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

Date: **10 June 2010**

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***

Confidential

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

**Decision further to the Appeals Chamber judgment of 9 December 2009 and
responding to request 1959-Conf-Exp of the Office of the Prosecutor**

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

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Katanga**

**Counsel for the Defence of Mathieu
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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

Ms Maria Luisa Martinod-Jacome

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

Appeals Chamber

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 54, 64(2), 67 and 68 of the Rome Statute (“the Statute”) and regulations 92 of the Regulations of the Court and 189 of the Regulations of the Registry, decides as follows.

I. Background

1. On 8 June 2009, the Registrar submitted her initial 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 Prosecutor³ who, on 12 June 2009, urgently moved the Chamber on the basis of regulation 101(3) of the Regulations of the Court to, *inter alia*, prohibit all contact between Mathieu Ngudjolo and the outside and separate him from the other detained persons⁴ (“the 12 June 2009 Brief”).
3. Pursuant to the above-mentioned regulation 101(3), the Chamber informed Mathieu Ngudjolo of the existence of the Brief so that he could make

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.

observations if he so chose. It also took provisional measures to prohibit all external contact, whether in the form of incoming and outgoing mail, telephone calls, visits or contact with his co-detainees.⁵

4. On 23 June 2009 the Defence for Mathieu Ngudjolo submitted its observations under regulation 101(3).⁶ On 24 June, the Chamber issued its decision⁷ wherein it ordered the monitoring of Mathieu Ngudjolo's mail which it temporarily restricted to his family alone, prohibited all telephone contact and visits and ordered his separation from his co-detainees. However, the Chamber allowed his communication with his Defence team to continue.
5. The Chamber also refused to authorise disclosure to the Prosecutor of the recordings of the telephone conversations referred to in the Registrar's report, the list of telephone contacts and the annex to the said report which refers to the recordings.
6. 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

⁵ *Order Inviting Observations from Mathieu Ngudjolo on Request 1200 of the Prosecutor (Regulation 101(3) of the Regulations of the Court) and Provisionally Prohibiting any Contact between Mathieu Ngudjolo and any other Person with the Exception of his Defence Team*, 18 June 2009, ICC-01/04-01/07-1215-Conf-Exp-tENG. On 19 June 2009 this document was reclassified as confidential, *ex parte*, only available to the Office of the Prosecutor, Mathieu Ngudjolo's Defence and the Registry.

⁶ 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.

⁷ *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.

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.⁸ 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.⁹

7. The Chamber thus held 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. It did, however, underscore the need to afford the most effective protection possible to the witnesses – which was the principal objective of the measures it ordered – by inviting the Victims and Witnesses Unit (“the VWU”) to contact the Prosecutor to this end, if appropriate.
8. This decision was the subject of two separate applications for leave to appeal, respectively from the Prosecutor¹⁰ and Mathieu Ngudjolo’s Defence.¹¹ The parties filed a response to each application.¹²
9. On 14 July 2009, the Chamber dismissed the application from the Defence for Mathieu Ngudjolo and partially granted the Prosecutor’s application on the issue

⁸ ECHR, *Huvig v. France* and *Kruslin v. France*, Judgments of 24 April 1990.

⁹ ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 40.

¹⁰ 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.

¹¹ 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.

¹² 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.

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”.¹³

10. 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”.¹⁴ 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”.¹⁵ The Appeals Chamber 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.” (“the Appeals Chamber Judgment”).¹⁶

11. On 16 February 2010, the Chamber received observations from the Registrar in accordance with regulation 24 *bis*(1) of the Regulations of the Court (“the Registrar’s Observations”).¹⁷ In an e-mail to the Chamber on 22 February 2010, the Defence for Mathieu Ngudjolo stated that it would not file submissions on the Registrar’s Observations. It further underscored that it “[TRANSLATION]

¹³ *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, p. 13.

¹⁴ 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.

¹⁵ ICC-01/04-01/07-1718-Conf-Exp, para. 52.

¹⁶ *Idem*.

¹⁷ Registry, “*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)*”, 16 February 2010, ICC-01/04-01/07-1875-Conf-Exp.

wholly concurred” with the Registrar’s findings and that it wished to refer “[TRANSLATION] also to all of its previous submissions to the Chamber on the *sub judice* matter, which it considered as reproduced verbatim and in full.”¹⁸ On 25 February 2010, the Prosecutor considered it necessary to file his own observations (“the 25 February 2010 Observations”).¹⁹

12. On 11 March 2010, the Prosecutor made a further separate request for the Chamber to take a certain number of measures set out at paragraph 27 (hereinafter “the 11 March 2010 Request”).²⁰

13. In its response of 25 March 2010, the Defence for Mathieu Ngudjolo moved the Chamber to dismiss all of the petitions set out in the said Request (“the 25 March 2010 Response”).²¹

14. The purpose of the present decision is therefore not only to adjudge the 12 June 2009 Brief anew in pursuance of the directions of the Appeals Chamber set out at paragraph 52 of its Judgment, but also to respond to the 11 March 2010 Request filed by the Prosecutor subsequently to the Judgment.

15. However, the Prosecutor’s petitions in the 11 March 2010 Request are articulated differently and at times contradict those in the 12 June 2009 Brief, on which the Appeals Chamber ruled in its Judgment. In this respect, the Prosecutor did not

¹⁸ E-mail from the Defence for Mathieu Ngudjolo to the Chamber on 22 February 2010 at 7:05.

¹⁹ Office of the Prosecutor, “Prosecution’s Response to ‘*Observations du Greffe en vertu de la norme 24bis-l 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.

²⁰ Office of the Prosecutor, “Prosecution’s Request for Access to Material in Edition to the Registry’s Reports on Ngudjolo’s non-Privileged Communications, pursuant to the Appeals Chamber Judgment of 9 December 2009 [ICC-01/04-01/07-1718-Conf-Exp]”, 11 March 2010, ICC-01/04-01/07-1959-Conf-Exp.

²¹ Defence for Mathieu Ngudjolo, “*Réponse de la Défense à « Prosecution’s Request for Access to Material in Edition to the Registry’s Reports on Ngudjolo’s non-Privileged Communications, pursuant to the Appeals Chamber Judgment of 9 December 2009 [ICC-01/04-01/07-1718-Conf-Exp] » (ICC-01/04-01/07-1959-Conf-Exp du 11 mars 2010)*”, 25 March 2010, ICC-01/04-01/07-2000-Conf-Exp.

state his position or indicate whether he was minded to withdraw and replace the latter Request with that of 11 March 2010.

16. The Chamber notes that the 11 March 2010 Request – whose ambit exceeds the 12 June 2009 Brief insofar as the Prosecutor specifically extends his petitions to all of the Registry’s reports to date – also provides greater support for the arguments advanced. The Chamber will therefore consider it as an updated request which supersedes the 12 June 2009 Brief and hereby decides to implement the Appeals Chamber’s directions for all of the conversations for which access is sought through the 11 March 2010 Request. Accordingly, the present decision is confined to responding thereto.

II. The parties’ main submissions and the Registrar’s Observations

17. On 23 June 2009, the Defence for Mathieu Ngudjolo argued as follows:

The Defence is of the view that the purpose of such a request, namely disclosure of the recordings of the conversations cited, is to subvert and obstruct the Accused’s defence, thereby undermining his right to a fair trial, in violation of article 67(1)(e) of the Rome Statute. If such a request were to be granted, it is almost certain, at the stage which Mathieu Ngudjolo’s team has reached in the field, that nobody else would come to testify in favour of the Accused, who would then be deprived of all evidentiary material enabling him to formulate a proper reply to the Prosecutor’s case. It is through his contacts that Mathieu Ngudjolo contributes to his defence.²²

Such a measure would be inconsistent with a fair trial, throwing into disarray the defence strategy of the Accused, who is simply seeking, through his contacts, to plan his investigations.²³

The Defence for Mathieu Ngudjolo submits that it is wrong for the recordings of Mathieu Ngudjolo’s communications and list of contacts, which are internal Detention Centre documents, to be transmitted to the Prosecutor, who seeks to use them against the Accused. The Detention Centre is not a place where evidence against the accused should be gathered.²⁴

Disclosure as requested by the Prosecution, particularly in order to use the content of Mathieu Ngudjolo’s conversations about Bogoro as evidence against him, could

²² ICC-01/04-01/07-1238-Conf-Exp-tENG, para. 47.

²³ *Ibid.*, para. 48.

²⁴ *Ibid.*, para. 50.

constitute a violation of the absolute right of the Accused against self-incrimination under article 67(1)(g) of the Statute. In the context of criminal proceedings, the Accused must be able to remain silent if he so wishes. To confront him at trial with conversations recorded during monitoring at the Detention Centre is a serious violation of the rights of the accused. Monitoring is specific, circumscribed and cannot be used against the Accused.²⁵

18. In her Observations, the Registrar takes the view that the transcripts of monitored telephone conversations do not fall within the ambit of material filed in the detention record.²⁶ She further recalls that the Appeals Chamber did not adjudge this matter but confined itself to stating that the Trial Chamber had erred in law in exercising the discretion vested in it by virtue of regulation 92(3) of the Regulations of the Court.²⁷ She therefore views her analysis as consistent with the Appeals Chamber Judgment.²⁸

19. The Registrar is of the opinion that insofar as the information extracted from the transcripts of monitored telephone conversations does not fall within the sphere of the detention record, the Chamber's discretion to disclose the information contained therein under regulation 92(3) of the Regulations of the Court need not be exercised.²⁹ She considers the disclosure of information extracted from telephone call monitoring conducted pursuant to regulations 174(2) and 175(2) of the Regulations of the Registry as strictly governed by the statutory provisions of the Court.³⁰

20. The Registrar recalls that regulation 171 of the Regulations of the Registry effectively prohibits the disclosure of any information extracted from, *inter alia*, telephone calls, to persons other than the Registrar and the Chief Custody Officer, save for those exceptions specifically laid down by the Regulations of the

²⁵ *Ibid.*, para. 52.

²⁶ ICC-01/04-01/07-1875-Conf-Exp, para. 13.

²⁷ *Ibid.*, para. 14.

²⁸ *Ibid.*, para. 15.

²⁹ *Ibid.*, para. 16.

³⁰ *Ibid.*, para. 17.

Registry,³¹ including an offence against the administration of justice or a breach of victim and witness security.³² Information concerning victim and witness security may be disclosed to the Chamber pursuant to article 68 of the Rome Statute, as may information regarding the commission of an offence against the administration of justice on the basis of regulation 175(10) of the Regulations of the Registry. In the view of the Registrar, save for these two scenarios, any other category of information, such as that pertaining to the commission of crimes set out in the document containing the charges, remains within the purview of the prohibition under regulation 171 of the Regulations of the Registry and must not be disclosed.³³

21. Lastly, the Registrar regards the prohibition on disclosure of information containing incriminating or exculpatory evidence of relevance to the case at bar as also underpinned by a threefold concern: the legality of the evidence, the protection of the impartiality of the Bench, and the neutrality of the Registry.³⁴ For the Registrar, it would be unfair to the person under prosecution if the monitoring of telephone conversations were to be used for purposes other than those of which counsel and client are apprised, particularly for gathering incriminating evidence in the case against that person.³⁵ It is for the Chamber to assess whether obtaining incriminating and exculpatory evidence through the Registry may affect the impartiality of the Bench.³⁶ Finally, the use at trial of evidence gathered from telephone monitoring directed by the Registrar of her own initiative may, in her view, compromise her neutrality in the proceedings before the Court.³⁷

³¹ *Ibid.*, para. 18.

³² *Ibid.*, para. 21.

³³ *Idem.*

³⁴ *Ibid.*, para. 23.

³⁵ *Ibid.*, para. 24.

³⁶ *Ibid.*, para. 26.

³⁷ *Ibid.*, para. 27.

22. In his 25 February 2010 Observations, the Prosecutor petitioned the Chamber to dismiss the Registrar's Observations "without entertaining the submissions contained therein."³⁸
23. On the basis of a joint reading of article 43(1) of the Statute, which provides: "[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court [...]", and regulation 24 *bis* of the Regulations of the Court, which allows it only to make written or oral submissions to a chamber "when necessary for the proper discharge of the Registry's functions", the Prosecutor first contends that the Registrar's Observations cannot be founded on the second of the two provisions. He considers that regulation 24 *bis* does not authorise the Registrar "to comment on the submissions of other parties and participants, or to express views about judicial decisions made by Chamber", much less to "reinterpret[...] judgments from the Appeals Chamber or [...] invit[e] a Trial Chamber to disregard a binding ruling from the Appeals Chamber".³⁹
24. The Prosecutor then asserts that, contrary to the Registrar's argument, "[t]he Appeals Chamber found that Regulation 92(3) was applicable to the instant case, which necessarily implies that the monitored information fell within the detention record."⁴⁰ In his view, it follows that the Appeals Chamber Judgment entitled parties to ask to consult the content of the transcripts of Mathieu Ngudjolo's telephone conversations and that the Chamber may grant such a request.⁴¹
25. The Prosecutor further disputes the Registrar's analysis that the transcripts of telephone conversations made pursuant to regulations 174(2) and 175(2) of the

³⁸ ICC-01/04-01/07-1918-Conf-Exp, para. 4.

³⁹ *Ibid.*, para. 7.

⁴⁰ *Ibid.*, para. 9.

⁴¹ *Ibid.*, para. 10.

Regulations of the Registry cannot be transmitted to the Chamber for the purposes of the trial since to do so would contravene the principles of legality of the evidence, impartiality of the Bench and neutrality of the Registrar.⁴² In his view, the Registrar disregards the principle that the Regulations of the Registry “shall be read subject to the Statute, the Rules and the Regulations of the Court” and is at variance with the Appeals Chamber position that the Chamber may “transmit the information to the parties regardless of the fact that the monitoring measures were ordered by the Registrar pursuant to Regulations 174 and 175 of RoR.”⁴³ Further still, he contends that the Registrar fails to consider the duty of the Chamber to ensure the fair conduct of proceedings with full respect for the rights of the Accused, thus requiring it to balance such rights with the responsibilities cast on the Office of the Prosecutor by article 54(1) of the Statute.⁴⁴

26. Finally, the Prosecutor does not accept the argument that the Registrar’s neutrality could be affected, were information to be used at trial which had been obtained during the monitoring which she ordered. Here too, he is of the view that it lies with the Chamber to act as arbiter of the interests at stake, given the observations of the parties concerned, and to implement the Appeals Chamber ruling unimpeded by the Registrar.⁴⁵

27. In his 11 March 2010 Request, the Prosecutor ultimately prays the Chamber to:

- a. authorise prosecutorial access to the full recordings of Mathieu Ngudjolo’s non-privileged telephone conversations listed in Annex A to his Request;
- b. direct the transcription, translation and analysis of the conversations in Kilendu [REDACTED] listed in Annex B, and grant prosecutorial access to such analyses; and

⁴² *Ibid.*, para. 13.

⁴³ *Ibid.*, para. 15.

⁴⁴ *Ibid.*, para. 16.

⁴⁵ *Ibid.*, para. 17.

c. direct the Registry to reinstate part of the redacted passages of the reports analysing Mathieu Ngudjolo's telephone conversations, as specified in Annex C.⁴⁶

28. He asserts that, pursuant to regulation 92(3) of the Regulations of the Registry and in light of the Appeals Chamber Judgment, his petitions *must* be granted given the duties and obligations cast on him by articles 54(1) and 68 of the Statute.⁴⁷ In his opinion, "it is unjustified to bar, *on principle*, prosecutorial access to the transcripts of Ngudjolo's communications included in the Registry's Reports."⁴⁸

29. He emphasises that these telephone conversations may affect witnesses' continued cooperation with the Court and the content of their evidence, all the more so given the reports of threats to prosecution witnesses and certain other witnesses' unexpected refusal to testify or their giving accounts of events which contradict their earlier statements.⁴⁹ He notes that knowledge of the transcripts' content will enable him to assess the situation, given his sustained contact with his witnesses and that he is best informed as to any ties they may have to the Accused or militias members involved in the case and as to their personal situation and environment. He maintains that he has no interest in intervening in the legitimate defence strategy pursued by Mathieu Ngudjolo or in violating his privacy, but that conversations seeking to procure false testimony and thereby frustrate the search for the truth are not lawful and do not warrant the same level of privacy protection. He therefore considers that "[TRANSLATION] it is important to evaluate the credibility of witness testimony in order to determine whether a witness has been intimidated, coached or induced to testify in a certain way." Finally, he notes that in the view of the Registrar, the information in her reports

⁴⁶ ICC-01/04-01/07-1959-Conf-Exp, p. 3.

⁴⁷ *Ibid.*, para. 8 (emphasis added).

⁴⁸ *Ibid.*, para. 9 (emphasis added).

⁴⁹ *Ibid.*, para. 10.

did not pertain to the Defence strategy and that the fourth report in particular⁵⁰ only concerned information which relates to witness protection and was intended to clarify earlier reports or information on conversations between the Accused and an unauthorised third party.⁵¹

30. To perform a meaningful analysis of the information in the Registrar's reports and discharge his statutory obligations, the Prosecutor requests the reinstatement of certain passages which were redacted from the versions provided to him.⁵²

31. He similarly seeks the transcription, translation and analysis of those conversations on the identification or preparation of witnesses which were entirely or partially conducted in Kilendu [REDACTED]. Staffing problems which had impeded translation are, to his understanding, now resolved and the prompt disclosure of a version of the Registrar's reports containing fewer redactions and an analysis of those hitherto untranslated parts would allow him to determine which conversations should be provided to him in full.⁵³

32. In support of these various petitions, the Prosecutor invokes his binding obligations under article 54(1)(a) of the Statute. By way of example, he makes reference to: a conversation [REDACTED] which appears to implicate Germain Katanga in the attack on Bogoro;⁵⁴ the Accused's alleged revelation of the identity of witnesses to third parties during conversations;⁵⁵ conversations in which potential witnesses were allegedly intimidated, emphasising the effect that such tactics could have on their

⁵⁰ Registry, "Quatrième rapport du Greffier sur l'écoute des communications non couvertes par le secret professionnel de M. Mathieu Ngudjolo", 19 October 2009, ICC-01/04-01/07-1542-Conf-Exp.

⁵¹ *Ibid.*, paras. 11 and 12.

⁵² *Ibid.*, para. 13.

⁵³ *Ibid.*, paras. 14-17.

⁵⁴ *Ibid.*, paras. 18 and 19.

⁵⁵ *Ibid.*, para. 20.

subsequent testimony;⁵⁶ certain conversations concerning “secret meetings” at which prosecution witnesses were allegedly discussed;⁵⁷ other conversations suggesting that the Defence has sought to “coach” or suborn witnesses to give testimony favourable to him;⁵⁸ and conversations suggesting that certain witnesses for the Accused were invited to give false testimony.⁵⁹

33. The Prosecutor further emphasises his obligations under article 68 of the Statute and responsibilities towards witnesses whom, in conjunction with the VWU, he must protect. In his view, such a duty entails being in possession of any information which may require him to seek adjustments to current protective measures.⁶⁰

34. Lastly, he underlines that the information sought pertains to non-privileged conversations which may be monitored by the Chief Custody Officer and the Registrar.⁶¹ He argues that by approving the disclosure of information to him on 9 June and 20 July 2009, the Chamber has in principle authorised the disclosure of the impugned conversations on the basis of regulation 92(3) of the Regulations of the Court.⁶² Finally, he contends that disclosure of the requested information “does not unduly impinge on Mathieu’s Ngudjolo’s right to communicate, nor is it in violation of his right against self-incrimination protected under Article 67 and Rule 74”, since the Accused was informed of the possible telephone conversation monitoring, knowingly took the risk to disclose confidential information to witnesses and had received no assurances that “conversations would not be used in proceedings (or in investigations)”.⁶³

⁵⁶ *Ibid.*, para. 21.

⁵⁷ *Ibid.*, para. 24.

⁵⁸ *Ibid.*, para. 26.

⁵⁹ *Ibid.*, para. 27.

⁶⁰ *Ibid.*, para. 29.

⁶¹ *Ibid.*, para. 30.

⁶² *Ibid.*, para. 31.

⁶³ *Ibid.*, para. 32.

35. In its 25 March 2010 Response, the Defence for Mathieu Ngudjolo objects to all of the petitions set forth in the Prosecutor's Request. The Defence first submits that by relying on regulation 92(3) of the Regulations of the Court and the Appeals Chamber Judgment to seek access to transcripts of Mathieu Ngudjolo's non-privileged telephone conversations, the Prosecutor raises a ground which he hitherto had not invoked.⁶⁴ The Defence then argues anew "[TRANSLATION] that there is no authorisation in the basic texts for the use at trial of telephone conversations obtained through the monitoring effected by the Registrar pursuant to regulations 174 and 175 of the Regulations of the Registry".⁶⁵ As the neutral organ of the Court, the Registrar cannot therefore disclose to the Prosecutor the content of these conversations to enable him to "[TRANSLATION] extract evidence"⁶⁶ therefrom without infringing the right of the Accused to privacy, compelling him to incriminate himself and breaching the requirement of fairness in evidence-gathering.⁶⁷

III. Discussion

36. The Chamber reformulates all of the petitions articulated by the Office of the Prosecutor in the 11 March 2010 Request as follows: the Office of the Prosecutor considers itself entitled to request, in a language which it understands and in unredacted form, the entire content of Mathieu Ngudjolo's telephone conversations enumerated in Annex A to its Request, as well as the various reports produced by the Registrar, albeit with fewer redactions, in accordance with Annex C to the 11 March 2010 Request. The Office of the Prosecutor requires the Registry to translate and analyse several conversations in Kilendu [REDACTED]

⁶⁴ ICC-01/04-01/07-2000-Conf-Exp, paras. 26 and 27.

⁶⁵ *Ibid.*, paras. 36-42.

⁶⁶ *Ibid.*, para. 45.

⁶⁷ *Ibid.*, paras. 45-49.

37. It must be recalled that the 11 March 2010 Request extends the ambit of prosecutorial petitions set out in the 12 June 2009 Brief⁶⁸ – adjudged by the Appeals Chamber in a ruling which considered only the information contained in the initial report – to all of the Registry’s reports.⁶⁹

38. In addition, the Chamber must now address the issue of whether the general right to transcript disclosure which the Prosecutor invokes in his 11 March 2010 Request is envisaged by the texts governing the functioning of the Court and, if not, whether that right accords therewith. The Prosecutor has thereby added to the Appeals Chamber directions to the Chamber 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.”⁷⁰

a. Is the Prosecutor entitled to disclosure of the transcripts of all of the telephone conversations sought?

39. It is first necessary to inquire as to whether the detention record includes the transcripts of telephone conversations which the Prosecutor is now seeking. Indeed, the submissions received by the Chamber subsequent to the Appeals Chamber Judgment raised the issue of the precise content of the detention record. The Appeals Chamber determined that regulation 92 of the Regulations of the Court founded the decision before it and directed the Chamber to rule anew in accordance with that provision which is entitled “Confidentiality of the detention record”.

40. In this respect, the Chamber recalls that regulation 189 of the Regulations of the Registry concerning the “Detention record” provides: “[a] detention record shall

⁶⁸ ICC-01/04-01/07-1959-Conf-Exp, p. 3.

⁶⁹ Registry, “Registrar’s initial report on the monitoring of Mathieu Ngudjolo Chui’s nonprivileged communications further to the Registrar’s decision of 12 February 2009”, 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp-tENG.

⁷⁰ ICC-01/04-01/07-1718-Conf-Exp, para. 52.

be maintained for every detained person received into the detention centre. The record shall contain *inter alia*: [...] (c) Any order restricting access to news and contact issued in accordance with regulation 101 of the Regulations of the Court”.⁷¹

41. Firstly, the Chamber notes that this list is not exhaustive and subparagraph (c) makes explicit provision for the incorporation in the detention record of decisions issued pursuant to regulation 101 of the Regulations of the Court.
42. Secondly, it considers that such orders will frequently rely on information concerning correspondence, telephone conversations or visits which is necessary to substantiating the orders and thereby forms an inseverable part thereof. Moreover, it is conceivable that a chamber may have to cite or append to an order made pursuant to the aforesaid regulation 101 the totality or excerpts of information to which recent reference has been made and on which the Chamber considered it necessary to rely. This is clearly not the case in this instance. Nonetheless, it is self-evident that the telephone conversations selected by the Registry as warranting the Bench’s attention necessarily form an integral part of the orders issued by the Chamber.
43. The inclusion in the detention record of all information gathered by the Registrar pursuant to the relevant provisions of the Regulations of the Registry can certainly not be contemplated. Information founding orders that restrict a detainee’s contact with other persons must alone be included, in this instance the Registrar’s reports to which the Defence was given access and the full transcripts of Mathieu Ngudjolo’s telephone conversations mentioned in the reports. The Chamber takes the view that it would be somewhat artificial to dissociate orders issued by the Chamber under regulation 101 of the Regulations of the Court from the material which gave rise to the orders. Accordingly, from a joint and logical

⁷¹ Emphasis added.

reading of regulations 92 of the Regulations of the Court and 189 of the Regulations of the Registry, it follows that these transcripts do indeed fall within the detention record.

44. In this respect, the Chamber is mindful of the decision issued on 16 December 2008 by the Single Judge in *Bemba*,⁷² recalling that the transcripts of telephone conversations “fall[...] outside the scope of the detention record as such”.⁷³ However, the Chamber notes that in that case no order was issued under regulation 101 of the Regulations of the Court.

45. The issue which then arises is that of determining the conditions for disclosure of the detention record or part thereof to the Office of the Prosecutor.

46. According to the applicable texts, the detention record – including orders issued under regulation 101 of the Regulations of the Court and their various annexes or supporting documentation, if any – cannot automatically be disclosed to any interested party, in this case the Office of the Prosecutor.

47. The Chamber first recalls that regulation 92(1) states the confidentiality of detention record. In this regard, the Chamber has already held that, in principle, this record is not accessible to other parties and participants and that the term “confidential” used in regulation 92(1) must in fact be understood as “confidential *ex parte*”. Thus, as the Chamber had occasion to point out:

the first paragraph of [...] regulation [92 of the Regulations of the Court] must be read in light of its other provisions, whose effect is that the detention record must be regarded as a confidential *ex parte* document available only to the accused’s Defence and to the Registry. Thus paragraph 4 states that the detained person shall be informed of any request for access to his detention record and shall be given the opportunity to be heard or to submit his views before any decision by the Chamber on its disclosure. [...] It follows that the Registry’s report of 29 June 2009 should be disclosed only to the Defence for Mathieu Ngudjolo, since it forms part of the

⁷² Pre-Trial Chamber III, *Decision on Re-classification of Monitoring Reports*, 16 December 2008, ICC-01/04-01/08-325.

⁷³ ICC-01/04-01/08-325, paras. 8 and 12.

detention record, and this is, in principle, available only to the Defence and to the Registry. [...]⁷⁴

48. The Chamber now wishes to underscore the importance of the discretion with which it is invested. It must be noted that neither the Statute, specifically articles 54(1) and 68, nor the Rules of Procedure and Evidence include provisions which explicitly vest the Prosecutor with a general right to disclosure of the content of part of the detention record, in this instance the transcripts of Mathieu Ngudjolo's telephone conversations. Regulation 92(3) of the Regulations of the Court, to which the submissions make frequent reference, does not enshrine any prosecutorial right to disclosure: discretion in this respect lies with the Chamber, as the Appeals Chamber has expressly acknowledged.⁷⁵

49. Such discretionary power requires the Chamber to balance any conflicting interests at stake and, where necessary, empowers it to sift out those documents or excerpts whose disclosure it may approve. This was the Chamber's approach in the present case, and it considered that it need disclose to the Prosecutor only the Registrar's reports in redacted form, excluding the telephone conversation transcripts.

50. Finally, the Chamber recalls that regulation 92(4) prescribes that the detained person must be informed of any request for access to his or her detention record and is entitled to be heard or to submit views.

⁷⁴ *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, paras. 36 and 37.

⁷⁵ ICC-01/04-01/07-1718-Conf-Exp, para. 44.

51. Having set out these general observations, it now should be determined whether to authorise disclosure of all or part of the detention record to the Prosecutor in the present case, and, to this end, it is necessary to perform the balancing exercise prescribed by the Appeals Chamber.

b. Should all of the telephone communications referred to in Annex A to the 11 March 2010 Request be disclosed to the Prosecutor in this instance?

52. The Appeals Chamber directs the Chamber to strike a balance between the rights of the Accused (article 67 of the Statute) and prosecutorial responsibilities (article 54(1)(a) of the Statute).⁷⁶

53. In the view of the Prosecutor, “[TRANSLATION] the Prosecution has the obligation to establish the truth in this case, based on incriminatory or partially exculpatory material. To this end, prosecutorial access to the transcript of the communications in question is essential”.⁷⁷ The Prosecutor adds that he is duty-bound “[TRANSLATION] to investigate and to present relevant evidence at trial”⁷⁸ and “[TRANSLATION] where a witness is intimidated, and then, to general surprise, his or her testimony differs from his or her previous incriminating statements, significant weight will be attached the intimidation of the witness in establishing the truth, as a result of the serious doubts cast over the reliability of the new version of his or her evidence”.⁷⁹

54. He further asserts that:

It is equally important for the presentation of the full facts to the Chamber, so that the Chamber may discover the truth, that it considers the content of conversations that coach or induce favourable testimony from potential prosecution or defence witnesses. The Prosecution has no interest in intervening in legitimate defence strategy, or in violating the accused’s legitimate privacy interests. At the same time, conversations

⁷⁶ ICC-01/04-01/07-2010-Conf-Exp, para. 52.

⁷⁷ ICC-01/04-01/07-1959-Conf-Exp, para. 18.

⁷⁸ *Ibid.*, para. 21.

⁷⁹ *Idem.*

aimed at procuring false testimony are designed to distort the truth-finding process and, as such, are neither legitimate nor meriting the same level of privacy. At trial, it is an important fact in evaluating credibility of witness testimony to know if the witness has been intimidated, coached, or otherwise induced to testify in a certain way.⁸⁰

55. The Prosecutor further argues that it is for the Chamber to afford consideration to his obligations under article 68 of the Statute.⁸¹ In particular, he is of the view that “information bearing on the possibility of inappropriate contacts with the Prosecution’s witnesses, including improper attempts to locate witnesses in the court protection program, is obviously material to the protection of witnesses [...]”⁸² and in this respect, he underlines the responsibilities towards his witnesses which, together with the VWU, he must assume.

56. The Chamber first wishes to underscore that the Registrar’s practice in the present case differs from the practice she adopted in *Bemba* as regards the recording of the Accused’s telephone conversations.⁸³ In fact, in *Katanga/Ngudjolo*, the Registrar did not consider it necessary to disclose the numerous telephone calls to the Chamber which, moreover, were made over a prolonged period. She did, however, thoroughly analyse of the calls in her reports, without confining such analysis to the mere transmission of tables of verbatim excerpts of conversations.

57. In the view of the Chamber, it is established that the Registrar’s analysis of the telephone conversations has enabled her to bring to the fore all of the information of potential relevance to the Chamber and the parties concerned, where such conversations may constitute a breach of the Regulations of the Registry or the various provisions governing the running of the Detention Centre, or may breach witness security. It is therefore apparent to the Chamber that the Office of the Prosecutor already has access through the Registrar’s reports, which contain

⁸⁰ *Ibid.*, para. 11

⁸¹ *Ibid.*, paras. 29-33.

⁸² *Ibid.*, para. 29.

⁸³ ICC-01/04-01/08-325.

numerous excerpts of telephone conversations, to all of the information of relevance to him and which potentially impacts on witnesses.

58. The Registrar views the selection in her reports as specifically aimed at shielding from the Prosecutor any information of which he need not be apprised inasmuch as it concerns:

- a. conversations of a private and/or an affective nature with his wife, family members or relatives;
- b. conversations of a spiritual or religious nature;
- c. general discussions of family, domestic or financial matters;
- d. considerations pertaining to the Accused's health;
- e. financial considerations linked to the conduct of his investigations and his defence in general; and
- f. the Defence strategy, as previously decided with his Counsel, insofar as it concerns the conduct of investigations, the organisation of meetings in the Democratic Republic of the Congo and the determination of those matters founding his defence.

59. Such information comprises conversations or parts of the Registrar's reports which, as the case may be, fall within the purview of article 8 of the European Convention on Human Rights or the right to mount his defence, as understood by the Appeals Chamber. As the Chamber has already recalled, any interference of a public authority in the exercise of such rights must be in accordance with the

law and necessary and proportionate to the legitimate aim pursued.⁸⁴ While the existence of legal provisions is beyond question here, it is nonetheless essential to inquire as to the necessity and proportionality of the proposed prosecutorial interference, on the understanding that the Chamber will not assess the proportionality of the measures where they are unnecessary.

60. Firstly, the Prosecutor submits that full disclosure of the telephone conversations listed in Annex A to the 11 March 2010 Request and the Registrar's reports, albeit with fewer redactions, is essential to the determination of the truth. The Chamber responds to this submission hereunder.

61. 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.

62. Furthermore, the Chamber notes that the causes of the hypothetical discrepancies between the oral evidence given by witnesses and their written

⁸⁴ ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 19.

statements, apparently feared by the Prosecutor, may differ greatly. Whilst the Chamber concurs with the Prosecutor that knowledge of those factors which may influence witnesses and enable their credibility to be assessed could conceivably be of considerable importance in assessing their evidence, the fact remains that disclosure of the transcripts will, in the instant case, not enable the cause of any potential discrepancies between the statements and oral evidence to be ascertained. It is worth recalling in this regard that such factors as the lack of familiarisation procedures by the parties themselves at the Court (witness proofing), the witnesses' travel to The Hague, the formality of the hearings and the ordeal of cross-examination may account for such discrepancies.

63. As concerns the Prosecutor's petition for the translation following transcription, and analysis of conversations in Kilendu, the Chamber has given consideration to those problems, particularly as regards staffing, which were raised by the Registry on several occasions, and has accordingly deferred any such petition. However, at this stage in the proceedings, the analysis can no longer be delayed. The Chamber therefore directs the Registrar to perform the analysis as soon as practicable in accordance with those modalities which it considers the most appropriate and to report to the Chamber on any difficulties it encounters.

64. Secondly, the Prosecutor considers that disclosure of the entirety of the conversations listed in Annex A to his 11 March 2010 Request is necessary to the discharge of his witness protection mandate within the meaning of article 68 of the Statute.

65. In this regard, the Chamber recalls that this concern lies at the heart of each of the decisions prohibiting or restricting Mathieu Ngudjolo's communication. Therefore, as far back as 24 June 2009, the Chamber rendered a decision expressly recalling that it was mindful of the witness protection mandate also conferred on the Prosecutor.

66. On that occasion, the Chamber cited the Appeals Chamber decision of 26 November 2008:

[w]hile the VWU is responsible for specific aspects of witness protection, the Prosecutor has a more general mandate in relation to protection matters under articles 54 (3) (f) and 68 (1) of the Statute. The Appeals Chamber interprets those provisions as ensuring that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses. Such measures could include meeting witnesses in discrete locations rather than in public and keeping their identities confidential. Paragraph 59 of the Submission of the Registrar refers to the need for the Prosecutor to apply good practices when contacting witnesses and, in addition, to the ability of the Prosecutor to enhance the personal security situation of a witness or the physical security of their residence. The obligation of the VWU to advise the Prosecutor on, and recommend the adoption of, appropriate protective measures makes sense. It is a reality that the Prosecutor is in the field and will need to take protective measures during the course of his investigations. Consultation, cooperation and advice are all part of ensuring that individuals are not put at risk during the course of the investigations and prosecutions of the Prosecutor [...]⁸⁵

67. The Chamber added:

44. When assessing each of the conversations, it will therefore be appropriate for the VWU to contact the Office of the Prosecutor whenever necessary so as to benefit from its in-depth knowledge about the situation of each of its witnesses and to decide in close consultation with the Office on any applications for additional protective measures which may appear justified to them. The VWU shall therefore make all necessary recommendations to the Office of the Prosecutor by disclosing to it, where necessary, those excerpts of conversations which are strictly necessary to determining the most suitable protective measures.

45. With respect to the Prosecutor's request for disclosure of the list of "contacts" annexed to the Report, the Chamber must recall that the information contained therein relates to the private life of the accused and that, as matters now stand, it cannot be separated from the content of the recorded conversations. It goes without saying, however, that if the VWU considered that one of the "contacts" merited use for the purpose of determining any further protective measures, it must, subject to the strict necessity recalled above, bring this to the Prosecutor's attention. Interference in Mathieu Ngudjolo's private life would then be justified by the compelling need to ensure the witnesses' current and future protection.

46. Finally, the Chamber now has the opportunity to recall that, when faced with possible abuse, the Registry, and only the Registry, is responsible for reducing the number of "contacts" on the

⁸⁵ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I*, 26 November 2008, ICC-01/04-01/07-776, para. 98 (footnotes omitted).

list. To this end, the Chamber requests the Registry to inform it if it intends to take initiatives in this regard and, if so to specify the nature and time period within which it intends to take them.

68. That invitation to the VWU was repeated in its decisions of 24 July, 25 September and 4 December 2009. Moreover, the Chamber also received assurances from the VWU that it had discharged its obligation and that, to its knowledge, it need not make the “necessary recommendations” to the Prosecutor as provided for at paragraph 44 of the Appeals Chamber’s judgment.

69. The Chamber thereby ensured that the witness protection obligation which the Prosecutor is now seeking to discharge by seeking disclosure of the entire telephone conversations which he itemises was assumed by the neutral organ of the Court which is specifically vested with such mandate. The Chamber further notes that save for exceptional circumstances and in the absence of concrete information, it is not for the Prosecutor, by merely raising arguments of a general and abstract nature, to bring into question the assessment conducted by that unit of the Registry.

70. It follows that the objective of the Prosecutor’s petitions for disclosure has been met and the 11 March 2010 Request cannot be granted, unless the necessity requirement is met.

71. Ultimately, the exercise of balancing the rights of the Accused (article 67 of the Statute) and prosecutorial duties (article 54(1)(a) of the Statute) which the Appeals Chamber directed the Chamber to perform has led the Chamber to favour the rights of Mathieu Ngudjolo in this instance, since, moreover, the security of witnesses who must also be protected (article 68 of the Statute) is not at risk.

c. Determination of petitions concerning the implementation of article 70 of the Statute

72. In the introduction to his 11 March 2010 Request, the Prosecutor sought authorisation to consult a more comprehensive version of the Registrar's reports in order to highlight possible breaches of article 70 of the Statute.⁸⁶

73. The Chamber wishes to point out *in initio* that the reference to article 70 is not repeated in the submissions of the 11 March 2010 Request, raising questions as to the actual importance the Prosecutor attaches to this petition and whether the Bench is obliged to respond thereto. It notes that the 11 March 2010 Request is in fact divided into two main parts addressing the need of the Office of the Prosecutor for sufficient information to implement the provisions of article 54(1) of the Statute, on the one hand, and article 68, on the other. No submission addresses article 70.

74. However, the Chamber does not wish to circumvent the matter but makes the following observations:

a. the Registrar analysed the telephone conversations, mindful that certain passages may constitute an offence under article 70 of the Statute. This is particularly apparent from the Registrar's initial report of 8 June 2009⁸⁷ and the general considerations articulated in her Observations;⁸⁸

b. Rule 165 of the Rules provides: "[t]he Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis [*inter alia*,] of information communicated by a Chamber [...]"⁸⁹ The Chamber has hitherto considered that the recordings of the telephone conversations referred to in the Registry's initial report need

⁸⁶ ICC-01/04-01/07-1959-Conf-Exp, p. 4.

⁸⁷ ICC-01/04-01/07-1195-Conf-Exp-tENG and ICC-01/04-01/07-1233-Conf-Exp, paras. 24-27.

⁸⁸ ICC-01/04-01/07-1875-Conf-Exp, paras. 21 and 22.

⁸⁹ Emphasis added.

not be disclosed –⁹⁰ these being information the Prosecutor requested on 12 June 2009.⁹¹ Nor has the Chamber granted leave to appeal on this point,⁹² and in light of the information now in its possession, it is not minded to revisit this position;

c. However, the Chamber may vary this ruling once it is in receipt of the analysis of the translated transcripts of conversations in Kilendu.

FOR THESE REASONS, THE CHAMBER

PARTIALLY DENIES the 11 March 2010 Request;

DIRECTS the Registrar to include in the Accused's detention record all of the reports to which the Defence was given access and the full transcripts of Mathieu Ngudjolo's telephone conversations mentioned in the said reports;

DIRECTS the Registrar as soon as practicable to transcribe and translate the telephone conversations in Kilendu [REDACTED] in accordance with those modalities which it considers the most appropriate and to report to the Chamber any difficulties which it encounters; and

DIRECTS the Registrar to analyse the said conversations and report thereon to the Chamber.

⁹⁰ ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 40.

⁹¹ ICC-01/04-01/07-1200-Conf-Exp.

⁹² ICC-01/04-01/07-1303-Conf-Exp-tENG, para. 16.

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 10 June 2010

At The Hague, The Netherlands