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No. ICC-01/04-02/06 OA 4

Date: 8 March 2017

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

**Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing
restrictions on contacts of 7 September 2016**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Decision reviewing the restrictions placed on Mr Ntaganda’s contacts” of 7 September 2016 (ICC-01/04-02/06-1494-Conf-Exp),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision reviewing the restrictions placed on Mr Ntaganda’s contacts” is confirmed.

REASONS

I. KEY FINDINGS

1. A finding that there are reasonable grounds to believe that a detained person personally engaged in witness interference is relevant, not only to the imposition of restrictions under regulation 101 of the Regulations of the Court but also for their continuation.
2. The fact that information may be withheld from a detained person in proceedings under regulation 101 of the Regulations of the Court is not *per se* unfair. The Chamber must balance the detained person’s right to be informed against the possible need to withhold information.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 8 August 2014, the Prosecutor filed a request for restrictive measures under regulation 101 (2) of the Regulations of the Court in relation to communication by Mr

Bosco Ntaganda (“Mr Ntaganda”) with outside contacts while he is in detention¹ (“Prosecutor’s Request for Restrictive Measures of 8 August 2014”). The Prosecutor alleged, *inter alia*, that she had reasonable grounds to believe that Mr Ntaganda had “improperly disclosed confidential information” concerning witnesses for the Prosecutor and “that this may be part of a broader practice of violating non-disclosure obligations, and interfering with and/or intimidating witnesses”.² On 18 September 2014, the Prosecutor submitted additional evidence in support of her request³ (“Prosecutor’s Submission of Additional Evidence of 18 September 2014”).

4. On 8 December 2014, Trial Chamber VI (“Trial Chamber”) issued a decision⁴ (“Decision on Interim Restrictive Measures of 8 December 2014”) “in which it, *inter alia*, ordered the *post-factum* review of Mr Ntaganda’s phone conversations from December 2013⁵ and imposed certain restrictions on his non-privileged contacts, such as prohibiting him from receiving non-privileged visits on an interim basis, pending receipt by the Chamber of further submissions by the parties”.⁶ It also ordered that his non-privileged telephone calls may be monitored from 19 December 2014 onwards pursuant to regulations 174 (2) (passive monitoring) and 175 (1) (random monitoring) of the Regulations of the Registry.⁷

¹ “Prosecution’s urgent request for measures under regulation 101(2) of the Regulations of the Court”, ICC-01/04-02/06-349-Conf-Exp; a confidential redacted version was registered on the same day (ICC-01/04-02/06-349-Conf-Red); a less redacted confidential version, was registered on 19 December 2014 (ICC-01/04-02/06-349-Conf-Red2); a public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-349-Red3](#)).

² [Prosecutor’s Request for Restrictive Measures of 8 August 2014](#), para. 48.

³ “Prosecution’s Submission of Additional Evidence in Support of “Prosecution’s urgent request for measures under regulation 101(2) of the Regulations of the Court” dated 8 August 2014”, ICC-01/04-02/06-371-Conf-Exp; a public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-371-Red2](#)).

⁴ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 3 and footnote 5, referring to “Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs”, ICC-01/04-02/06-410-Conf-Exp; a confidential redacted *ex parte* version, available to the Prosecution, defence and Registry, was registered on the same day, with corrected versions of both registered on 16 February 2015 (ICC-01/04-02/06-410-Conf-Exp-Corr and ICC-01/04-02/06-410-Conf-Exp-Red-Corr).

⁵ See Decision on Interim Restrictive Measures of 8 December 2014, para 56.

⁶ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 3, with footnote 5 thereto referring to Decision on Interim Restrictive Measures of 8 December 2014, para. 51 and disposition.

⁷ Decision on Interim Restrictive Measures of 8 December 2014, para. 51 and disposition.

5. On 13 March 2015, the Trial Chamber, having preliminarily reviewed the first report filed by the Registry⁸ (“First Registry Report”), issued the “Order instructing the Registry to put in place additional temporary restrictions on contact”⁹ (“Order on Active Monitoring of 13 March 2015”). The Trial Chamber “instructed the Registry, in addition to the restrictions already imposed as a result of the Decision on Interim Restrictive Measures [of 8 December 2014], to actively monitor Mr Ntaganda’s phone calls”.¹⁰

6. On 22 May 2015, the Registrar submitted the “Second Report on the *post-factum* review of the phone conversations made by Mr Ntaganda”¹¹ (“Second Registry Report”).

7. On 9 June 2015, on the basis of its assessment of the First Registry Report, the Prosecutor filed the “Prosecution request for further restrictions to the Accused’s communications”¹² (“Request for Further Restrictive Measures of 9 June 2015”). On 12 June 2015, the Registrar filed the “Report on an incident that occurred during the active monitoring of Mr. Ntaganda’s telephone communications”¹³ (“Incident Report”), which concerned the termination of one of Mr Ntaganda’s phone calls during active monitoring, due to the suspected use of coded language.¹⁴

8. On 29 June 2015, the Trial Chamber issued the “Order imposing interim restrictions on detainees’ contacts with certain individuals and related measures”¹⁵ (“Interim Order on Restrictions”).

⁸ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 5 and footnote 8, referring to “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.

⁹ ICC-01/04-02/06-508-Conf-Exp.

¹⁰ [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 6 and footnote 9, referring to the Order on Active Monitoring of 13 March 2015, para. 7 and disposition.

¹¹ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 8 and footnote 12, referring to ICC-01/04-02/06-607-Conf-Exp.

¹² ICC-01/04-02/06-635-Conf-Exp; a public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-635-Red4](#)).

¹³ ICC-01/04-02/06-640-Conf-Exp.

¹⁴ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 11 and footnote 17, referring to the Incident Report.

¹⁵ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 12 and footnote 18, referring to ICC-01/04-02/06-683-Conf-Exp.

9. The Registrar filed two additional reports on the issue¹⁶ and, on 18 August 2015, following the receipt of further submissions from the parties,¹⁷ the Trial Chamber rendered the “Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts”¹⁸ (“Decision on Restrictions of 18 August 2015”) in which it, *inter alia*, maintained the restrictions on Mr Ntaganda’s communications as imposed by the Decision on Interim Restrictive Measures of 8 December 2014 and the Order on Active Monitoring of 13 March 2015, subject to certain modifications.¹⁹ In particular, the Trial Chamber, *inter alia*, (i) found that the active monitoring of Mr Ntaganda’s non-privileged telephone conversations should continue and stated that conversations “shall only [...] [be] about private or family matters”, prohibiting the use of coded language and any discussion of “case-related matters, including possible evidence or witnesses, whether appearing for the Prosecution or the Defence” during the phone calls;²⁰ (ii) permitted, *inter alia*, continued contact with [REDACTED], stating that “the limitation that the conversations shall be strictly of a personal nature and may not relate in any way to the present case applies also to any information passed on or directly discussed with [REDACTED]”.²¹ The Trial Chamber instructed

¹⁶ See [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 15 and footnote 24, referring to “Report on the Active Monitoring Review of Mr Ntaganda’s Telephone Conversations pursuant to Trial Chamber VI’s Order ICC-01/04-02/06-697 dated 3 July 2015”, 13 July 2015, ICC-01/04-02/06-714-Conf-Exp; [Decision on Restrictions](#) of 18 August 2015 (as designated below), para. 18 and footnote 28, referring to “Third Report on the *post-factum* review of the phone conversations made by Mr Ntaganda”, 27 July 2015, ICC-01/04-02/06-748-Conf-Exp.

¹⁷ In relation to the Prosecutor, see “Prosecution additional observations for further restrictions to detainee communications”, 16 July 2015, ICC-01/04-02/06-727-Conf-Exp (“Prosecutor’s Additional Submissions”). A public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-727-Red4](#)); “Prosecution final observations on the need for further restrictions to Ntaganda’s contacts”, 21 July 2015, ICC-01/04-02/06-738-Conf-Exp – a public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-738-Red](#)); “Prosecution reply to the Defence’s ‘Confidential Redacted Version of ‘Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications’”, 3 August 2015, ICC-01/04-02/06-759-Conf-Exp’, ICC-01/04-02/06-759-Conf-Exp-Red”, 13 August 2015, ICC-01/04-02/06-780-Conf-Exp – a public redacted version was registered on 15 January 2016 ([ICC-01/04-02/06-780-Red](#)). In relation to Mr Ntaganda, see “Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications”, 3 August 2015, ICC-01/04-02/06-759-Conf-Exp – a public version dated 12 January 2016 was registered on 13 January 2016 ([ICC-01/04-02/06-759-Red2](#)) (“Mr Ntaganda’s Final Observations of 12 January 2016”).

¹⁸ ICC-01/04-02/06-785-Conf-Exp, available to the Prosecution, Defence and Registry; a public redacted version was filed on the same day ([ICC-01/04-02/06-785-Red](#)).

¹⁹ [Decision on Restrictions](#) of 18 August 2015, disposition, p. 35.

²⁰ [Decision on Restrictions](#) of 18 August 2015, para. 60.

²¹ [Decision on Restrictions](#) of 18 August 2015, paras 62-63.

the Registrar to terminate any call immediately in case of breach of these conditions and to report the matter to the Trial Chamber.²²

10. In keeping with its indication that it would conduct a periodic review of the restrictions,²³ the Trial Chamber invited submissions and observations on the restrictions imposed in relation to Mr Ntaganda's contacts by way of an e-mail to the parties and participants dated 1 April 2016.²⁴ Submissions were filed by the Registrar²⁵ ("Fourth Registry Report"), the Prosecutor²⁶ ("Prosecutor's Submissions of 9 May 2016") and Mr Ntaganda²⁷ ("Defence Observations").

11. In addition, on 11 May 2016, Mr Ntaganda filed the "Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests"²⁸ ("Mr Ntaganda's Request for Disclosure of 11 May 2016"). On 3 June 2016, following receipt of submissions by the Prosecutor,²⁹ the Trial Chamber rendered a decision on the request³⁰ ("Decision on Mr Ntaganda's Request for Disclosure of 3 June 2016") wherein it, *inter alia*, ordered the lifting of certain redactions to one of the *inter partes* annexes (unless the Prosecutor brought further and compelling reasons) and rejected the remainder of the request.³¹

²² [Decision on Restrictions](#) of 18 August 2015, para. 63. *See also* para. 60.

²³ [Decision on Restrictions](#) of 18 August 2015, para. 70.

²⁴ *See* [Impugned Decision](#) (as designated below) para. 2 and footnote 3.

²⁵ "Fourth Report on the post-factum review of the phone conversations made by Mr Ntaganda", 29 April 2016, ICC-01/04-02/06-1303-Conf-Exp; a public redacted version, dated 11 October 2016, was registered on 13 October 2016 ([ICC-01/04-02/06-1303-Red](#)).

²⁶ "Prosecution's submissions on the restrictions to Ntaganda's contacts", 9 May 2016, ICC-01/04-02/06-1313-Conf-Exp; a public redacted version was registered on 17 May 2016 ([ICC-01/04-02/06-1313-Red](#)) and another public, lesser redacted version, was registered on 14 December 2016 ([ICC-01/04-02/06-1313-Red2](#)).

²⁷ "Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention", 9 May 2016, ICC-01/04-02/06-1312-Conf-Exp; a public redacted version, dated 10 October 2016, was registered on 11 October 2016 ([ICC-01/04-02/06-1312-Red](#)).

²⁸ ICC-01/04-02/06-1315-Conf-Exp-Corr.

²⁹ "Prosecution's response to the 'Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests', ICC-01/04-02/06-1315-Conf-Exp-Corr", 16 May 2016, ICC-01/04-02/06-1318-Conf-Exp ("Prosecutor's Response to Mr Ntaganda's Request for Disclosure of 16 May 2016"); a public redacted version was registered on 14 December 2016 ([ICC-01/04-02/06-1318-Red3](#)).

³⁰ "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; a public redacted version was registered on 21 November 2016 ([ICC-01/04-02/06-1364-Red2](#)).

³¹ [Decision on Mr Ntaganda's Request for Disclosure](#) of 3 June 2016, para. 25 and disposition.

12. On 7 September 2016, following receipt of further submissions from the Prosecutor on the Defence Observations³² (“Prosecutor’s Reply of 13 June 2016”) and from Mr Ntaganda on the Prosecutor’s Submissions of 9 May 2016³³ (“Mr Ntaganda’s Reply”), the Trial Chamber rendered the “Decision reviewing the restrictions placed on Mr Ntaganda’s contacts”³⁴ (“Impugned Decision”), in which it decided, *inter alia*, to largely maintain the restrictions imposed and to continue to review them periodically.³⁵

13. On 13 September 2016, Mr Ntaganda filed the “Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts”.³⁶ On 16 September 2016, following receipt of responses from the Prosecutor³⁷ and the victims,³⁸ the Trial Chamber, by majority, Judge Chung dissenting,³⁹ granted Mr Ntaganda leave to appeal⁴⁰ (“Decision on Leave to Appeal”).⁴¹

³² “Response to the ‘Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention’, ICC-01/04-02/06-1312-Conf-Exp”, 13 June 2016, ICC-01/04-02/06-1390-Conf-Exp (“Prosecutor’s Response to Mr Ntaganda’s Observations of 13 June 2016”); a public redacted version was registered on 26 September 2016 ([ICC-01/04-02/06-1390-Red2](#)), with another public, lesser redacted, version registered on 14 December 2016 ([ICC-01/04-02/06-1390-Red3](#)).

³³ “Response on behalf of Mr Ntaganda to the ‘Prosecution’s submissions on the restrictions to Ntaganda’s contacts’”, 13 June 2016, ICC-01/04-02/06-1391-Conf-Exp; a public redacted version, dated 10 October 2016, was registered on 11 October 2016 ([ICC-01/04-02/06-1391-Red2](#)).

³⁴ ICC-01/04-02/06-1494-Conf-Exp; a public redacted version was registered on 7 September 2016 ([ICC-01/04-02/06-1494-Red3](#)); another public, lesser redacted, version, dated 21 November 2016, was registered on 22 November 2016 ([ICC-01/04-02/06-1494-Red4](#)).

³⁵ [Impugned Decision](#), para. 36 and disposition.

³⁶ ICC-01/04-02/06-1501-Conf-Exp; a public redacted version was registered on the same day ([ICC-01/04-02/06-1501-Red](#)).

³⁷ “Prosecution’s response to the Defence’s request for leave to appeal the decision reviewing restrictions placed on Mr Ntaganda’s contacts”, dated 14 September 2016 and registered on 15 September 2016, ICC-01/04-02/06-1506-Conf-Exp; a public redacted version was dated and registered on the same days ([ICC-01/04-02/06-1506-Red2](#)).

³⁸ “Response of the Common Legal Representative of the Attacks to the ‘Public redacted version of ‘Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts’”, 14 September 2016, [ICC-01/04-02/06-1505](#); “Former child soldiers’ response to the ‘Public redacted version of ‘Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts’”, dated 14 September 2016 and registered on 15 September 2016, [ICC-01/04-02/06-1507](#).

³⁹ “Dissenting Opinion of Judge Chang-Ho Chung, 16 September 2016, [ICC-01/04-02/06-1513-Anx1](#).

⁴⁰ “Decision on Defence request for leave to appeal the ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’”, [ICC-01/04-02/06-1513](#).

⁴¹ [Decision on Leave to Appeal](#), para. 6 and disposition.

B. Proceedings before the Appeals Chamber

14. On 6 October 2016, Mr Ntaganda, having been granted an extension of the time limit,⁴² filed “Bosco Ntaganda’s Appeal against ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’”⁴³ (“Document in Support of the Appeal”), in which he requested, *inter alia*, that the Impugned Decision be reversed and that the Appeals Chamber “remand the issue to the Trial Chamber for further and expedited consideration”⁴⁴ and, as a minimum interim measure, that the Appeals Chamber order that Mr Ntaganda’s “allotment of telephone calls per week – still subject to active monitoring – be increased [to] two hours per week”.⁴⁵

15. On 24 October 2016, the Prosecutor filed the “Prosecution’s response to Bosco Ntaganda’s appeal against ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’”⁴⁶ (“Prosecutor’s Response to the Document in Support of the Appeal”). On the same day, the two groups of victims participating in the proceedings (“Victims”) filed their respective responses.⁴⁷

III. MERITS

16. This appeal concerns the Trial Chamber’s decision to impose restrictions on Mr Ntaganda’s telephone contacts while in detention pursuant to regulation 101 (2) of the

⁴² See “Urgent request on behalf of Mr Ntaganda seeking an extension of time limit to submit the Document in Support of the Appeal”, 26 September 2016, [ICC-01/04-02/06-1543 \(OA4\)](#); “Prosecution’s response to Ntaganda’s request for an extension of time to submit the Document in Support of the Appeal”, 26 September 2016, [ICC-01/04-02/06-1545 \(OA4\)](#); and “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’”, 28 September 2016, [ICC-01/04-02/06-1549 \(OA4\)](#).

⁴³ ICC-01/04-02/06-1569-Conf (OA4); a public redacted version was registered on 20 October 2016 ([ICC-01/04-02/06-1569-Red \(OA4\)](#)); it was later registered on 31 October 2017, having been re-stamped to reflect the correct numbering (ICC-01/04-02/06-1569-Red).

⁴⁴ [Document in Support of the Appeal](#), para. 46. See also para. 3.

⁴⁵ [Document in Support of the Appeal](#), para. 3. See also para. 46.

⁴⁶ ICC-01/04-02/06-1592-Conf-Exp, available to the Prosecution; a confidential, *ex parte*, redacted version was registered on 24 October 2016 (ICC-01/04-02/06-1592-Conf-Exp-Red (OA4)) available to the Prosecution and Defence; a public redacted version was registered on 25 October 2016 ([ICC-01/04-02/06-1592-Red2](#)).

⁴⁷ “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’””, ICC-01/04-02/06-1590-Conf (OA4) (“Response of Victims of the Attacks”) – a public redacted version was registered on 9 November 2016 ([ICC-01/04-02/06-1590-Red \(OA4\)](#)); “Former Child Soldiers’ response to ‘Bosco Ntaganda’s Appeal against ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’””, original version registered on 24 October 2016 and corrected version registered on 7 November 2016, ICC-01/04-02/06-1591-Conf-Corr (OA4) (“Response of Former Child Soldiers”) – a public redacted version was registered on 7 November 2016 ([ICC-01/04-02/06-1591-Corr-Red \(OA4\)](#)).

Regulations of the Court.⁴⁸ Regulation 101 of the Regulations of the Court regulates “[r]estrictions to access to news and contact”. Sub-regulations (2) and (3) provide:

2. The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds 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;
- (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.

3. The detained person shall be informed of the Prosecutor’s request and shall be given the opportunity to be heard or to submit his or her views. In exceptional circumstances such as in an emergency, an order may be made prior to the detained person being informed of the request. In such a case, the detained person shall, as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views.

17. Having been granted leave to appeal on a single issue, namely 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”,⁴⁹ Mr Ntaganda raises seven grounds of appeal.

A. Standard of review

18. Mr Ntaganda alleges various errors of law, fact and procedure arising out of the exercise of the Trial Chamber’s discretion in reviewing the restrictions that it had imposed. The Appeals Chamber set out the relevant standard of review for such a

⁴⁸ In this judgment, the Appeals Chamber has, following consultation with the presiding judge of the Trial Chamber, made public certain information contained in non-public documents, on the basis that its revelation is not harmful.

⁴⁹ [Decision on Leave to Appeal](#), para. 6 and disposition.

decision in a previous judgment in the case of *Prosecutor v. Uhuru Muigai Kenyatta*:⁵⁰

22. The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.⁵¹ The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.⁵² In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.⁵³ Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.⁵⁴

23. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.⁵⁵

⁵⁰ *Prosecutor v. Uhuru Muigai 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, [ICC-01/09-02/11-1032](#) (OA 5) ("Kenyatta OA 5 Judgment"), paras 22-25.

⁵¹ [Footnote 36 in the original] *Kony et al. OA 3 Judgment*, para. 79; *Lubanga A 4 A 6 Judgment*, para. 41. See also *Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, [ICC-01/04-02/12-271 \(A\)](#) ("Ngudjolo A Judgment"), para. 21.

⁵² [Footnote 37 in the original] See *Kony et al. OA 3 Judgment*, para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, "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) ("Banda OA 5 Judgment"), para. 30; *Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, [ICC-02/04-01/15-251](#) (OA 3) ("Ongwen OA 3 Judgment"), para. 35.

⁵³ [Footnote 38 in the original] *Kony et al. OA 3 Judgment*, paras 80-81; *Banda OA 5 Judgment*, para. 30; *Ongwen OA 3 Judgment*, para. 35.

⁵⁴ [Footnote 39 in the original] *Kony et al. OA 3 Judgment*, para. 80; *Banda OA 5 Judgment*, para. 30; *Ongwen OA 3 Judgment*, para. 35.

⁵⁵ [Footnote 40 in the original] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, ([ICC-01/04-01/06-3121-Red](#)) (A 5) ("Lubanga A 5 Judgment"), para. 18; *Prosecutor v. 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-Conf (OA) with a public redacted version, ([ICC-02/11-01/12-75-Red](#)) (OA) ("S. Gbagbo Admissibility OA Judgment"), para. 40. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of

24. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby accorded a margin of deference to the Chamber's findings.⁵⁶ The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.⁵⁷ Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.⁵⁸ It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.⁵⁹

19. The above standard of review will guide the analysis of the Appeals Chamber in this judgment.

B. The Prosecutor's request to dismiss the appeal *in limine*

20. The Prosecutor submits that the appeal, in general, is unsubstantiated and that Mr Ntaganda fails to allege errors of law, fact or procedure with clarity.⁶⁰ She argues that the appeal should therefore be dismissed *in limine*.⁶¹

21. The Appeals Chamber has previously held that

appellate review is conducted on the basis of the grounds of appeal raised by an appellant and he/she is required *inter alia*, to set out the legal and/or factual reasons in support of each ground of appeal. In addition, the Appeals Chamber has held that, where an appellant fails to identify an alleged error or to draw a link between the alleged error and its material effect on the impugned decision,

12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation', 17 February 2012, [ICC-02/05-03/09-295](#) (OA 2), para. 20.

⁵⁶ [Footnote 41 in the original] [Lubanga A 5 Judgment](#), paras 24, 27; [S. Gbagbo Admissibility OA Judgment](#), para. 39.

⁵⁷ [Footnote 42 in the original] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁵⁸ [Footnote 43 in the original] *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', 14 July 2011, [ICC-01/04-01/10-283](#) (OA) ("*Mbarushimana* OA Judgment"), para. 17; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁵⁹ [Footnote 44 in the original] [Mbarushimana OA Judgment](#), para. 17; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁶⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), paras 5-7.

⁶¹ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 6.

the Appeals Chamber will not consider the merits of the ground of appeal concerned and instead will dismiss the ground *in limine*.⁶²

22. The Appeals Chamber is not persuaded by the Prosecutor’s argument that the present appeal, in its entirety, should be dismissed *in limine*. Although there are some arguments that the Appeals Chamber finds to be unsubstantiated, Mr Ntaganda’s submissions generally meet the minimum requirements of substantiation allowing the Appeals Chamber to consider their merits. In these circumstances, the Appeals Chamber decides to address the merits of the appeal.

C. Relevant parts of the Impugned Decision

23. The Trial Chamber first recalled the law applicable to its decision, including that drawn from the European Court of Human Rights (“ECtHR”), as set out in its previous decision, the Decision on Restrictions of 18 August 2015.⁶³ It noted that “the Decision on Restrictions has been in force for over 12 months, and that certain restrictions had already been in place on an interim basis prior to this period”.⁶⁴ It proceeded “to review whether the Restrictions remain necessary and proportionate, in accordance with the applicable law outlined [...] and to assess whether there are any alternative less restrictive means to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings”.⁶⁵ The Trial Chamber stated that, “[i]n conducting this assessment, [it] has had particular regard to any developments occurring since the issuance of the Decision on Restrictions”.⁶⁶

24. It recalled its previous findings,

that there are reasonable grounds to believe that Mr Ntaganda: (i) ‘abused his entitlement to communications by speaking to non-registered interlocutors without prior approval of the Registry’; (ii) used coded language to ‘disguise attempts to disclose confidential information or to interfere with witnesses’; (iii)

⁶² *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”, 8 August 2016, [ICC-01/05-01/13-1964 \(OA13\)](#), para. 27; see also *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 19 October 2010, [ICC-01/05-01/08-962](#), paras 102-104.

⁶³ [Impugned Decision](#), paras 16-18.

⁶⁴ [Impugned Decision](#), para. 21 (footnote omitted).

⁶⁵ [Impugned Decision](#), para. 21.

⁶⁶ [Impugned Decision](#), para. 21.

disclosed the identity of Prosecution witnesses in circumstances which the Chamber found to be of ‘grave concern’; (iv) ‘intended to engage in a serious form of witness interference’; and (v) ‘instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in a manner as described by [him] and the necessity of synchronising the stories’.⁶⁷ [Footnotes omitted.]

25. It found “that these findings continue to stand, and [it] re-emphasise[d] the gravity of this conduct, which may have a serious and ongoing impact on both witnesses in the *Ntaganda* case, and on the proceedings more generally”.⁶⁸ The Trial Chamber noted that, since the Decision on Restrictions, the Prosecutor had reviewed additional transcripts of Mr Ntaganda’s telephone conversations from detention and the review “appear[ed] to provide further support for the Chamber’s original findings with respect to witness interference and coaching”. Regarding accounts of interference, it stated that if they were accurate, “this would indicate that Mr Ntaganda had direct knowledge of, and involvement in, such interference”.⁶⁹

26. The Trial Chamber then went on to consider the Fourth Registry Report and, having done so, assessed other relevant developments that occurred since the Decision on Restrictions of 18 August 2015 (“Review Period”). First, it noted that it was “not in possession of any information which suggests that, since the date of the Decision on Restrictions, Mr Ntaganda himself has, directly or indirectly, attempted to further disclose confidential information or interfere with witnesses”.⁷⁰ However, it stated:

29. In issuing the present decision, the Chamber has also had particular regard to the current stage of proceedings. As noted by the Defence, four of the ‘insider’ witnesses who had been the subject of alleged interference have now concluded their testimony. The Chamber observes, however, that there remain in excess of 50 witnesses on the Prosecution’s list of witnesses, including remaining insider witnesses and their family members. The Chamber notes in this regard that allegations of attempted witness interference extend beyond the Four Witnesses [as referred to above], including incidents of alleged interference occurring since the imposition of the Restrictions (as well as alleged renewed attempts to intimidate certain of the Four Witnesses). Consequently, though noting that recent reported incidents of interference are

⁶⁷ [Impugned Decision](#), para. 22.

⁶⁸ [Impugned Decision](#), para. 22.

⁶⁹ [Impugned Decision](#), para. 24.

⁷⁰ [Impugned Decision](#), para. 28.

not directly linked to Mr Ntaganda, the Chamber considers that the risk of potential interference is not limited to the Four Witnesses.⁷¹

30. Finally, in a context where the Chamber has previously found there to be reason to believe that Mr Ntaganda both engaged in witness coaching himself and directed his interlocutors to do so, the fact that preparations for any defence case should currently be actively underway is a relevant consideration.⁷² [Footnotes omitted.]

27. In reaching a conclusion with regard to the restrictions, the Trial Chamber stated:

31. In the Chamber's view, the circumstances outlined above indicate that the risk of witness interference and witness coaching remains high at the present stage of the proceedings. The Chamber has previously found reasonable grounds to believe that Mr Ntaganda personally engaged in such conduct, and intended and directed others to do so. These factors militate against granting Mr Ntaganda renewed access at this time to the same, or a similar, modes of communications through which that conduct was originally perpetrated.⁷³

32. Specifically, the Chamber is not convinced by the Defence argument that Mr Ntaganda's abstention from engaging in misconduct within the meaning of Regulation 101(2) of the Regulations since the imposition of the Restrictions should lead to the conclusion that the Restrictions are no longer warranted. As the Chamber already found in issuing the Decision on Restrictions, '[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'.⁷⁴ [Footnote omitted.]

28. It therefore concluded "that certain restrictions remain necessary to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings."⁷⁵ It stated:

34. The Chamber further considers the maintenance of the present Restrictions to be the least restrictive means available to achieve these objectives. In so deciding, the Chamber does not consider the Defence suggestion to dispense with the active monitoring of telephone calls or visits to adequately guard against the potential for further conduct listed in Regulation

⁷¹ [Impugned Decision](#), para. 29.

⁷² [Impugned Decision](#), para. 30.

⁷³ [Impugned Decision](#), para. 31.

⁷⁴ [Impugned Decision](#), para. 32.

⁷⁵ [Impugned Decision](#), para. 33.

101 (2) of the Regulations, given that any such conduct could only be ascertained after it had already occurred.⁷⁶ [...] [Footnote omitted.]

29. As to the proportionality of the restrictions, the Trial Chamber went on to state that it

notes that Mr Ntaganda may continue to have contact with his mother through actively monitored telephone conversations, and with his wife and children, through actively monitored telephone conversations and visits, and/or the recording of messages. The Chamber recalls in this regard [REDACTED] [...]. The continuing proportionality of the Restrictions and their impact on Mr Ntaganda's family and private life, including on his wife and children, have been assessed in light of these circumstances. As a result, the Chamber considers that at this time, Mr Ntaganda's right to privacy and family life is being appropriately balanced with the objectives of protecting witnesses, preventing breaches of confidentiality and ensuring the integrity of the proceedings.⁷⁷ [Footnotes omitted.]

30. The Trial Chamber then noted 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”.⁷⁸

D. First ground of appeal: protection of “insider” witnesses

1. Submissions of the parties and participants

31. In relation to the first ground of appeal, Mr Ntaganda notes that the “two witnesses whose identity was disclosed by Mr Ntaganda have long since testified”.⁷⁹ He states that the Trial Chamber “nevertheless justifies prolonging restrictions because the Prosecution has not yet chosen to call thirteen ‘remaining insider witnesses and their family members’ have not yet testified”.⁸⁰ He argues that the Trial Chamber erred when it ignored “a fact highly relevant to the justifiability” of

⁷⁶ [Impugned Decision](#), para. 34.

⁷⁷ [Impugned Decision](#), para. 35.

⁷⁸ [Impugned Decision](#), para. 36 (footnote omitted).

⁷⁹ [Document in Support of the Appeal](#), para. 15.

⁸⁰ [Document in Support of the Appeal](#), para. 15 (footnote omitted).

continued restrictions, namely, that the Prosecutor “has now had ample time in the 400 days since the start of the trial to call all insider witnesses” and failed to do so.⁸¹

32. Mr Ntaganda also argues that the Trial Chamber mentions “non-insider” witnesses for the first time “without, however, expressly stating that this is a basis for continued restrictions”.⁸² He submits that the defence is unaware “of any allegations of intimidation against non-insider 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”.⁸³ He submits that the “Impugned Decision’s vague reference to non-insider witnesses reflects either a failure to state reasons or the taking into account of an irrelevant fact”.⁸⁴

33. The Prosecutor argues that Mr Ntaganda’s submissions misstate the Impugned Decision and “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”.⁸⁵ In her view, the issue of “scheduling of witnesses” is irrelevant to the consideration of this appeal.⁸⁶ She avers that, “[i]n speculating ‘[t]hat the Prosecution has had ample time to call all insider witnesses but chose not to do so’, [Mr Ntaganda] fails to acknowledge that the Prosecution had indeed sought to change its witness order to accommodate as many insiders as early as possible”.⁸⁷ The Prosecutor then argues that Mr Ntaganda does not acknowledge several witnesses beyond the Four Witnesses who had been the subject of alleged interference.⁸⁸ In addition, the Prosecutor argues that, in light of “credible information” indicating acts of coaching, the Trial Chamber was required to “no longer limit the ‘risk of potential interference’ to the Four Witnesses, the Prosecution’s insider witnesses or even just the Prosecution’s witnesses, but rather, consider the Defence witnesses who may be coached”.⁸⁹ The Prosecutor submits that, “[f]ar from showing that this factor was irrelevant to the

⁸¹ [Document in Support of the Appeal](#), para. 16.

⁸² [Document in Support of the Appeal](#), para. 17.

⁸³ [Document in Support of the Appeal](#), para. 17.

⁸⁴ [Document in Support of the Appeal](#), para. 17 (footnote omitted).

⁸⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 14.

⁸⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 15.

⁸⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 16 (footnote omitted).

⁸⁸ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 17.

⁸⁹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 18 (footnote omitted).

Decision, or that the Chamber failed to properly reason, the Defence fails to even show error, let alone an impact on the [Impugned] Decision”.⁹⁰

34. The Victims submit that Mr Ntaganda’s arguments under this ground are without merit. In their view, “it is not for the Defence nor the Chamber to manage the order in which the Prosecution calls its witnesses” and “the order of witnesses is in any event irrelevant to the consideration of measures of restriction to prevent interference of any kind”.⁹¹ In addition, the Victims submit that, whether the Prosecutor had sufficient time to call “insider” witnesses does not relieve the Chamber of its obligation to ensure the protection of all witnesses – both “insiders” and “non-insiders”.⁹²

2. Determination by the Appeals Chamber

35. Mr Ntaganda alleges that the Trial Chamber erred by failing to attach relevance to the amount of time that the Prosecutor has had to call all “insider” witnesses and her failure to do so.⁹³ The Appeals Chamber finds that the amount of time that the Prosecutor has had to call “insider” witnesses is in and of itself irrelevant to the Trial Chamber’s review of whether the risk of witness interference remains high at a given stage of the proceedings. Although delay in the calling of witnesses may be a factor which a Chamber can consider in deciding whether particular restrictions should remain in place, this would not have the immediate consequence that restrictions should be stopped, in particular if the risks previously identified still exist. In any event, the Appeals Chamber finds Mr Ntaganda’s suggestion that the Prosecutor could have called all “insider” witnesses earlier to be speculative.

36. In relation to Mr Ntaganda’s argument that the Trial Chamber’s reference to “non-insider” witnesses “reflects either a failure to state reasons or the taking into account of an irrelevant fact”, noting that he is not aware of any allegations of intimidation against “non-insider” witnesses,⁹⁴ the Appeals Chamber recalls that the Trial Chamber, in assessing the current stage of the proceedings, observed that “there

⁹⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 18.

⁹¹ [Response of Victims of the Attacks](#), para. 32.

⁹² [Response of Former Child Soldiers](#), para. 13.

⁹³ [Document in Support of the Appeal](#), para. 16.

⁹⁴ [Document in Support of the Appeal](#), para. 17.

remain in excess of 50 witnesses on the Prosecution’s list of witnesses, including remaining insider witnesses and their family members”.⁹⁵ The Trial Chamber considered that “allegations of attempted witness interference extend beyond the Four Witnesses”.⁹⁶ However, in further detailing this finding, the Trial Chamber referred only to alleged incidents of interference with four other “insider” witnesses. Notably, at footnote 61 of the Impugned Decision, the Trial Chamber referred to four *other* “insider” witnesses [REDACTED], [REDACTED], [REDACTED] and [REDACTED].⁹⁷ The Trial Chamber recalled further that attempts of witness interference had included incidents that allegedly had occurred since the imposition of the restrictions and in this regard it referenced, at footnote 62 of the Impugned Decision, allegations made in connection with, “for example”, “insider” witness [REDACTED]. Furthermore, the Trial Chamber noted alleged renewed attempts to intimidate certain of the Four Witnesses and in this regard referenced, at footnote 63 of the Impugned Decision, allegations in connection with witnesses [REDACTED] and [REDACTED]. Therefore, although the Trial Chamber may have mentioned “non-insider” witnesses in describing the number of remaining witnesses, all of the specific witnesses referred to by it in this passage were “insider” witnesses. Thus, contrary to Mr Ntaganda’s submission, the Trial Chamber has not relied on the risk of interference with “non-insider” witnesses.

37. In sum, the Appeals Chamber dismisses Mr Ntaganda’s arguments under the first ground of appeal.

E. Second ground of appeal: reliance on alleged recent acts of interference

1. Submissions of the parties and participants

38. As to the second ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in relying on alleged recent acts of interference of witnesses for the Prosecutor ([REDACTED], [REDACTED] and [REDACTED]) to continue the restrictions.⁹⁸ Mr Ntaganda submits that incidents of alleged interference with respect to [REDACTED]

⁹⁵ [Impugned Decision](#), para. 29.

⁹⁶ [Impugned Decision](#), para. 29 (footnote omitted).

⁹⁷ See [ICC-01/04-02/06-1313-Red2](#), paras 30, 33 where she refers, *inter alia*, to witnesses ([REDACTED], [REDACTED], [REDACTED] and [REDACTED]) as “insider” witnesses.

⁹⁸ [Document in Support of the Appeal](#), para. 19.

and [REDACTED] occurred in December 2015 and March 2016, respectively, and that by the time of the first incident he had been subject to active monitoring for nine months.⁹⁹ Thus, in his view, the Trial Chamber’s reliance on these allegations as establishing a “risk of potential interference” was not relevant to the necessity or proportionality of continuing the existing restrictions especially since they “demonstrate that Mr Ntaganda ha[d] no role in such events”.¹⁰⁰

39. With respect to [REDACTED], Mr Ntaganda submits that this witness “has been making sundry complaints dating back to October 2013”.¹⁰¹ He notes that the witness most recently alleged that he received “threatening phone calls from someone the Prosecution speculates has an association with Mr Ntaganda”.¹⁰² He states that “[o]nce again, Mr Ntaganda had long been subject to active monitoring by the time of these alleged telephone calls”.¹⁰³ With respect to [REDACTED], Mr Ntaganda suggests that this witness had received threats long before he had been a witness in this case.¹⁰⁴

40. Mr Ntaganda argues further that there is “[n]o evidential or rational basis [...] to connect these reports of recent intimidation to the ‘reasonable grounds to believe’ standard of Regulation 101(2)” and submits that “[t]he 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”.¹⁰⁵

41. The Prosecutor responds that the Trial Chamber “correctly considered the recent incidents of alleged interference” which, in her view, “were, and remain, highly relevant”.¹⁰⁶ With reference to incidents mentioned in the Registry reports indicating non-compliance with the conditions imposed on his communications after active monitoring was enforced, the Prosecutor submits that “active monitoring itself did not

⁹⁹ [Document in Support of the Appeal](#), para. 19.

¹⁰⁰ [Document in Support of the Appeal](#), para. 19.

¹⁰¹ [Document in Support of the Appeal](#), para. 20.

¹⁰² [Document in Support of the Appeal](#), para. 20.

¹⁰³ [Document in Support of the Appeal](#), para. 20.

¹⁰⁴ [Document in Support of the Appeal, para. 21.](#)

¹⁰⁵ [Document in Support of the Appeal](#), para. 22.

¹⁰⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 21.

deprive Mr Ntaganda of his ability to breach the conditions on his communication.”¹⁰⁷ Thus, in her view, the suggestion that “active monitoring somehow divests the recent interference incidents of relevance is flawed”.¹⁰⁸ Furthermore, the Prosecutor avers that Mr Ntaganda did not “have to speak directly to these witnesses at the time, for the possibility of interference to exist, when his network was already engaged”.¹⁰⁹

42. The Prosecutor states that, although the Trial Chamber found that recent reported incidents were not directly linked to Mr Ntaganda, not only had it previously found that he had engaged in witness coaching himself and directed his interlocutors to do so, it noted that the Prosecutor’s ongoing investigations indicated that he had direct knowledge of, and involvement in, such interference.¹¹⁰ She states that Mr Ntaganda had presented “no more than [his] unsubstantiated opinion to challenge the Chamber’s findings”.¹¹¹ Lastly, as to the Trial Chamber’s use of the phrase “risk of potential interference” the Prosecutor suggests that this was not proffered as a legal standard but “merely a factual conclusion describing the extent of witness interference in the case” and that throughout the Impugned Decision, when read in context, it is clear that the Trial Chamber used the proper standard of reasonable grounds to believe.¹¹²

43. The Victims submit that these allegations may have been relevant to the Trial Chamber’s assessment if they “were related to conduct previously found to necessitate restrictions”.¹¹³ They suggest that, in that sense the fact that the recent allegations were not a result of Mr Ntaganda’s direct involvement does not render those incidents irrelevant.¹¹⁴

2. *Determination by the Appeals Chamber*

44. The Appeals Chamber finds that, in conducting its review of whether restrictions remained necessary and proportionate to ensure the safety of witnesses,

¹⁰⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 21.

¹⁰⁸ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 21.

¹⁰⁹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 21 (footnote omitted).

¹¹⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 22.

¹¹¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 22 (footnote omitted).

¹¹² [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 23.

¹¹³ [Response of Victims of the Attacks](#), para. 34; *see also* [Response of Former Child Soldiers](#), paras 18-19.

¹¹⁴ [Response of Former Child Soldiers](#), paras 18-19.

prevent breaches of confidentiality and ensure the integrity of the proceedings, it was incumbent upon the Trial Chamber to assess any recently reported incidents of alleged interference of witnesses, given the potential impact of such allegations on the need to either lift, maintain or add restrictions. Thus, the overall approach of the Trial Chamber in considering information that had recently become available was correct.¹¹⁵

45. The Trial Chamber considered developments occurring during the Review Period with a view to considering their impact on the stage of the proceedings at the time and the restrictions that were already in place.¹¹⁶ In this regard, it noted that there remained “in excess of 50 witnesses on the Prosecution’s list of witnesses, including remaining insider witnesses and their family members”,¹¹⁷ and that preparations for the defence case were likely underway.¹¹⁸ The fact that both parties still had witnesses scheduled to testify, and the fact that interference with the Prosecutor’s witnesses had allegedly occurred during the Review Period, contributed to the Trial Chamber’s overall conclusion that “the risk of witness interference and witness coaching remain[ed] high at [that] stage of the proceedings”.¹¹⁹

46. In particular, the Trial Chamber considered allegations of witness interference that had occurred during the Review Period relating to two witnesses whom the Chamber had found were already the subject of interference prior to the Review Period ([REDACTED] and [REDACTED]), as well as one additional witness for the Prosecutor ([REDACTED]).¹²⁰ The Appeals Chamber finds no error in the Trial Chamber’s approach in treating these allegations as relevant to its overall finding because they represented an ongoing potential risk to the integrity of the proceedings. It was therefore entitled to take this into account in assessing whether the standard in regulation 101 (2) of the Regulations of the Court was met. Contrary to Mr Ntaganda’s assertions, the Trial Chamber did not imply a “connection between these events and Mr Ntaganda’s conduct”.¹²¹ In fact, the Trial Chamber noted that “recent

¹¹⁵ See [Impugned Decision](#), para. 29.

¹¹⁶ [Impugned Decision](#), para. 29.

¹¹⁷ [Impugned Decision](#), para. 29 (footnote omitted).

¹¹⁸ [Impugned Decision](#), para. 30.

¹¹⁹ [Impugned Decision](#), para. 31.

¹²⁰ [Impugned Decision](#), para. 29.

¹²¹ [Document in Support of the Appeal](#), para. 21.

reports of interference [were] not directly linked to Mr Ntaganda”.¹²² However, in the view of the Appeals Chamber, it is not necessarily the case that such a link should have been drawn by the Trial Chamber in order for it to conclude that the restrictions on Mr Ntaganda’s contacts should be maintained. As noted in the Impugned Decision, the Trial Chamber had previously found “reasonable grounds to believe that Mr Ntaganda personally engaged in such conduct, and intended and directed others to do so”.¹²³ A finding that there are reasonable grounds to believe that Mr Ntaganda personally engaged in witness interference is relevant, not only to the imposition of restrictions under regulation 101 of the Regulations of the Court, but also for their continuation. In circumstances where the Trial Chamber found that witness interference appeared to be ongoing and in light of the finding that Mr Ntaganda previously had personally engaged in such conduct, it was not unreasonable for the Trial Chamber to find that there was an ongoing risk to the proceedings and that it should maintain the restrictions on Mr Ntaganda’s contacts in order to reduce this risk.

47. As to Mr Ntaganda’s arguments relating to the Trial Chamber’s reliance on two particular witnesses, [REDACTED] and [REDACTED],¹²⁴ the Appeals Chamber finds that nothing in the Impugned Decision suggests that the Trial Chamber considered the threats made to these witnesses to emanate directly from Mr Ntaganda.¹²⁵ The Appeals Chamber considers that the fact that “there are other individuals who may have been the source of the disclosure of these witnesses’ identities”, as argued by Mr Ntaganda,¹²⁶ is irrelevant. As stated above, the combination of the immediate and ongoing climate of witness interference and the previous finding by the Trial Chamber of grounds to believe that Mr Ntaganda had engaged in witness interference was sufficient for the Trial Chamber to maintain the restrictions without a direct link between Mr Ntaganda and the recent incidents of interference with witnesses [REDACTED] and [REDACTED]. Accordingly, the Trial Chamber did not err.

¹²² [Impugned Decision](#), para. 29.

¹²³ [Impugned Decision](#), para. 31.

¹²⁴ [Document in Support of the Appeal](#), paras 20-21.

¹²⁵ [Impugned Decision](#), para. 29.

¹²⁶ [Document in Support of the Appeal](#), para. 21.

48. Finally, regarding Mr Ntaganda’s argument that the Trial Chamber erred in law by relying on the mere “risk of potential interference”,¹²⁷ the Appeals Chamber notes that the Trial Chamber did indeed refer to “the risk of potential interference”.¹²⁸ However, it went on to refer to the standard of reasonable grounds to believe – the standard stipulated by regulation 101 (2) of the Regulations of the Court, indicating that the Trial Chamber was fully aware of the relevant legal standard and applied it.¹²⁹

49. In sum, the Appeals Chamber dismisses Mr Ntaganda’s arguments under the second ground of appeal.

F. Third ground of appeal: restrictions are neither a necessary nor proportionate means to counteract the risk of witness coaching

1. Submissions of the parties and participants

50. In relation to the third ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in finding that active monitoring was the least restrictive measure to prevent the prejudice caused by coaching and did so without giving any reasons.¹³⁰ In his view, “[a]n equally effective antidote to coaching [...] 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”.¹³¹ He argues that “[a]ny 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”.¹³² Mr Ntaganda argues that this error, “which concerns the alleged ongoing and future need for maintaining restrictions, materially affected the Impugned Decision”.¹³³

51. In response, the Prosecutor submits that Mr Ntaganda “fails to acknowledge that the Trial Chamber meticulously reasoned on the necessity of active monitoring”.¹³⁴ In her submission, not only did the Trial Chamber conclude that the restrictions

¹²⁷ [Document in Support of the Appeal](#), para. 22.

¹²⁸ [Impugned Decision](#), para. 29.

¹²⁹ [Impugned Decision](#), para. 31.

¹³⁰ [Document in Support of the Appeal](#), para. 26.

¹³¹ [Document in Support of the Appeal](#), para. 26.

¹³² [Document in Support of the Appeal](#), para. 26.

¹³³ [Document in Support of the Appeal](#), para. 27.

¹³⁴ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 26 (footnote omitted).

remained necessary, “it also considered the Defence’s suggestion to dispense with active monitoring, but found it unconvincing”.¹³⁵ In addition, the Prosecutor avers that Mr Ntaganda’s “suggested alternative – passive monitoring *in lieu* of active monitoring – is ineffective” because any remedies following passive monitoring “cannot cut the coaching off” at the source.¹³⁶ In her view, “[r]ather than being ‘an equally effective antidote’, any such remedies would be futile, logistically difficult (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)”.¹³⁷

52. The Victims submit that even though they were “not privy to specific information as regards monitored conversations, [...], it is apparent that the Chamber carefully considered all material before it” before concluding that active monitoring was still necessary.¹³⁸ In addition, the Victims note that the Trial Chamber’s approach was consistent with the jurisprudence of the ECtHR, “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”.¹³⁹ Furthermore, the Victims submit that the “*least restrictive measures*” requirement should be considered against all the factors involved and that the active monitoring in this case was put in place in response to security incidents and threats reported by several witnesses in the case and not simply to prevent witness coaching.¹⁴⁰

2. *Determination by the Appeals Chamber*

53. The Appeals Chamber observes that, under the third ground of appeal, Mr Ntaganda appears to be challenging primarily the Trial Chamber’s finding that active monitoring is the “least restrictive means” to achieve the objective sought, as well as the Trial Chamber’s purported lack of reasoning.¹⁴¹ He puts forward an alternative

¹³⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 26 (footnote omitted).

¹³⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 27.

¹³⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 27 (footnote omitted).

¹³⁸ [Response of Victims of the Attacks](#), para. 37 (footnote omitted).

¹³⁹ [Response of Victims of the Attacks](#), para. 37 (footnote omitted).

¹⁴⁰ [Response of Former Child Soldiers](#), para. 21.

¹⁴¹ [Document in Support of the Appeal](#), paras 24, 26.

measure – passive monitoring *in lieu* of active monitoring – which he submits would lead to “[a]n equally effective antidote to coaching”.¹⁴²

54. The Appeals Chamber first notes that Mr Ntaganda’s argument concerning a lack of reasoning on the part of the Trial Chamber regarding restrictions in relation to coaching is misguided. In relation to the suggestion by Mr Ntaganda before the Trial Chamber for an alternative to active monitoring in general,¹⁴³ namely, “[...] that active monitoring should be lifted, to be replaced by a mechanism of weekly random monitoring of Mr Ntaganda’s non-privileged phone conversations [...]”,¹⁴⁴ the Trial Chamber stated that it did “not consider the Defence suggestion to dispense with the active monitoring of telephone calls or visits to adequately guard against the potential for further conduct listed in Regulation 101(2) of the Regulations, given that any such conduct could only be ascertained after it had already occurred”.¹⁴⁵ Thus, the Trial Chamber addressed Mr Ntaganda’s proposal and explained why it rejected it. This conclusion was preceded by several paragraphs in which the Trial Chamber set out the reasons for the imposition of restrictions, including specifically in relation to coaching.¹⁴⁶ The Appeals Chamber finds that, contrary to Mr Ntaganda’s assertion, the Trial Chamber did provide reasons for its findings and, consequently, did not err in this respect.

55. As to the alternative measure of passive monitoring, which Mr Ntaganda suggests leads to “an equally effective antidote”,¹⁴⁷ the Appeals Chamber notes that Mr Ntaganda did not raise the specific argument he has raised now as to the appropriateness of active monitoring specifically in respect of coaching. Therefore, the Trial Chamber cannot be expected to have addressed it in that context. In addition, the Appeals Chamber notes that the Trial Chamber considered the question of the necessity of active monitoring based on all of the information it had before it and not only that which concerned witness coaching. In the view of the Appeals Chamber, the Trial Chamber did not err in doing so and, as a result, it was unnecessary for it to

¹⁴² [Document in Support of the Appeal](#), para. 26.

¹⁴³ [Impugned Decision](#), para. 34, referring to [Defence Observations](#), para. 30.

¹⁴⁴ [Defence Observations](#), para. 30.

¹⁴⁵ [Impugned Decision](#), para. 34 (footnote omitted).

¹⁴⁶ [Impugned Decision](#), paras 30, 31.

¹⁴⁷ [Document in Support of the Appeal](#), para. 26.

enter into the question of coaching specifically and, in particular, whether active monitoring was the least intrusive measure in this respect. Whether witness coaching alone could be a basis for maintaining restrictions, including active monitoring, does not arise in the present appeal and therefore will not be considered.

56. In sum, the Appeals Chamber rejects Mr Ntaganda's arguments under the third ground of appeal.

G. Fourth ground of appeal: failure to define “witness coaching” and finding that witness coaching exists

1. Submissions of the parties and participants

57. With respect to the fourth ground of appeal, Mr Ntaganda argues that the Trial 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”.¹⁴⁸ In addition, Mr Ntaganda asserts that the Trial Chamber's reliance on allegations of witness coaching “to justify continued draconian restrictions more than two years after the fact is disproportionate”.¹⁴⁹

58. In response, the Prosecutor submits that Mr Ntaganda “shows no error” in the Trial Chamber's assessment of coaching and “re-interprets evidence without cause”.¹⁵⁰ With reference to the Trial Chamber's understanding of the term “coaching” in its Decision on Restrictions of 18 August 2015, the Prosecutor asserts that the Trial Chamber's understanding was clear.¹⁵¹ Furthermore, the Prosecutor argues that Mr Ntaganda “merely seeks to supplant the Chamber's conclusions with his own speculation” when he attempts to re-interpret certain conversations and “fails to show that the Trial Chamber's findings were unreasonable”.¹⁵²

59. The Victims observe that the Trial Chamber's finding on coaching and its interpretation of the concept were made in a previous decision and do not arise from

¹⁴⁸ [Document in Support of the Appeal](#), para. 31.

¹⁴⁹ [Document in Support of the Appeal](#), para. 31.

¹⁵⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 29.

¹⁵¹ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 30.

¹⁵² [Prosecutor's Response to the Document in Support of the Appeal](#), para. 32.

the Impugned Decision.¹⁵³ The Victims point out that Mr Ntaganda did not challenge the earlier decision, and he is barred from raising it now.¹⁵⁴ The Victims also argue that witness coaching is “described as a prohibited practice” in the prior jurisprudence of the Court.¹⁵⁵

2. *Determination by the Appeals Chamber*

60. With regard to Mr Ntaganda’s allegation that the Trial Chamber failed to define witness coaching, the Appeals Chamber notes that regulation 101 (2) of the Regulations of the Court, concerning restrictions to access to news and contact, lists the circumstances in which a request to restrict contact between a detained person and any other person may be made. It provides that the Prosecutor may make such a request if he or she has reasonable grounds to believe that contact, *inter alia*, “(b) [c]ould prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation”, “(d) [c]ould be used by a detained person to breach an order for non-disclosure made by a judge” or “(f) [i]s a threat to the protection of the rights and freedom of any person”.

61. In the Impugned Decision, and in relation to the coaching of witnesses, the Trial Chamber recalled and affirmed what it had previously held with respect to the type of conduct it found to be problematic.¹⁵⁶ In relation to coaching, it recalled that it had found that there were reasonable grounds to believe that Mr Ntaganda had “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 synchronising the stories”.¹⁵⁷ The Appeals Chamber also observes that, in the Decision on Restrictions of 18 August 2015, the Trial Chamber considered “that coaching of witnesses is a form of witness interference and has the potential to severely affect the integrity of the proceedings”.¹⁵⁸ The Appeals Chamber finds that, in circumstances where the focus of the Trial Chamber’s examination was whether the terms of regulation 101 (2) of the Regulations of the Court were met, the Trial

¹⁵³ [Response of Victims of the Attacks](#), para. 39.

¹⁵⁴ [Response of Victims of the Attacks](#), para. 39.

¹⁵⁵ [Response of Former Child Soldiers](#), para. 24.

¹⁵⁶ [Impugned Decision](#), para. 22.

¹⁵⁷ [Impugned Decision](#), para. 22 citing to [Decision on Restrictions](#) of 18 August 2015, para. 57.

¹⁵⁸ [Decision on Restrictions](#) of 18 August 2015, para. 57.

Chamber provided sufficient indication as to the type of behaviour in relation to the coaching of witnesses that it deemed to be legally impermissible and which fell within the terms of regulation 101 (2) of the Regulations of the Court.

62. As to the argument that the Trial Chamber applied a standard that was wrong in law,¹⁵⁹ the Appeals Chamber finds that the argument lacks substantiation. In particular, the Appeals Chamber finds that Mr Ntaganda has not explained to what standard he is referring, nor has he put forward any alternative legal standard and demonstrated why this standard is correct as opposed to that employed by the Trial Chamber.

63. In relation to the remaining argument that there were no reasonable grounds to believe that Mr Ntaganda had engaged in witness coaching, the Appeals Chamber notes that Mr Ntaganda in essence challenges the finding of the Trial Chamber that he “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”.¹⁶⁰ In his view, the Trial Chamber misconstrued the relevant passages relied upon for its conclusion that he “told his interlocutors which story to tell”.¹⁶¹ In particular, Mr Ntaganda states that the two passages relied upon in the Decision on Restrictions of 18 August 2015 “do not go beyond a discussion of a particular sequence of events and encouragement that witnesses ‘remind each other [of] the whole history’”.¹⁶² He states that Mr Ntaganda himself asks how particular events unfolded”.¹⁶³ It is noted that the two passages referred to¹⁶⁴ also indicate that Mr Ntaganda referred to witnesses ‘speaking the same thing’ and ‘speaking one thing’.¹⁶⁵ Although Mr Ntaganda does ask how particular events unfolded, it is not clear that the passages only reflect Mr Ntaganda encouraging witnesses to remind themselves of the history. The Appeals Chamber recalls that it will only interfere with a factual finding of the Trial Chamber in limited

¹⁵⁹ [Document in Support of the Appeal](#), para. 31.

¹⁶⁰ [Decision on Restrictions](#) of 18 August 2015, para. 57

¹⁶¹ [Document in Support of the Appeal](#), para. 30

¹⁶² [Document in Support of the Appeal](#), para. 30 (footnote omitted).

¹⁶³ [Document in Support of the Appeal](#), para. 30 (footnote omitted).

¹⁶⁴ The Appeals Chamber has followed the references in the Decision on Restrictions, finding the references in the Document in Support of the Appeal to be unclear.

¹⁶⁵ Second Registry Report, annex 2, pp. 4, 6 (of Registry stamped numbers).

circumstances. In this case, Mr Ntaganda has not demonstrated that it was unreasonable for the Trial Chamber to draw the conclusion it did, that this amounted to impermissible witness coaching.

64. In sum, the Appeals Chamber dismisses Mr Ntaganda's arguments under the fourth ground of appeal.

H. Fifth ground of appeal: failure to consider less intrusive measures and other relevant factors

1. Submissions of the parties and participants

65. Under the fifth ground of appeal, Mr Ntaganda submits that the Trial Chamber failed to consider alternative, less intrusive measures, as well as other relevant factors, when determining that restrictions to Mr Ntaganda's communications remained necessary.¹⁶⁶

66. Notably, he argues that the Trial Chamber "failed to consider whether any of the alternative measures of restriction would constitute a disincentive for the prohibited conduct".¹⁶⁷ He submits, for example, that "giving [him] two more hours per week of telephone conversation subject to immediate passive review [...] is a very strong incentive for [him] not to engage in any misconduct whatsoever".¹⁶⁸ Mr Ntaganda argues that the Trial Chamber's dismissal of "the extremely long period (now approaching two-and-a-half years) since the alleged misconduct" in addition to his own efforts to avoid the misconduct, without assessing its impact on the need or the 'reasonable grounds' standard to continue the restrictive measures was an error.¹⁶⁹ Lastly, Mr Ntaganda refers to decisions rendered in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo* to posit that the restrictions pursuant to regulation 101 (2) of the Regulations of the Court imposed on Mr Ngudjolo in that case were relaxed after a much shorter period "based on an evaluation of reduced

¹⁶⁶ [Document in Support of the Appeal](#), paras 2, 32-37.

¹⁶⁷ [Document in Support of the Appeal](#), para. 33.

¹⁶⁸ [Document in Support of the Appeal](#), para. 33.

¹⁶⁹ [Document in Support of the Appeal](#), paras 34, 36.

‘grounds to believe’ over time, combined with an awareness of the impropriety of maintaining restrictions on family relationships for too long”.¹⁷⁰

67. The Prosecutor responds that none of the arguments raised under the fifth ground of appeal show any error.¹⁷¹ In particular, the Prosecutor argues that Mr Ntaganda is incorrect in claiming that the Trial Chamber “proceeded without analysis” with respect to its finding on the “least restrictive” measure.¹⁷² Furthermore, in relation to Mr Ntaganda’s suggested alternative measure of restriction, the Prosecutor submits that it is inappropriate “for Mr Ntaganda to negotiate the terms of his restrictions on appeal” and that “the Appeals Chamber should not lightly overturn the Trial Chamber’s exercise of discretion”.¹⁷³ The Prosecutor submits further, in relation to the “passage of time” argument, that Mr Ntaganda’s appeal presents a “disjointed picture”.¹⁷⁴ In her view, the Trial Chamber “properly considered the passage of time since the restrictions were imposed” and Mr Ntaganda “merely surmises and contradicts” the Trial Chamber’s findings in claiming that the restrictions are permanent.¹⁷⁵ As to “Mr Ntaganda’s claims of his ‘consistent efforts [...] to avoid any communications that could be misinterpreted as misconduct’”, the Prosecutor submits that these arguments are unconvincing, recalling that “Mr Ntaganda’s active monitoring reports revealed frequent use of coded language”.¹⁷⁶ Finally the Prosecutor submits that Mr Ntaganda’s reliance on the “*Ngudjolo* case law on restrictions is cursory, and impedes the *Ntaganda* Trial Chamber’s lawful discretion to assess the individual circumstances of the case”.¹⁷⁷

68. The Victims submit that the Trial Chamber explicitly referred to the need to resort to the least restrictive measures and gave due consideration to Mr Ntaganda’s proposal for the termination of active monitoring of telephone calls and visits but ultimately rejected the proposal on the basis that it would not “adequately guard against the potential for further conduct listed in Regulation 101(2) of the Regulations

¹⁷⁰ [Document in Support of the Appeal](#), para. 37 (footnote omitted).

¹⁷¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 34.

¹⁷² [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 35.

¹⁷³ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 36.

¹⁷⁴ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 37.

¹⁷⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 37 (footnote omitted).

¹⁷⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 38.

¹⁷⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 38 (footnote omitted).

[of the Court], given that any such conduct could only be ascertained after it had already occurred”.¹⁷⁸ They submit that the Trial Chamber “expressly stated that it considered and balanced [Mr Ntaganda’s] right to private and family life with the objectives of protecting witnesses, preventing breaches of confidentiality and ensuring the integrity of the proceedings”.¹⁷⁹ The Victims submit that the Trial Chamber “concretely gave effect” to the “passing of time”, by rejecting the proposal by the Prosecutor for maintenance of restrictions until the end of the defence case and instead implementing a system of monitoring and review.¹⁸⁰ They submit that Mr Ntaganda “wrongly asserts that the Trial Chamber failed to take into account the passage of time as a relevant factor when assessing the continuing existence of reasonable grounds to believe that the accused will engage in a prohibited conduct”.¹⁸¹

2. *Determination by the Appeals Chamber*

69. The Appeals Chamber notes that the issue of whether the Trial Chamber considered alternative measures was also raised in the context of the third ground of appeal in relation to coaching.¹⁸² As noted above, the Trial Chamber did address an alternative measure that Mr Ntaganda had at that time proposed. In particular, the Appeals Chamber notes that, contrary to Mr Ntaganda’s argument that the Trial Chamber “proceeded without analysis to its conclusion that the existing restrictions” should be considered the least restrictive,¹⁸³ the Trial Chamber did provide reasons for its conclusion.

70. The Appeals Chamber finds no merit in Mr Ntaganda’s argument that the Trial Chamber erred by dismissing the impact of the amount of time that has passed since the imposition of the restrictions and his own efforts to avoid any misconduct in the meantime on its assessment of the need to continue with the restrictions.

¹⁷⁸ [Response of Former Child Soldiers](#), para. 25 quoting the Impugned Decision, para. 34; *see also* [Response of Victims of the Attacks](#), para. 41.

¹⁷⁹ [Response of Victims of the Attacks](#), para. 42 (footnote omitted).

¹⁸⁰ [Response of Former Child Soldiers](#), para. 26.

¹⁸¹ [Response of Former Child Soldiers](#), para. 27.

¹⁸² [Document in Support of the Appeal](#), paras 26-27.

¹⁸³ [Document in Support of the Appeal](#), para. 32.

71. The Appeals Chamber recalls that the Trial Chamber explicitly noted the guidance provided by the ECtHR jurisprudence on the need to carefully review the necessity of the measures in question in light of the passage of time and the severity of the measures imposed.¹⁸⁴ Indeed, the Trial Chamber noted, in the Impugned Decision, that the ECtHR had “held that the passage of time and severity of the measures imposed require a ‘careful review’ of the necessity of the measures in question and the consideration of ‘alternative means’ of fulfilling the aim of the measures imposed”,¹⁸⁵ going on to state that, “[h]owever, the passing of time alone will not necessarily require the lifting or adjustment of the measures imposed”.¹⁸⁶ The Trial Chamber also noted the period since the restrictions had been in place and stated that it would “review whether the Restrictions remain necessary and proportionate, in accordance with the applicable law [it had outlined], and to assess whether there are any alternative less restrictive means” which could be put in place.¹⁸⁷ In deciding to reinstate a person on to Mr Ntaganda’s list of authorised contacts, the Trial Chamber recalled more generally the need to assess “for each of the measures taken as part of the Restrictions regime whether they continue to be necessary and proportionate as time elapses”.¹⁸⁸ Clearly, therefore, it was cognisant of the need to take into account the passage of time.

72. The Appeals Chamber considers that the passage of time does not mean *per se* that the risk in question no longer exists and/or that restrictions have become disproportionate. In this regard, the passage of time is but one factor that may influence either finding. In this case, the Trial Chamber took into account the stage of the proceedings in hand (that more witnesses had yet to testify), the nature and severity of the previous misconduct and the fact that there had been recurrences of interference (although not linked to Mr Ntaganda). It concluded that the risk still existed and that restrictions remained proportionate. The Appeals Chamber can find no error. At the same time, however, the Appeals Chamber considers that the passage

¹⁸⁴ [Impugned Decision](#), para. 18.

¹⁸⁵ [Impugned Decision](#), para. 18; referring to, *inter alia*, ECtHR, *Bagiński v. Poland*, [Application no 37444/97](#), 11 October 2005, para. 96; ECtHR, *Piechowicz v. Poland*, [Application no 20071/07](#), 17 April 2012, para. 220.

¹⁸⁶ [Impugned Decision](#), para. 18, citing to ECtHR, *Gallico v. Italy*, [Application no 53723/00](#), 28 June 2005, para. 29; ECtHR, *Enea v. Italy*, [Application no 74912/01](#), 17 September 2009, paras 127-128.

¹⁸⁷ [Impugned Decision](#), para. 21.

¹⁸⁸ [Impugned Decision](#), para. 41.

of time is a factor that could become more significant as more time elapses and the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact.

73. To the extent that Mr Ntaganda argues that the Trial Chamber failed to assess the impact of his own efforts to avoid any misconduct since the imposition of the restrictions, the Appeals Chamber recalls that the Trial Chamber was aware of four occasions since the imposition of restrictions when Mr Ntaganda's phone calls had been terminated on account of alleged breaches of the conditions of the restrictions.¹⁸⁹ While noting Mr Ntaganda's failure to provide an explanation on one issue, which it found "may have been warranted", it found that "throughout the period of active monitoring covered by the Fourth Registry Report, the Registry indeed did not identify any specific information relating to potential witnesses in the case, or to Prosecution witnesses"¹⁹⁰ and noted that "it is not in possession of any information which suggests that since the date of the Decision on Restrictions [of 18 August 2015], Mr Ntaganda himself has, directly or indirectly, attempted to further disclose confidential information or interfere with witnesses".¹⁹¹ However, in light of all the information before it, the Trial Chamber rejected Mr Ntaganda's argument that his "abstention" from misconduct since the imposition of the restrictions should lead to the lifting of the restrictions.¹⁹² In the Trial Chamber's view, "[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".¹⁹³ The Appeals Chamber finds no error. Indeed, the fact that no personal misconduct has been identified since the imposition of restrictions does not bear much weight, given the fact that the restrictions themselves removed in large measure the possibility for misconduct. In addition, as stated above, the Trial Chamber provided reasons as to why, despite the lack of personal misconduct having been identified, the restrictions should remain in place.

¹⁸⁹ [Impugned Decision](#), para. 26.

¹⁹⁰ [Impugned Decision](#), para. 25 (footnote omitted).

¹⁹¹ [Impugned Decision](#), para. 28.

¹⁹² [Impugned Decision](#), para. 32.

¹⁹³ [Impugned Decision](#), para. 32 (footnote omitted) quoting [Decision on Restrictions](#) of 18 August 2015, para. 59.

While Mr Ntaganda's willingness to abide by the conditions of the restrictions is noteworthy, Mr Ntaganda has not identified why the Trial Chamber's conclusion is erroneous.

74. Mr Ntaganda refers to the restrictions imposed on Mr Ngudjolo Chui in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, arguing that the restrictions in that case were relaxed much sooner compared to his case.¹⁹⁴ The Appeals Chamber finds this argument to be unpersuasive. As noted by the Trial Chamber, "these matters need to be assessed on a case-by-case basis".¹⁹⁵ The Appeals Chamber dismisses Mr Ntaganda's argument.

75. In sum, the Appeals Chamber rejects Mr Ntaganda's arguments under the fifth ground of appeal.

I. Sixth ground of appeal: procedures and standards of proof adopted

1. Submissions of the parties and participants

76. Mr Ntaganda's sixth ground of appeal is that "[t]he procedures and standards of proof adopted were not commensurate with the serious interests at stake for Mr Ntaganda".¹⁹⁶ He argues that the Trial Chamber "failed to accord Mr Ntaganda an adequate hearing in several respects",¹⁹⁷ thereafter raising four specific arguments.¹⁹⁸

77. Mr Ntaganda refers to the Trial Chamber's acceptance of *ex parte* submissions and *ex parte* witness statements, and its [REDACTED].¹⁹⁹ He avers that the fact that part of the Impugned Decision is *ex parte* constitutes a failure to state reasons.²⁰⁰ He argues that, because of the *ex parte* nature of the documents, he "is not even in a position to concretely address prejudice"; he states that one can infer that the Trial Chamber "has entertained volumes of this information" and that it "apparently has no intention of ever making this information available to the Defence".²⁰¹ Mr Ntaganda

¹⁹⁴ [Document in Support of the Appeal](#), para. 37.

¹⁹⁵ [Decision on Restrictions](#) of 18 August 2015, para. 59.

¹⁹⁶ [Document in Support of the Appeal](#), p. 16.

¹⁹⁷ [Document in Support of the Appeal](#), para. 38.

¹⁹⁸ [Document in Support of the Appeal](#), paras 39-43.

¹⁹⁹ [Document in Support of the Appeal](#), paras 39-40.

²⁰⁰ [Document in Support of the Appeal](#), para. 39.

²⁰¹ [Document in Support of the Appeal](#), para. 40 (footnote omitted).

argues that “[t]he 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”.²⁰²

78. Second, Mr Ntaganda submits that “the factual findings incorporated by reference in the Impugned Decision are based on reversals of the burden of proof.”²⁰³ He submits that:

The Chamber deemed translations and summaries more reliable where they had not been specifically challenged by the Defence; “note[d]”, in finding that allegations of coaching were of “grave concern”, the absence of a Defence response to allegations of coaching Defence witnesses, even though the remedy sought by the Prosecution had been limited to Prosecution witnesses; and entertained suspicions about an ambiguous expression used by Mr Ntaganda during an actively monitored telephone call, *inter alia*, on the basis that “further clarification by the Defence may have been warranted.”²⁰⁴ [Footnotes omitted.]

79. In relation to the latter, he submits that he “did not consider, given all the circumstances, that there was any significant ambiguity, and the Chamber’s negative inference from the alleged lack of submissions was unjustified”.²⁰⁵

80. Third, he submits that “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’”.²⁰⁶ He argues that, although the Trial Chamber noted “that there was no prohibition on a detainee using coded language during their telephone conversations”, it improperly relied on the fact that Mr Ntaganda had done so.²⁰⁷ He states that the Trial 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

²⁰² [Document in Support of the Appeal](#), para. 40.

²⁰³ [Document in Support of the Appeal](#), para. 41 (footnote omitted).

²⁰⁴ [Document in Support of the Appeal](#), para. 41.

²⁰⁵ [Document in Support of the Appeal](#), para. 41.

²⁰⁶ [Document in Support of the Appeal](#), para. 42.

²⁰⁷ [Document in Support of the Appeal](#), para. 42.

Prosecution”.²⁰⁸ Mr Ntaganda explains that codes were innocuously used to communicate “the identity of potential *Defence* witnesses to his interlocutors”.²⁰⁹

81. Finally, Mr Ntaganda asserts that the Impugned Decision was based on translations that were not certified, and some of them were only in summary form. He claims that reliance on such documents, and the “inference of reliability” based on the absence of Mr Ntaganda’s corrections to such documents, is an error of law.²¹⁰

82. The Prosecutor responds that “Mr Ntaganda’s sixth sub-ground is unrelated to the scope of the appeal” and should be dismissed *in limine*.²¹¹ In her view, while disputing the “procedures and standards of proof adopted” and alleging unfairness, Mr Ntaganda “fails to show how this relates to [...] whether the continued restrictions are justified”, which is the issue on appeal.²¹²

83. The Prosecutor notes that “none of the identified Prosecution submissions have remained *ex parte*”, and of those cited to by Mr Ntaganda, confidential redacted versions have been filed.²¹³ [REDACTED].²¹⁴ [REDACTED].²¹⁵ With respect to Mr Ntaganda’s remaining arguments in the sixth sub-ground, the Prosecutor argues that the Trial Chamber did not reverse the burden of proof and Mr Ntaganda merely airs his discontent without pointing to a concrete error.²¹⁶

84. The Victims note that the Trial Chamber only had to establish that there were reasonable grounds to believe that there was a risk of a threat to witnesses, not with certainty show the existence of such.²¹⁷ Furthermore, the Victims argue that “the [Trial] Chamber applied the correct standard of proof and adequately balanced the Appellant’s rights with the safety of witnesses and interests of justice”.²¹⁸ They note that there is a possibility, under regulation 101 (3) of the Regulations of the Court, to

²⁰⁸ [Document in Support of the Appeal](#), para. 42 (footnote omitted).

²⁰⁹ [Document in Support of the Appeal](#), para. 42.

²¹⁰ [Document in Support of the Appeal](#), para. 43.

²¹¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 40.

²¹² [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 40.

²¹³ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 42.

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), paras 44-45.

²¹⁷ [Response of Former Child Soldiers](#), para. 32.

²¹⁸ [Response of Victims of the Attack](#), para. 45.

inform a detained person about “a request for an order [on restrictions] *ex post factum*, ‘as soon as practicable’”.²¹⁹ Because of “the security implications for third parties”, they submit that “[b]eing informed on the general nature of material would have been sufficient in the circumstances”.²²⁰ Yet, even if the actions of the Trial Chamber could be considered a procedural error, it would not have a “material impact on the correctness of the [Trial] Chamber’s decision.”²²¹ In their submission, “reasonable grounds to believe” is “the lowest standard within the statutory framework of the Court” and this is the legal standard in regulation 101.²²²

2. *Determination by the Appeals Chamber*

(a) **Prosecutor’s request to dismiss the sixth ground of appeal *in limine***

85. The Prosecutor argues that Mr Ntaganda “fails to show how [the sixth ground of appeal] relates to the issue on appeal” and that therefore it should be dismissed *in limine*.²²³ The Appeals Chamber recalls that the issue on appeal, as certified by the Trial Chamber, is whether the Trial Chamber erred in determining that the continued restrictions are necessary and proportionate to the objectives served, including in respect of regulation 101 (2) of the Regulations of the Court.²²⁴ It also recalls that, in the past, it has declined to consider grounds of appeal that went beyond the scope of the issue in relation to which leave to appeal was granted.²²⁵ Nevertheless, it has

²¹⁹ [Response of Victims of the Attack](#), para. 45.

²²⁰ [Response of Victims of the Attack](#), para. 45.

²²¹ [Response of Victims of the Attack](#), para. 45.

²²² [Response of Victims of the Attack](#), para. 45.

²²³ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 40.

²²⁴ [Decision on Leave to Appeal](#), paras 6, 17.

²²⁵ See *Prosecutor v. Laurent Koudou Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, [ICC-02/11-01/11-572 \(OA5\) \(“Gbagbo OA5 Judgment”\)](#), paras 63-66; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU’”, 8 October 2010, [ICC-01/04-01/06-2582 \(OA 18\)](#), para. 45; *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II”, 23 February 2009, [ICC-02/04-179 \(OA\)](#) and [ICC-02/04-01/05-371 \(OA 2\)](#), para. 32.

considered arguments that were outside the scope of the appeal if they were “intrinsically linked” to the issue on appeal.²²⁶

86. With the sixth ground of appeal, Mr Ntaganda challenges, *inter alia*, the propriety of the procedure leading to the Impugned Decision.²²⁷ Although these arguments are, as such, outside the scope of the issue on appeal – the necessity and proportionality of the restrictions to contact – the Appeals Chamber nonetheless finds that they are “intrinsically linked” to that issue. This is because the question as to whether the restrictions imposed are necessary and proportionate includes considerations as to the propriety of the procedure taken by the Trial Chamber which led to these restrictions. This includes the procedure taken for ordering the disclosure of redacted and confidential information. Accordingly, the Appeals Chamber rejects the Prosecutor’s request to dismiss Mr Ntaganda’s arguments under the sixth ground of appeal *in limine*.

(b) Merits of the sixth ground of appeal

87. Mr Ntaganda’s first argument is that various information, to which he did not have access, was before the Trial Chamber. He argues that the Trial Chamber’s practice of receiving *ex parte* information prevented him from addressing potential prejudice. In terms of the specific documents referred to by Mr Ntaganda, the Appeals Chamber notes that, as mentioned by the Prosecutor, many of the documents to which Mr Ntaganda refers were also filed in redacted versions, available to Mr Ntaganda, in some cases on the day of filing of the original versions or the day after.²²⁸ Therefore,

²²⁶ “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, 1 November 2016, [ICC-02/11-01/15-744](#), paras 13, 19. See also [Gbagbo OA5 Judgment](#), footnote 142

²²⁷ [Document in Support of the Appeal](#), para. 40.

²²⁸ The original Prosecutor’s Request for Restrictive Measures of 8 August 2014 was filed by the Prosecutor on the same day that a redacted version was made available to the defence. A less redacted version was then registered on 19 December 2014 (ICC-01/04-02/06-349-Conf-Red2); the Request for Further Restrictive Measures of 9 June 2015 was filed by the Prosecutor in a redacted version available to the defence the day after the *ex parte* version was filed (ICC-01/04-02/06-635-Conf-Red-Exp); the Prosecutor’s Additional Submissions, dated 16 July 2015, were filed in a redacted version available to the defence on the same day as the *ex parte* version (ICC-01/04-02/06-727-Conf-Exp-Red); the Prosecutor’s Submissions of 9 May 2016, filed prior to the Impugned Decision, were filed in a redacted version available to the defence the same day as the *ex parte* version (ICC-01/04-02/06-1313-Conf-Exp-Red); the Prosecutor’s Response to Mr Ntaganda’s Request for Disclosure of 16 May 2016 was filed by the Prosecutor in a redacted version available to the defence the day after the *ex parte* confidential version (ICC-01/04-02/06-1318-Conf-Exp-Red); and the Prosecutor’s Response to Mr

for those submissions, Mr Ntaganda did indeed have an opportunity to “concretely address prejudice” after they were re-filed with redactions by the Prosecutor. In relation to the *ex parte* witness statements or annexes to which Mr Ntaganda refers, and which were registered on an *ex parte* basis on 8 August 2014²²⁹ and 9 May 2016,²³⁰ Mr Ntaganda made a formal request to the Trial Chamber for disclosure of these documents.²³¹ The Trial Chamber issued decisions thereon on 8 December 2014 and 3 June 2016, respectively. In this regard, in its first decision on the issue, the Decision on Interim Restrictive Measures of 8 December 2014, the Trial Chamber observed that, in terms of Mr Ntaganda being given the opportunity to submit his view, “this should be a genuine opportunity, which entails the Defence being provided with sufficient information to submit an informed view”.²³² It considered that

[d]uring the entirety of the proceedings against the accused, the Chamber has to carefully balance the accused’s rights, including his right to receive adequate information to mount an effective defence, whilst at the same time ensuring that appropriate measures are taken to protect witnesses. The Defence should receive as much information as is reasonably possible, without compromising the safety of any witnesses referred to in the materials concerned.²³³

Noting “the extensive nature of the redactions” to the Prosecutor’s Request for Restrictive Measures of 8 August 2014, and that no redacted version of the Prosecutor’s Submission of Additional Evidence of 18 September 2014 had been filed, the Trial Chamber instructed the Prosecutor to re-file, redacting from the submissions and annexes, only what was “strictly necessary for ensuring the protection of witnesses”.²³⁴ The Prosecutor then re-filed the *ex parte* annexes as confidential with redactions on 19 December 2014 (except for Annex F, which is addressed below). Therefore, for those documents, Mr Ntaganda did indeed have an

Ntaganda’s Observations of 13 June 2016 was filed in a redacted version available to the defence one day after the *ex parte* confidential version was filed (ICC-01/04-02/06-1390-Conf-Exp-Red).

²²⁹ [Document in Support of the Appeal](#), para. 39, referring to document ICC-01/04-02/06-349-Conf-Exp, annex F.

²³⁰ [Document in Support of the Appeal](#), para. 39, referring to document ICC-01/04-02/06-1313-Conf-Exp, annexes C-O.

²³¹ Respectively, “Réponse/Observations de M. Bosco Ntaganda à la Demande du Procureur pour l’imposition de mesures prévues à la norme 101(2) du Règlement de la Cour”, 1 September 2014, ICC-01/04-02/06-360-Conf-Exp and Mr Ntaganda’s Request for Disclosure of 11 May 2016.

²³² Decision on Interim Restrictive Measures of 8 December 2014, para. 46.

²³³ Decision on Interim Restrictive Measures of 8 December 2014, para. 47.

²³⁴ Decision on Interim Restrictive Measures of 8 December 2014, para. 48 and disposition, p. 26.

opportunity to “concretely address prejudice” after they were re-filed by the Prosecutor.

88. Regarding the 13 *ex parte* annexes to the Prosecutor’s Submissions of 9 May 2016, Mr Ntaganda filed a request for the disclosure of, *inter alia*, those annexes, prior to the Impugned Decision.²³⁵ In a decision rendered on the issue, on 3 June 2016, the Trial Chamber recalled its findings regarding the importance of disclosure as set out above, in the Decision on Interim Restrictive Measures of 8 December 2014.²³⁶ It then considered whether the withheld material, including the *ex parte* annexes, should be disclosed to Mr Ntaganda.²³⁷ In relation to certain entirely redacted paragraphs and the four *ex parte* annexes referred to therein, concerning allegations of witness coaching, it determined there to be sufficient information already available to Mr Ntaganda.²³⁸ It noted the material which remained withheld contained allegations “of a very similar nature to the incidents for which the Defence ha[d] already been provided with specific details” and that transmission to the defence was not “necessary for the Defence to understand and respond to the allegations of witness interference and coaching raised by the Prosecution”.²³⁹ In so deciding, the Trial Chamber emphasised that, “being composed of professional judges, no prejudice will be occasioned to the accused, given the Chamber’s ability to consider [the relevant redacted paragraphs] and the *Ex Parte* Annexes only for the limited purposes submitted, and to the extent considered necessary”.²⁴⁰ After reviewing all of the withheld material requested by Mr Ntaganda, the Trial Chamber rejected the request, save in relation to one annex,²⁴¹ in respect of which the Prosecutor was ordered to file (and later did file), a lesser redacted version.²⁴²

²³⁵ Mr Ntaganda’s Request for Disclosure of 11 May 2016, para. 1.

²³⁶ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, paras 15-17.

²³⁷ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, paras 18-26.

²³⁸ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, para. 18. The remaining nine of the 13 *ex parte* annexes referred to by Mr Ntaganda relate to allegations about the particulars of a person who was ultimately reinstated to Mr Ntaganda’s list of permitted telephone contacts pursuant to the Impugned Decision. Given that the Trial Chamber did not rule in favour of the Prosecutor in that regard and Mr Ntaganda does not appeal that aspect of the Impugned Decision, the Appeals Chamber does not consider that any prejudice arose from those nine *ex parte* annexes.

²³⁹ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, para. 20.

²⁴⁰ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, para. 21.

²⁴¹ [Decision on Mr Ntaganda’s Request for Disclosure](#) of 3 June 2016, p. 12.

²⁴² ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red2, 7 June 2016.

89. The Appeals Chamber can find no error in this overall approach. The fact that information may be withheld from a detained person in such proceedings is not *per se* unfair.²⁴³ The Trial Chamber must ensure the fairness of the proceedings in compliance with articles 64 (2) and 67 of the Statute, and regulation 101 (3) of the Regulations of the Court, which stipulates that, generally, the “detained person shall be informed of the Prosecutor’s request [to restrict contact] and shall be given the opportunity to be heard or to submit his or her views”. Additionally, the Trial Chamber must continuously balance the detained person’s right to be informed under regulation 101 (3) of the Regulations of the Court with, in this case, the protection of victims and witnesses under article 68 (5) of the Statute and rule 81 of the Rules of Procedure and Evidence and, at the request of the Prosecutor, the need not to prejudice further or ongoing investigations under rule 81 (2) of the Rules of Procedure and Evidence.²⁴⁴ The result is that the Trial Chamber may sometimes review evidence which the detained person has not seen. In doing so, the Trial Chamber must be cognisant that the detained person, in proceedings under regulation 101 of the Regulations of the Court, has not had an opportunity to challenge the evidence and it should, therefore, consider such evidence with that in mind.

90. Recalling the above, the Appeals Chamber notes that the Trial Chamber was cognisant of the issues associated with the withholding of information from Mr Ntaganda. In addition, in the Decision on Mr Ntaganda’s Request for Disclosure of 3 June 2016, in relation to the aforementioned entirely redacted paragraphs and the *ex parte* annexes referred to therein, the Trial Chamber stated that “the weight, if any, to be attached to [the] material [in question] – which pre-dates the Decision on Restrictions of 18 August 2015 and some of which was prepared by a party to the proceedings – is a matter to be addressed in the Chamber’s ultimate decision on

²⁴³ *Prosecutor v. Germain Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, [ICC-01/04-01/07-475 \(OA\)](#), para. 62 (“*Katanga OA Judgment*”), finding that “[...] not every incident of non-disclosure automatically results in an unfair trial”.

²⁴⁴ *Katanga OA Judgment*, para. 62: “[...] the Statute and the Rules make specific provision to protect those at risk from the activities of the Court. In addition, the relevant jurisprudence of the European Court of Human Rights [...] demonstrates that the right to disclosure is not absolute [and] that the withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual”.

restrictions”.²⁴⁵ In the Impugned Decision, the Trial Chamber did not refer to this specifically. The Appeals Chamber notes, however, that in the relevant paragraph of the Impugned Decision, it cited to the withheld material (which, as mentioned, includes four of the *ex parte* annexes to the Prosecutor’s Submissions of 9 May 2016, as has been referred to by Mr Ntaganda²⁴⁶) in determining that the restrictions should remain in place. In this regard, it stated that the withheld paragraphs in the Prosecutor’s submissions “suggest” that “attempts to coach potential witnesses *may* have occurred on more than one occasion”.²⁴⁷ This demonstrates that the Trial Chamber assessed the evidence in question with the necessary caution. Similarly, in relation to the relevant *ex parte* annexes filed with the Prosecutor’s Reply of 13 June 2016, and the corresponding submissions, the Trial Chamber considered that they “suggest” that “a number of the accounts of Prosecution witnesses of *alleged* interference *appear to be corroborated* by certain of Mr Ntaganda’s reviewed non-privileged phone conversations”.²⁴⁸ The Trial Chamber found that this material would indicate direct links to Mr Ntaganda “if accurate”, but did not make any final determination in that regard.²⁴⁹ The Trial Chamber then reiterated its guidance to the Prosecutor, “that any Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence be made as soon as possible”.²⁵⁰

91. Thus, the Appeals Chamber finds that the Trial Chamber relied on some of the withheld material, in the annexes to the Prosecutor’s Submissions of 9 May 2016 and the Prosecutor’s Reply of 13 June 2016, as additional support for a finding already made, but that the withheld material was not used as the primary basis for that finding. The Appeals Chamber also notes that some of the information which was still withheld from Mr Ntaganda at the time of the Impugned Decision has since been disclosed to him.²⁵¹ Should Mr Ntaganda have further concerns as a result of that (or

²⁴⁵ [Decision on Mr Ntaganda’s Request for Disclosure of 3 June 2016](#), para. 20.

²⁴⁶ [Document in Support of the Appeal](#), para. 39.

²⁴⁷ [Impugned Decision](#), para. 24 (emphasis added).

²⁴⁸ [Impugned Decision](#), para. 24 (emphasis added).

²⁴⁹ [Impugned Decision](#), para. 24.

²⁵⁰ [Impugned Decision](#), para. 24.

²⁵¹ See ICC-01/04-02/06-1313-Conf-Red2, registered on 28 November 2016, and annexes B-E and G-O to ICC-01/04-02/06-1313-Conf-Exp, registered with the following note: “Pursuant to Trial Chamber VI’s instructions, dated 6 December 2016, this document is reclassified as ‘Confidential’”; see ICC-

any) disclosure, he may file submissions before the Trial Chamber, which has stated that it will “periodically monitor” the question of restrictions.²⁵²

92. Finally, Mr Ntaganda refers specifically to Annex F to the Prosecutor’s Request for Restrictive Measures of 8 August 2014, which remains confidential *ex parte*, [REDACTED]. In relation to the former, the Appeals Chamber finds that there is no indication of any immediate prejudice to Mr Ntaganda arising from Annex F. In that regard, the Trial Chamber specifically noted in the Decision on Interim Restrictive Measures of 8 December 2014 that the Prosecutor relied on Annex F in a section of her Request for Restrictive Measures of 8 August 2014 which was not available to Mr Ntaganda.²⁵³ The Trial Chamber then did not cite to that section of the Prosecutor’s submission in its analysis, and it did not rely on the contents of Annex F in its finding that restrictions pursuant to regulation 101 (2) of the Regulations of the Court should be put in place on an interim basis.²⁵⁴ Nor did the Trial Chamber explicitly rely on Annex F in its subsequent Decision on Active Monitoring, in its Decision on Restrictions or, ultimately, in the Impugned Decision. There is no indication that the Trial Chamber relied on its contents in imposing and continuing the current restrictions. Therefore, there is no indication that prejudice occurred from the non-disclosure of Annex F in the context of the proceedings under review. [REDACTED].

93. Turning to the purported reversal of the burden of proof, the Appeals Chamber is not persuaded by Mr Ntaganda’s arguments. In relation to translations and summaries, the Appeals Chamber does not consider that the Trial Chamber drew an “inference of reliability” based on the absence of corrections by Mr Ntaganda to uncertified incomplete translations²⁵⁵ or, that by referring in the Decision on Restrictions of 18 August 2015 to the fact that summarised translations had not been

1318-Conf-Red2, registered on 28 November 2016; *see* ICC-01/04-02/06-1390-Conf and annexes A-D to ICC-01/04-02/06-1390-Conf, all registered on 6 December 2016 with the following note: “Pursuant to Trial Chamber VI’s instructions, dated 6 December 2016, this document is reclassified as ‘Confidential’”; *see* “Decision on the ‘Prosecution’s request to provide Bosco Ntaganda with access to evidence obtained pursuant to article 70’”, ICC-01/04-738-Conf-Exp, 4 November 2016, para. 2.

²⁵² [Impugned Decision](#), para. 36.

²⁵³ Decision on Interim Restrictive Measures of 8 December 2014, footnote 20.

²⁵⁴ Decision on Interim Restrictive Measures of 8 December 2014, para. 49.

²⁵⁵ [Document in Support of the Appeal](#), para. 43.

contested, the Trial Chamber imposed a burden of proof on Mr Ntaganda.²⁵⁶ In respect of the latter, Mr Ntaganda refers to two excerpts of the Decision on Restrictions of 18 August 2015; in the first, the Trial Chamber noted that Mr Ntaganda had not contested a particular translation and in the second it noted that Mr Ntaganda had been provided with an original language transcription.²⁵⁷ Earlier in that decision, the Trial Chamber had noted that the issue of translations and summaries left “room for discussion”, stating that it would focus on allegations that are not, or are only partially, contested by Mr Ntaganda.²⁵⁸ The Trial Chamber then, in its review of the evidence in the Registry reports, noted such occurrences.²⁵⁹ Thus, out of fairness to Mr Ntaganda, the Trial Chamber referred primarily to evidence that was uncontested. The Appeals Chamber does not agree that this amounts to a reversal of the burden of proof as alleged by Mr Ntaganda, or that the Trial Chamber drew an inference of reliability. The Appeals Chamber also notes that the Trial Chamber, in the Impugned Decision, pointed again to this issue, noted Mr Ntaganda’s submissions on the point, but stated that “the generalised and unsubstantiated nature of the Defence submissions on this point, combined with the lack of any request for particular relief, make it unnecessary for the Chamber to consider them further at this time”.²⁶⁰ Mr Ntaganda has not indicated which specific translations were incorrect and it is not clear why the Trial Chamber, in the circumstances of this case, could not rely on those uncertified or draft translations in the manner in which it did. It is also noted that Mr Ntaganda is free to raise any further issues in relation to this issue at any time.

94. The Appeals Chamber also finds that it does not appear unreasonable for the Trial Chamber to have noted, in the Decision on Restrictions of 18 August 2015, that

²⁵⁶ See [Document in Support of the Appeal](#), para. 41, referring to [Decision on Restrictions of 18 August 2015](#), paras 51, 55.

²⁵⁷ [Document in Support of the Appeal](#), para. 41, referring to [Decision on Restrictions of 18 August 2015](#), paras 51, 55.

²⁵⁸ [Decision on Restrictions, para. 45.](#)

²⁵⁹ Referring to, in particular, “... the – uncontested – summarised translation of the relevant conversation”; noting that “... Mr Ntaganda – on the basis of a non-contested translation of a section of that same conversation – appears to have been well aware...” of the confidentiality of certain information; and noting that “... according to the, on this point, uncontested translation...” the subject-matter of Mr Ntaganda’s conversation was about the Prosecutor’s witnesses ([Decision on Restrictions, paras 51-52](#)).

²⁶⁰ [Impugned Decision](#), para. 23.

Mr Ntaganda had not addressed the issue of witness coaching.²⁶¹ Mr Ntaganda was on notice that there were allegations as to witness coaching from the Second Registry Report,²⁶² a decision by the Trial Chamber,²⁶³ and submissions by the Prosecutor.²⁶⁴ It is not inappropriate *per se* for the Chamber to note that Mr Ntaganda has not responded thereto.²⁶⁵ The issue of coaching was also specifically addressed in the Decision on Restrictions of 18 August 2015 and additional information on the matter has been brought since then.

95. Regarding the fact that the Impugned Decision noted that Mr Ntaganda had not provided clarification in respect of ambiguous language, Mr Ntaganda submits that he “did not consider, given all the circumstances, that there was any significant ambiguity, and the Chamber’s negative inference from the alleged lack of submissions was unjustified”.²⁶⁶ The Appeals Chamber observes that the Trial Chamber’s comment was based on a specific term that the Registrar had raised as concerning and it stated that “[i]n that light, the Chamber considers that further clarification by the Defence may have been warranted”.²⁶⁷ The Appeals Chamber notes that such clarification could have provided the Trial Chamber with a clearer understanding of what was meant and finds no error in the Trial Chamber’s statement.

96. With respect to the argument that the Trial Chamber erred in its consideration of Mr Ntaganda’s submissions regarding the use of codes during telephone conversations,²⁶⁸ the Appeals Chamber finds that the Trial Chamber appears to have considered the plausibility of Mr Ntaganda’s general explanations, and it arrived at a conclusion that there were reasonable grounds to believe that Mr Ntaganda used codes for an improper purpose.²⁶⁹ Contrary to Mr Ntaganda’s argument, there is no

²⁶¹ See [Document in Support of the Appeal](#), para. 41, referring to [Decision on Restrictions](#) of 18 August 2015, paras 56-57.

²⁶² Second Registry Report, para. 8.

²⁶³ “Decision on reclassification of the second Registry’s report on post-factum review”, 10 July 2015, ICC-01/04-02/06-710-Conf-Exp, para. 13.

²⁶⁴ See ICC-01/04-02/06-738-Conf-Exp, paras 30-33.

²⁶⁵ It is noted that Mr Ntaganda, although he does not bring this to the Appeals Chamber’s attention, states, prior to the Decision on Restrictions, that the Registry’s reports “give no indication that he ever encouraged coaching of Defence witnesses” (Mr Ntaganda’s Final Observations of 12 January 2016, para. 30). He does not, however, elaborate beyond this.

²⁶⁶ [Document in Support of the Appeal](#), para. 41.

²⁶⁷ [Impugned Decision](#), para. 27.

²⁶⁸ [Document in Support of the Appeal](#), para. 42.

²⁶⁹ [Decision on Restrictions](#) of 18 August 2015, paras 48-50.

indication that the Trial Chamber “adopted an unduly low burden of proof”.²⁷⁰ It took account of the surrounding circumstances, including evidence that Mr Ntaganda insisted on using the coded language even though he himself had trouble expressing himself in that manner²⁷¹ and that speaking in coded language was not as common as Mr Ntaganda claimed it was.²⁷² The Trial Chamber also reviewed evidence which it found tended to contradict Mr Ntaganda’s claims that he used codes only to conceal his personal financial information²⁷³ and that he was fearful that certain parties in sub-Saharan Africa would intercept his phone conversations.²⁷⁴ The fact that it did not specifically address one argument (“the perception, based on past practice, that Registry recordings of conversations of detainees will end up in the hands of the Prosecution”²⁷⁵) does not automatically show that the Trial Chamber erred in the balancing exercise it carried out. Moreover, Mr Ntaganda has not shown why this one argument would change the ultimate finding by the Trial Chamber.

97. In sum, the Appeals Chamber rejects Mr Ntaganda’s arguments under the sixth ground of appeal.

J. Seventh ground of appeal: failure to analyse impact on family and private life

1. Submissions of the parties and participants

98. Under the seventh ground of appeal, Mr Ntaganda argues that “[t]he Impugned Decision fails to analyse the damage to Mr Ntaganda’s family and private life cause [*sic*] by the imposition of the restrictions for two-and-a-half-years, and the impact of their indefinite continuation”.²⁷⁶ In his view, the Trial Chamber failed to address “whether, in this case, the passage of time necessitated or favoured diminished restrictions”.²⁷⁷ Mr Ntaganda argues that the Trial Chamber only addressed whether the restrictions remain “necessary and proportionate relative to its stated objectives”

²⁷⁰ [Document in Support of the Appeal](#), para. 42.

²⁷¹ [Decision on Restrictions](#) of 18 August 2015, para. 48.

²⁷² [Decision on Restrictions](#) of 18 August 2015, para. 49.

²⁷³ [Decision on Restrictions](#) of 18 August 2015, para. 50.

²⁷⁴ [Decision on Restrictions](#) of 18 August 2015, para. 50.

²⁷⁵ [Document in Support of the Appeal](#), para. 42 (footnote omitted).

²⁷⁶ [Document in Support of the Appeal](#), para. 45.

²⁷⁷ [Document in Support of the Appeal](#), para. 45.

and failed “to balance these considerations against the ongoing damage to [his] well-being and his rights”.²⁷⁸ This, in his view, amounted to an error of law and fact.²⁷⁹

99. The Prosecutor responds that Mr Ntaganda’s argument “wrongly assumes that all contact with his family is prohibited” and ignores the Trial Chamber’s conclusion which assessed the impact on his family.²⁸⁰ The Prosecutor asserts that Mr Ntaganda fails on appeal “to argue – let alone demonstrate – that the Chamber erred in law or was unreasonable”.²⁸¹

100. The Victims submit that Mr Ntaganda “misconstrues the temporal scope of the restrictions imposed” and that contrary to Mr Ntaganda’s argument the Trial Chamber “expressly acknowledged the impact of the continuation of the restrictions on his rights [...] and proceeded to state that it had appropriately balanced them against the interests of their legitimate aim”.²⁸²

2. *Determination by the Appeals Chamber*

101. The Appeals Chamber finds Mr Ntaganda’s arguments under this ground of appeal to be unsubstantiated as he fails to show any error in the Trial Chamber’s assessment. The Appeals Chamber recognises that, while contact restrictions are needed to preserve the integrity of the proceedings, these must be weighed against the accused’s right to privacy and family life. The Appeals Chamber notes that the Trial Chamber did indeed make such an assessment, at paragraphs 35 to 41 of the Impugned Decision, in expressly considering “the continuing proportionality of the Restrictions and their impact on Mr Ntaganda’s family and private life, including on his wife and children”.²⁸³ The Trial Chamber noted that Mr Ntaganda may continue to have contact with his wife and children through actively monitored telephone calls and visits, and with his mother through actively monitored telephone calls.²⁸⁴ It considered that his right to privacy and family life was being appropriately balanced with the objectives of the stated aim of the restrictions. While the Appeals Chamber

²⁷⁸ [Document in Support of the Appeal](#), para. 45.

²⁷⁹ [Document in Support of the Appeal](#), para. 45.

²⁸⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 47.

²⁸¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 47.

²⁸² [Response of Victims of the Attacks](#), para. 47 (footnote omitted).

²⁸³ [Impugned Decision](#), para. 35.

²⁸⁴ [Impugned Decision](#), para. 35.

accepts that the restrictions on Mr Ntaganda's communications are significant and are likely to lead to hardship on his part, not least because of their length, it recalls that, in accordance with the applicable standard of review, it may intervene only if an error in the Trial Chamber's assessment has been established. In the case at hand, however, Mr Ntaganda has failed to show that the exercise of the Trial Chamber's discretion was abusive or otherwise erroneous. In these circumstances, Mr Ntaganda's arguments under this ground of appeal are dismissed.

IV. APPROPRIATE RELIEF

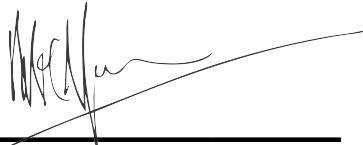
102. Having reviewed the Impugned Decision on the basis of Mr Ntaganda's grounds of appeal, the Appeals Chamber is satisfied, in light of its standard of review, that the Trial Chamber correctly balanced Mr Ntaganda's right to respect for his private and family life against the objectives of ensuring the safety of witnesses, preventing breaches of confidentiality and ensuring the integrity of the trial proceedings.

103. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, having dismissed the grounds of appeal raised by Mr Ntaganda, it is appropriate to confirm the Impugned Decision.

104. The Appeals Chamber notes Mr Ntaganda's request that the Impugned Decision be reversed and remanded to the Trial Chamber for further consideration and that the Appeals Chamber order "as an interim measure that Mr Ntaganda be permitted two hours of actively monitored telephone calls to his existing list of contacts".²⁸⁵ The Appeals Chamber understands this to be a request for the Appeals Chamber, having found an error and having remanded this matter to the Trial Chamber, to order this interim measure with a view to it being put in place pending the Trial Chamber's reconsideration of the matter. Having found no errors, the Appeals Chamber finds it unnecessary to address this request.

Done in both English and French, the English version being authoritative.

²⁸⁵ [Document in Support of the Appeal](#), para. 46.



Judge Howard Morrison
Presiding Judge

Dated this 8th day of March 2017

At The Hague, The Netherlands