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No.: **ICC-01/04-01/07**

Date: **19 August 2011**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

**URGENT
Confidential**

***Ex parte*, only available to the Office of the Prosecutor, the Defence for Mathieu
Ngudjolo and the Registry**

**Decision on Prosecution requests 2787 and 3066 (monitoring of Mathieu Ngudjolo's
non-privileged communications)**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for the Defence of Germain
Katanga**

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Legal Representatives of the Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court (respectively, “the Chamber” and “the Court”), acting pursuant to articles 54, 64(2), 67 and 69 of the Rome Statute (“the Statute”) and regulation 23 *bis*(3) of the Regulations of the Court, decides as follows.

I. BACKGROUND

1. On 8 June 2009, the Registrar submitted her first report on the monitoring of Mathieu Ngudjolo’s non-privileged communications to the Chamber,¹ further to her decision of 12 February 2009, ordering the *post-factum* monitoring of Mathieu Ngudjolo’s telephone conversations since 1 October 2008 and the active monitoring, for a period of 14 days, of his future telephone conversations.²
2. By oral decision of 9 June 2009, the Chamber authorised the disclosure of the said report to the Prosecutor,³ who, on 12 June 2009, urgently moved the Chamber on the basis of regulation 101(3) of the Regulations of the Court *inter alia* to prohibit all contact between Mathieu Ngudjolo and the outside and separate him from the other detained persons.⁴

¹ Registry, “Registrar’s initial report on the monitoring of Mathieu Ngudjolo Chui’s non-privileged communications further to the Registrar’s decision of 12 February 2009”, 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp-tENG. See also Registry, “Enregistrement au dossier des versions expurgées du Rapport du Greffier du 8 juin 2009 (ICC-01/04-01/07-1195-Conf-Exp) et du Mémoire de l’Accusation du 11 juin 2009 (ICC-01/04-01/07-1200-Conf-Exp)”, 19 June 2009, ICC-01/04-01/07-1233-Conf-Exp, Annexes 1 and 2.

² Registry, “Registrar’s Decision on the Monitoring of Non-Privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui”, 12 February 2009, ICC-01/04-01/07-894-Conf-Exp.

³ ICC-01/04-01/07-T-66-CONF-EXP-ENG ET 09-06-2009, p. 39, lines 11-15.

⁴ Office of the Prosecutor, “Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to prohibit Mathieu Ngudjolo’s Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees”, 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp-tENG. See also ICC-01/04-01/07-1233-Conf-Exp.

3. On 23 June 2009 the Defence for Mathieu Ngudjolo submitted its observations under the aforesaid regulation 101(3).⁵ On 24 June, the Chamber issued its decision (“the 24 June 2009 Decision”)⁶ wherein it refused to authorise disclosure to the Prosecutor of the recordings of the telephone conversations referred to in the Registrar’s afore-mentioned Report, the list of telephone contacts and the annex to the said Report which refers to the recordings.
4. In that Decision, the Chamber determined as follows:

The Chamber recalls that the requested recordings of the conversations obtained thanks to the passive monitoring measures were ordered by the Registry on the basis of regulations 174 and 175 of the Regulations of the Registry for the sole purpose of ensuring that the communication facilities provided to the accused were being used appropriately. Therefore, in no way did this interference with the confidentiality of Mathieu Ngudjolo’s correspondence seek to facilitate the post factum gathering of new evidence in support of the prosecution. Nor was it ordered by a judicial authority which had expressly decided to retain control thereover. The Chamber considers, that at this stage in the proceedings, the Prosecutor cannot use the content of these conversations to make a determination of the truth. The monitoring measures ordered sought an entirely different aim and their use for the purposes of prosecution could be challenged on the basis of a possible abuse of process and on the ground that the information thus gathered was not equitably obtained. Furthermore, the Chamber specifically notes that none of the texts governing the Court explicitly provide for the possibility of using the recordings ordered on the basis of regulations 174 and 175 of the Regulations of the Registry for purposes other than those for which they were laid down. Accordingly, it considers that the recordings of the conversations need not be fully disclosed to the Office of the Prosecutor for their possible use as incriminating or exonerating evidence.⁷

5. This decision was the subject of two separate applications for leave to appeal, respectively from the Prosecutor⁸ and Mathieu Ngudjolo’s Defence.⁹ The

⁵ Defence for Mathieu Ngudjolo, “Observations on the Registry’s Report and the Prosecutor’s Brief Underpinning the Trial Chamber’s Order ICC-01/04-01/07-1215-Conf-Exp of 18 June 2009”, 23 June 2009, ICC-01/04-01/07-1238-Conf-Exp-tENG.

⁶ *Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre*, 24 June 2009, ICC-01/04-01/07-1243-Conf-Exp-tENG.

⁷ ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 40 (footnotes omitted).

⁸ Office of the Prosecutor, “Prosecution’s Application for Leave to Appeal the ‘*Décision sur la Requête 1200 du Procureur aux fins de mesures d’interdiction et de restriction de contacts avec l’extérieur comme au sein de l’établissement pénitentiaire contre Mathieu Ngudjolo*’”, 30 June 2009, ICC-01/04-01/07-1254-Conf-Exp.

⁹ Defence for Mathieu Ngudjolo, “Application for Leave to: Appeal the Decision of Trial Chamber II No. ICC-01/04-01/07-1243-Conf-Exp of 24 June 2009”, 30 June 2009, ICC-01/04-01/07-1255-Conf-Exp-tENG.

parties filed a response to each application.¹⁰ On 14 July 2009, the Chamber dismissed the application from the Defence for Mathieu Ngudjolo (“the 14 July 2009 Decision”).¹¹ However, it partially granted the Prosecutor’s application on the issue of “ascertaining whether the parties or the Chamber can refer to or use all the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in his list of contacts during the hearings on the merits”.¹² In its decision, the Chamber further stated that, in the 24 June 2009 Decision, it had ruled that the Prosecutor could not use the requested recordings of the conversations and the list of contacts for the purpose of any prosecution, whether in the present case or any proceedings instituted under article 70 of the Statute, on the ground that the surveillance measures ordered by the Registry, and not a judicial authority, pursued an entirely different objective.

6. On 9 December 2009, the Appeals Chamber found that “[the] rejection of the Prosecutor’s request for access to information obtained through monitoring at the Court’s detention centre was based on an erroneous determination as to the inadmissibility of the information as evidence at trial, and was therefore materially affected by an error of law” (“the Appeals Chamber Judgment”).¹³ Accordingly, regarding that issue, the Appeals Chamber reversed the impugned decision and remanded the matter to the Trial Chamber “for a new decision under regulation 92 (3) of the Regulations of the Court as to whether or not to grant the Prosecutor access to the monitored information”.¹⁴ It

¹⁰ Defence for Mathieu Ngudjolo, “Réponse de la Défense de Mathieu Ngudjolo à la Demande d’Autorisation d’Interjeter Appel 1254-Conf-Exp du Procureur”, 6 July 2009, 01/04-01/07-1268-Conf-Exp; Office of the Prosecutor, “Prosecution’s Response to Defence « Demande d’autorisation d’interjeter appel contre la décision de la Chambre de première instance II N° ICC-01/04-01/07-1243-Conf-Exp du 24 juin 2009 »”, 6 July 2009, 01/04-01/07-1270-Conf-Exp.

¹¹ *Decision on the Appeals by the Prosecutor and the Defence of Mathieu Ngudjolo Chui against Decision 1243 of 24 June 2009*, 14 July 2009, ICC-01/04-01/07-1303-Conf-Exp-tENG.

¹² ICC-01/04-01/07-1303-Conf-Exp-tENG, p. 15.

¹³ Appeals Chamber, *Judgment on the Appeal of the Prosecutor against the “Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre”*, 9 December 2009, ICC-01/04-01/07-1718-Conf-Exp, para. 1.

¹⁴ Appeals Chamber Judgment, para. 52.

added, moreover, that: “[w]hen making its decision the Trial Chamber must endeavour to strike a balance between the rights of the accused, as enshrined in article 67 of the Statute, as well as his right to privacy and right to conduct his defence, on the one hand, and the Prosecutor’s responsibilities pursuant to article 54 (1) of the Statute, on the other.”¹⁵

7. On 10 June 2010, the Chamber issued a decision which not only adjudged anew the 12 June 2009 Request in pursuance of the directions of the Appeals Chamber set out at paragraph 52 of its Judgment, but also responded to a further request of 11 March 2010 filed by the Prosecutor subsequently to the Judgment¹⁶ (“the 10 June 2010 Decision”).¹⁷ The Decision of the Chamber partially allowed the Prosecutor’s request and, *inter alia*, directed the Registry as soon as practicable to transcribe and translate telephone conversations in Kilendu [REDACTED].¹⁸ The Chamber specified that:

[TRANSLATION] In general, the information which the Registrar did not consider necessary to include in her reports (namely the conversations on afore-mentioned topics (a) to (d)) or which she redacted further (afore-mentioned topics (e) to (f)) mainly concerns matters such as the private life of the Accused or the conduct of his defence. **Moreover, the Prosecutor has not argued that the disclosed reports of the Registrar had provided him with material to suggest that the transcripts concerned could contain information which is material to the determination of the truth and could not be obtained from other evidence gathered in the course of his investigations.** In other words, he did not argue that a lack of access to such information would, in this instance, deprive him of any possibility of achieving the objective prescribed by article 54(1) of the Statute. In the view of the Chamber, the mere fact that one or more transcripts could potentially provide information of interest or, as the case may be, evidence necessary to the determination of the truth, does not, *per se*, render their disclosure indispensable or, in any event, necessitate an interference with the rights of the Accused.¹⁹

Request for Disclosure

¹⁵ *Idem*.

¹⁶ Office of the Prosecutor, “Prosecution’s Response to « *Observations du Greffe en vertu de la norme 24bis-1 du Règlement de la Cour faisant suite à l’arrêt de la Chambre d’appel du 9 décembre 2009* (ICC-01/04-01/07-1718-Conf-Exp) », 25 February 2010, ICC-01/04-01/07-1918-Conf-Exp.

¹⁷ *Décision faisant suite à l’arrêt de la Chambre d’appel du 9 décembre 2009 et répondant à la requête 1959-Conf-Exp du Bureau du Procureur*, 10 June 2010, ICC-01/04-01/07-2187-Conf-Exp.

¹⁸ ICC-01/04-01/07-2187-Conf-Exp, p. 31.

¹⁹ ICC-01/04-01/07-2187-Conf-Exp, para. 61.

Conversations in Kilendu. On 17 August 2011, the Chamber directed the Defence to make fresh proposals,²⁷ which were filed on 18 August 2011²⁸ (“the Fresh Redactions”).

Request for Reclassification

12. On 24 July 2009, the Chamber issued a *Second Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo*, in which it rejected a request from the Prosecutor for the reclassification of the Registry’s reports. That request sought disclosure to the Defence for Germain Katanga pursuant to rule 77 of the Rules (“the 24 July 2009 Decision”).²⁹
13. On 8 July 2011, the Prosecutor filed an additional request for the reclassification of the Registrar’s five reports on Mathieu Ngudjolo’s non-privileged communications which were already in his possession (“the Request for Reclassification”). The reports (“the Five Reports”) were filed on

²⁶ Defence for Mathieu Ngudjolo, “*Propositions d’expurgations sur le « Deuxième et dernier rapport du Greffier sur l’écoute de certaines conversations de Mathieu Ngudjolo tenues en Kilendu ou dans une langue non identifiée suite à la décision de la Chambre du 10 juin 2010 (ICC-01/04-01/07-3075-Conf-Exp du 15 juillet 2011) »*”, 10 August 2011, ICC-01/04-01/07-3098-Conf-Exp.

²⁷ E-mail from the Chamber to the Defence for Mathieu Ngudjolo, 17 August 2011, at 16:54.

²⁸ E-mails from the Defence for Mathieu Ngudjolo to the Chamber on 18 August 2011, at 13:53 and 16:22, respectively.

²⁹ *Second Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo*, 24 July 2009, ICC-01/04-01/07-1334-Conf-Exp-tENG, para. 30.

19 June 2009,³⁰ 14 July 2009,³¹ 17 July 2009,³² 11 November 2009,³³ and 19 February 2010,³⁴ respectively.

14. The Prosecutor stated that he intended to use the Five Reports in the cross-examination of the two Accused and Witness DRC-D03-P-0088 (“Chief Manu”), who had been called by the Defence for Mathieu Ngudjolo. He contended that, were the reports not to be used, there was a risk that the Chamber would be misled as regards the general credibility of the witnesses and “[TRANSLATION] the truth as to essential material in the record”.³⁵ The Prosecutor further petitioned the Chamber to direct the Registrar to reconsider her redactions to the Five Reports in light of the list of witnesses filed by the Defence for Mathieu Ngudjolo in March 2011. He also considered the redactions concerning prosecution witnesses to be no longer necessary since they had all given evidence.³⁶

15. The Prosecutor stated that he was aware of having already sought the reclassification of the Registry’s reports in an earlier filing³⁷ which the Chamber had addressed in the 24 July 2009 Decision.³⁸ He nevertheless argued that in that decision, the request was reserved, was not entertained in the 10 June 2010 Decision, and therefore had not yet been adjudged anew by

³⁰ ICC-01/04-01/07-1233-Conf-Exp.

³¹ “Version expurgée du deuxième rapport du Greffier sur l’écoute des communications non couvertes par le secret professionnel de Mathieu Ngudjolo Chui suite à la décision du Greffier du 12 février 2009”, 14 July 2009, ICC-01/04-01/07-1299-Conf-Exp.

³² “Version expurgée du troisième rapport du Greffier sur l’écoute des communications non couvertes par le secret professionnel de Mathieu Ngudjolo Chui suite à la décision du Greffier du 12 février 2009”, 17 July 2009, ICC-01/04-01/07-1312-Conf-Exp.

³³ “Transmission aux parties de versions expurgées du « Quatrième rapport du Greffier sur l’écoute des communications non couvertes par le secret professionnel de M. Mathieu Ngudjolo », 11 November 2009, ICC-01/04-01/07-1627-Conf-Exp.

³⁴ Registry, “Rapport du Greffier sur l’écoute de certaines des conversations de Mathieu Ngudjolo suite à la décision de surveillance du Greffier en date du 22 janvier 2010”, 19 February 2010, ICC-01/04-01/07-1890-Conf-Exp.

³⁵ ICC-01/04-01/07-3066-Conf-Exp, para. 3.

³⁶ ICC-01/04-01/07-3066-Conf-Exp, para. 4.

³⁷ Office of the Prosecutor, “Prosecution’s Observations on Registry’s Second and Third Reports on the Analysis of the Telephone Conversations of Mathieu Ngudjolo”, 20 July 2009, ICC-01/04-01/07-1321-Conf-Exp, para. 13.

³⁸ 24 July 2009 Decision, para. 30.

the Chamber. In his view, the Request for Reclassification was grounded in articles 64(6)(f) and 69(3) of the Statute and regulation 23 *bis*(3) of the Regulations of the Court, regulation 92(3) of the Regulations not finding application since the documents in question were already in his possession.³⁹ For the Prosecutor, the announcement that the two Accused are soon to testify constituted “[TRANSLATION] a new circumstance which substantially alters the context of the present request”.⁴⁰

16. The Prosecutor therefore submitted that the detailed and explicit information contained in the Five Reports is of vital importance in establishing the truth and relevant to the assessment of the credibility of:

- a. Mathieu Ngudjolo himself, since the Five Reports demonstrate that: he regularly connived with his witnesses so that they would know how to answer his defence team; he used his wife for this purpose following visits or telephone calls; he used various local persons who are not part of his defence team in witness coaching activities; and he disclosed the name of prosecution witnesses and one of their statements to third parties.⁴¹ There is also an interest in putting to Mr Ngudjolo his statement on Germain Katanga’s participation in the attack on Bogoro, as set forth in the Registry’s first report (conversation No. 109 of 18 December 2008);⁴²
- b. Chief Manu, since his services were enlisted for Mathieu Ngudjolo, whose instructions he took and in collusion with whom he engaged in the coaching of defence witnesses. He was also present at secret meetings with Mathieu Ngudjolo’s wife and the Accused’s Resource

³⁹ ICC-01/04-01/07-3066-Conf-Exp, para. 15.

⁴⁰ ICC-01/04-01/07-3066-Conf-Exp, para. 16 *in fine*.

⁴¹ ICC-01/04-01/07-3066-Conf-Exp, para. 19.

⁴² ICC-01/04-01/07-3066-Conf-Exp, para. 19.

Person. The Prosecutor considers it vital to prove this witness's collusion with the Accused;⁴³

- c. Germain Katanga, since Mathieu Ngudjolo's statement on his involvement in the attack on Bogoro appears, given its source and context, material to the cross-examination of Germain Katanga. Moreover, the Prosecutor wishes him to clarify the underhand deals between Chief Manu and Jean Logo, the Resource Person for Germain Katanga's team.⁴⁴

17. The Prosecutor maintains that this information cannot be obtained by other means and that, were the Chamber to refuse to include the Five Reports in the list of documents which he wishes to use in cross-examination, he would be unable to conduct a meaningful cross-examination of the Accused persons and the aforesaid witness. It would therefore be impossible for him to discharge the obligations cast on him by article 54(1) of the Statute.⁴⁵ Adopting the Appeals Chamber's line of reasoning, the Prosecutor argues that, ultimately, the Chamber itself will be deprived of information material to the determination of core issues in the instant case.⁴⁶

18. The Prosecutor further argues that the requested reclassification is a proportionate measure:⁴⁷ he is already in possession of the Five Reports, which, as the Chamber itself stated in its 10 June 2010 Decision, reflect the Registry's selective removal of information pertaining to private conversations and the defence strategy; Mathieu Ngudjolo himself opted to testify and risk cross-examination; reclassification does not contravene the Accused's privilege against self-incrimination since the Accused knowingly and voluntarily disclosed information during monitored telephone

⁴³ ICC-01/04-01/07-3066-Conf-Exp, para. 20.

⁴⁴ ICC-01/04-01/07-3066-Conf-Exp, para. 22.

⁴⁵ ICC-01/04-01/07-3066-Conf-Exp, para. 24.

⁴⁶ ICC-01/04-01/07-3066-Conf-Exp, para. 25.

⁴⁷ ICC-01/04-01/07-3066-Conf-Exp, paras. 26-30.

conversations that could be used as evidence, with no discernible recourse to stratagems, surreptitiousness or inaccuracy.

19. The Defence for Mathieu Ngudjolo, which filed a response on 14 July 2011 to the Request for Reclassification,⁴⁸ considers that the Prosecutor has the necessary means and time to investigate the subjects and facts on which the Defence witnesses will give evidence and that he will have the opportunity to cross-examine those witnesses during their in-court testimony, and that obtaining the information contained in the Registry's reports is not the Prosecutor's sole means of testing the credibility of the Defence witnesses or that of Mathieu Ngudjolo, and of determining the truth.⁴⁹
20. The Defence is of the further opinion that the Request for Reclassification violates the rights of the Defence. It also notes that the process for listening to Mathieu Ngudjolo's telephone conversations and prohibiting and restricting his contacts both outside and inside the Detention Centre has now definitively ended.⁵⁰

⁴⁸ Defence for Mathieu Ngudjolo, "*Réponse de la Défense de Mathieu Ngudjolo à la «Requête de l'Accusation aux fins de reclassification des rapports du Greffier sur l'écoute des communications non couvertes par le secret professionnel de Mathieu Ngudjolo et aux fins de levée/révision des expurgations appliquées dans ces Rapports» (ICC-01/04-01/07-3066-Conf-Exp)*", 14 July 2011, ICC-01/04-01/07-3074-Conf-Exp.

⁴⁹ ICC-01/04-01/07-3074-Conf-Exp, para. 43.

⁵⁰ ICC-01/04-01/07-3074-Conf-Exp, para. 58.

II. DISCUSSION

a. The Request for Disclosure

21. The Chamber allows the said Request for the following reasons:

- a. The Chamber disclosed the Registry's Five Reports to the Prosecutor, which, save for the first report, included the redactions proposed by the Defence for the Accused which the Chamber allowed. Accordingly, the Chamber sees no reason at this stage for modifying the procedure followed to date.
- b. The Chamber is currently reviewing the new redactions made by the Defence for Mathieu Ngudjolo at its direction, in order to ensure that the Prosecutor does not have access to information within the purview of article 8 of the European Convention on Human Rights or pertaining to the right to mount his defence, as understood by the Appeals Chamber.

b. The Request for Reclassification

22. The Chamber underscores, as conceded by the Prosecutor, that it had already received the Request for Reclassification in a filing dated 20 July 2009⁵¹ and it had already rejected the said Request in its Decision of 24 July 2009. In that Decision, the Chamber stated that, "without prejudice to the position to be adopted by the Appeals Chamber on this point",⁵² it would not grant the request. The Chamber notes that this request has never since been repeated.⁵³

⁵¹ Office of the Prosecutor, "Prosecution's Observations on Registry's Second and Third Reports on the Analysis of the Telephone Conversations of Mathieu Ngudjolo", 20 July 2009, ICC-01/04-01/07-1321-Conf-Exp, para. 13.

⁵² 24 July 2009 Decision, para. 30.

⁵³ Office of the Prosecutor, "Prosecution's Request for Access to Material in Addition to the registry's Reports on Ngudjolo's Non-privileged Communications, pursuant to the Appeals Chamber Judgment No. **ICC-01/04-01/07**

23. The substantive issue raised by the Request for Reclassification is whether the Five Reports of the Registry may be used at trial. In this respect, reference to the Appeals Chamber Judgment is of limited assistance since it does not specifically address the matter. In fact, the Appeals Chamber construed the issue initially formulated by the Chamber⁵⁴ “in the context of the [i]mpugned [d]ecision”,⁵⁵ indicating that it that would respond solely to the issue of determining “whether the Trial Chamber erred when it rejected the Prosecutor’s request for access to the information on the ground that such information could not be used at trial for evidentiary purposes”.⁵⁶ It must be further emphasised that this Judgment addresses the disclosure of information which has yet to be obtained by the Prosecutor, whereas the Request for Reclassification refers to documents which he has already obtained.
24. Nevertheless, it must be noted that the Appeals Chamber has reiterated that under article 69(3) of the Statute, the Bench is vested with broad powers to request the submission of all evidence that it considers necessary for the determination of the truth. As previously stated, the point as articulated above was also taken into consideration by the Chamber in its 10 June 2010 Decision.⁵⁷ The Appeals Chamber specifically stated that in rejecting the Prosecutor’s request for the disclosure of the telephone transcripts, the Chamber had prevented him from discharging his duty “to establish the truth” under article 54(1) of the Statute, and that the rejection of his request had deprived him of material that might be of great importance to the case.⁵⁸

of 9 December 2009 [ICC-01/04-01/07-1718-Conf-Exp]”, 11 March 2010, ICC-01/04-01/07-1959-Conf-Exp.

⁵⁴ The issue raised by the Chamber was that of ascertaining whether the parties or the Chamber can refer to or use all the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in his list of contacts during the hearings on the merits. See the 14 July 2009 Decision, para. 11.

⁵⁵ Appeals Chamber Judgment, para. 36.

⁵⁶ Appeals Chamber Judgment, para. 39.

⁵⁷ 10 June 2010 Decision, para. 61.

⁵⁸ Appeals Chamber Judgment, para. 50.

25. The Chamber is of the view that this same requirement must also be considered in determining whether the Prosecutor should be authorised to use the Five Reports of the Registry in the cross-examination of Chief Manu and the two Accused.
26. The Chamber notes that only the first report was disclosed unredacted to the Office of the Prosecutor, pursuant to an oral decision of 9 June 2009, without any opportunity for the Defence for Mathieu Ngudjolo to propose redactions. Therefore this report, more so than the others, is likely to contain information on the Defence strategy over which the Chamber must exercise particular vigilance. In this regard, the Chamber must emphasise that in his Request for Reclassification, the Prosecutor relies heavily on this report.
27. In the instant case, having analysed the relevant passages of the reports and in light of how the Prosecutor specifically intends to use them in cross-examination, the Chamber considers that such information does not, to use the words of the Appeals Chamber, seem “of great importance”⁵⁹ to the determination of the truth.

Cross-examination of Mathieu Ngudjolo

28. The Prosecutor seeks to use the excerpts mentioned at paragraph 19 of the Request for Reclassification for the sole purpose of assessing the credibility of the Accused. He refers almost exclusively to the Registry’s first report, which, as previously mentioned, was disclosed unredacted. The Chamber considers that the excerpts are not material to the manifestation of the truth, as the Appeals Chamber understands it. They are not factual information “related to the case at hand”.⁶⁰ Moreover, whilst any contradictions that may arise out of the Registry’s description of the Accused’s actions being put to him are

⁵⁹ Appeals Chamber Judgment, para. 50.

⁶⁰ Appeals Chamber Judgment, para. 49.

undeniably essential to the assessment of his credibility and hence the determination of the truth in a broad sense, the use of these excerpts for that sole purpose does not, in the view of the Chamber, justify the breach it would entail of the exercise of his right to mount his defence and freely define its strategy.

29. Mathieu Ngudjolo's statement on Germain Katanga's possible participation in the attack on Bogoro, which the Prosecutor also intends to use in the cross-examination of Mr Ngudjolo – "Germain came from a long way away to Beni to come to attack Bogoro and everybody already knows this, we can't make it up, it's the truth"⁶¹ – is, however, undeniably "related" to "the case at hand". Nevertheless, it must be observed that other material obtained during the course of the Prosecutor's investigations may be used to invite Mathieu Ngudjolo to clarify this information which forms part of his statement. Indeed another document, contained in the list of incriminating evidence, contains similar information (DRC-0039-0017) which the Prosecutor may extensively use. In other words, by denying the Prosecutor use of that excerpt, the Chamber will not be depriving him of all possibility of attaining his objective prescribed by article 54(1) of the Statute. The allegation of interference with the exercise of the right to conduct his defence that its use of the excerpt in cross-examination would entail therefore cannot be justified.

Cross-examination of Germain Katanga

30. The Prosecutor wishes to use the aforesaid extract of Mathieu Ngudjolo's statements on Germain Katanga's participation in the attack on Bogoro. In the Chamber's view, these statements on Germain Katanga's involvement in Bogoro, whether contained in the telephone conversations or other

⁶¹ Request for Reclassification, footnote 26.

documents, would not, in the context of cross-examination, meaningfully contribute to the determination of the truth. To put statements to Germain Katanga that he did not make cannot enlighten the Chamber as to his credibility or the veracity of his statements.

Cross-examination of Chief Manu

31. The Prosecutor intends to examine this witness on the exact information contained the Registry's reports to "[TRANSLATION] prove his collusion with Mathieu Ngudjolo and his bias".⁶² He wishes essentially to use information contained in the Registry's first report to this end.⁶³
32. The material concerned is not factual information "related to the case at hand".⁶⁴ Here again, while the Prosecutor's intended use of such material may actually be essential to the assessment of the witness's credibility, recourse to such excerpts for this sole purpose does not justify the ensuing breach of the Accused's exercise of his right to mount his defence.
33. Ultimately, the Chamber cannot accept the Prosecutor's argument that the "[TRANSLATION] nature, subject-matter, source, authenticity, variety, volume and context"⁶⁵ of the information contained in the excerpts of the telephone conversations, as set out in the Registry's reports, renders it indispensable to the determination of the truth. On the contrary, the analysis of its content, considered in light of the very specific context of the circumstances in which the information surfaced and the Prosecutor's intended use thereof, is what impels the Chamber to find that the information is of no "great importance", as construed by the Appeals Chamber, to the determination of the truth.

FOR THESE REASONS, THE CHAMBER

⁶² Request for Reclassification, para. 20.

⁶³ Request for Reclassification, para. 20.

⁶⁴ Appeals Chamber Judgment, para. 49.

⁶⁵ Request for Reclassification, para. 23.

ALLOWS the Request for Disclosure and **ORDERS** the Reports of Conversations in Kilendu to be disclosed once the Chamber has adjudged the fresh redactions; and **DENIES** the Request for Reclassification.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Van den Wyngaert

Dated this 19 August 2011

At The Hague, The Netherlands