

**Cour
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**International
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Date: **11 March 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

Public Redacted Document

Public Redacted version of "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 of 9 December 2009 [ICC-01/04-01/07-1718-Conf-Exp]", 11 March 2010, ICC-01/04-01/07-1959-Conf-Exp

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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**Legal Representatives of the
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Detention Section

**Victims Participation and Reparations Other
Section**

On 9 December 2009, the Appeals Chamber issued its “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 (“Appeals Judgment”).¹

In accordance with that decision, the Prosecution hereby requests 1) access to the full record of monitored non-privileged telephone communications that Mathieu Ngudjolo (“Ngudjolo”) had while at the Detention Unit, as identified in Annex A; 2) the translation of, and access to, such conversations listed in Annex B, and 3) the lifting of some of the redactions applied by the Registry in its reports analysing Ngudjolo’s telephone communications, specified in Annex C. The communications have been monitored retroactively pursuant to the Registrar’s Decision dated 12 February 2009² and renewed on 27 February 2009.³

The information sought derives from four reports prepared by the Registry (“Registry Reports”).⁴ Each of these reports reflects the analysis of communications Ngudjolo had during identified timeframes: the First report pertains to calls made from 1 October 2008 to 31 January 2009 (“First Report”);⁵ the second one reflects the analysis of communications Ngudjolo had in February 2009 (“Second Report”);⁶ the third one pertains to the analysis of communications made by Ngudjolo from 1 to 17 March 2009 and from 17 to 31 May 2009 (“Third Report”);⁷ the fourth report pertains to calls made from 17 March to 17 May 2009 and from 1 to 30 June 2009 and analysed

¹ ICC-01/04-01/07-1718-Conf-Exp, 9 December 2009.

² ICC-01/04-01/07-894-Conf-Exp.

³ ICC-01/04-01/07-932-Conf-Exp.

⁴ Voir *infra*.

⁵ Premier 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, ICC-01/04-01/07-1195-Conf-Exp, 8 June 2009 (“First Report”).

⁶ 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, ICC-01/04-01/07-1299-Conf-Exp, 14 July 2009 (“Second Report”).

⁷ 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, ICC-01/04-01/07-1312-Conf-Exp, 17 July 2009 (“Third Report”).

by the Registry (“Fourth Report”).⁸ The Registry Reports also reference excerpts of monitored conversations.

The Prosecution requests full access to the monitored information because the Registry Reports refer only to excerpts (some of which are not fully translated) or summaries of the conversations. In order to obtain further access to relevant information, which is required by the Prosecution to comply with its duties and obligations, the Prosecution only requests that the Registry translate and analyse the conversations or parts thereof conducted in Lendu [REDACTED] that have not been transcribed into French. Last, the Prosecution requests access to a less redacted version of the Registry Reports to determine whether the reports or conversations referred to therein reveal further violations of Article 70 or trigger its obligations under Article 54(1). This submission is based on Articles 54(1) and 68 of the Rome Statute (“the Statute”) and Regulation 92(3) of the Regulations of the Court (“the Regulations”). Once granted full access to the material, pursuant to Article 54, the Prosecution will be better placed to determine whether it is under an obligation to investigate an offence against the administration of justice, as encompassed by Article 70.

Confidentiality

The Prosecution submits this filing as confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence of Ngudjolo, since it contains information that is not accessible to the public nor to the Defence of Germain Katanga. The Prosecution submits Annexes A, B and C to this filing as confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence of Ngudjolo since they

⁸ Annex 1 to 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 », ICC-01/04-01/07-1627-Conf-Exp-Anx1, 11 November 2009 (“Fourth Report”).

contain details of the requested conversations from the Registry Reports which are not accessible to the public or to Germain Katanga's Defence.

Background

1. On 9 June 2009, by oral decision, Trial Chamber II authorised the Registrar to disclose the First Report to the Prosecution.⁹ The Prosecution was then given partial access to Ngudjolo's monitored information contained in said report.¹⁰
2. On 11 June 2009, the Prosecutor submitted to the Trial Chamber the "Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to Prohibit Ngudjolo's Contact with the Outside and to Separate Ngudjolo from the Other Detainees" ("Prosecution's Request").¹¹ In this brief the Prosecution requested, *inter alia*, that the Trial Chamber grant the Prosecution access to the full recorded conversations that were summarized in the First Report; the annex to the First Report; and the list of Mr Ngudjolo Chui's telephone contacts.¹²
3. On 18 June 2009, the Trial Chamber filed with the Registry a redacted version of the First Report and the Prosecution's Request, which were made available to Ngudjolo's defence.¹³ The Defence filed its observations on the First Report on 23 June 2009.¹⁴

⁹ See ICC-01/04-01/07-1718-Conf-Exp, 9 December 2009, para. 4 referring to ICC-01/04-01/07-T-66-CONF-EXP-ENG.

¹⁰ See ICC-01/04-01/07-1718-Conf-Exp, 9 December 2009, para. 4.

¹¹ ICC-01/04-01/07-1200-Conf-Exp-tENG.

¹² ICC-01/04-01/07-1200-Conf-Exp-tENG, paras 28-35.

¹³ ICC-01/04-01/07-1215-Conf-Exp.

¹⁴ ICC-01/04-01/07-1238-Conf-Exp.

4. On 24 June 2009, the Trial Chamber denied the Prosecution's Request in its "Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre" ("24 June 2009 Decision").¹⁵ In this decision the Trial Chamber determined that "the Prosecutor cannot use the content of these conversations to make a determination of the truth".¹⁶ For that reason, the Trial Chamber considered "that the recordings of the conversations need not be fully disclosed to the Office of the Prosecutor for their use as incriminating or exonerating evidence."¹⁷
5. Both parties appealed the 24 June 2009 Decision.¹⁸ On 14 July 2009, the Trial Chamber denied the Defence's leave to appeal while it granted, in part, the Prosecution's leave to appeal.¹⁹ The Appeals Chamber identified the issue on appeal as the following:

[W]hether 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.²⁰

6. In its Appeals Judgment, the Appeals Chamber reversed the 24 June 2009 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".²¹ In doing so, it explained, "the Trial Chamber must endeavour to strike a balance between the rights of the accused, [...] as well as his right to privacy and right to conduct his defence, on the one hand, and the Prosecutor's responsibilities

¹⁵ ICC-01/04-01/07-1243-Conf-Exp-tENG.

¹⁶ ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 40.

¹⁷ *Ibid.*

¹⁸ ICC-01/04-01/07-1254-Conf-Exp ; ICC-01/04-01/07-1255-Conf-Exp.

¹⁹ ICC-01/04-01/07-1303-Conf-Exp.

²⁰ ICC-01/04-01/07-1718-Conf-Exp, para. 39.

²¹ ICC-01/04-01/07-1718-Conf-Exp, para. 52.

pursuant to article 54(1), on the other.²² In its Judgment, the Appeals Chamber stressed that “the parties may request access to such information, and access may be granted by the relevant Chamber”.²³ It further stressed that the Prosecution should not be deprived of access to all of the monitored information because such material might be of great importance.²⁴ The Appeals Chamber noted that the Prosecution’s access to this information may be necessary for it to discharge its duty under Article 54(1) of the Statute.²⁵

7. The Prosecution’s present submission concerns information emanating from all of the Registry’s Reports since the rationale underlying the Appeals Chamber’s Judgment on this specific issue, albeit based exclusively on communications referred to in the First Report,²⁶ applies *ipso facto* to the communications referred to and included in excerpted or summarized form in all the reports filed by the Registry.²⁷

The Prosecution has a right to access the material in addition to the Registry’s Reports pertaining to Ngudjolo’s non-privileged conversations

8. Pursuant to Regulation 92(3) of the Regulations of the Court²⁸ and in light of the Appeals Chamber’s ruling, the Prosecution submits that it should be granted access to the complete transcripts of the selected communications including material not translated to date, as well as a less redacted version of the Registry Reports to determine whether to seek additional material. This

²² ICC-01/04-01/07-1718-Conf-Exp, para. 52.

²³ ICC-01/04-01/07-1718-Conf-Exp, para. 49.

²⁴ ICC-01/04-01/07-1718-Conf-Exp, paras 44 and 50.

²⁵ ICC-01/04-01/07-1718-Conf-Exp, para. 50.

²⁶ “Mémoire urgent de l’Accusation, en application de la norme 101-3 du Règlement de la Cour, aux fins d’interdiction des contacts de Mathieu Ngudjolo avec l’extérieur et de séparation de Mathieu Ngudjolo d’avec les autres détenus”, ICC-01/04-01/07-1200-Conf-Exp, 12 June 2009.

²⁷ ICC-01/04-01/07-1299-Conf-Exp; ICC-01/04-01/07-1312-Conf-Exp; ICC-01/04-01/07-1627-Conf-Exp-Anx1.

request stems from the Prosecution's duties and obligations enshrined in Articles 54(1) and 68 of the Statute, and it does not unfairly impinge on the accused's rights under Article 67 of the Statute.

Request for access to transcripts of identified communications

9. First, the Prosecution wishes to stress that, regardless whether the telephone conversations might be used as evidence in proceedings before the Court, it is unjustified to bar, on principle, prosecutorial access to the transcripts of Ngudjolo's communications included in the Registry's Reports. Indeed, the Trial Chamber deemed it appropriate to disclose the First Report to the Prosecution on 9 June 2009, which contained summarized parts of communications made by Ngudjolo.²⁹

10. The conversations may substantially bear on the willingness of proposed Prosecution witnesses to testify and the substance of their evidence. This is particularly important now, given the increasing frequency of reports that Prosecution witnesses are being threatened and the inescapable facts that witnesses are suddenly balking at testifying or providing different versions inconsistent with their prior statements. Access to these transcripts of the conversations will enable the Prosecution to better assess the situation since the Prosecution has maintained contact with its witnesses over the years and has acquired a unique knowledge of their ties to the accused, or to other members of the militias involved in this case, as well as of their environment and personal situation.

²⁸ "A Chamber may, *proprio motu* or at the request of any interested person, order that the detention record or part thereof be withheld or disclosed".

²⁹ ICC-01/04-01/07-T-66-CONF-EXP-ENG ET, 9 June 2009, p. 39, lines 11 to 15.

11. 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 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 protection. 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.

12. Before providing access to the material at issue, the Registry had determined that the information contained in the Reports could be disclosed because it did not pertain to the Defence's strategy. In particular, the Registrar indicated that the first section of the Fourth Report dedicated to the analysis of monitored communications Ngudjolo had from 17 March to 15 April 2009, included solely information regarding witness protection or was provided specifically to clarify previous reports.³⁰ Other sections of the Fourth Report pertain specifically to information related to conversations Mathieu Ngudjolo had with unauthorized third parties.³¹ Furthermore, the Trial Chamber also noted, in relation to the information contained in one of the Reports, that it was not related to Defence's investigations..³²

Request for less redacted versions of the Registry's Reports

³⁰ Fourth Report, para. 1.

³¹ Fourth Report, para. 8.

13. In order to analyse the information in the Registry Reports, the Prosecution requests the lifting of certain redactions currently applied to the Reports submitted to the Office of the Prosecutor. The Prosecution requires access to a fuller recitation of the information contained therein to comply with its obligations under the Statute. Based on that further information, currently redacted, the Prosecution would be in a position, from the outset, to identify, as narrowly as possible, its request for access to complete transcripts, as detailed herein below.

Request for translations of communications conducted in Lendu or in an unidentified language

14. Some of the conversations transcribed in the Registry Reports which appear in sections related to identification or preparation of witnesses, were conducted, in whole or in part, in Lendu/Kilendu.³³ On occasion, Ngudjolo and his interlocutor change the language of the conversation to Lendu or to [REDACTED], notably when witnesses are being discussed.³⁴

15. Prior to the filing of the Registry Reports, [REDACTED]. Therefore, those conversations were neither transcribed nor analysed with any degree of precision. In fact, the summary of some of these communications referred to in the Registry Reports is based on a contextual interpretation made by Swahili interpreters.³⁵

³² ICC-01/04-01/07-1319-Conf-Exp, para. 8. In its 20 July 2009 Decision the Trial Chamber had declared that it remained “unconvinced that the information contained in the Redacted Third Report can be included in the category of documents prepared by the Defence in connection with its investigations”.

³³ Third Report, para. 1: «*Il ressort néanmoins de l'écoute des conversations que la langue de communication qui domine, en l'occurrence au mois de mai 2009 est le Lendu/Kilendu* ».

³⁴ **Conversation No. 30**, 10 March 2009, Third Report, footnote 14; **Conversation No. 9**, 30 December 2008, First Report, footnote 23.

³⁵ Fourth Report, pp. 4-5.

16. [REDACTED].³⁶ The Prosecution, therefore, requests that these conversations be transcribed and analysed as soon as practicable, and that this analysis be provided to the Office of the Prosecutor.

17. Upon receipt of a less redacted version of the Registry Reports which would include relevant analysis of parts of communications that have not been translated to date, the Prosecution will be in a position to identify the conversations that should be communicated to it in full.

The requested information may be relevant trial evidence, thus access is necessary to allow the Prosecution to satisfy its obligations pursuant to Article 54(1)

18. Under Article 54(1)(a) of the Statute the Prosecution has the obligation to establish the truth in this case, based on incriminatory or potentially exculpatory material. Access to the communications is essential to the performance of that duty.

19. For example, Conversation 109 – as best can be ascertained, since the Prosecution has not received access to the original transcript and part of the conversation was conducted [REDACTED] and has not been transcribed -- relates to the responsibility for the Bogoro attack and seems to implicate Germain Katanga.³⁷ The conversation appears to contain highly relevant information to determining the truth in this case. It should therefore be disclosed, in its entirety, to the Prosecution.

20. It is also highly significant that, on the basis of the monitored communications referred to in the Registry Reports, the Registrar concluded that Ngudjolo, in contravention of his confidentiality and detention obligations, has revealed

³⁶ [REDACTED].

³⁷ **Conversation No. 109**, 18 December 2008, First Report, footnote 11: «C'est pour te dire qu'ici les gens s'accusent mutuellement, les uns disent c'est Germain qui a frappé Bogoro, les autres, non ce n'est pas lui (..) ».

the identities of witnesses to unauthorized third parties. The Registrar further concluded that such actions were accomplished with a view to locate or exert pressure on witnesses, so as to either interfere with their testimony or “coach” them to provide rehearsed responses.³⁸

21. Consistent with its responsibility to investigate, as well as to present relevant evidence at trial, the Prosecution thus also requests the transcripts of a number of communications wherein potential witnesses are being intimidated, or wherein Ngudjolo discusses plans with associates to intimidate witnesses.³⁹ This information is relevant to the ongoing trial in two respects. First, the effort of an accused person to intimidate a witness is affirmative evidence of consciousness of guilt.⁴⁰ Second, if a witness has been intimidated and thereafter provides unexpected testimony inconsistent with previous inculpatory statements, the fact of intimidation becomes important evidence in the Chamber’s ability to assess the truth, since it bears substantially on the witness’s credibility with respect to the new version.

22. And finally, if a witness becomes unavailable, including if he refuses to appear to testify at trial, because of intimidation by the Defence, the Prosecution will seek to introduce the witness’s prior statement as substantive evidence. Such a step is consistent with national jurisdictions that require the

³⁸ First Report, paras 16, 19, 23, 24 and 27 ; Third Report, p. 14, Conclusion, para. 2; **Conversation No. 20**, 28 January 2009, First Report, footnotes 33 and 37.

³⁹ In several conversations Ngudjolo actively attempted to locate witnesses [REDACTED] and, subsequently, [REDACTED] (these witnesses are not on the Prosecution’s list of INCRIM evidence). See **Conversation No. 201**, 2 January 2009, First Report, footnote 26 ; **Conversation No. 200**, 2 January 2009, First Report, footnotes 29 and 32; **Conversation No. 7**, 31 December 2008, First Report, footnotes 34 and 38. Yet another conversation reveals Ngudjolo’s attempts to identify another Prosecution witness that he considers to be “suspect”: **Conversation No. 9**, 30 December 2008, First Report, para. 13 footnote 23. Finally, some conversations demonstrate Mathieu Ngudjolo’s attempts to locate Prosecution witnesses or other witnesses by revealing their names to unauthorized third parties: see **Conversation No. 10**, 30 December 2008, First Report, para. 12, footnote 22, in which Ngudjolo attempts to locate [REDACTED] Witness 250; **Conversation No. 124**, 4 February 2009, Second Report, footnotes 19 and 20 (redacted).; see also **Conversation No. 9**, 30 December 2008, First Report, para. 13, footnote 23.

⁴⁰ This is a well-recognized principle in other jurisdictions. E.g., *United States v. Calabrese*, 572 F.3d 362, 368 (7th Cir. 2009) (“[w]e have repeatedly observed that intimidation of a witness suggests consciousness of guilt” (citing cases); *United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996) (“evidence of attempts to induce witnesses to lie is indicative of consciousness of guilt and may be placed before the jury”).

availability of a witness for cross-examination but recognize that a person who is responsible for the unavailability of a witness has forfeited that right to cross-examine. It is also essential to ensure that the accused does not profit from his obstruction of justice and wrongdoing.

23. Access to the conversations is thus highly relevant to establishing that a witness has been intimidated and as a consequence changes his or her mind and refuses to testify. In this regard, Ngudjolo requested that P-28 be located because he “poses problems” for both Germain Katanga and Ngudjolo.⁴¹

24. Some of the communications pertain to “secret meetings” during which Prosecution witnesses may be discussed. In one instance, Ngudjolo and his interlocutors suddenly switched their language of expression to Lendu ([REDACTED]).⁴² The Registrar indicated that, although it was not possible to discern the exact purpose of these communications, the parties were likely “reading the declaration of (P-250)”⁴³ On one occasion, the meeting was abruptly interrupted when P-250’s relative was detected amongst the listeners.⁴⁴ Also, Ngudjolo chastised his wife and Maître Jean for meeting with people other than those that he had expressly identified.⁴⁵ The Prosecution respectfully submits that these conversations in relation to witness P-250 are very much relevant in light of the time the witness took to respond when asked if anyone had told him what to say and how to say it, including to the members of his family.⁴⁶

⁴¹ **Conversation No. 91**, 13 January 2009, First Report, para. 19, footnote 35; **Conversation No. 18**, 19 June 2009, Fourth Report, footnotes 55 and 56.

⁴² **Conversation No. 8**, 31 December 2008, First Report, footnote 17.

⁴³ First Report, para. 10.

⁴⁴ **Conversation No. 19**, 29 December 2008, First Report, footnote 18.

⁴⁵ **Conversation No. 18**, 29 December 2008, First Report, footnote 16; **Conversation No. 26**, 28 December 2008, First Report, footnote 16 ; **Conversation No. 31**, First Report, 28 December 2008, footnote 16.

⁴⁶ See ICC-01/04-01/07-T-99-CONF-ENG ET 10-02-2010, page 63, lines 8 to 12 or ICC-01/04-01/07-T-99-CONF-FRA ET 10-02-2010, page 64, lines 1 to 5.

25. In paragraph 19 of the Third Report, the Registrar mentions a conversation that seems to have taken place between Ngudjolo, [REDACTED] and [REDACTED].⁴⁷ In concert with other information in the Prosecution's possession, this conversation, which is not identified by number, may reveal that Ngudjolo is attempting to contact and influence P-238.
26. The same relevance attaches to evidence that witnesses are being "coached" or induced by the defence to provide favourable testimony. Not only would coaching or inducing a witness to testify in a certain manner be indicative of consciousness of guilt, it is also critical information in weighing the credibility of the witness's in-court testimony. Interviews between the Prosecution and its witnesses are recorded (taped or in signed written statements) and provided to the Defence, in part to permit examination about the interview process and the information provided. It is unreasonable to impose a different regime on contacts between the accused, or persons acting at his behest, and Defence witnesses. If the recorded conversations reveal coaching, that is a matter that should be aired at the trial so that the Chamber may assess the credibility of the witness's testimony based on all relevant information.
27. Excerpts of Ngudjolo's conversations referred to in the Registry Reports suggest that witnesses for Ngudjolo have been instructed to offer false testimony. For example, in conversations between Ngudjolo with his contact persons, including his own wife, repeated and explicit mentions are made to the preparation of witnesses revealing that they are instructed on how to respond when questioned.⁴⁸ In other conversations, oblique references are made to "preparation" of witnesses, which in the context of the conversations

⁴⁷ Third Report, para. 19.

⁴⁸ **Conversation No. 171**, 7 December 2008, First Report, footnote 9; **Conversation No. 201**, 2 January 2009, First Report, footnote 9; **Conversation No. 8**, 22 May 2009, Third Report, footnote 20; **Conversation No. 25**,

mentioned herein above indicates that their responses are rehearsed.⁴⁹ Ngudjolo also personally inquired whether “a witness is favourable to them and whether he is going to report the facts the way he was prepared to do.”⁵⁰

28. In short, the Prosecution has a legitimate need for the information sought. Whether any individual conversation might ultimately be admissible as substantive or impeachment evidence need not be determined at this stage; that instead will be decided on an item-by-item basis if and when the information is offered at trial.⁵¹

The requested information is also necessary to enable the Prosecution to fulfill its responsibilities under Article 68

29. Finally, 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 in this case. The Prosecution, along with the Victims and Witnesses Unit, has a responsibility towards its witnesses. Knowing the degree and nature of risk to particular witnesses will assist the Prosecution in its assessment whether to request adjustments to protective measures for them pursuant to Article 68.

20 May 2009, Third Report, footnote 22; **Conversation Without Number**, 19 May 2009, Third Report, footnote 26.

⁴⁹ **Conversation No. 13**, 13 March 2009, Third Report, footnotes 12 and 13; **Conversation No. 6**, 30 May 2009; Third Report, footnote 24; **Conversation No. 45**, 18 May 2009, Third Report, footnote 25; **Conversation No. 15**, 27 May 2009, Third Report, footnotes 31, 32 and 45; **Conversation No. 146**, 3 October 2008, First Report, footnote 8. **Conversation No. 197**, [no date indicated], First Report, footnote 12.

⁵⁰ **Conversation No. 38**, 19 May 2009, Third Report, footnote 44; **Conversation No. 2**, 24 May 2009, Third Report, footnote 17; **Conversation No. 3**, 24 May 2009, Third Report, footnote 19; **Conversation No. 1**, 24 May 2009, Third Report, footnote 16.

⁵¹ ICC-01/04-01/07-1718, para. 45.

Providing the requested information will not unfairly or unduly impinge on Ngudjolo's rights

30. The additional information requested by the Prosecution pertains to non-privileged communications. A detained person is entitled under Regulation 99(1)(i) of the Court to communicate by telephone with persons (so long as they have not abused those privileges, see Regulation 175 of the Regulations of the Court) but that entitlement is expressly subject to monitoring. There is no right to unmonitored communications, nor does the accused have a right to use the communication facilities to obstruct the administration of justice.⁵² The Chief Custody Officer, in fact, may impose active monitoring of non-privileged conversations of a detainee under Regulation 175 of the Regulations of the Court, as well as their transcription and translation into one of the working languages of the Court,⁵³ when he and ultimately the Registrar determines it is necessary to do so.⁵⁴ On that basis, the Registrar ordered, *inter alia*, the active monitoring of Ngudjolo's future conversations and the post-factum listening of his prior conversations during certain periods of time, as well as their translation.⁵⁵

31. The disclosure of such communications, which are part of the detention record, may be ordered by the Trial Chamber, pursuant to Regulation 92(3) of the Court. In fact, the Trial Chamber authorized, in principle, such disclosure to the Prosecution on 9 June 2009⁵⁶ and on 20 July 2009⁵⁷.

32. Furthermore, the Prosecution contends that such access 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.

⁵² See Regulation 99(2) of the Regulations of the Court.

⁵³ See Regulation 175(1) and (6) of the Court.

⁵⁴ See Regulation 175(8).

⁵⁵ ICC-01/04-01/07-894-Conf-Exp, ICC-01/04-01/07-932-Conf-Exp and ICC-01/04-01/07-1195-Conf-Exp, p. 3.

⁵⁶ ICC-01/04-01/07-T-66-CONF-EXP-ENG ET 09-06-2009, p. 39, lines 11 to 15.

He received due notice of the monitoring of telephone conversations upon arrival at the Detention Unit.⁵⁸ He knowingly took the risk to disclose confidential information related to witnesses in violation of the Court's texts.⁵⁹ No assurances that his conversations would not be used in proceedings (or in investigations) were made to him.⁶⁰

33. The access to additional information responds to a paramount interest of protecting the integrity of the proceedings and the well-being of Prosecution witnesses and, further, serves the good administration of justice. Therefore, disclosing such material satisfies the balancing test imposed by the Appeals Chamber.⁶¹

Conclusion

The Prosecution respectfully requests that the Chamber:

- a) order that the transcripts of the conversations listed in Confidential *ex parte* Annex A be disclosed in their entirety to the Office of the Prosecutor;
- b) that the conversations in Lendu listed in Confidential *ex parte* Annex B are transcribed and analysed and that this analysis be provided to the Office of the Prosecutor; and

⁵⁷ ICC-01/04-01/07-1319-Conf-Exp.

⁵⁸ See more closely the arguments developed in "Mémoire urgent de l'Accusation, en application de la norme 101-3 du Règlement de la Cour, aux fins d'interdiction des contacts de Mathieu Ngudjolo avec l'extérieur et de séparation de Mathieu Ngudjolo d'avec les autres détenus" ICC-01/04-01/07-1200-Conf-Exp, 12 June 2009, esp. para. 16.

⁵⁹ See more closely the arguments developed in "Mémoire urgent de l'Accusation, en application de la norme 101-3 du Règlement de la Cour, aux fins d'interdiction des contacts de Mathieu Ngudjolo avec l'extérieur et de séparation de Mathieu Ngudjolo d'avec les autres détenus" ICC-01/04-01/07-1200-Conf-Exp, 12 June 2009, esp. para. 16.

⁶⁰ See Rule 74(3)(ii).

⁶¹ ICC-01/04-01/07-1718, paras 49, 52. Pursuant to Article 21 of the Statute, see also *Silver, Klass and others v. Germany*, (Application No. 5029/71), 6 September 1978 and *Malone v. the United Kingdom*, (Application No. 8691/79), 2 August 1984, cases which support the argument that a detainee's ability to foresee that his conversations would be monitored is the determining criterion when balancing the Prosecution's obligations under Article 54(1) and the rights of the accused.

- c) order that a less redacted version of the four Registry reports as indicated in Confidential *ex parte* Annex C be disclosed to the Office of the Prosecutor.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of March 2010

At The Hague, The Netherlands