

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No. ICC-01/04-01/07 OA 9

Date: 9 December 2009

**THE APPEALS CHAMBER**

**Before:**

**Judge Erkki Kourula, Presiding Judge  
Judge Sang-Hyun Song  
Judge Ekaterina Trendafilova  
Judge Daniel David Ntanda Nsereko  
Judge Joyce Aluoch**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF**

**THE PROSECUTOR**

**v. Germain KATANGA and Mathieu NGUDJOLO CHUI**

**Confidential – *Ex Parte* – Available only to the Prosecutor  
and to Mr Ngudjolo Chui**

**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”**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**

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

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In 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” (ICC-01/04-01/07-1243-Conf-Exp-tENG),

After deliberation,

By majority, Judge Song dissenting,

*Delivers* the following

## JUDGMENT

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 Center” is reversed and remanded to the extent that the Trial Chamber rejected the Prosecutor’s request for access to Mr Ngudjolo Chui’s full recorded non-privileged conversations as summarised in the “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”, the annex to this report, and Mr Ngudjolo Chui’s list of telephone contacts.

## REASONS

### I. KEY FINDING

1. The Trial Chamber’s 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.

#### A. Proceedings Before the Trial Chamber

2. On 12 February 2009, the Registrar issued the “Registrar’s Decision on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Germain

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Katanga and Mr Mathieu Ngudjolo Chui”<sup>1</sup> (hereinafter: “Registrar’s Monitoring Decision”). The Registrar, *inter alia*, ordered the Chief Custody Officer “to conduct a post-factum listening to: a) all non-privileged communications of both Mr Germain Katanga and Mr Mathieu Ngudjolo Chui recorded as of 1 October 2008; b) all non-privileged telephone communications made by Mr Germain Katanga and Mr Mathieu Ngudjolo Chui as of the date of notification of this decision, for a period of 14 calendar days and to provide a regular report on this monitoring.”<sup>2</sup> The Registrar’s Monitoring Decision was issued as confidential *ex parte*, available only to the Registry, the Prosecutor and the Defence of Mr Ngudjolo Chui “in view of the confidential nature of the information provided to and in the possession of the Registrar.”<sup>3</sup>

3. On 27 February 2009, the Registrar issued the “Second Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui”<sup>4</sup> (hereinafter: “Registrar’s Second Monitoring Decision”), by which she ordered the Chief Custody Officer to continue conducting the post-factum listening to the non-privileged telephone communications of Mr Ngudjolo Chui between 1 October 2008 and 26 February 2009.<sup>5</sup> The Registrar also ordered the Chief Custody Officer to discontinue the monitoring of future non-privileged telephone communications and visits as of 26 February 2009.<sup>6</sup> This decision was issued confidential *ex parte*, available only to the Registry, the Prosecutor and the Defence of Mr Ngudjolo Chui.

4. On 8 June 2009, the Registrar submitted to Trial Chamber II (hereinafter: “Trial Chamber”) the “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”<sup>7</sup> (hereinafter: “First Monitoring Report”). This First Monitoring Report summarised the content of conversations Mr Ngudjolo Chui had conducted with outside contacts between 1 October 2008 and 31 January 2009, and provided

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<sup>1</sup> ICC-01/04-01/07-894-Conf-Exp.

<sup>2</sup> Registrar’s Monitoring Decision, p. 5.

<sup>3</sup> Registrar’s Monitoring Decision, p. 5.

<sup>4</sup> ICC-01/04-01/07-932-Conf-Exp.

<sup>5</sup> Registrar’s Second Monitoring Decision, p. 4.

<sup>6</sup> Registrar’s Second Monitoring Decision, p. 4.

<sup>7</sup> ICC-01/04-01/07-1195-Conf-Exp-tENG.

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more detailed transcriptions of the communications in the footnotes of the report.<sup>8</sup> The First Monitoring Report was submitted as “confidential *ex parte* only available to the Registry” and the Registrar requested the Trial Chamber “to advise her on whether it is necessary to reclassify this document if appropriate.”<sup>9</sup> On 9 June 2009, by oral decision, the Trial Chamber authorised the Registrar to disclose this report to the Prosecutor.<sup>10</sup> Thus, the Prosecutor was given partial access to Mr Ngudjolo Chui’s monitored information at this time.

5. On 10 June 2009, the Registrar issued a third confidential *ex parte* decision, available only to the Prosecutor and Mr Ngudjolo Chui’s Defence, in which she ordered the Chief Custody Officer to resume the post-factum listening to all non-privileged telephone communications of Mr Ngudjolo Chui for the period of 27 February to 9 June 2009<sup>11</sup> (hereinafter: “Registrar’s Third Monitoring Decision”).

6. 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 Mathieu Ngudjolo’s Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees”<sup>12</sup> (hereinafter: “Prosecutor’s Request”). In this filing, the Prosecutor requested that the Trial Chamber grant him access to the full recorded conversations that were summarised in the First Monitoring Report; the annex to the First Monitoring Report; and the list of Mr Ngudjolo Chui’s telephone contacts.<sup>13</sup> The Prosecutor also requested that the Trial Chamber issue an order prohibiting all contacts between Mr Ngudjolo Chui and anyone outside the detention centre, and that he be separated from all other detained persons.<sup>14</sup>

7. On 15 June 2009, Mr Ngudjolo Chui’s Defence applied to the Presidency for review of the Registrar’s Third Monitoring Decision.<sup>15</sup>

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<sup>8</sup> First Monitoring Report, paras 3-22.

<sup>9</sup> First Monitoring Report, para. 29.

<sup>10</sup> ICC-01/04-01/07-T-66-Conf-Exp-ENG.

<sup>11</sup> “Third Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications of Mr Mathieu Ngudjolo Chui”, ICC-01/04-01/07-1196-Conf-Exp.

<sup>12</sup> ICC-01/04-01/07-1200-Conf-Exp-tENG.

<sup>13</sup> Prosecutor’s Request, paras 28-35.

<sup>14</sup> Prosecutor’s Request, para. 4.

<sup>15</sup> “Defence Application for Review of the Registrar’s Decision of 10 June 2009 entitled Third Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui”, ICC-RoR221-04/09-1-Conf-Exp.

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8. On 18 June 2009, the Trial Chamber issued an order requiring the Registrar to notify Mr Ngudjolo Chui's Defence of the Prosecutor's Request, and to prepare, in consultation with the Prosecutor, a redacted version of that request and the First Monitoring Report.<sup>16</sup> The Trial Chamber also directed the Defence to provide the Chamber with its observations on the report and the Prosecutor's Request. The Trial Chamber then filed with the Registry the redacted version of the First Monitoring Report and the Prosecutor's Request, which were available to Mr Ngudjolo Chui's Defence.<sup>17</sup> The Defence filed its observations to the First Monitoring Report on 23 June 2009.<sup>18</sup>

9. On 24 June 2009, the Trial Chamber issued 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"<sup>19</sup> (hereinafter: "Impugned Decision"), denying the Prosecutor's disclosure requests.

10. On 30 June 2009, the Prosecutor filed the "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 »"<sup>20</sup> (hereinafter: "Prosecutor's Application for Leave to Appeal").

11. On the same day, the Defence also filed an application for leave to appeal the Impugned Decision.<sup>21</sup>

12. On 14 July 2009, the Trial Chamber issued the "Decision on the Appeals by the Prosecutor and the Defence of Mathieu Ngudjolo Chui against the Decision 1243 of

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<sup>16</sup> "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", ICC-01/04-01/07-1215-Conf-Exp-tENG.

<sup>17</sup> "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 urgent de l'Accusation du 11 juin 2009 (ICC-01/04-01/07-1200-Conf-Exp)", ICC-01/04-01/07-1233-Conf-Exp.

<sup>18</sup> "Observations sur le Rapport du Greffe et la Requête du Procureur ayant motivé l'ordonnance ICC-01/04-01/07-1215-Conf-Exp du 18 juin 2009 de la Chambre de première instance II", ICC-01/04-01/07-1238-Conf-Exp.

<sup>19</sup> ICC-01/04-01/07-1243-Conf-Exp-tENG.

<sup>20</sup> ICC-01/04-01/07-1254-Conf-Exp.

<sup>21</sup> "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", ICC-01/04-01/07-1255-Conf-Exp.

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24 June 2009”<sup>22</sup> (hereinafter: “Decision Granting Leave to Appeal”). Leave to appeal the Impugned Decision was partly granted to the Prosecutor; the Defence’s request was rejected.<sup>23</sup>

## **B. Proceedings on Appeal**

13. On 28 July 2009, the Prosecutor filed the “Prosecution Document in Support of Appeal against 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’”<sup>24</sup> (hereinafter: “Document in Support of the Appeal”).

14. On the same day, the Prosecutor filed the “Prosecution’s Urgent Request for Extension of Time for Filing its Document in Support of Appeal against 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’”<sup>25</sup> (hereinafter: “Request for Extension of Time”), explaining that “due to technical error, not attributable to the Case Manager”, the Document in Support of the Appeal was filed ten minutes after the time limit set out in regulations 33 (2) and 65 (4) of the Regulations of the Court.<sup>26</sup> The Prosecutor thus requested the Appeals Chamber to use its authority under regulation 35 of the Regulations of the Court to extend the applicable time limit by ten minutes and to treat the Document in Support of the Appeal as timely filed.<sup>27</sup>

15. On 4 August 2009, the Presidency issued the “Decision replacing judges in the Appeals Chamber,” deciding “to temporarily attach Judge Ekaterina Trendafilova [...] and Judge Joyce Aluoch [...] to the Appeals Chamber for the purpose of the appeal”.<sup>28</sup>

16. On 6 August 2009, Mr Ngudjolo Chui filed his response to the Prosecutor’s Document in Support of the Appeal, entitled “Response of the Defence for Mathieu

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<sup>22</sup> ICC-01/04-01/07-1303-Conf-Exp-tENG.

<sup>23</sup> Decision Granting Leave to Appeal, pp. 12-13.

<sup>24</sup> ICC-01/04-01/07-1340-Conf-Exp.

<sup>25</sup> ICC-01/04-01/07-1341-Conf-Exp.

<sup>26</sup> Request for Extension of Time, para. 6.

<sup>27</sup> Request for Extension of Time, para. 8.

<sup>28</sup> “Decision replacing judges in the Appeals Chamber”, ICC-01/04-01/07-1266, p. 4.

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Ngudjolo to the Prosecutor's Brief 1340-Conf-Exp"<sup>29</sup> (hereinafter: "Defence Response").

## II. PRELIMINARY ISSUE: THE PROSECUTOR'S REQUEST FOR AN EXTENTION OF TIME

17. The Appeals Chamber notes that the Prosecutor's Document in Support of the Appeal was filed ten minutes after the time limit for submission pursuant to regulation 33 (2) of the Regulations of the Court. The Prosecutor requests that the Appeals Chamber extend the time limit and accept his Document in Support of the Appeal pursuant to regulation 35 of the Regulations of the Court.

18. Regulation 35 (2) provides as follows:

The Chamber may extend [...] a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

19. To substantiate his request for an extension of time, the Prosecutor submits that "[d]uring the process of converting the Word version of the document in support of the appeal into PDF for the purposes of its electronic filing, the computer of the Appeals Section Case Manager froze and failed to complete the operation. It became apparent soon thereafter that due to some technical error, not attributable to the Case Manager, the final version of the document that was about to be filed had been lost. [...] Despite the difficult situation, the Case Manager was present at CMS officers with a paper copy of the document at 4:05 pm. [...] CMS calculat[ed] the time of the filing to be 4:10 pm."<sup>30</sup>

20. In this case, the Appeals Chamber is persuaded that the Prosecutor has demonstrated that he was unable to file his request within the time limit for reasons beyond his control. Furthermore, the extension sought is only for the very short period of ten minutes. Thus, the Appeals Chamber grants the Prosecutor's request for an extension of time and accepts the Document in Support of the Appeal.



<sup>29</sup> ICC-01/04-01/07-1353-Conf-Exp-tENG.

<sup>30</sup> Request for Extension of Time, para. 6.



### III. MERITS OF THE APPEAL

#### A. Relevant Part of the Impugned Decision

21. In the Prosecutor's Request, the Prosecutor requested access to the full recorded conversations summarised in the First Monitoring Report, the annex to the First Monitoring Report, and Mr Ngudjolo Chui's contact list. The Prosecutor requested full access to the monitored information because he was given only partial access to these materials when the Trial Chamber ordered that he receive the First Monitoring Report on 9 June 2009.<sup>31</sup>

22. The Prosecutor submitted to the Trial Chamber that this information would enable him to better assess the protective measures he is required to take under article 68 of the Statute and any additional applications made under regulation 101 of the Regulations of the Court.<sup>32</sup> He also maintained that the information may provide a basis for an investigation of offenses against the administration of justice, under article 70 of the Statute.<sup>33</sup> Finally, the Prosecutor submitted that the information may constitute incriminating evidence and therefore "form part of determining the truth in this case."<sup>34</sup>

23. In denying the Prosecutor's Request, the Trial Chamber first noted that the recording of Mr Ngudjolo Chui's conversations were ordered by the Registrar pursuant to 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."<sup>35</sup> The Trial Chamber continued:

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

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<sup>31</sup> ICC-01/04-01/07-T-66-Conf-Exp-ENG.

<sup>32</sup> Prosecutor's Request, para. 29.

<sup>33</sup> Prosecutor's Request, para. 29.

<sup>34</sup> Prosecutor's Request, para. 33.

<sup>35</sup> Impugned Decision, para. 40.

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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.<sup>36</sup>

24. The Trial Chamber also recognised that the information should be thoroughly analysed in view of the Court's obligation to protect witnesses pursuant to article 68 of the Statute.<sup>37</sup> Because the Prosecutor did not have full access to the conversations, the Trial Chamber ordered the Victims and Witnesses Unit (hereinafter: "VWU") to use the materials to assess whether there was reason to reinforce protective measures for witnesses referred to in the conversations.<sup>38</sup> The Trial Chamber additionally found it appropriate for the VWU to consult with the Prosecutor on any additional protective measures which might be justified, and to disclose to the Prosecutor those excerpts of conversations which were strictly necessary to determine the most suitable protective measures for witnesses.<sup>39</sup>

## **B. Submissions of the Parties**

### *1. Submission of the Prosecutor*

25. In his Document in Support of the Appeal, the Prosecutor states that he does not dispute that "the content of the recorded conversations and the [a]ccused's list of contacts were obtained by the Registry for purposes other than their use as evidence at trial."<sup>40</sup> The Prosecutor also concedes that if he wishes the Registry to intercept a person's communications for investigative purposes, this "may require judicial authorisation by the relevant Chamber."<sup>41</sup> The Prosecutor does not dispute that "the obtaining of intercepted telephone conversations illegally may impinge on internationally recognized human rights."<sup>42</sup>

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<sup>36</sup> Impugned Decision, para. 40.

<sup>37</sup> Impugned Decision, para. 41.

<sup>38</sup> Impugned Decision, paras 41-42.

<sup>39</sup> Impugned Decision, para. 44.

<sup>40</sup> Document in Support of the Appeal, para. 5.

<sup>41</sup> Document in Support of the Appeal, para. 5.

<sup>42</sup> Document in Support of the Appeal, para. 5.

26. The Prosecutor contests, however, the Trial Chamber's determination that the information "cannot, under any circumstances, be admissible at trial."<sup>43</sup> He asserts that the Trial Chamber, in denying him access to the information, failed to assess critical factors on admissibility of evidence such as the probative value of the evidence, and the damage that its exclusion may cause to the reliability of the judgment.<sup>44</sup>

27. The Prosecutor asserts that "the recordings were lawfully and openly done by passive monitoring, a legitimate administrative function, and listened to pursuant to a judicial order."<sup>45</sup> He contends that "[t]here is nothing inequitable in using the [a]ccused's own words and conduct in his criminal trial" because he "did not induce the [a]ccused to [...] communicate confidential information" and "did not ask the Registry to passively monitor the conversations as an investigative tool to assist the Prosecution in developing its case."<sup>46</sup> The Prosecutor further submits that the monitoring process is "fair and the intrusion into privacy limited and transparent", so that "there is nothing facially inequitable about using the information obtained if it is relevant to issues in the pending criminal case."<sup>47</sup>

28. The Prosecutor also states that even if the monitoring measures were illegal, article 69 (7) of the Statute expressly allows the introduction of illegally obtained evidence "if it is relevant, so long as there is no substantial doubt about its reliability and the admission would not be antithetical to and seriously damage the integrity of the proceedings."<sup>48</sup>

## 2. *Submission of Mr Ngudjolo Chui*

29. Mr Ngudjolo Chui requests that the Appeals Chamber confirm the Impugned Decision, and uphold the Trial Chamber's refusal to allow the Prosecutor to use his non-privileged conversations at trial.<sup>49</sup>

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<sup>43</sup> Document in Support of the Appeal, para. 6.

<sup>44</sup> Document in Support of the Appeal, para. 7.

<sup>45</sup> Document in Support of the Appeal, para. 18.

<sup>46</sup> Document in Support of the Appeal, para. 19.

<sup>47</sup> Document in Support of the Appeal, para. 31.

<sup>48</sup> Document in Support of the Appeal, para. 20.

<sup>49</sup> Defence Response, pp. 22-23.

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30. Mr Ngudjolo Chui contends that the Prosecutor's arguments raise two issues, namely that of legality and fairness.<sup>50</sup> With regard to the legality of the recording of his telephone conversations, he asserts that the Prosecutor's use of the monitored information as evidence at the upcoming trial is illegal because there is no legal basis for this in the Statute and other related legal instruments.<sup>51</sup>

31. Mr Ngudjolo Chui notes that regulations 174 and 175 of the Regulations of the Registry are located in the chapter entitled "Detention matters" and thus fall within the detention regime, and are "entirely separate from those relating to the prosecution of the charges against the accused."<sup>52</sup> He argues that allowing the Prosecutor to have access to the information for evidentiary purposes would jeopardise the neutral role of the Registry, which "cannot be used as a means of investigation on behalf of the Prosecution."<sup>53</sup>

32. Mr Ngudjolo Chui also contends that he knew about the monitoring measures, but was "never aware or warned that his telephone conversations could be used against him at the trial."<sup>54</sup> He reminds the Court that the confidentiality of his administrative and detention record is supported by regulation 92 of the Regulations of the Court and 171 of the Regulations of the Registry.<sup>55</sup>

33. With regard to fairness, Mr Ngudjolo Chui disagrees with the Prosecutor's approach in framing the issue raised by the Impugned Decision in terms of a discussion on admissibility of evidence.<sup>56</sup> He states that the discussion on admissibility of evidence is "premature" and is not at issue in the present appeal.<sup>57</sup> However, he also contends that should the debate focus on admissibility issues, the information obtained would be, in his view, inadmissible at trial in application of article 69 of the Statute.<sup>58</sup>

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<sup>50</sup> Defence Response, para. 9.

<sup>51</sup> Defence Response, para. 14.

<sup>52</sup> Defence Response, para. 15.

<sup>53</sup> Defence Response, para. 16.

<sup>54</sup> Defence Response, para. 17.

<sup>55</sup> Defence Response, para. 20.

<sup>56</sup> Defence Response, para. 43.

<sup>57</sup> Defence Response, para. 10.

<sup>58</sup> Defence Response, para. 10, 43.

34. Mr Ngudjolo Chui contests the Prosecutor's assertion that this information would be admissible at trial pursuant to articles 69 (4) and 69 (7) of the Statute. Mr Ngudjolo Chui argues that use of recorded information as evidence would seriously prejudice the fairness of the proceedings because it would constitute a violation of his right against self-incrimination and the correlated right to remain silent, as set out under articles 55 and 67 (1) (g) of the Statute.<sup>59</sup> Mr Ngudjolo Chui also submits that the use of non-privileged conversations at trial would be inconsistent with his right to private and family life.<sup>60</sup>

35. Mr Ngudjolo Chui claims that disclosing such information to the Prosecutor for evidentiary purposes would also be inconsistent with the right of the accused to prepare his or her defence, which is a principle enshrined in article 67 (1) (b) of the Statute.<sup>61</sup>

### **C. Determination of the Appeals Chamber**

#### *1. The Issue on Appeal*

36. In its Decision Granting Leave to Appeal, the Trial Chamber formulated the issue on appeal as follows:

[W]hether 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 hearing on the merits.<sup>62</sup>

The Appeals Chamber considers that the issue as formulated by the Trial Chamber must be understood in the context of the Impugned Decision.

37. As stated above, the Prosecutor requested the Trial Chamber that he be granted access to the full conversations referenced in the First Monitoring Report, the annex to the First Monitoring Report, and Mr Ngudjolo Chui's contact list.<sup>63</sup> In the Impugned Decision, the Trial Chamber rejected this request. To support its decision to reject the Prosecutor's request for full access to the information, the Trial Chamber stated that the Prosecutor could not use the information "at this stage in the

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<sup>59</sup> Defence Response, paras 44, 45.

<sup>60</sup> Defence Response, para. 46-48.

<sup>61</sup> Defence Response, para. 49.

<sup>62</sup> Decision Granting Leave to Appeal, p. 13.

<sup>63</sup> Prosecutor's Request, paras 28-35.

proceedings.” The Trial Chamber also stated that the information could not be used “to make a determination of the truth,” and that it “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.”<sup>64</sup> Thus, the Chamber concluded that it need not be “fully” disclosed<sup>65</sup> and denied the Prosecutor access to the information because it was of the view that, in any event, the information could not be used for evidentiary purposes at trial.

38. In its Decision Granting Leave to Appeal, the Trial Chamber quoted the Impugned Decision’s paragraph 40 and then stated that it “thus held that the Prosecution could not use [the information] which he was seeking *for the purpose of any prosecution, whether in the present case or any prosecution based on article 70 of the Statute*”.<sup>66</sup> The Trial Chamber later noted that the problem raised in the present case “is a crucial pre-condition [...] [t]o decide whether the Prosecutor, the Defence or indeed the Chamber *may mention or use* all the information contained in the aforementioned documents *during the hearings on the merits*.”<sup>67</sup>

39. Reading the Impugned Decision in conjunction with the Decision Granting Leave to Appeal, the Appeals Chamber considers that the issue on appeal is 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.

## 2. The Standard of Review

40. The Appeals Chamber considers that the legal basis for the Trial Chamber’s decision was regulation 92 (3) of the Regulations of the Court which regulates access to the detention record of a detained person. Regulation 92, entitled “Confidentiality of the detention record”, provides as follows:

1. The detention record of each detained person shall be confidential.
2. The detention record shall be made accessible to the detained person, his or her counsel and persons authorised by the Registrar, save as regards such

<sup>64</sup> Impugned Decision, para. 40.

<sup>65</sup> Impugned Decision, para. 40.

<sup>66</sup> Decision Granting Leave to Appeal, para. 10 (emphasis added).

<sup>67</sup> Decision Granting Leave to Appeal, para. 11 (emphasis added).



information as the Chief Custody Officer, in consultation with the Registrar, determines should be withheld in the interests of the proper management of the detention centre.

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

4. The detained person shall be informed of any request for access to his or her detention record and shall be given the opportunity to be heard or to submit his or her views. In exceptional circumstances such as in an emergency, an order may be made prior to the detained person being informed of the request. In such a case, the detained person shall, as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views.

41. The Appeals Chamber notes that regulation 92 (3) of the Regulations of the Court uses the word "may" which entails that the Trial Chamber has discretion to order that the monitored information be withheld or disclosed. Accordingly, the Appeals Chamber must examine whether the Trial Chamber correctly exercised its discretion under regulation 92 (3) when withholding the monitored information from the Prosecutor.

42. The Appeals Chamber recalls that it recently described the standard of review in respect of discretionary decisions as follows:

[T]he Appeals Chamber will not interfere with the [...] Chamber's exercise of discretion [...], save where it is shown that th[e] determination [by the Chamber] was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means that in effect the Appeals Chamber will interfere with the discretionary decision only under limited conditions."<sup>68</sup>

43. Thus, the guiding question for the Appeals Chamber will be whether the Trial Chamber's discretionary decision rejecting the Prosecutor's request was vitiated by an error of law, an error of fact, or a procedural error.<sup>69</sup>

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<sup>68</sup> *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19(1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408, para. 80.

<sup>69</sup> It must be noted that although both the Prosecutor and Mr Ngudjolo Chui focused their respective arguments on the legality of the Registrar's decision to monitor Mr Ngudjolo Chui's conversations, Mr Ngudjolo Chui filed an application for review of the Registrar's decision before the Presidency on 15 June 2009. In the present matter, the Appeals Chamber will not address this question.

### 3. *Trial Chamber's Error of Law*

44. As stated above, the Trial Chamber's exercise of discretion under regulation 92 (3) of the Regulations of the Court, denying the Prosecutor access to all of the monitored information, was based on the Trial Chamber's understanding that the information could not be used at trial for evidentiary purposes. For the following reasons, the Appeals Chamber is of the view that this understanding was incorrect and amounted to an error of law, which vitiated the Trial Chamber's determination that the Prosecutor should not be given full access to the monitored information.

45. The Appeals Chamber finds that in stating that the information could not be used for evidentiary purposes at trial, the Trial Chamber failed to take note of articles 69 (3), (4) and (7) of the Statute and rule 64 (1) of the Rules of Procedure and Evidence (the "Rules"). The Appeals Chamber first recalls that according to rule 64 (1) of the Rules, "[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber". In the instant matter, the Prosecutor was seeking access to the requested information rather than presenting evidence to the Trial Chamber. Thus, in the context of the Impugned Decision, this was not the correct stage of the proceedings to make a finding on admissibility, and the Trial Chamber's decision was in error.

46. The Appeals Chamber further notes that when evidence is presented before a Chamber, article 69 of the Statute applies. The scheme established by article 69 (4) and (7) of the Statute anticipates that a Chamber's determination that evidence is inadmissible at trial will be made on a case-by-case basis. According to article 69 (4) of the Statute, the Court may rule on the "relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial". In addition, pursuant to article 69 (7) of the Statute, even if the Trial Chamber found that the information was obtained by means of a violation of the Statute or of internationally recognised human rights, its admissibility would be subject to a case-by-case assessment because not every alleged violation leads to inadmissibility. Article 69 (7) of the Statute provides that evidence obtained by means of such a violation shall not be admissible if the violation casts a "substantial doubt" on its reliability or its "admission would be antithetical to and would seriously damage the integrity of the proceedings".



47. In the present case, the Trial Chamber made no such case-by-case determination of inadmissibility. Thus, in this context, the Trial Chamber's categorical statement that the monitored information would be inadmissible was in error.

48. Moreover, article 69 (3) of the Statute gives a Chamber broad powers to request the submission of evidence, providing:

The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

In making its decision, the Trial Chamber could not have known, at this point in the proceedings, whether the information the Prosecutor requested would not be "necessary for the determination of the truth" in the future. Thus, the Trial Chamber's decision that the information was inadmissible at trial inhibited the Chamber's own power to request the submission of future evidence under article 69 (3) of the Statute.

49. The Appeals Chamber is also not persuaded by the Trial Chamber's additional reasoning in support of its decision. It is true, as the Trial Chamber stated, that the monitoring measures were not ordered by a judicial authority, but by the Registrar 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".<sup>70</sup> However, this reasoning is not sufficient for the Trial Chamber to conclude that the information is *per se* inadmissible, particularly if the information is related to the case at hand or is of great significance to the parties. On the contrary, the parties may request access to such information, and access may be granted by the relevant Chamber. In this respect, the Chamber would decide to what extent the information would be disclosed to any of the parties, bearing in mind the specific circumstances and the fairness of the proceedings.

50. Finally, the Appeals Chamber notes that the Trial Chamber's rejection of the Prosecutor's Request hinders him from fulfilling his duty under article 54 (1) of the Statute "to establish the truth". The rejection of the Prosecutor's request for access based on the view that the monitored information may be inadmissible deprived the Prosecutor of material that might be of great importance. For these reasons, the Appeals Chamber finds that the Trial Chamber's rejection of the Prosecutor's request

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<sup>70</sup> Impugned Decision, para. 40.

for access was based on an erroneous determination as to the inadmissibility of the information as evidence and the Trial Chamber's decision was therefore materially affected by an error of law.

#### IV. APPROPRIATE RELIEF

51. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).<sup>71</sup> In the present case it is appropriate to reverse the Impugned Decision to the extent that the Trial Chamber rejected the Prosecutor's request for full access to the information because the Trial Chamber's exercise of discretion under regulation 92 of the Regulations of the Court was materially affected by an error of law.

52. The Appeals Chamber remands 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. When 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 notes in this context that, if need arises, the Trial Chamber has the power to invite the Prosecutor to submit a detailed request for information, as the case may be.

Judge Song's dissenting opinion to this judgment will be filed shortly.



**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 9<sup>th</sup> day of December 2009

At The Hague, The Netherlands

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<sup>71</sup> Pursuant to rule 158 (2) of the Rules of Procedure and Evidence read with article 83 (4) of the Statute, judgments of the Appeals Chamber "shall be delivered in open court." As the proceedings in the present appeal are confidential, the Appeals Chamber delivers this judgment by way of notification to the parties (regulations 31 and 32 of the Regulations of the Court).