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No.: **ICC-01/04-02/12**
Date: **18 September 2015**

TRIAL CHAMBER II

Before: **Judge Marc Perrin de Brichambaut, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR
v. MATHIEU NGUDJOLO CHUI

Public with public Annex A

Prosecution's response to Mathieu Ngudjolo Chui's request for compensation

Source: **Office of the Prosecutor**

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

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A. Overview

1. Mathieu Ngudjolo Chui does not deserve compensation from this Court. Nor has he shown that compensation is, in any way, necessary—let alone, proper. Rather, Mr Ngudjolo's request for compensation is flawed, speculative, unfounded in law and fact, and indeed, inadmissible.[1]

2. To succeed in his Compensation Request, Mr Ngudjolo must first show it is admissible. In other words, he bears the burden of demonstrating—in sound and compelling terms objectively based on the case record—that he has suffered a "grave and manifest miscarriage of justice" or was "unlawfully detained". Mr Ngudjolo fails to do so. Because Mr Ngudjolo fails to discharge this burden, his Request rests on his mere subjective opinion and protestations, and must fail.

3. More so, Mr Ngudjolo's Request is further undermined by his fundamental misunderstandings of the Court's processes and often incorrect narrative of the case history. At the outset, Mr Ngudjolo is not entitled to compensation merely because he was detained following his arrest and during trial. He was treated on par with other detained accused before this Court. Nor is compensation a foregone conclusion as a result of his acquittal by the Court. Acquittals are part and parcel of criminal proceedings, and sometimes result from the normal course of criminal trials. But they do not in themselves demonstrate a "miscarriage of justice"— let alone one that is "grave and manifest" in nature. Not only are Mr Ngudjolo's arguments legally untenable, such submissions—if endorsed—could have a chilling effect on the Prosecution's mandate to investigate and prosecute, and expose this Court to a wide range of frivolous claims. For all these reasons, the Request is not admissible and should be dismissed *in limine*.

[1] ICC-01/04-02/12-290 ("Compensation Request" or "Request").

4. Equally, even if the Request were found admissible (absent a first showing that a grave and manifest miscarriage of justice or unlawful detention had occurred), it cannot succeed for the very same defects that render it inadmissible. Mr Ngudjolo's misapprehensions of the law and the facts do not persuade. Likewise, the amount sought in compensation is both clearly excessive and unjustified.

5. Importantly, Mr Ngudjolo is not a person fit to be compensated by this Court. He does not come before this Court with clean hands.[2] In fact, compensating him would violate the cardinal principles of equity which prevent relief to a person in proceedings where he has himself improperly acted. Mr Ngudjolo did just that. Critically, as the record of the case confirms, Mr Ngudjolo was reasonably suspected of acts of witness interference and disclosure of confidential information about witnesses through outside contacts. There are reasonable suspicions that not only had he targeted Prosecution witnesses and intimidated them from testifying, but that he had also tampered with the veracity of the evidence of his own witnesses. There are reasonable suspicions that he broke the law to contrive the outcome of his case.[3]

6. No less than eight Judges of this Court have now been made aware of information showing Mathieu Ngudjolo's efforts to interfere with witnesses and unduly influence the outcome of his case. This information was before all three Judges of the Trial Chamber. And even though the Judges of the Appeals Chamber disagreed among themselves on whether Mr Ngudjolo should be

[2] Garner, B. (Ed.)., *Black's Law Dictionary*, p. 268, defining the "clean hands doctrine" as when "a party cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle, such as good faith." In other words, this maxim, grounding the clean hands doctrine (a principle of equity complementing common law), bars relief for anyone guilty of improper conduct in the matter at hand. It operates to prevent any affirmative recovery for the person with "unclean hands," no matter how unfairly the person's adversary has treated him or her. Its purpose is to protect the integrity of the court.

[3] *See e.g.*, ICC-01/04-02/12-271-Corr ("*Ngudjolo* Appeal Judgement"), paras. 232-233, 275, 281, 283, 288-291; ICC-01/04-02/12-271-AnxA ("*Ngudjolo* Appeal Dissent"), paras. 8, 13, 20, 27.

acquitted or not, all five appellate Judges acknowledged his actions to undermine the integrity of the proceedings. The Majority of the Appeals Chamber was "aware of [Mathieu Ngudjolo's] possible efforts to distort witness testimony or the truth finding process."[4] The Dissenting Judges went even further, and expressly recognised the "abusive means employed by Mr Ngudjolo to mount his defence and to define his strategy."[5] No matter the impact of his actions, Mr Ngudjolo's resort to such improper conduct during his trial alone should disqualify him from being compensated at this stage.

7. And the corrosive impact of Mr Ngudjolo's actions on the Prosecution's case and the integrity of the proceedings was apparent. As the Dissenting Judges underscored, Mr Ngudjolo's improper conduct, compounded by the Trial Chamber's passivity, adversely affected the Prosecution's case and the Chamber's decision. As they stated, the Prosecution was deprived of "the genuine opportunity to […] tender evidence free of any external and/or undue influence and to question witnesses comprehensively."[6] Likewise, they emphasised that the Trial Chamber was crippled in its "comprehensive search for the truth" and in reaching its "final determination."[7] In these circumstances, Mr Ngudjolo cannot expect to benefit from the very Court he sought to systematically undermine.

8. For all these reasons, and as demonstrated below, the Compensation Request should be dismissed.

[4] *Ngudjolo* Appeal Judgement, para. 275.
[5] *Ngudjolo* Appeal Dissent, para. 20.
[6] *Ngudjolo* Appeal Dissent, para. 14.
[7] *Ibid*., para. 25.

B. The Law on Compensation: Mr Ngudjolo has failed to discharge his burden

i. The burden under article 85

9. Mr Ngudjolo must convince this Chamber that he should be compensated. He bears the burden under article 85 of the Statute to do so. If he fails to meet this burden, the Request is inadmissible. And it is only *if* he meets this burden that any discussion about the compensation amount becomes relevant. Commentaries to the Statute support this two-stage determination of a compensation request under article 85. Indeed, views on this "double procedure" under article 85 are uniform.[8] Obtaining a finding, for example, on "the unlawfulness of the detention" and/or "the grave and manifest miscarriage of justice" is the first crucial step to advancing any compensation request. Without such a finding, no compensation can flow.

10. *Ad hoc* tribunal case law accords with this understanding. It establishes that a decision establishing the basis of the compensation must precede any decision awarding any such compensation.[9]

11. Sound policy reasons which protect the Court's time and resources also support the adoption of the "double procedure": interpreting article 85 otherwise

[8] *See* Zappalà, S, "Compensation to an arrested or convicted person", p. 1583, stating "[r]ule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention is unlawful (Article 85(1)), […] or that there was a grave and manifest miscarriage of justice (Article 85(3)). Moreover, the request shall contain all the elements justifying the request and the amount requested."; Bitti, G, "Compensation to an Arrested or Convicted Person" , p. 627, stating "[d]elegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there has been a grave and manifest miscarriage of justice." *See also* Zappalà, S, *Human Rights in International Criminal Proceedings*, p. 75, stating "[t]he Rules have opted for a separation of the proceedings on determination of unlawfulness and the decision on compensation (Rule 173.2 ICC Rules)."

[9] *See* ICTR: *Rwamakuba* Decision of 13 September 2007, paras. 23-24, emphasising that "Trial Chamber II recognised the existence of these violations, and the Appeals Chamber indicated that Mr Rwamakuba could "seek reparation" for them; *Zigiranyirazo* Decision of 26 February 2013, para. 8, where the Appeals Chamber found that no compensation was warranted because "[n]othing in the Appeals Judgement could be reasonably interpreted as authorising a claim for compensatory damages."

would put the cart before the horse. It would negate the intended statutory bulwark against frivolous claims for compensation, and expose this Court to unnecessary and time consuming proceedings.

12. Finally, and contrary to the Request which conflates the distinct burdens under the various sub-articles of article 85,[10] Mr Ngudjolo is required to make two different showings under articles 85(1) and 85(3).

ii. Article 85(1): "Unlawful detention"

13. Mr Ngudjolo's request for compensation under article 85(1) cannot succeed unless he demonstrates that he was "unlawfully detained" in violation of either the Statute or internationally recognised human rights law. No "enforceable right to compensation" exists until a detention is established as unlawful. The text of article 85(1) is clear.[11] So too are the views of commentators on the Statute.[12] Moreover, as case law and commentary equally show, arrest and pre-trial detention do not automatically become wrongful, and subject to compensation, merely because an accused has been acquitted.[13] Nor should persons be

[10] *See e.g.*, Request, paras. 34-41, which challenges "*la détention ordonnée*" as one aspect of the "miscarriage of justice", while at the same time stating that the Request was filed "*sur pied de l'article 85(1) et (3) du Statut*."
[11] Article 85(1) states that "[a]nyone *who has been the victim of unlawful arrest or detention* shall have an enforceable right to compensation." (emphasis added).
[12] *See* Staker, C, "Article 85: Compensation to an arrested or convicted person", p. 1500, stating "[p]aragraph 1 of this article adopts verbatim the wording of article 9 para.5 of the ICCPR. In the context of the ICC, this provision would apply in cases where a person is arrested or detained in violation of specific provisions of the Statute (in particular, article 55 para.1 (d) of the Rules), and presumably, where the arrest or detention was unlawful under other applicable rules of international law." *See also* Brady, H and Jennings, M, "Appeal and Revision", p. 303, stating "[d]elegations agreed a person who has been *the subject of an unlawful arrest or detention, in violation of either the Statute or internationally recognised human rights law*, shall have a right to compensation from the Court. This is reflected in Article 85(1)."(emphasis added).
[13] *See W.B.E v. The Netherlands* (No.432/1990), UN Doc. CCPR/C/46/D/432/1990 (1992), para. 6.5, stating "[t]he author, however, has not substantiated, for purposes of admissibility [of the compensation claim], his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful." *See also* Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute*, p. 967.

compensated when they have been lawfully detained "based on a reasonable suspicion of having committed a crime."[14]

iii. Article 85(3): "Grave and manifest" miscarriage of justice

14. For Mr Ngudjolo's claim under article 85(3) to succeed, he must show that there was a "grave and manifest miscarriage of justice". Under this limb of article 85, compensation is restricted to "exceptional circumstances", and would depend on the Court recognising, by its decision, that such a grave and manifest miscarriage of justice had occurred. More so, a person seeking to be compensated for specific damage caused must provide evidence of such harm.[15]

15. Notably, article 85(3) "confers no *right* to compensation, but allows for compensation to be awarded in the Court's *discretion*."[16] Not only therefore may compensation be granted solely in exceptional circumstances, but additionally the decision on whether to award compensation is left to the Chamber's discretion.[17] And even if, as Mr Ngudjolo claims, "the fact of being victim of a grave and manifest miscarriage of justice should be considered *ipso facto* an 'exceptional circumstance' […]",[18] he is still not relieved from demonstrating that he is indeed such a victim. Compensation, under article 85(3), is hardly Mr Ngudjolo's individual right.[19]

[14] *See* Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute*, p. 967, citing Professor Manfred Nowak, in his Commentary on the International Covenant on Civil and Political Rights, that "article 9(5) does not grant a right to compensation to innocent pre-trial detainees as long as their detention is based on a reasonable suspicion of having committed a crime."; Treschel, S, *Human Rights in Criminal Proceedings* , p. 497, stating "[a] person who was kept lawfully in detention on remand but was later acquitted is not entitled to compensation […]."
[15] Bitti, G, "Compensation to an Arrested or Convicted Person", p. 629.
[16] Staker, C, "Article 85: Compensation to an arrested or convicted person", p. 1501.
[17] *See* Zappalà, S, "Compensation to an arrested or convicted person", p. 1583.
[18] Request, paras. 36-37.
[19] *See* Zappalà, S, "Compensation to an arrested or convicted person", p. 1583.

16. Moreover, the phrase "grave and manifest" vastly limits the scope of this provision.[20] Although the phrase is undefined, the drafting history clearly shows that the test is a high one. Critically, an acquittal *per se* is not automatically grounds for compensation under article 85(3).[21] Indeed, because compensation for acquittals *per se* was controversial at the Rome Conference, it was excluded from the provision's ambit. Furthermore, as commentators have noted:

> "[i]n situations beyond an unlawful arrest/detention and/or a miscarriage of justice, many delegations had difficulty in accepting that a person could obtain compensation. In particular, many delegations had difficulty in accepting that a person could claim compensation if the final verdict was one of acquittal. These delegations were concerned such a provision would greatly hamper the Prosecutor's discretion to bring proceedings, and might prevent or deter him or her from bringing certain charges for fear such proceedings would result in an acquittal and consequently to a large compensation claim by the accused."[22]

17. Undeniably, because "[t]he final sub-paragraph of the article [85(3)] exceed[ed] current conventional and customary international law", it was agreed that compensation to someone who is released following a decision of acquittal or termination of proceedings may be awarded exceptionally, and only "to encapsulate the common law requirement for *malafides* on the part of the Prosecutor."[23]

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[20] Staker, C, "Article 85: Compensation to an arrested or convicted person", p. 1501, stating "[t]here is no definition of what would constitute a 'grave and manifest miscarriage of justice' for the purposes of this paragraph, but the words 'grave and manifest' suggest that this expression is narrower in scope than the expression 'miscarriage of justice' in paragraph 2."

[21] *See* Brady, H and Jennings, M, "Appeal and Revision", p. 303. *See also Rwamakuba* Decision of 13 September 2007, para. 25, stating "[…] there is no right to compensation for an acquittal *per se*[…]."

[22] Brady, H and Jennings, M, "Appeal and Revision", p. 303. *See also* Bitti, G, "Compensation to an Arrested or Convicted Person", p. 623, fn. 3, citing the report of the Working Group on Procedural Matters at the Rome Conference, Document A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998) noting "[t]here are delegations which believe that there should be an unfettered right to compensation where a person is acquitted or released prior to the end of trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Others (*sic*) delegations considered this text to be too restrictive."

[23] *See* Brady, H and Jennings, M, "Appeal and Revision", p. 304, stating "[t]he final sub-paragraph of the article [85(3)] exceeds current conventional and customary international law. After discussion in the informals, it was agreed [a]rticle 85(3) should provide that in exceptional circumstances, where the Court has found there has been

18. The wording of the final adopted text reflects these views. Because article 85(3) requires the Court to exercise its discretion only in "exceptional circumstances" "ordinarily no compensation will be paid to persons acquitted by the Court, or against whom proceedings are terminated before final judgement."[24] And because similar cases should be treated the same, this Chamber should be very circumspect indeed about establishing a precedent that would conceivably lead to all acquitted persons being entitled to compensation. Its discretion must therefore be stringently exercised.[25]

19. More recently, Chambers of the *ad hoc* Tribunals have interpreted article 85(3) of the Statute to reflect the current state of customary law with respect to compensation for acquitted persons. They too have emphasised the "permissive nature of article 85(3)," and have firmly rejected the notion that mere acquittals must be compensated.[26] So too have they rejected any notion of strict liability applying to claims for compensation by acquitted persons. Indeed, persons are entitled to compensation only if they demonstrate that their rights have been

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a grave and manifest miscarriage of justice, it can award compensation to someone who has been acquitted. This wording was seen to encapsulate the common law requirement for *malafides* on the part of the Prosecutor, and to highlight the fact that it will only be in exceptional circumstances that a Court can award compensation to someone who is released following a decision of acquittal or a termination of the proceedings."

[24] Staker, C, "Article 85: Compensation to an arrested or convicted person", p. 1501. *See also* Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute*, p. 968, citing General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, para. 53, noting that "[n]o compensation is due if the conviction is set aside upon appeal, i.e., before the judgement becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice."

[25] *See* Zappalà, S, "Compensation to an arrested or convicted person", p. 1583, stating "[o]f course, it seems correct to argue that the Court will have to respect in its decisions the principles of equality and non-discrimination. Therefore, similar cases will have to be treated in conformity with the same principles. However, it would have been appropriate to have more stringent criteria for the exercise of such power by the Court."

[26] ICTR: *Rwamakuba* Decision of 31 January 2007, paras. 26-28, 31, stating "[…] customary international law [does not provide] for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice"; upheld in *Rwamakuba* Decision of 13 September 2007, paras. 10, 15, 25, finding the Trial Chamber did not err when it found that "it lacked authority to award compensation to Mr Rwamakuba for having been prosecuted and acquitted" and "[t]here is no right to compensation for an acquittal *per se*[…]."; *See also Zigiranyirazo* Decision of 18 June 2012, paras. 19-22, stating "[i]t is clear that the framers of Article 85(3) of the ICC Statute did not intend the mandatory provision of compensation to all individuals acquitted."; also "[t]he language of [article 85] is permissive rather than compulsory"; upheld in *Zigiranyirazo* Decision of 26 February 2013, paras. 7-8.

violated.[27] Compensation is therefore not automatic upon acquittal. And as the ICTR Chambers have recognised, "there is insufficient evidence of State practice or of the recognition by States of this practice to establish that customary international law provides for compensation to an acquitted person."[28]

20. Accordingly, the ICTR Trial and Appeals Chambers in *Rwamakuba* denied Mr Rwamakuba compensation merely because he was arrested, prosecuted and then acquitted. Rather, these Chambers found that Mr Rwamakuba was only entitled to be compensated because his specific right to legal assistance had been violated, resulting from the Registrar's failure to appoint duty counsel during the initial months of his detention.[29] Similarly, the ICTR Trial and Appeals Chamber in *Zigiranyirazo* rejected that any compensation should accrue to all individuals acquitted, but found that compensation remained appropriate only where there was a clear violation of the claimant's fundamental rights.[30] Indeed, as the Chambers cited above have cautioned, awarding compensation without a clear violation of the accused's rights, "might open the floodgates to an unmanageable host of compensation claims."[31]

21. Save for reproducing the text of article 85 and stating that the Chamber has "*ratione materiae*" jurisdiction over the Request, Mr Ngudjolo advances no specific

[27] *Zigiranyirazo* 18 June 2012 Decision, paras. 49-51; *Zigiranyirazo* Decision of 26 February 2013, paras. 7-8.
[28] *Zigiranyirazo* 18 June 2012 Decision, para. 49; *Rwamakuba* Decision of 31 January 2007, para. 27.
[29] *Rwamakuba* Decision of 31 January 2007, paras. 19-31, p. 23; *Rwamakuba* Decision of 13 September 2007, paras. 10-15.
[30] *Zigiranyirazo* Decision of 18 June 2012, paras. 19-22; *Zigiranyirazo* Decision of 26 February 2013, paras. 7-8.The *Zigiranyirazo* Appeals Chamber was unanimous in finding that Mr Zigiranyirazo should not be compensated. Although, at trial, Judge Seon Ki Park dissented from the Trial Chamber's decision to deny Mr Zigiranyirazo compensation, he did not disagree with the principle that mere acquittals should not be compensated. Instead, his disagreement was confined to the gravity of the violation established and what harm ensued. He stated that because the Appeals Chamber had found that the Trial Chamber had "violated the Claimant's most basic and fundamental rights" stemming from its "reversal of the burden of proof", his detention on appeal following his conviction "was entirely unjustified" and needed redress. (Partially Dissenting Opinion – Judge Park, paras. 1-4). On the other hand, the Majority of the Trial Chamber acknowledged that Mr Zigiranyirazo suffered prejudice as a result of the Trial Chamber's errors causing a "miscarriage of justice". However, for the Majority, this prejudice did not constitute a "grave and manifest miscarriage of justice." Equally, Mr Zigiranyirazo did not allege that the Prosecution was malicious or that the Trial Chamber was improperly constituted or motivated. He also delayed in bringing his claim for over two years after his acquittal.
[31] *See e.g. Zigiranyirazo* 18 June 2012 Decision, para. 21.

arguments on the admissibility of his Request.[32] However, the Prosecution will consider Mr Ngudjolo's arguments, advanced under "*les mérites de la requête*",[33] as his submissions on admissibility and respond accordingly. Subject to the Chamber's decision, the Prosecution does not object to Mr Ngudjolo's submission that the Request was filed in a timely manner.[34]

[32] Request, paras. 27-28.
[33] Request, paras. 34-115.
[34] Request, paras. 29-33. The Prosecution notes this Chamber's previous decision (ICC-01/04-02/12-285), paras. 1-5, where it noted Mr Ngudjolo's earlier expressed intention to file the Request by 14 August 2015, and rejected his request for clarification on the time limit to file a compensation claim.

C. The Request is unfounded in law and fact

22. Mr Ngudjolo claims that he must be compensated because the Prosecution, Pre-Trial Chamber I and Trial Chamber II all purportedly erred. In particular, he argues that:[35]

i. no objective and impartial investigation and assessment was allegedly conducted before the arrest warrant against him was issued and subsequent detention ordered;

ii. the Pre-Trial Chamber carried out a purportedly flawed joinder and confirmation process; and

iii. the Trial Chamber, while correctly evaluating the evidence and drawing legal conclusions, allegedly left some doubt as to Mr Ngudjolo's innocence.[36]

23. According to Mr Ngudjolo, these three asserted errors led to a "grave and manifest miscarriage of justice".[37] However, as shown below, Mr Ngudjolo's claims are unfounded in law and fact. Many of his arguments have been raised before and rejected at trial and on appeal: the compensation procedure is not a second appellate process. Several of his contentions are speculative at best, and all are unsubstantiated. His individual assertions, and the Request taken as a whole, fail to establish any "miscarriage of justice"—let alone "a grave and manifest miscarriage of justice". Nor does he show that he was unlawfully detained. Rather, the case record shows that the Court treated Mr Ngudjolo impeccably, on par with other accused before it, and fully respecting his rights at every stage. The case record equally shows that it was Mr Ngudjolo himself who abused his

[35] Request, paras. 25, 35, 41.
[36] Request, para. 35.
[37] Request, paras. 35-41.

detention privileges and sought to improperly influence the outcome of the case against him.

I. Mr Ngudjolo's arrest and subsequent detention at the Court shows no error

a. Issuing an arrest warrant is an ex parte *procedure, and Mr Ngudjolo was not required to be heard at that stage.*

24. Mr Ngudjolo wrongly claims that he should have been heard before the arrest warrant against him was issued. In claiming that the arrest warrant was issued *"sans son audition préalable sur les faits fondant ledit mandat"*,[38] he misapprehends the *ex parte* nature of the procedure to issue an arrest warrant. In general, and as Pre-Trial Chambers of this Court have emphasised,[39] article 58 proceedings are confidential and *ex parte.* In other words, the application requesting an arrest warrant and the related procedure under article 58 remain confidential to the subjects of the arrest warrant. And there is good reason to maintain the *ex parte* nature of article 58 proceedings. Persons to be the subject to arrest warrants, if made aware of their existence, could defeat the very purpose of the warrants by evading capture and/or obstructing the investigation.

25. Nor are arrest warrants adversarial in nature. Arrest warrants are a matter for the Prosecution's discretion, subject only to the Pre-Trial Chamber's

[38] Request, para. 44.
[39] *See* ICC-02/05-01/09-3 ("*Bashir* Article 58 Decision"), para. 47, fn. 48, where the Chamber noted "[t]hat the proceedings for the issuance of warrant of arrest remain confidential and *ex parte*, despite the fact that the Prosecution has filed a public summary of its Application in the record of the Darfur situation." *See also* Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute*, p. 706, explaining further that Pre-Trial Chamber I had "chided the Prosecutor, who filed a public summary of his application for an arrest warrant at the time of the application." *See also* ICC-01/09-01/15-11 ("*Gicheru and Bett* Order of 10 September 2015"), p. 3, noting that documents pertaining to the arrest need not be "restrictively classified" once the arrest has taken place.

authorisation. Persons subject to arrest warrants have no standing at that stage and are not permitted to contest the facts or the reasons underpinning the necessity of such warrants.[40] Indeed, five Judges of the Pre-Trial Division of this Court have been unanimous on this point. They expressly state, in a recently published manual documenting the Chambers' best practices since the Court's inception, that:

> The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), *the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application*.[41]

26. Moreover, Mr Ngudjolo is incorrect to claim that "*[i]l n'a pas eu l'occasion de s'expliquer sur les faits qui lui étaient imputés*."[42] Although he could not contest the facts at the stage of being arrested, he had ample opportunity to contest the facts underpinning the Prosecution's case at various other stages, including the confirmation, at trial and on appeal. His claim is cursory and lacks detail showing that he has been prejudiced in any manner. Indeed, he contested the facts at confirmation. He also contested the facts at trial, following which he was acquitted, and then once again on appeal, when his acquittal was confirmed. He was not prejudiced.

27. Nor, contrary to the Request,[43] did Mr Ngudjolo have a right under article 55(2) to be interviewed by the Prosecutor. Mr Ngudjolo wrongly presupposes that every person subject to an arrest warrant must be interviewed; rather, as article

[40] *Contra* Request, paras. 44, 47-48.
[41] *See* Pre-Trial Practice Manual, September 2015, para. 1. (emphasis added). The Manual was presented to and shared with all Judges of the Court […] who "endorsed the manual and recommended that it be made public as soon as possible." *See also* ICC-01/09-42, para. 18; ICC-01/09-35, para. 10.
[42] Request, para. 47.
[43] Request, paras. 44-45.

55(2) makes clear,[44] conducting such interviews is not mandatory. The interviews are held at the discretion of the Prosecution, and the rights guaranteed under article 55(2) apply only *if and when* these interviews are conducted. As commentators confirm, "[p]aragraph 2 of [a]rticle 55 establishes a set of additional guarantees *which are triggered by two conditions*: first, there must be 'grounds to believe that a person has committed a crime within the jurisdiction of the Court'; second, that a person is 'about to be questioned by the Prosecutor […] upon request of the Prosecutor under Part 9 of the Statute.'"[45] Therefore, any rights that Mr Ngudjolo may have had under article 55(2) were contingent on the decision to interview him. Because no such interview was held, no rights under article 55(2) accrued to him.

28. Nor does article 14 of the International Covenant on Civil and Political Rights (ICCPR) support Mr Ngudjolo's claim of a right to be interviewed at the arrest warrant stage.[46] First, this provision, as reflected in article 67, relates to an accused's rights: persons against whom arrest warrants are being considered are not yet accused and do not have article 67 rights. Second, Mr Ngudjolo's rights as an accused were fully respected once the charges against him were confirmed. He does not claim otherwise. As Mr Ngudjolo concedes,[47] he was given full opportunity to contest the facts. Not only did he mount a vigorous defence, he also testified in his own defence, made an unsworn statement— under article

[44] Article 55(2) states: Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court *and that person is about to be questioned* either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed *prior to being questioned*. (emphasis added).
[45] Zappalà, S, "Rights of Persons during an Investigation" , p. 1198 (emphasis added); Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute*, p. 688, stating "[a]rticle 55(2) governs the rights of an individual who is questioned […]" and "[t]he person being questioned is entitled to be informed of the rights set out in article 55(2) prior to questioning."; Zappalà, S, *Human Rights in International Criminal Proceedings*, p. 54, noting that article 55 confers two sets of rights: article 55(1) applies initially when there are still no grounds to believe that a person is responsible for the crime under investigation, and article 55(2) applies subsequently when such grounds exists and the person is about to be questioned; Friman, H, "The Rights of Persons Suspected or Accused of a Crime" , pp. 250-251.
[46] *Contra* Request, paras. 46-47.
[47] Request, para. 47.

67(1)(h)— at the close of his trial,[48] and even addressed the Appeals Chamber during the oral hearing on appeal.[49]

29. Crucially, even though the Trial Chamber stated that "it would have been expedient—subject to its approval—for a statement to be taken from the Accused during the investigation stage",[50] the Prosecution was not bound to do so. Further, the Chamber was equally aware of the difficulties faced by the Prosecution in conducting investigations in the region affected by recurrent conflicts.[51] And the Chamber's statement is ambiguous: it remains unclear why "a statement [from the Accused] during the investigation stage" would have had more weight than the Accused's sworn testimony at trial.

30. Nor was Mr Ngudjolo a person fit to be summoned to the Court.[52] An arrest warrant was necessary to ensure his appearance at trial (article 58(1)(b)(i)), and to ensure that he did not obstruct or endanger the investigation or the court proceedings (article 58(1)(b)(ii)).[53] Indeed, although Mr Ngudjolo claims that because of his position in the *centre supérieur militaire de Kinshasa, "[i]l n'avait aucune ressource pour se soustraire à la justice*",[54] the Pre-Trial Chamber found otherwise. According to the Chamber:

> "there were reasonable grounds to believe that by virtue of his current position as a Colonel of the *Forces Armées de la République Démocratique du Congo*

[48] ICC-01/04-02/12-3-tENG ("*Ngudjolo* Trial Judgement"), paras. 23, 25.
[49] ICC-01/04-02/12-210, p. 4; ICC-01/04-02/12-217, para. 9 (allowing Mr Ngudjolo to make an unrestricted personal address to the Court on any issue he deemed relevant to his defence).
[50] *Ngudjolo* Trial Judgement, para. 120, stating "[t]he Chamber also considered that it would have been expedient—subject to its approval—for a statement to be taken from the Accused during the investigation stage. Mathieu Ngudjolo opted to testify as a witness under oath at the end of the trial, when he was in possession of all the testimony received during the proceedings. The uniqueness of his testimony at the ultimate stage of the hearing failed to provide the Chamber with the opportunity to collate his testimony with prior testimonies, which would have proven invaluable."
[51] *Ngudjolo* Trial Judgement, paras. 115, 121.
[52] *Contra* Request, paras. 92-94.
[53] ICC-01/04-02/07-3 or ICC-01/04-01/07-262 ("Article 58 Decision"), paras. 62-68.
[54] Request, paras. 43, 92.

> *("FARDC")* in Bunia and as the advisor to the Operational Zone Commander in the Ituri district, Mathieu Ngudjolo is able to make use of "the services" of former FNI and FRPI members who have integrated into the ranks of FARDC, and that he might use his connections and the means at his disposal in order to flee as soon as he would become aware of the warrant of arrest issued against him."[55]

31. Likewise, it found that Mr Ngudjolo, as a well-known senior former commander of the FNI/FRPI, and current Colonel of the FARDC, had the resources to "obtain information which ordinary citizens cannot obtain."[56] More so, as the Prosecution had shown, men under his control had threatened witnesses in the past, relating to both the Prosecutor's ongoing investigations but also national proceedings.[57] The Trial Chamber also periodically reviewed his detention and decided against his release.[58] As future events concerning Mr Ngudjolo's conduct in detention demonstrated, Mr Ngudjolo's continued detention was not only founded in law, but equally necessary, given the suspicions that he and his associates interfered with witnesses. At this belated stage, Mr Ngudjolo only disagrees with the Pre-Trial Chamber's conclusions but shows no error.

32. Finally, being summoned to the Court, instead of being arrested, is not a "right" of a suspect.[59] A uniform rule cannot be applied to every accused: the Prosecution must determine whether the circumstances of the case require an arrest warrant or summons. Most importantly, a summons to appear is not an

[55] Article 58 Decision, para. 64. *See also* paras. 63, 65.
[56] Article 58 Decision, para. 67.
[57] *Ibid*., para. 67.
[58] *See e.g.*, ICC-01/04-01/07-280-tENG; ICC-01/04-01/07-572; ICC-01/04-01/07-694; ICC-01/04-01/07-746; ICC-01/04-01/07-750; ICC-01/04-01/07-1593-Red.
[59] *Contra* Request, para. 94, where Mr Ngudjolo claims discriminatory treatment because he was not summoned to the Court, similar to the suspects in the *Kenya* situation.

option if, as in Mr Ngudjolo's case, there are grounds to believe that the person would simply not appear and/or obstruct justice.[60]

b. The referral of the Situation in the Democratic Republic of Congo to the Court was proper

33. Mr Ngudjolo also wrongly suggests that the referral of the *Situation in the Democratic Republic of Congo* ("DRC") to the Court, under article 14, was faulty.[61] The Request (mis)interprets the facts surrounding the referral and Mr Ngudjolo's subsequent arrest in a rather dramatic manner, but shows no error. Rather, it fundamentally misunderstands the Court's processes, including the Prosecutor's role following such State referral and what makes a case admissible before this Court.

34. First, the Request fails to distinguish between a situation and a case. Contrary to Mr Ngudjolo's contention,[62] a State under article 14 may only refer a *situation* to the Court—not a particular case against an individual. Therefore, the absence of Mr Ngudjolo's name in the referral letter is irrelevant. More so, that *"[…] le chef de l'État congolais n'avait nommément cité personne"*[63] was proper. Indeed, once a referral is made, it is for the Prosecutor, and not the DRC authorities, to further investigate and determine the persons who may be investigated and prosecuted in specific cases.[64] Put simply, the Prosecutor must be free to investigate all

[60] Hall, C, "Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear", p. 1144. *See also* ICC-02/05-03/09-632-Red ("*Banda* Appeal Decision of 3 March 2015"), paras. 25-26.
[61] *Contra* Request, paras. 9-14, 42.
[62] Request, para. 11.
[63] Request, para. 11.
[64] *See* Marchesi, A, "Referral of a situation by a State Party", p.579, stating "[d]uring the 1996 sessions of the Preparatory Committee, it was proposed that State complaints should in fact be understood as State entitlement to refer 'situations', leaving to the Prosecutor the task of prosecuting individual persons suspected of having committed a crime in the context of the 'situation' concerned. This division of roles, aimed at avoiding the awkwardness of States, as such, selecting individual suspected perpetrators for prosecution by the ICC, was accepted by the Diplomatic Conference and is now part of the Rome Statute."; also "[a]lthough the proposal that the object of State complaints should be 'situations' rather than specific crimes was well received by the participants in the preparatory process, concern was expressed that the complainant State should not be able to

persons who may be responsible for crimes within a particular situation. And in doing so, the Prosecution is not obliged to, and indeed cannot, consult the referring State in determining which persons to investigate and prosecute.[65] Article 42 requires the Office of the Prosecutor to "act independently as a separate organ of the Court." Moreover, the Office "is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."[66] Any other interpretation would undermine the statutorily safeguarded Prosecutor's role and independence in determining who to investigate and prosecute.

35. Likewise, having made the referral, the DRC authorities relinquished their role *vis-à-vis* the situation (and any cases arising therefrom). As commentators to the Statute have noted, limiting a State Party's role to referring "situations" only, and not "cases", was both prudent and efficient. It was prudent because it helped "reduce the arguably unseemly prospect of States Parties referring complaints against specific individuals, which might create a perception of using the Court to 'settle scores'." It was efficient because "as a practical matter, a State Party […] should not be required to carry out a full-fledged investigation in order to identify all of the perpetrators before it can call upon the ICC for action." Instead, the Court's Prosecutor assumes that function.[67]

36. Further, Mr Ngudjolo's submission that the referral letter was "*très laconique du reste parce que totalement dépourvue d'exposé des faits*"[68] is irrelevant. Yet again,

'limit the referral to include crimes committed by one side to a conflict in a situation…or restrict the nationality of those who can be investigated and prosecuted…' In other words, '[t]he prosecutor must be free to investigate all persons who may be responsible for crimes within the court's jurisdiction in a situation.'"

[65] *Contra* Request, para. 11.

[66] Article 42(1), Statute.

[67] Kirsch, P and Robinson, D, "Referral by States Parties", p. 623 (also noting that conferring mandate, without naming specific individuals, is consistent with the practice of other tribunals (Nuremburg, Tokyo, ICTY and ICTR)). *See also* Gurmendi, S, "The Role of the International Prosecutor", p. 180.

[68] Request, para. 14.

Mr Ngudjolo has misapprehended the distinct roles of a referring State Party and the Prosecutor in article 14 referrals. Whether or not the letter from the DRC authorities mentioned certain facts concerning the conflict,[69] it was for the Prosecution to determine the scope of its investigations, including whether Mr Ngudjolo would be a possible suspect. And when it did so, the Prosecution's request for an arrest warrant against Mr Ngudjolo met, *inter alia,* the standard in article 58(1)(a), *i.e.,* that there were reasonable grounds to believe that Mathieu Ngudjolo had committed a crime within the Court's jurisdiction. The Pre-Trial Chamber confirmed this, along with the necessity for an arrest warrant in Mr Ngudjolo's case.[70]

37. Second, Mr Ngudjolo launches an eleventh hour, but misplaced, challenge to the admissibility of his case before this Court. He is, however, massively out of time to do so.[71] Compensation proceedings post-appeal is hardly the time (or the place) to challenge the admissibility of this case. Nor does he substantiate such a claim. Although Mr Ngudjolo now seems to argue that his case should not have been admissible before the Court,[72] he misreads the referral letter. There is nothing in the referral letter to suggest that the referral is conditional, or "*pour l'heure*".[73] Significantly, the Request fails to note that in the Article 58 Decision, the Pre-Trial Chamber considered Mr Ngudjolo's interests and conducted an initial determination, under article 19(1), of the admissibility of the case.[74] Nevertheless, the Pre-Trial Chamber found the case admissible before the Court, at the time it authorised the arrest warrant against Mr Ngudjolo.

[69] *See e.g.* Request, fn. 16, where the Request claims that in contrast to the DRC referral, the referrals by Uganda, the Comoros and Mali explained the nature of the conflict in more detail.
[70] Article 58 Decision, paras. 9-68, finding that the case against Mr Ngudjolo fell within the Court's jurisdiction, was admissible and met the conditions under article 58 to issue an arrest warrant.
[71] *See generally* article 19.
[72] Request, paras. 10, 12, 13.
[73] DRC-D03-0001-0786 (ICC-01/04-02/07-24-Conf-AnxA 1) ("DRC Referral Letter").
[74] Article 58 Decision, paras. 17-22.

38. In particular, the Pre-Trial Chamber found that any existing national proceedings against Mr Ngudjolo at the time did not render the case inadmissible because they did not concern "the same conduct which is the subject of the Prosecution Application."[75] Indeed, the Chamber noted the existence of several then existing national proceedings against Mr Ngudjolo, for example:

- On or about 23 October 2003, Mr Ngudjolo was arrested by MONUC and surrendered to the DRC authorities. He was charged before the *Tribunal de Grand (sic) Instance*, in Bunia, for the murder of a UPC officer. He was later acquitted of this charge in June 2004 and released from detention in December 2004;
- Mr Ngudjolo was also investigated by the Bunia Prosecutor for other murders allegedly committed within an attack on the village of Tchomia on 15 July 2003; and
- In September 2005, the national military Prosecutor issued an arrest warrant for Mr Ngudjolo in relation to charges relating to his role within the *Mouvement Révolutionnaire Congolaise (sic)* (MRC).[76]

39. None of these national proceedings, however, concerned the same conduct underpinning the Prosecution's case before the Court. Mr Ngudjolo's case was found admissible before the Court. Nor did he subsequently challenge the admissibility of his case before the Court.[77] At this belated stage, therefore, Mr Ngudjolo can neither challenge the admissibility of his case nor can he claim that the existence of national proceedings against him rendered the article 14 referral erroneous.[78]

[75] Article 58 Decision, para. 21.
[76] Article 58 Decision, paras. 18-19.
[77] Mr Ngudjolo's co-Accused, Germain Katanga, challenged the admissibility of his case before the Court. *See* ICC-01/04-01/07-1213-tENG, where Trial Chamber II found that Katanga's case was admissible. The Appeals Chamber confirmed this finding (ICC-01/04-01/07-1497 OA8).
[78] *Contra* Request, para. 12.

40. Finally, Mr Ngudjolo merely speculates that if the DRC authorities had considered him responsible, they would have prosecuted him under *le Code judiciaire militaire* and *le Code pénal militaire congolais.* He relies on the "Songo Mboyo" trial, which convicted certain soldiers of rape, to support his argument.[79] This is unpersuasive. First, the DRC authorities were never prevented from continuing unrelated national proceedings, following its referral to the Court. Second, and crucially, the Songo Mboyo trial concerned crimes in the Mongala district (northwest DRC). It is nowhere close to Bogoro, nor even the Ituri region.[80] Neither do the facts resemble the case against Mr Ngudjolo. Nor was Mr Ngudjolo charged with crimes relating to Songo Mboyo before this Court. That some military soldiers were tried and convicted in a different unrelated trial is irrelevant to Mr Ngudjolo's trial on the charges he faced at the ICC.

c. The Prosecution properly discharged its mandate to investigate under article 54(1)(a)

41. In another effort to impugn the credibility of the Court's processes, Mr Ngudjolo hypothesises that the arrest warrant was "*un abus de pouvoir*".[81] But he offers no proof. Rather, he grasps at the straws of individual occurrences outside of the Prosecution's control, and fails to stitch together a plausible narrative. Critically, although the Request makes several gratuitous and unfounded comments about the credibility of the Prosecution's investigations,[82] it fails to acknowledge Mr Ngudjolo's own role in tarnishing the process and improperly influencing the outcome of the case. Although Mr Ngudjolo is correct to note that

[79] Request, para. 42.
[80] http://www.un.org/apps/news/story.asp?NewsID=18812
[81] Request, para. 48.
[82] Request, paras. 48-53, 87-95.

witnesses were interfered with,[83] the Prosecution acted properly and diligently. Despite the clear case record documenting his role in interfering with witnesses, Mr Ngudjolo fails to take responsibility for his own improper conduct from the detention centre.

i. The Prosecution is entitled to choose its witnesses

42. Mr Ngudjolo conflates the Prosecution's duty to investigate "incriminating and exonerating circumstances equally" under article 54(1)(a) with the Prosecution's discretion and indeed, obligation, to present its best possible case. Contrary to the Request, that the Prosecution chose certain witnesses to prove its case does not show that "*le Procureur n'a enquêté uniquement et abusivement qu'à charge*."[84] In fact, the two stages are distinct. Article 54(1)(a) obliges the Prosecutor to investigate "to establish the truth", *i.e.*, whether, subsequent to the initial evaluation and finding of a reasonable basis to proceed, criminal responsibility exists. However, once the investigation is concluded, it is for the Prosecutor to determine whether and how the case must proceed to the stage of prosecution.[85] It is axiomatic therefore that the Prosecution is free to choose which witnesses it wishes to call (and which it does not) in prosecuting its case in court.

43. Even the Trial Chamber (that the Request cites with favour),[86] while commenting on the Prosecution's investigation practices,[87] recognised that "the discretion to call various witnesses rested above all with the Office of the Prosecutor."[88] Moreover, the Trial Chamber's observations were its opinion, but

[83] *See e.g.* Request, para. 91.
[84] Request, para. 49.
[85] *See e.g.*, Bergsmo, M. and Kruger, P, "Duties and powers of the Prosecutor", pp. 1079-1080.
[86] Request, paras. 54-55.
[87] *Ngudjolo* Trial Judgement, para. 119, stating *inter alia* "[i[t would have equally been worthwhile for the Chamber to hear the testimonies of certain of the commanders who played a key role before the attack, during the fighting and afterwards."
[88] *Ngudjolo* Trial Judgement, para. 119.

could not replace the Prosecutor's judgement and role in investigating and prosecuting the case. The Prosecution was therefore entitled to call P-250, P-279, P-280, P-28 and P-219—all persons who knew Mr Ngudjolo well—to present its case.[89] If these witnesses were later not found credible after the trial, that, in and of itself, cannot undermine the Prosecution's initial views about these witnesses before trial. Similarly, and contrary to Mr Ngudjolo's assertion, the Prosecution was not obliged to call Floribert Ndjabu Ngabu and Emmanuel Ngabu Mandro (Chef Manu) to support its case.[90]

44. Neither is the Prosecution responsible, nor is compensation due to Mr Ngudjolo, merely because (some of) the Prosecution's evidence was ultimately not relied upon by the Trial Chamber. The Prosecution is obliged to investigate with absolute integrity, but it is not obliged to, and indeed cannot, *ensure* a particular outcome for a trial. A criminal trial is anything but wholly predictable; its outcome is often uncertain.

45. Nor does the fact that some witnesses were found unreliable necessarily imply that the Prosecution's case was flawed, or even tainted.[91] As the ICTR Appeals Chamber has categorically stated, even though "[t]he Trial Chamber eventually found that the Prosecution evidence lacked credibility upon a final analysis of all the evidence as a whole[…]", this cannot mean that "the Prosecution evidence—which was initially considered to be sufficiently credible and reliable […]—was therefore false or tainted."[92] Mr Ngudjolo advances only his personal opinion and conjecture.[93]

[89] *Contra* Request, paras. 49-51.
[90] *Contra* Request, para. 51.
[91] *Contra* Request, paras. 49-53.
[92] *Rwamakuba* Decision of 13 September 2007, paras. 11, 12, rejecting the argument that compensation was due because Prosecution witnesses presented at trial lacked credibility and reliability.
[93] *See* Request, paras. 49, 52, 53, 90, 91.

46. The Request further denies the complexity of an international criminal trial. Its reliance on Germain Katanga's testimony or his Defence's submissions during trial, which diminished Mathieu Ngudjolo's criminal role[94] is immaterial. So too are later developments that may have unfolded during the course of trial. Criminal trials are not conducted with an eye on the rear view mirror. Subsequent developments at trial do not void earlier legally founded decisions to investigate and prosecute.

ii. Mathieu Ngudjolo interfered with witnesses in his case

47. Mr Ngudjolo fails to address "the elephant in the room". The Request ignores the obvious truth. It was *his* illicit behaviour which impugned the Court's integrity and in particular, the Prosecution's case. As the Trial Chamber's decisions, the Registry's reports and the Prosecution's own submissions show,[95] Mr Ngudjolo attempted to pervert the course of justice in his case. In particular, he sought to interfere with, even intimidate, vital Prosecution witnesses (including P-250 and P-28).[96] At the same time, he also ensured that his supporters were briefed and coached to speak to his Defence team when they arrived in the field.[97]

[94] *Contra* Request, paras. 76-78.
[95] *See e.g.* ICC-01/04-02/12-261-AnxC ("Prosecution's submission of 14 January 2009"); ICC-01/04-02/12-235-Anx3-Red2 ("Registry's first report of 8 June 2009"); ICC-01/04-02/12-235-Anx8-Red ("TC's first Decision of 24 June 2009"); ICC-01/04-02/12-235-Anx9-Red ("Registry's second report of 14 July 2009"); ICC-01/04-02/12-235-Anx11-Red ("Registry's third report of 17 July 2009"); ICC-01/04-02/12-235-Anx12-Red ("TC's second Decision of 24 July 2009"); ICC-01/04-02/12-235-Anx22-Red ("TC's third Decision of 25 September 2009"); ICC-01/04-02/12-235-Anx14-Red ("Registry's fourth report of 19 October 2009"); ICC-01/04-02/12-235-Anx15-Red ("TC's fourth Decision of 4 December 2009"); ICC-01/04-02/12-235-Anx18-Red ("Registry's first Kilendu report of 29 August 2011"); ICC-01/04-02/12-235-Anx20-Red ("Registry's second Kilendu report of 29 August 2011"); *Ngudjolo* Appeal Dissent, para. 8. *See also* Prosecution's submissions relating to the third ground of its appeal (ICC-01/04-02/12-T-4-Red2-ENG, p. 7, ln. 22-p. 8, ln. 19; p. 14, ln. 17-p. 25, ln. 21; p. 65, ln. 2-p. 69, ln. 6; ICC-01/04-02/12-39-Red3, paras. 140-226.
[96] Prosecution's submission of 14 January 2009; Registry's first report of 8 June 2009, paras. 10, 19.
[97] Registry's first report of 8 June 2009, paras. 7, 27.

48. At the very least, the record from the Registry and the Trial Chamber shows the following:

- Mathieu Ngudjolo "sought to have testimonies changed, which might affect their veracity[…]."[98] He instructed his associates, in violation of the Chamber's orders, to identify "the youngsters" who were under his command (Prosecution witnesses) and their parents.[99] Indeed, Mathieu Ngudjolo hired Pastor Lopa as his resource person to "prepare the ground" on the child soldiers testifying for the Prosecution, *i.e.*, identify the child soldiers and establish contact with their parents.[100]
- His attitude disregarding the Chamber's orders to protect confidential information likely was sufficient to amount to contempt of Court.[101]
- He identified, located and possibly manipulated witnesses.[102] As the Trial Chamber noted, as early as June 2009, a "serious concern" remained that Mr Ngudjolo would be able "to continue to exert a negative influence on the outcome of the proceedings against him."[103] And as the Registry recognised—it was evident that "Mathieu Ngudjolo [was] attempting to identify Prosecution witnesses *via* third parties", third parties who were not authorised to access such confidential information regarding witnesses.[104]
- Indeed, despite being monitored, Mathieu Ngudjolo was undeterred in trying to influence witness testimonies in his case. He switched languages to discuss witnesses' related issues or used coded messages.[105] As the Registry was compelled to note, his conduct was "even more

[98] Registry's first report of 8 June 2009, para. 27.
[99] Registry's second report of 14 July 2009, paras. 8, 10.
[100] Registry's third report of 17 July 2009, paras. 5-12.
[101] Registry's first report of 8 June 2009, para. 27.
[102] ICC-01/04-02/12-235-Anx4-Red2 ("Registry's report of 24 August 2009").
[103] TC's first Decision of 24 June 2009, para. 30; followed by TC's second Decision of 24 July 2009, para. 20.
[104] Registry's third report of 17 July 2009, p. 4.
[105] *Ngudjolo* Appeal Dissent, para. 8; Registry's third report of 17 July 2009, pp. 4-6.

reprehensible" because he was aware that he was being monitored.[106] And the Trial Chamber noted the "particular gravity of [his] conduct."[107]

- Further, Mathieu Ngudjolo's close aides— who he patronised—showed a "distorted perception of or even disregard for […]ethics."[108]

49. That Mr Ngudjolo acted improperly and violated the Chamber's orders is beyond dispute. As the case record demonstrates, he admitted to seeking the assistance of third parties, giving instructions and passing on information to harm witnesses.[109] Equally, both the Trial and Appeals Chambers have acknowledged his illicit conduct.[110]

50. Mr Ngudjolo's improper conduct, compounded by the Trial Chamber's eventual passivity in denying the Prosecution full access to the Registry reports and the ability to use these reports in cross-examination, adversely affected the Prosecution's case. As the Dissenting Judges robustly stated, the Prosecutor was prevented "from presenting her case on a par with the [D]efence and from fulfilling her statutory obligations pursuant to article 54(1) of the Statute[…]"[111] The critical witnesses were frightened away. Following Mr Ngudjolo's interference, P-250 "made curious statements and behaved oddly during his testimony." As the Trial Chamber noted, "none of the other witnesses considered to be vulnerable behaved in such a peculiar manner."[112] Further, the Appeals Chamber was alert to the possibility that discrepancies between P-250's pre-trial statements and oral evidence may have been due to "interference or pressure that

[106] Registry's third report of 17 July 2009, p. 12.
[107] TC's fourth Decision of 4 December 2009, para. 19.
[108] Registry's third report of 17 July 2009, p. 12.
[109] TC's third Decision of 25 September 2009, para. 19, documenting Mr Ngudjolo's "word of honour" to refrain from improper conduct. *See also* ICC-01/04-02/12-235-Anx5-Red2 ("Registry's submission of 10 September 2009").
[110] *See e.g.*, *Ngudjolo* Appeal Judgement, paras. 275-276;
Ngudjolo Appeal Dissent, paras. 5, 8, 13, fn. 19, para. 28.
[111] *Ngudjolo* Appeal Dissent, para. 5.
[112] *Ngudjolo* Trial Judgement, para. 141.

may have been exerted on him."[113] Likewise, P-28 surprised the Trial Chamber with his contradictions and behaviour in court, and failed to "deliver the account expected from a combatant who had personally experienced the event, participated in it and taken risks."[114]

51. In this light, Mr Ngudjolo's lament that the Prosecution did not call "Chef Manu" (Emmanuel Ngabu Mandro)[115] is particularly ironic. Chef Manu was Mathieu Ngudjolo's key accomplice in ensuring his illegal contacts from the detention centre.[116] The Prosecution's concerns about the reliability of Chef Manu's testimony—including that his testimony about Mathieu Ngudjolo was biased— were vindicated.[117] Indeed, the Trial Chamber found that although Chef Manu's testimony was "credible in the main", it must be treated with "a great deal of caution" on matters of the Accused's liability.[118] Significantly, the Chamber found that Chef Manu was particularly defensive when questioned about his contacts with Mr Ngudjolo from the detention centre.[119] Despite the Registry's documentation on Chef Manu's frequent contact with Mr Ngudjolo while the latter was detained and despite being under oath, Chef Manu denied having any such contact. Mr Ngudjolo replied with equal irritation to the Prosecution's questions about his contact with Chef Manu.[120]

52. The case record is clear: Mr Ngudjolo impugned this Court's integrity by seeking to alter and influence witness testimony and disclosing protected information. This should, on its own, disqualify him from any compensation. Principles of equity—and the clean hands doctrine in particular—require that "a

[113] *Ngudjolo* Appeal Judgement, paras. 283, 291.
[114] *Ibid*., paras. 240-241.
[115] Request, para. 51.
[116] *See e.g.*, Registry's first report of 8 June 2009, para. 7.
[117] *Ngudjolo* Trial Judgement, para. 306.
[118] *Ibid.*, para. 313.
[119] *Ibid*., para. 311.
[120] *See Ngudjolo* Trial Judgement, para. 311.

party cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle, such as good faith."[121] Mr Ngudjolo now seeks to benefit from the very outcome he engineered. Compensating him is simply not appropriate because he does not come before this Court with clean hands.

iii. The Request shows no prejudice caused by the Prosecution's investigations

53. First, Mr Ngudjolo does not explain why he would be prejudiced because the Pre-Trial Chamber, at the stage of the arrest warrant and the confirmation of charges, considered him the "*plus-haut commandant du FNI*".[122] As the Trial Chamber confirmed, the Prosecution's proposed amendment to describe Mathieu Ngudjolo's role from "FNI supreme commander" to "leader of the Lendu militia in the Bedu-Ezekere *groupement*" did not exceed the facts and circumstances.[123] Indeed, as the Trial Chamber noted, both the Prosecution's submissions and the Confirmation Decision described various similarities between the Lendu combatant group and the FNI group. Their military structures, camp locations and commanders responsible for those camps were identical. So too was Mathieu Ngudjolo identified as "the commander of the Lendu group of combatants from Bedu-Ezekere" in both documents. He was therefore fully aware that he was being charged because "he exercised control over the Lendu combatants from Bedu-Ezekere *groupement* who took part in the 24 February 2003 attack on Bogoro."[124] Mr Ngudjolo has advanced these submissions before and failed. Nor is his reference that he signed the agreement on the cessation of the hostilities in a certain capacity[125] relevant to his Compensation Request.

[121] Garner, B. (Ed.)., *Black's Law Dictionary*, p. 268.
[122] Request, paras. 52, 53.
[123] *Ngudjolo* Trial Judgement, paras. 345-350.
[124] *Ngudjolo* Trial Judgement, para. 351.
[125] Request, fn. 53, para. 72.

54. Second, the Request cannot rely on the Trial Chamber's opinion about the Prosecution's investigative practices to advance its claims.[126] Mr Ngudjolo's reliance on the Chamber's exhortations that the Prosecution should have visited Zumbe or interviewed Major Boba Boba[127] cannot persuade. First, the Chamber's various findings on the Prosecution's investigative practices were provided merely to facilitate "a better understanding of [the] judgement"[128] – not as a means to direct the Prosecution's investigations. Second, the Chamber was aware of "the difficulties encountered by the Prosecution in conducting investigations", including the high levels of insecurity affecting the collection of the evidence, and that it was duty bound to eschew any action that could result in identifying witnesses in the region.[129]

55. Third, neither the Prosecution nor the Chamber was expected to conduct a mini-trial before issuing the arrest warrant, *i.e.* to "*procéder à l'analyse, à la vérification, à l'évaluation, à la contre-évaluation des éléments de preuve à sa disposition avant de prendre la grave décision de mettre un suspect en détention préventive.*"[130] By imposing upon the Prosecution and the Chamber an unduly onerous burden at the stage of the article 58 proceedings, Mr Ngudjolo wrongly imports the standard of proof for trial (proof beyond reasonable doubt) and bypasses the article 58 standard (reasonable grounds to believe).

56. Fourth, and equally, Mr Ngudjolo's submissions that the Prosecution failed to recognise "[*l*]*a réalité iturienne*" and its complexity[131] in its investigations are unfounded. That the Prosecution has brought several other cases grounded in the Ituri conflict, focusing on the Lendu-Hema ethnic conflict and resulting in two

[126] Request, paras. 54-55.
[127] Request, paras. 54-55.
[128] *Ngudjolo* Trial Judgement, paras. 115-123.
[129] *Ibid.*, paras. 115, 121.
[130] *Contra* Request, para. 53.
[131] Request, para. 88.

convictions thus far,[132] is proof to the contrary. Nor does Mr Ngudjolo substantiate his claim that the Prosecution ignored the conflict's international nature.[133] Nor does he show its relevance to his Request.

57. Fifth, the Request is unclear on why Mr Ngudjolo was prejudiced by the former Prosecutor's (Luis Moreno Ocampo's) purported comments—as reported by Chef Manu when observing a video played in the courtroom—that he (Mathieu Ngudjolo) killed the people at Bogoro.[134] Because the video was played without sound,[135] Chef Manu merely speculated as to the former Prosecutor's exact words. Equally, portions of his testimony were treated with caution.[136] And even if, *arguendo*, the former Prosecutor uttered these words, he was merely presenting and conveying his case to the affected Bogoro community. That Mathieu Ngudjolo killed people in Bogoro was at the heart of the Prosecution's case against him — equally reflected in the various public Court documents concerning Mathieu Ngudjolo, including the arrest warrant and the Confirmation Decision. In principle, a public presentation of the Prosecution's charges in a particular case cannot infringe upon an accused's presumption of innocence. [137] To the contrary, the Prosecutor plays an important role in informing victims and the public at large about ongoing investigations and prosecutions.[138] It is in keeping with the Prosecution's practice to reach out to affected communities, as required. Moreover, as the Appeals Chamber has recalled, whether particular statements could violate the presumption of innocence should "be considered in light of all of the relevant circumstances",[139] and not in a selective or distorted manner.

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[132] Thomas Lubanga Dyilo and Germain Katanga.
[133] Request, para. 88.
[134] Request, para. 89, referring to Chef Manu's testimony (ICC-01/04-01/07-T-302-Red-FRA, p. 42, lns. 26-27), stating "*le Procureur que vous voyez en blanc, c'est lui qui intervenait en premier. Il a dit que Ngudjolo a tué des gens à Bogoro*."
[135] ICC-01/04-01/07-T-302-Red-FRA, p. 42 lns. 2-10.
[136] *Ngudjolo* Trial Judgement, paras. 311, 313.
[137] *Contra* Request, paras. 89-90.
[138] ICC-01/11-01/11-175, para. 27.
[139] *Ibid*., para. 28.

58. Finally, although Mr Ngudjolo has exhausted his challenge to the Prosecution's appeal against the Trial Judgement during the appellate process, he repeats his arguments at this belated stage.[140] Yet, they remain nebulous: the Prosecution's appeal in the *Ngudjolo* case—a right it is accorded under article 81—raised three separate grounds of appeal, none of which concerned Germain Katanga or the withdrawal of his appeal. Mr Ngudjolo fails to show why the Prosecution's appeal, nor the confirmation of his acquittal on appeal, has resulted in a miscarriage of justice.

[140] Request, paras. 81-82. *See* ICC-01/04-02/12-T-4-Red2-ENG, p. 81 lns. 4-16, where the *Ngudjolo* Defence submits on the discontinuance of the appeals in Germain Katanga's case.

II. The Pre-Trial Chamber properly authorised the arrest warrant, ordered the joinder of the Ngudjolo and Katanga cases and confirmed the charges, and Mr Ngudjolo fails to demonstrate any resulting miscarriage of justice

59. The Request alleges that the Pre-Trial Chamber erred in three ways: (i) by authorising the arrest warrant; (ii) by ordering the joinder of the *Ngudjolo* and *Katanga* cases; and (iii) by confirming the charges, without giving the Defence sufficient time to prepare and without properly evaluating the evidence before it. According to Mr Ngudjolo, because of these errors, he was improperly detained.[141] Mr Ngudjolo is simply wrong and yet again, fails to demonstrate any unlawful detention or a miscarriage of justice (let alone a grave and manifest one).

a. The Pre-Trial Chamber properly authorised the arrest warrant

60. Mr Ngudjolo shows no error in the Prosecution's investigation, its subsequent application for an arrest warrant and the Pre-Trial Chamber's authorisation of the arrest warrant.[142] Since the Prosecution has addressed these issues above, it incorporates its response here accordingly.[143]

b. The Pre-Trial Chamber properly ordered the joinder of charges

61. Mr Ngudjolo's Request fails to explain why the joinder of the case *per se* amounted to a miscarriage of justice.[144] In fact, he merely relitigates an issue, which has long been settled by the Pre-Trial Chamber and the Appeals Chamber in this case.

[141] Request, para. 41.
[142] *Contra* Request, paras. 41-55.
[143] *See* Section C-I above, paras. 24-58.
[144] Request, paras. 57-60.

62. Nevertheless, by the joinder of the two cases, Mr Ngudjolo suffered no prejudice. Merely because the cases were ultimately severed following the unpredictable course of a criminal trial does not impugn the initial decision to join the cases.[145]

63. Nor does the Request acknowledge that the Pre-Trial Chamber authorised the joinder primarily to safeguard *his* rights as an accused.[146] In particular, the Chamber found that "the joinder enhances the fairness as well as the judicial economy of the proceedings […]."[147] Not only did such joinder afford to the arrested persons the same rights as if they were being prosecuted separately, it also avoided having witnesses testify more than once, reduced expenses related to those testimonies, and limited duplicating evidence. At the same time, it afforded equal treatment to both arrested persons by eliminating inconsistencies when evidence was presented.[148] Indeed, the efficiency of the joinder was confirmed during trial. Both Germain Katanga and Mathieu Ngudjolo called several joint witnesses, which considerably saved the Court's resources.

64. The Pre-Trial Chamber also found that, in principle, the concurrent presentation of evidence pertaining to different arrested persons did not *per se* constitute a conflict of interests.[149] Neither did the Defence show that separate proceedings were necessary to avoid serious prejudice to either Accused. Significantly, while Mr Katanga did not oppose the joinder, Mr Ngudjolo only objected to the joinder, under article 64(5) and rule 136, of the proceedings leading to the confirmation hearing. He did not object to the joinder at trial.[150] Limited as his objection was, Mr Ngudjolo was given a further opportunity to

[145] *Contra* Request, paras. 57-59.
[146] ICC-01/04-01/07-257 ("Joinder Decision").
[147] Joinder Decision, p. 8.
[148] Joinder Decision, p. 8.
[149] *Ibid*.
[150] Joinder Decision, p. 10.

make his case before the Appeals Chamber. The Appeals Chamber held that joinder of more than one person in the same document containing the charges was the norm, which not only tallied with the Statute's object to ensure "the efficacy of the criminal process", but equally promoted its purpose "that proceedings should be held expeditiously."[151] The Appeals Chamber found that the joinder of the cases against the two Accused was warranted because it was "a course consistent with the rights of the accused, assured by article 67(1)(c) of the Statute, and the rights of a person facing charges at the confirmation hearing (rule 121(1) of the Rules)".[152]

65. Contrary to Mr Ngudjolo's argument, the joinder pre-confirmation in no way violated the principle of legality.[153] Moreover, nothing in the Trial Chamber's assessment of the evidence shows that he was prejudiced by the joinder. In fact, the severance prior to the issuance of the Trial Judgement, and his subsequent acquittal show the opposite.[154] The Trial Chamber neither triggered regulation 55 against Mr Ngudjolo nor did it delay its decision against him pending its regulation 55 ruling for Mr Katanga. Rather, it recognised that the severance of the charges against Mr Ngudjolo was "necessary to avoid serious prejudice to him", and required the proceedings against him to be brought to a prompt end.[155] Mr Ngudjolo simply cannot show prejudice.

66. Nor is it compelling that Mr Ngudjolo contests the joinder—by relying on his Counsel's own closing submissions—to claim that the two Accused did not know each other until 8 March 2003, and thereby could not have conceived the common

[151] ICC-01/04-01/07-573 ("Appeals Decision on Joinder"), paras. 7-8.
[152] Appeals Decision on Joinder, para. 8.
[153] *Ibid*., para. 9.
[154] ICC-01/04-01/07-3319-tENG/FRA ("Severance Decision"), paras. 58-63.
[155] Severance Decision, paras. 58-62.

plan to attack Bogoro on 24 February 2003.[156] Yet, the Prosecution's case theory did not require the two Accused to know each other personally before the attack. The Prosecution alleged that Germain Katanga and Mathieu Ngudjolo, the respective leaders of the Ngiti and Lendu militias, formed an alliance to eliminate the UPC and destroy Bogoro and its civilian inhabitants. According to the Prosecution, the Lendu and Ngiti began to cooperate in order to neutralise the threat posed by the Hema and the UPC, following two meetings of June and November 2002. Among other events, around late December 2002, Mathieu Ngudjolo sent a delegation from Bedu-Ezekere to Aveba, where the Lendu delegation met the Ngiti combatants to finalise the plan to attack Bogoro.[157]

67. The Defence is entitled to have critical views on the Prosecution's case. However, differing and adversarial views between the Prosecution and the Defence on the former's case theory are neither grounds for miscarriage of justice nor compensation.

c. The Pre-Trial Chamber properly confirmed the charges

68. Mr Ngudjolo fails to demonstrate any prejudice or miscarriage of justice resulting from the process of confirming the charges. The Pre-Trial Chamber did not err when it confirmed the charges. Mr Ngudjolo had sufficient time and resources to prepare for the confirmation.[158]

69. Mr Ngudjolo's submissions challenging the confirmation process[159] reveals his fundamental misunderstanding of this Court's processes and in particular, the

[156] Request, para. 57, referring to ICC-01/04-01/07-T-339-FRA, p. 40, lns. 6-7, stating "*[d]e trois, Mathieu Ngudjolo et Germain Katanga ne se sont connus et vus que le 8 mars 2003 à Dele*.[…]"
[157] *Ngudjolo* Trial Judgement, para. 84; ICC-01/04-01/07-3251-Corr-Red ("Prosecution's Closing Brief"), paras. 500, 515-529.
[158] Request, paras. 61-85.
[159] Request, paras. 61-79, 95-110.

nature of the confirmation process. Despite the Chamber's frequent reminders that the confirmation process is not a "mini-trial",[160] he has persisted in likening the confirmation to a trial.[161] The Request simply fails to respect the statutory and limited nature of the confirmation process before this Court, and to recalibrate its expectations accordingly.

70. Although Mr Ngudjolo takes issue with the Pre-Trial Chamber's finding that "[t]he confirmation hearing has a limited scope and purpose and should not be seen as a "mini-trial" or a "trial before the trial",[162] he shows no error. Indeed, a confirmation hearing is not a trial. But neither, as Mr Ngudjolo wrongly claims, is the confirmation of charges a mere formality.[163] Rather, as the Appeals Chamber has recalled in the *Mbarushimana* decision that Mr Ngudjolo cites,[164] it "serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence." The confirmation process "exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history."[165] In other words, it "defines the parameters of the charges for trial."[166]

71. Moreover, the Request only selectively quotes from the *Mbarushimana* Appeal Decision.[167] Although the *Mbarushimana* Appeals Chamber allowed the relative weighing of evidence at the confirmation stage, this finding was firmly located

[160] *See e.g.* ICC-01/04-01/07-T-38-ENG, p. 7, lns. 6-13; Confirmation Decision, para. 64.
[161] *See e.g.* ICC-01/04-01/07-T-39-ENG, p.12 lns. 11-14, stating "[t]he confirmation of charges, contrary to the international tribunals, the – is a new phrase in the proceedings, a new concept. However, there are some things that were not thought of by those who drafted the Statute[…]" *See also* Request, para. 60, rejecting the notion that the confirmation process is not a "mini-trial" and stating "*[à] quoi sert alors cette procédure*?".
[162] ICC-01/04-01/07-717 ("Confirmation Decision"), para. 64.
[163] Request, para. 70.
[164] ICC-01/04-01/10-514 ("*Mbarushimana* Appeal Decision"), para. 39.
[165] *Mbarushimana* Appeal Decision, para. 39.
[166] ICC-01/04-01/06-3121-Red ("*Lubanga* Appeal Judgement"), para. 124.
[167] Request, paras. 103-110.

within the confirmation process.[168] It did not convert the confirmation process into a full-fledged trial. In fact, it cautioned against doing so.

72. Mr Ngudjolo fails to acknowledge certain key findings of the *Mbarushimana* Appeals Chamber. That Chamber was careful to underscore the limited nature of the confirmation process. As it recalled,

> "[t]he confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial."[169]

73. Nor did the Pre Trial Chamber in this case say anything different in the Confirmation Decision. It stated, in express terms, the following:

> "[t]he purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This

[168] *Mbarushimana* Appeal Decision, para. 46, stating "[i]n determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Any other interpretation would carry the risk of cases proceeding to trial although the evidence is riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged."
[169] *Mbarushimana* Appeal Decision, para. 47. *Contra* Request, paras. 104-110.

mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges."[170]

The Confirmation Decision is therefore clear as to the critical importance of the confirmation process to vet the evidence prior to trial. As the Pre-Trial Chamber confirmed, the proceedings were not meant to "end in a final determination of innocence or guilt of the suspects."[171] Mr Ngudjolo fails to show error in this approach. Indeed it is he who fails to sufficiently explain his own misapprehension on the nature of these proceedings, and why such misunderstanding should cause prejudice.

74. The Request's pervasive misunderstanding of the confirmation process negates all its related claims.

75. First, Mr Ngudjolo fails to show he was disadvantaged during the confirmation process. Despite making conclusory statements that *"[l]a Défense est désarmée*",[172] the Request neither substantiates nor explains.

76. The Ngudjolo Defence had more than four months to prepare for confirmation. Following Mr Ngudjolo's initial appearance on 11 February 2008, the Single Judge set the date for the confirmation hearing for 21 May 2008. In doing so, the Judge specifically provided time, *inter alia,* for the disclosure process, the Ngudjolo Defence's familiarisation with the case, and the Defence's preparation for the confirmation hearing. Neither Mr Ngudjolo nor his Counsel—who has represented him from the beginning—protested at that stage.[173] Nevertheless, when the Ngudjolo Defence later requested a postponement, the

[170] Confirmation Decision, para. 63.
[171] ICC-01/04-01/07-T-38-ENG, p. 15, lns. 13-15.
[172] Request, paras. 62-67.
[173] ICC-01/04-01/07-T-33-ENG, p. 26, ln. 3 – p. 27, ln. 25.

Pre-Trial Chamber granted it additional time to prepare for the confirmation hearing.[174] The confirmation hearing was eventually held from 27 June 2008 until 16 July 2008.[175]

77. The Request persists in repeating rejected arguments,[176] but fails to acknowledge that Mr Ngudjolo was given additional time to prepare for confirmation. Nor does it show why these already tried and failed submissions may now, at this belated stage, amount to a miscarriage of justice. The Defence was simply not expected, nor required, to investigate in a manner needed for trial at the confirmation stage. And more so, the Defence was able to investigate to its satisfaction during trial. In Mr Ngudjolo's own words: "*[p]endant tout ce temps du procès, la Défense a eu le temps de faire des enquêtes nécessaires*."[177] No prejudice therefore ensued.

78. Second, Mr Ngudjolo is wrong to state that he was unable to challenge the Prosecution's evidence at confirmation.[178] As the Pre-Trial Chamber noted, he launched a series of general and specific challenges to the admissibility and probative value of the Prosecution's evidence presented.[179] Yet again, the Request selectively narrates the case history.

79. Moreover, Mr Ngudjolo misunderstands the standard of proof that applies to the confirmation of charges, and confuses it with that required for trial. As the text of article 61 makes clear, the standard of proof for confirmation is significantly lower than that required for trial. As the Pre-Trial Chamber correctly

[174] ICC-01/04-01/07-446 ("Decision on the Defence Request for Postponement of the Confirmation Hearing"), pp. 3-8. *See also* ICC-01/04-01/07-410 ("Ngudjolo's Request to Postpone the Confirmation Hearing") and ICC-01/04-01/07-T-25-ENG ("Status Conference of 22 April 2008").
[175] ICC-01/04-01/07-717 ("Confirmation Decision"), para. 59.
[176] *See* ICC-01/04-01/07-T-39-ENG , p. 2, ln. 21-p. 13, ln. 24.
[177] Request, para. 75.
[178] *Contra* Request, para. 67.
[179] Confirmation Decision, para. 72 onwards.

recalled, the evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of "substantial grounds to believe".[180] The confirmation process does not require proof beyond reasonable doubt. Nor is the Prosecution obliged to call witnesses expected to testify at trial, and may rely on documentary or summary evidence.[181] And contrary to the Request,[182] the same piece of evidence may be assessed differently at confirmation and during trial, according to the distinct standards of proof that apply. Merely because the Trial Chamber found that some of the Prosecution's evidence did not meet the standard of proof for trial (a different standard from the confirmation) does not mean the Pre-Trial Chamber was wrong to confirm the charges in the first place.[183]

[180] Confirmation Decision, paras. 62-64.
[181] Articles 61(5) and (7). *Contra* Request, paras. 62-67.
[182] *See e.g* Request, paras. 99-100, challenging the Pre-Trial Chamber's assessment of the Agreement on the cessation of hostilities of 18 March 2003 (Confirmation Decision, fn. 701). As the Trial Judgement shows, the Pre-Trial Chamber did not err in considering this evidence, because Mathieu Ngudjolo acknowledged having signed the Agreement as colonel, a rank he arrogated to himself. Nevertheless, the Trial Chamber—guided by the higher standard of proof at trial—found that "in light of the various pieces of evidence", Mathieu Ngudjolo's signature of the Agreement established that "he had sufficient authority to represent his community at the signing ceremony", but it was unable to "infer from his signature of the document that he performed such duties as of 2002." (*Ngudjolo* Trial Judgement, paras. 464-467).
[183] *Contra* Request, paras. 72-79, relating various developments at trial to challenge the confirmation of the charges.

III. The Trial Chamber properly safeguarded Mr Ngudjolo's presumption of innocence

80. Mr Ngudjolo claims that the Trial Chamber failed to consider him presumed innocent until proven guilty. To support his claim, Mr Ngudjolo advances a piecemeal understanding of the Trial Judgement, isolating one sentence without regard to its context.[184] No miscarriage of justice is shown.

81. First, although the Trial Chamber stated, in paragraph 36 of the Trial Judgement, that "[f]inding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent",[185] Mr Ngudjolo takes this sentence out of context. The Request clutches at straws. The sentence was only one limited part of the Chamber's larger explanation of how it approached the burden of proof. But it did not imply that the Chamber had overturned or negated the presumption of innocence. Quite to the contrary, Mr Ngudjolo was presumed fully innocent at trial. The Chamber's findings—only a few lines before the single sentence Mr Ngudjolo takes issue with—demonstrate this beyond doubt.

82. Indeed, the Chamber emphasised that according to article 66 of the Statute, the Accused—Mathieu Ngudjolo—is presumed to be innocent until the Prosecutor has proven his guilt. More so, the Prosecutor bears the burden to establish each element of the offence "beyond reasonable doubt".[186] Further, in explaining its view on the standard of beyond reasonable doubt, the Chamber distinguished between facts and evidence. According to it, an alleged fact may exist in isolation of the evidence presented. Nevertheless, *the veracity of the alleged fact* would depend on sufficient reliable evidence to meet the standard of beyond

[184] Request, paras. 111-115.
[185] *Ngudjolo* Trial Judgement, para. 36.
[186] *Ngudjolo* Trial Judgement, para. 34, *citing Lubanga* Trial Judgement, para. 92.

reasonable doubt. Therefore, the Chamber's findings, contained in paragraphs 34-36 of its Judgement, underscored the important nature of the evidence to meet the standard at trial, but did not imply that Mr Ngudjolo was presumed guilty.

83. Mr Ngudjolo simply cannot show otherwise. His acquittal at trial demonstrates that he was not prejudiced. Not only was he acquitted at trial, but he was immediately released following the rendering of the Trial Judgement.[187]

84. Mr Ngudjolo's challenge is barely expressed. His reliance on one sole authority's subjective interpretation (Natacha Fauveau-Ivanovic) to claim that his presumption of innocence was violated[188] is unpersuasive. So too are his claims that this single sentence somehow led to an increase in "*les ardeurs processuelles d'un Procureur acharné qui a espéré jusqu'en dernière minute l'annulation dudit jugement d'acquittement au niveau de la Chambre d'appel*", and "*nourri l'esprit revanchard des familles des victimes de l'attaque de Bogoro contre Ngudjolo*.[189] As is clear from the appellate record of this case, the Prosecution's decision to appeal was taken independently, and its appeal (containing three separate grounds) was unrelated to the Chamber's one off reference in paragraph 36. Nor is it clear how, if at all, this solitary reference could trigger "the spirit of revenge" of the Bogoro victims' families, in a manner prejudicial to Mr Ngudjolo. The case record does not support Mr Ngudjolo's dramatic and speculative narrative.

85. Mr Ngudjolo has simply failed to show any error in the investigation and the prosecution of the case against him. Nor has he shown that the judicial proceedings against him were flawed. The Request is a mere reprise of many of his arguments rejected during the proceedings. The Request also mirrors his discontent that proceedings were even initiated against him in the first place. But

[187] *Ngudjolo* Trial Judgement, p. 197.
[188] Request, para. 112.
[189] Request, paras. 112-113.

his disgruntlement—confined to his personal opinion but bereft of all factual and legal support—cannot result in a valid compensation claim. Shorn of all legal and factual bases, the Request is inadmissible. It should be dismissed *in limine*.

D. *Arguendo*, even if the Request is admissible, Mr Ngudjolo fails to justify the compensation amount sought.

86. Even if the Request is found admissible, its bid to secure close to 1 million EUR is misguided—a shot in the dark—and cannot succeed. Mr Ngudjolo's words alone cannot guarantee him the exorbitant amount he now seeks in compensation—906,346.00 EUR.[190] Nor can his Counsel's public speech at a recent symposium add any forensic value to the Compensation Request.[191] Rather, he must demonstrate—on an objective showing based on the case record—that he was either a "victim of unlawful arrest or detention" under article 85(1), or that he suffered "a grave and manifest miscarriage of justice" under article 85(3). As demonstrated above, Mr Ngudjolo does neither.

87. Instead, his compensation claim rides on his misunderstanding that his detention facing trial entitles him to compensation. His coloured, even incomplete, view does not accord with the facts on the record. Nor is it accurate in law.

88. Although the Request categorises several purported "material and moral prejudice",[192] it scarcely acknowledges Mr Ngudjolo's reality as an accused before the ICC. He was charged with serious international crimes, and therefore was treated on par with every other ICC detained accused. Accordingly, he was detained at the ICC Detention Centre in The Hague, and not in the DRC *in situ*.[193] Moreover, his statutory guarantees to apply for interim release were duly

[190] Request, para. 157.
[191] Request, Annex IV. The Prosecution notes that the seven additional pages of argumentation exceeds the page limit (50 pages) under regulation 38 of the Regulations of the Court. Annex IV also contravenes regulation 36(2)(b). The Prosecution will not consider Annex IV any further.
[192] Request, paras. 116-160.
[193] *Contra* Request, para. 121.

respected. He made full use of the opportunity to apply for interim release.[194] But he was unsuccessful. The Court cannot waive established legal thresholds and procedures to suit one accused.

89. Contrary to the Request,[195] his detention for any immigration or asylum proceedings pending his deportation to the DRC bears no link to the Court. As the ICTR Appeals Chamber has held, an international criminal court has no jurisdiction "to review refugee claims, confer refugee status on individuals, or interfere with the immigration policies, practices or decisions of sovereign states."[196] Critically, upon acquittal, the Court's obligation only extended to releasing Mr Ngudjolo from its detention facility. This it did. If at all, the Registrar's responsibility is limited to making the necessary "diplomatic, logistical and physical arrangements for such release [from the detention facility] taking into consideration, to the extent possible, and as appropriate, the requests of the acquitted person."[197] But the Court has no obligation of result. It cannot compel a State to accept Mr Ngudjolo. Neither can it venture into the sovereign domain of the Host State's immigration policies.[198]

90. Moreover, Mr Ngudjolo's detention implied that he, and the other detained accused, was expected to abide with the Court's detention rules. Family visits and phone calls were thus regulated as per the rules.[199] Mr Ngudjolo's views contesting the restrictions are impractical and unfounded.

[194] *See e.g.*, ICC-01/04-01/07-280-tENG; ICC-01/04-01/07-572; ICC-01/04-01/07-694; ICC-01/04-01/07-746; ICC-01/04-01/07-750; ICC-01/04-01/07-1593-Red.
[195] Request, paras. 5, 122.
[196] *Zigiranyirazo* Decision of 18 June 2012, para. 55.
[197] *Ibid*., para. 56, citing ICTR: *Ntagerura* Decision of 18 November 2008, paras. 14-15.
[198] *Ntagerura* Decision of 18 November 2008, paras. 13-19.
[199] *Contra* Request, paras. 119-120. *Contra* Request, Annex II.

91. Equally, his argument, claiming compensation for the restrictions on his family visits and phone calls,[200] is fatally flawed: indeed, Mr Ngudjolo's conduct in detention fell below even the minimum expected for an average ICC detainee. He violated the Court's orders, interfered and intimidated witnesses, and disclosed confidential information. His own improper conduct from the detention centre[201] led to further restrictions on his ability to communicate. By failing to take responsibility for his own illicit behaviour, Mr Ngudjolo voids his own claim.

92. Moreover, all criminal defendants once acquitted would necessarily face adjustments in their lives, including reacclimatising to their lives post detention. These may include several smaller or greater changes to their personal and professional lives.[202] This follows in the normal course of an acquittal. But, none of these changes amount to "material" or "moral" prejudice.[203] Neither is the Request's resort to several academic works and decisions apposite:[204] as many of them apparently acknowledge, a showing of a miscarriage of justice must necessarily precede an award of compensation. Since Mr Ngudjolo has failed to meet his burden under article 85, his reliance on national and international authorities awarding compensation[205] is premature. Neither does article 78(2) assist him:[206] that provision ensures that any time served prior to a judgement of conviction is deducted from any eventual sentence of imprisonment. Mathieu Ngudjolo was not sentenced to imprisonment, but rather acquitted after a trial.

93. Nor is the Court responsible for independent media reports that may have reported or written about Mr Ngudjolo's return to the DRC and the victims'

[200] Request, Annex II.
[201] *See* paras. 47-52 above.
[202] Request, paras. 128-157.
[203] *Contra* Request, paras. 116-127.
[204] *Contra* Request, paras. 136-141.
[205] Request, paras. 116-160.
[206] Request, para. 141.

opposition to it.[207] The Prosecutor has herself noted—in a public statement issued following the confirmation of the acquittal—that the Appeal Judgement "brings the case to a close."[208] Following this, Mr Ngudjolo's request to press the Court's outreach program into service to narrate the results of the Appeal Judgement in Bedu Ezekere and other regions of the DRC[209] is simply drastic and unjustified.

94. The Prosecution opposes that Mr Ngudjolo should be compensated. The Request simply does not compel. Even if any amount were found due to him, Mr Ngudjolo fails to justify the clearly excessive monetary sum sought.

[207] Request, para. 149.
[208] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the Appeals Chamber's decision upholding the acquittal in the Ngudjolo Chui case, 27 February 2015. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-stat-27-02-2015-drc.aspx
[209] Request, p. 49.

E. Relief

95. Mr Ngudjolo's Compensation Request should be dismissed *in limine*. Far from showing that compensation is warranted, the Request fails at the threshold. The Request is inadmissible. Moreover, Mr Ngudjolo's unlawful conduct while in detention to contrive the outcome of his case undermined the Court's integrity. To compensate him, in these circumstances, would be abhorrent to basic principles of justice and equity.

Fatou Bensouda, Prosecutor

Dated this 18th September 2015

At The Hague, The Netherlands