their evidence* with counsel";[49] "[r]eview, with the witness,

[46] *Id*. para.22.
[47] *Nyiramasuhuko et al*., Decision on the Prosecutor's Further Allegations of Contempt, 30 November 2001, para.32.
[48] *Ruto & Sang, Prosecution Motion Regarding the Scope of Witness Preparation*, ICC-01/09-01/11-446, 13 August 2012 ("*Ruto* OTP Motion"), para.5 (italics added).
[49] *Ntaganda*, Prosecution motion regarding witness preparation, ICC-01/04-02/06-444, 5 February 2015, para.4 (italics added).

his/her *prior statements*";[50] "[c]onfirm whether the statements are accurate, *clarify additional points*, and document additions or retractions the witness may deem appropriate";[51] and "[s]how potential exhibits to the witness for his/her comment".[52] The consequence of such techniques, in practice, is to encourage an account that is more logical and coherent – i.e. "synchronized" – with other evidence in the case and the witness's own prior statements.

30. The Chamber misconstrues the relevant passages in concluding that Mr Ntaganda "told his interlocutors which story to tell." The [REDACTED] passages cited as "examples" do not go beyond a discussion of a particular sequence of events and encouragement that witnesses [REDACTED][53] Mr [REDACTED]. [54] Although communication between witnesses is not ideal, it is not prohibited and is apparently extremely common amongst Prosecution witnesses without the Prosecution suggesting that such contact means that witnesses are lying.

31. The Chamber's failure to define coaching was an error of law; the standard it appears to have applied was an error of law; and the consequent finding that there were reasonable grounds to believe that Mr Ntaganda had engaged in witness coaching was an error of law and fact. Moreover, reliance on any such conduct to justify continued draconian restrictions more than [REDACTED] years after the fact is disproportionate. These errors materially affected the Impugned Decision.

(v) No consideration was given to less intrusive restrictions, the period of time since the transgressions, or Mr Ntaganda's conduct in the intervening period

32. The Chamber declared that "certain restrictions remain necessary" to satisfy various objectives associated with the integrity of proceedings,[55] but then proceeded without analysis to its conclusion that the existing restrictions were "the least

[50] *Ruto* OTP Motion, para.5 (italics added).
[51] *Id.* (italics added).
[52] *Id.*
[53] [REDACTED]
[54] [REDACTED]
[55] Impugned Decision, para.33.

restrictive means available to achieve these objectives"[56] because anything less than active monitoring would not "adequately guard against the potential for further conduct listed in Regulation 101(2) … given that any such conduct could only be ascertained after it had already occurred."[57]

33. The Chamber ignored, however, that Regulation 101(2) requires the continuing existence of "reasonable grounds to believe" that an accused will engage in the prohibited conduct. Not only did the Chamber fail to consider how the passage of time impacted on "reasonable grounds", it also failed to consider whether any of the alternative measures of restriction would constitute a disincentive for the prohibited conduct. For example, giving Mr Ntaganda two more hours per week of telephone conversation subject to immediate passive review (i.e. within two or three days, depending on the Registry's capacity) is a very strong incentive for Mr Ntaganda not to engage in any misconduct whatsoever. The Chamber did not address this issue.

34. A reflection of the degree of disproportionality inherent in the restrictions is the claim that examples of telephones having been handed to unauthorized interlocutors makes active monitoring the "least restrictive" measure of restriction.[58] The reasoning adopted by the Chamber implies that the restrictions must be maintained permanently. The error of this reasoning is that the prohibited purposes under Regulation 101(2) measures are not co-extensive with every prison rule. The issue, rather, is whether the long period of restrictions, combined with alternative measures, changes the "reasonable grounds" analysis in respect of the prohibited outcomes and conduct.

35. The Chamber mentions the allegation that one of Mr Ntaganda's pre-restrictions contacts did not properly register his name with the detention centre authorities, but only in the context of deciding whether a different person, who is a

[56] *Id*. para.34.
[57] *Id*.
[58] First Decision, para.47.

relative, could be added to Mr Ntaganda's list of actively-monitored contacts.[59] No request has been, or is being, made that Mr Ntaganda be permitted to speak to anyone other than the [REDACTED] persons on his current contact list.

36. The Chamber also erred by failing to re-assess the likelihood of any misconduct in light of: (i) the extremely long period (now approaching [REDACTED] years) since the alleged misconduct; and (ii) Mr Ntaganda's consistent efforts during the period of active monitoring to avoid any communications that could be misinterpreted as misconduct in any way. The Chamber's dismissal of these considerations on the basis that "'[n]ot engaging in misconduct should be the norm and 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 disappeared'"[60] should have been the beginning, not the end, of its analysis. While this may indeed not "necessarily" be the case, it was incumbent upon the Chamber to assess and articulate whether this was the case. The Chamber, accordingly, erred in failing to consider all relevant circumstances in assessing whether "reasonable grounds to believe" under 101(2) continued to exist, and that the specific restrictions currently in place still constituted necessary and proportionate measures. The absence of this analysis materially affected the outcome reached in the Impugned Decision.

37. The absence of such analysis contrasts with the *Katanga* Trial Chamber, which gradually relaxed restrictions imposed under Regulation 101(2) based on an evaluation of reduced "grounds to believe" over time, combined with an awareness of the impropriety of maintaining restrictions on family relationships for too long.[61]

[59] Impugned Decision, para.40.
[60] *Id*. para.32.
[61] *Katanga*, ICC-01/04-01/07-1498-tENG-Red, paras.19,21; *Katanga*, ICC-01/04-01/07-1709-tENG-Red, para.22.

The draconian restrictions imposed on Mr Katanga, which were similar to those still imposed on Mr Ntaganda, were relaxed within a much shorter time-period.[62]

(vi) The procedures and standards of proof adopted were not commensurate with the serious interests at stake for Mr Ntaganda

38. The Chamber erred in various aspects of the procedure adopted for determination of the allegations and the burden of proof applied to those factual determinations. The serious consequences for Mr Ntaganda required a commensurate burden of proof and procedure to give effect to the "opportunity to be heard" in Regulation 101(3). The consequences involved serious and long-term incursions on rights to family and private life especially prior to conviction, and which went far beyond the unavoidable consequences of detention.[63] The measures are far more serious, and warrant a much higher evidential and procedural threshold, than regular witness protection measures under Article 68.[64] The Chamber, however, failed to accord Mr Ntaganda an adequate hearing in several respects.

39. First, the Chamber permitted substantial *ex parte* submissions by the Prosecution;[65] *ex parte* witness statements;[66] and *ex parte* hearing of witnesses.[67] Thirteen of the fifteen annexes attached to the motion leading to the Impugned Decision are *ex parte.* Part of the Impugned Decision is *ex parte* which, in itself, constitutes a failure to state reasons.[68] Requests for this *ex parte* material were rejected

[62] *Katanga*, "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, ICC-01/04-01/07-1966-tENG-Red, para.16.
[63] CCPR General Comment No. 21, Art. 10 (Humane Treatment of Prisoners Deprived of their Liberty), 10 April 1992 (the rights of prisoners "must be guaranteed under the same conditions as for that of free persons […] subject to the restrictions that are unavoidable in a closed environment.")
[64] Cf. First Decision, para.41.
[65] [REDACTED]
[66] [REDACTED]
[67] [REDACTED]
[68] Impugned Decision, para.24 ("[REDACTED]. [REDACTED]. [REDACTED].")

with *ex parte* reasons.[69] The Chamber justified these *ex parte* submissions, *inter alia*, [REDACTED],[70] [REDACTED].[71]

40. The Defence, as a result, is not even in a position to concretely address prejudice. The least that can already be inferred, however, is that the Chamber has entertained volumes of this information. The Chamber apparently has no intention of ever making this information available to the Defence.[72] The degree of resort to the practice, given these circumstances and the potential importance of the material received to the Chamber's perception of Mr Ntaganda's character, constitutes an error of law and a serious violation of the right "to be heard" under Regulation 101(3) and to a fair hearing under Article 67.

41. Second, the factual findings incorporated by reference in the Impugned Decision[73] are based on reversals of the burden of proof. The Chamber deemed translations and summaries more reliable where they had not been specifically challenged by the Defence;[74] "note[d]", in finding that allegations of coaching were of "grave concern",[75] the absence of a Defence response to allegations of coaching Defence witnesses,[76] even though the remedy sought by the Prosecution had been limited to Prosecution witnesses;[77] and [REDACTED]."[78] [REDACTED].

42. Third, the Chamber failed to take into account manifestly relevant considerations, or adopted an unduly low burden of proof, in reaching conclusions about "reasonable grounds to believe". Despite finding that there was no prohibition

[69] *See e.g.* Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda's contacts, ICC-01/04-02/06-1364-Conf-Exp-Red, 3 June 2016 ("Redactions Decision"), para.19 ("this material is *ex parte* on the basis that it [REDACTED]").
[70] [REDACTED]
[71] [REDACTED]
[72] [REDACTED]
[73] Impugned Decision, para.22.
[74] First Decision, para.51 ("the – uncontested – summarised translation of the relevant conversation shows ...."), para.55 ("the Chamber notes that an original language transcription was provided to the Defence").
[75] *Id*. para.57
[76] *Id*. para.56.
[77] ICC-01/04-02/06-738, para.43.
[78] [REDACTED]

on a detainee using coded language during their telephone conversations, the Chamber still drew an adverse inference against Mr Ntaganda for having done so.[79] The Chamber ignored Defence submissions explaining the perception, based on past practice, that Registry recordings of conversations of detainees will end up in the hands of the Prosecution.[80] The Defence, while conceding that codes were used, showed that codes had been used by Mr Ntaganda for the entirely proper purpose of communicating the identity of potential *Defence* witnesses to his interlocutors.[81] The Chamber did not even refer to these submissions in the First Decision; instead it adopted the blanket inference that "the use of codes was meant to disguise attempts to disclose confidential information or to interfere with witnesses."[82] The Chamber's adverse inference that the use of codes, *per se*, is probative of impropriety and misconduct was unfounded, and arose from a failure to take into account relevant considerations.

43. Fourth, not a single translation on which the Impugned Decision was based was certified, and many remain in summary form only. The reliance on these uncertified and incomplete translations, and the inference of reliability based on the absence of Defence corrections thereto, was an error of law.

44. Each of the foregoing errors materially affected the Impugned Decision to a degree that warrants reversal.

(vii) The Chamber failed to address the impact of the restrictions on Mr Ntaganda

45. The Impugned Decision fails to analyse the damage to Mr Ntaganda's family and private life cause by the imposition of the restrictions for two-and-a-half years, and the impact of their indefinite continuation. The Chamber stated as a matter of

[79] First Decision, para.49.
[80] First Defence Submissions, para.37 ("Resort to such language can be attributable to other purposes, including: a concern that such conversations might be disclosed to Prosecution, as occurred in the *Katanga* case.") The Trial Chamber addressed the second and third bullets set out at paragraph 37 of the Defence's submissions (First Decision, paras.49-50), but simply ignored the first bullet point.
[81] *Id*. paras.41-50.
[82] First Decision, para.50.

law that "the passage of time alone will not necessarily require the lifting or adjustment of the measures imposed,"[83] but failed to further address whether, in this case, the passage of time necessitated or favoured diminished restrictions. The only issue addressed by the Chamber was whether the restrictions, in its view "remain necessary and proportionate" relative to its stated objectives. The failure to balance these considerations against the ongoing damage to Mr Ntaganda's well-being and his rights was an error of law and an error of fact that materially affected the Impugned Decision.

RELIEF SOUGHT

46. The Defence respectfully requests the Appeals Chamber to:

REVERSE the Impugned Decision and remand the issue to the Trial Chamber for further and expedited consideration;

ORDER as an interim measure that Mr Ntaganda be permitted two hours of actively monitored telephone calls to his existing list of contacts.

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF OCTOBER 2016

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

[83] Impugned Decision, para.18.