

1 International Criminal Court  
2 Trial Chamber II - Courtroom 1  
3 Situation: Democratic Republic of Congo  
4 In the case of The Prosecutor v. Mathieu Ngudjolo Chui - ICC-01/04-02/12  
5 Presiding Judge Marc Perrin de Brichambaut, Judge Olga Herrera-Carbuccia and  
6 Judge Péter Kovács  
7 Compensation Hearing  
8 Monday, 23 November 2015  
9 (The hearing starts open session at 9.29 a.m.)  
10 THE COURT USHER: All rise.  
11 The International Criminal Court is now in session.  
12 Please be seated.  
13 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) Ladies and gentlemen,  
14 good morning.  
15 Courtroom officer, could you please call the case.  
16 THE COURT OFFICER: (Interpretation) Thank you, Mr President.  
17 The situation in the Democratic Republic of the Congo, in the case The Prosecutor versus  
18 Mathieu Ngudjolo Chui, case number ICC-01/04-02/12.  
19 We are in open session, Mr President.  
20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) I thank you. And I  
21 would like to request that counsel for Mr Ngudjolo and the Office of The Prosecution  
22 introduce themselves for the record.  
23 MR KILENDA: (Interpretation) I thank you very much, Mr President, Good morning,  
24 ladies and gentlemen, your Honours. The defence for Mathieu Ngudjolo this morning is  
25 composed of Adriana-Maria Manolescu, who is our case manager; to my right, Mr Bokolombe,

1 the legal assistant; and myself, Jean-Pierre Kilenda, lead counsel.

2 We would like to inform you, Mr President, that the submissions this morning will be  
3 provided by myself. My assistant, Mr Bokolombe, and myself, who will round it up.

4 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) Thank you very much.

5 As you know, you have an hour to do so Maître Kilenda. And I thank you.

6 Now, the Office of The Prosecution, please introduce yourselves.

7 MS BRADY: Good morning. Good morning, your Honours. The Prosecution today is  
8 represented by Ms Priya Narayanan, who is an appeals counsel, to my left. Behind me,  
9 Mr Reinhold Gallmetzer, appeals counsel. To the left of him, Mr Eric MacDonald, senior  
10 trial attorney and was senior trial attorney in the case against Mr Ngudjolo. Behind them is  
11 Ms Manochitra Prathaban, our case manager. And I'm Helen Brady, senior appeals counsel.  
12 Thank you.

13 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) I thank you very  
14 much.

15 And for the record I would like to introduce, I am Judge Perrin de Brichambaut, and we have  
16 Péter Kovács to my left and Judge Carbuccia to my right.

17 Trial Chamber II is seized of the request by Mr Ngudjolo, represented by Mr Kilenda,  
18 filed on 14 August 2015 requesting compensation, pursuant to Article 85 of the  
19 Statute.

20 The Prosecution filed a response to this request on 18 September 2015.

21 Maître Kilenda filed a rebuttal to this response by the Prosecution on 16 October 2015.

22 Maître Kilenda also filed a request on 7 October, registered on 8 October, requesting the  
23 holding of one or several hearings also an order requesting the attendance of Mr Ngudjolo  
24 during these -- all these hearings. The Chamber partially granted this order, this request and  
25 ordered the holding of this hearing.

1 Maître Kilenda you now have 60 minutes to present your submissions with regard to  
2 this request.

3 MR BOKOLOMBE: (Interpretation) I thank you for allowing me to address the Court,  
4 Mr President.

5 As Mr Kilenda just said, I will be addressing the Court first.

6 Mr President, Madam, your Honours, we read with great interest the response  
7 by the Office of The Prosecution to our request for compensation,  
8 and this is why we requested for this hearing to be held.

9 \* We thought, and we continue to think, that  
10 the issue of compensation that we raised –

11 to the extent that the criminal phase of the

12 proceedings has been brought to a close with a common consensus –

13 was no longer relevant and that it was beyond any arguments, alas, however.

14 By virtue of the fact that we are not afraid of arguments, we are going to involve  
15 ourselves. I have been assigned by counsel, by lead counsel to provide you with -- to  
16 recall to you the two basic principles that should be recalled in such an instance.

17 First of all, the first principle is that the procedure for compensation is not an annexed  
18 proceedings; it is just as important as that of the confirmation of charges, the trial  
19 phase and the appeals phase to the extent that it is also up to your Chamber and as  
20 well as that of the Pre-Trial and Appeals Chamber to render justice, to render justice  
21 in a technical sense and also in the true sense of the term. \* That means that we need  
22 to implement the fundamental judicial principle which holds that personal actions (by  
23 which I mean those of natural or legal person) must be punished or recompensed  
24 according to their merits in the eyes of the law, and only the law.

25 In a judicial proceedings, all phases are equal in importance. \* The following phases

1 exceed or complete those phases by annulling or confirming them.. So your Chamber  
2 is not an annexed Chamber, and as a result, Mr President, and this is the second  
3 principle, it holds true that the compensation that Mathieu Ngudjolo is requesting is  
4 an act of justice in itself and also an act of responsibility for the International Criminal  
5 Court.

6 \* Any fact or event that causes prejudice to others obliges the person who caused such  
7 harm to repair it. Each individual is responsible for the harm caused not only in itself  
8 but also by virtue of any imprudence or negligence.

9 What are the formulae that hold true in terms of this responsibility? Well, the fault of  
10 negligence and imprudence, do they not also come into play in terms of bad choice? Since  
11 the admission of the equivalence of civil and criminal faults and the correspondence of  
12 internal and international responsibility, there is no longer any debate in terms of  
13 responsibility.

14 It is up to the International Criminal Court to respond in terms of any negligence or  
15 imprudence. This is the true meaning and the *raison d'état* of Article 85 of the Statute, and  
16 Rules 173 and 175 of the ROP, read in conjunction with Article 21 of the Statute.

17 The last provision holds that the International Criminal Court and its law is not a  
18 cul-de-sac, but it is in fact a crossroads where the principles of international law and  
19 those of human rights come into play together.

20 Paragraphs 1 and 3 of Article 85 of the Statute consecrate the notion of the right to reparations  
21 for Mr Ngudjolo and that of the responsibility to provide reparations or compensation by the  
22 International Criminal Court.

23 So we shall now be demonstrating the constituent criteria for the right of compensation for  
24 Mr Ngudjolo.

25 Now, in accordance with the aforementioned provisions of the Statute, there are three criteria

1 that are required for the obtention of said compensation: The existence of a fact; the  
2 existence of a prejudice; and the existence of a link of causality between the fact and the  
3 prejudice.

4 I will start with the first criterion, that of the existence of a fact. The generating fact  
5 underlining the prejudice, according to paragraphs 1 and 3 of Article 85 of the Statute,  
6 first and foremost, are the arrest and placement in detention on an illegal basis and  
7 also the commission of a grave judicial error. I shall start with paragraph 3.

8 A judicial error is globally an error based on the existence of a fact or an error in the  
9 appreciation or assessment of a situation.

10 A report by the Canadian minister of justice studying this situation in Canada, and  
11 also assessing studies made across the world in the United States and in Europe,  
12 identifies a number of causes underpinning a judicial error. And I shall briefly name  
13 them:

14 Firstly, the obstination to follow but one theory; secondly, an error of identification; thirdly,  
15 false testimony; fourthly, incarcerated insiders; fifthly, an ignorance of the possible mistakes  
16 made by scientific experts; sixthly, an error in the interpretation of evidence, incompetence on  
17 the part of experts; and seventhly, the fabrication of evidence by the police, experts or any  
18 other protagonists.

19 \* Several, if not nearly all of these have been brought together in the proceedings  
20 implemented against Mr Mathieu Ngudjolo. \* In its final conclusions, the Defence  
21 repeatedly denounced the Prosecution's obstinate habit of only investigating  
22 inculpatory material, in violation of the obligation upon it of the Statute under Article  
23 55 – 54.1 At least on 15 occasions in paragraphs 164, 377, 472, 486, 559, 627, 650, 658,  
24 917, 927, 936, 941, 984, 1163 and 1218, the Defence recalled the violation of this  
25 obligation by the Prosecution even when it did not observe the orders made by the

1 Chamber.

2 The error of identification and perception is manifest and based on the confusion  
3 operated by the Prosecution with regard to the true actors in the tragedy in Bogoro  
4 for which the Prosecution wanted to have Mr Ngudjolo bear the responsibility. The  
5 Prosecution voluntarily and erroneously copied the entire RDC situation on that in  
6 Rwanda and transposed the entire Tutsi-Hutu conflict of Rwanda to the RDC  
7 between the Hema and the Lendu.

8 Completely putting to one side the bloody conflict between the Hema and the Hema,  
9 that is to say between the UPC of Thomas Lubanga, the Hema, and the PUSIC of  
10 Chef Kahwa, also Hema. It completely turned a blind eye to the fact that there were  
11 also Lendus in the UPC, turned a blind eye to the participation of the Congolese State  
12 and its army, and also turned a blind eye to the participation of other movements,  
13 notably the APC in the attack on Bogoro. It was obstinate in concentrating upon  
14 Mr Ngudjolo.

15 \* The Prosecutor called false witnesses, incompetent witnesses who had not  
16 experienced the facts and side-lined the true witnesses because their account was  
17 exculpatory for Mr Ngudjolo. Floribert Ndjabu, Emmanuel Ngabu, Mandro, that is  
18 Chef Manu, were approached and put to one side because they were telling the truth.  
19 The Prosecutor preferred without any critical assessment to call upon coached  
20 witnesses through scrupulous intermediaries and whose respective testimonies  
21 cancelled each other out. \* These witnesses and intermediaries fabricated and  
22 produced false exhibits such as: birth certificates and voters' cards all of which were  
23 adduced before the Chamber in order to prove their false civil status.

24 \* The ignorance of the forensic experts.... in paragraph 147 in these terms: It is equally  
25 desirable, where practicable, to make as many factual findings as possible – in

1 particular, forensic findings. \* An error in the interpretation of evidence was  
2 committed by the Pre-Trial Chamber which based itself on the Cessation of Hostilities  
3 Act signed by M. Ngudjolo as one of the notables of the Lendu community in Djugu  
4 territory, thereby reaching the erroneous conclusion that he was the highest-ranking  
5 FNI commander., in view of all these errors and many other errors, which sometimes  
6 fall within the provisions of paragraph 3 of Article 85, the arrestation and lengthy  
7 detention of Mr Ngudjolo became illegal to the extent that they were ordered on the  
8 basis of multiple errors.

9 They should and must give rise to compensation as prescribed in Article 9 of the  
10 international pact on civil and political rights.

11 So we have now come back to paragraph 1 of Article 85 of the Statute. The Trial  
12 Chamber itself formulated in paragraphs 115 and 112 of its decision to acquit  
13 Mr Ngudjolo its grievances with regard to the Prosecution and the conduct of the  
14 investigation against Mr Ngudjolo.

15 It notably noted that in addition to the absence of forensic expertise, the prejudicial  
16 facts -- facts prejudicial to the proceedings, notably that they did not go to the localities where  
17 the accused resided, also that they did not listen to the testimony of some of these  
18 commanders who played essential role, and the fact that they did not call them to testify  
19 before the Chamber, they did not -- nor did they listen to the testimony of Mr Ngudjolo, nor  
20 did they analyse in more attentive detail the civil status of the various Prosecution witnesses,  
21 and they did not seek to understand a number of local customs.

22 What is more, in view of the fact that Mr Ngudjolo has been acquitted on all charges,  
23 that is to say 10 in total, all these charges against him because the Prosecution was  
24 incapable of proving beyond reasonable doubt the guilt of Mr Ngudjolo, the arrest  
25 and detention of Mr Ngudjolo were therefore required and obtained on the basis of

1 non-serious elements.

2 Also, in virtually all national legal systems, as long as the accused has not been  
3 convicted on the basis of these -- on the basis of these charges, he can then claim  
4 reparations or compensation.

5 In France, for example, on the basis of Article 149 of the criminal -- of the code of criminal  
6 proceedings, he may obtain reparations for this prejudice resulting from detention.

7 \* The consultation on parliamentary works declared that the intention of the legislator  
8 was to confer upon any person who had not been declared definitively guilty the  
9 right to compensation for the prejudice caused by provisional detention, whatever the  
10 reason for the not guilty verdict.

11 \* By virtue of comparison, some national systems provide for the exclusion to the  
12 right to compensation when:

13 Firstly, when an individual who has been the subject of provisional detention has  
14 voluntarily and freely let themselves be wrongly accused in order to enable the true  
15 perpetrator to escape. Mr Ngudjolo pleaded not guilty.

16 Then, when the person is concurrently detained in another case. Mr Ngudjolo was not  
17 the subject of any other prosecution, either before or after.

18 Lastly, when the decision of acquittal was founded on the prescription of public  
19 action, this was not the case in Mr Ngudjolo's case. The acquittal of Mr Ngudjolo  
20 therefore does not correspond to any of the previous cases and does not resolve from  
21 the cancellation of the proceedings. And even the admission of the objective or  
22 subjective causes of liability, but it comes obviously from the inability of the  
23 Prosecution to establish the guilt of the accused beyond all reasonable doubt, which is  
24 the standard evidence threshold required by the ICC.

25 The second criterion is the existence of a prejudice. The applicant suffered two types



1 of prejudice, material prejudice and moral prejudices.

2 In our request for compensation submitted to your Chamber, we included a list of the various  
3 material prejudices suffered by the applicant including loss of revenues, the loss of training  
4 which would have given him access to positions of command and promotions in rank, as well  
5 as his movable and -- the loss of his movable and immovable property.

6 Moral prejudices suffered by the applicant was the result of the natural moral  
7 suffering caused by the prison shock, which he felt and the brutality and injustice  
8 around the deprivation of his liberty.

9 This suffering was aggravated by the separation from his family under particularly difficult  
10 circumstances. The applicant was arrested and deported from his country when his last son  
11 was only two months old. In addition to this suffering, there is the attack on the  
12 presumption of innocence.

13 The third and last criterion is the causal link. Case law is clear on this criterion, it is  
14 linked to an exclusive and direct causal link between the fact and the prejudices.

15 The existence of the criteria in the case of the applicant is obvious.

16 Mr President, your Honours, with such a battery of prejudices, if one feels that there  
17 has not been a miscarriage of justice and that Mr Ngudjolo has no right to reparation,  
18 then I would wonder where the threshold has to be fixed so as to repair the suffering  
19 he was subjected to in compliance with the Rules of the Court.

20 The compensation that Mr Ngudjolo is requesting very respectfully is a requirement  
21 of justice and responsibility. This requirement is part of universal law and no  
22 amendment is allowed to this law. It cannot be repealed, either partially or totally.

23 This laws are to be applied yesterday, today and tomorrow. It is the same law which  
24 is eternal and which has been governing all countries all the time. Anybody who  
25 does not comply with this law would have overlooked human nature. That was my

1 submission, your Honours. Thank you.

2 MR KILENDA: (Interpretation) Mr President, your Honours. When an individual is a  
3 victim of the miscarriage of justice, it pains them to the core, but he does not have the choice,  
4 he has to turn once again to justice in order to try to obtain reparation for the harm that has  
5 been done to him.

6 "Ô éternelle justice," that is what a French magistrate said in Lille in the 80s. And he  
7 set the highest challenge that this is the most decried but also the most treasured  
8 institution. Mathieu Ngudjolo Chui is coming to you this morning to present to you  
9 his complaints about his suffering from the International Criminal Court because of  
10 his dysfunctional nature.

11 This harm which has been described by my learned friend, Mr Bokolombe, constitute  
12 a notable regression of international criminal proceedings whose purpose is to  
13 ascertain the truth in compliance with the highest standards in international human  
14 rights instruments.

15 The fact of the matter is that on 6 February 2008, Mathieu Ngudjolo, who had been  
16 promoted to the rank of colonel of the armed forces of the Democratic Republic of the  
17 Congo two years earlier, and who was receiving a higher-ranking military training in  
18 the Kinshasa military academy, was brutally snatched from his loved ones by virtue  
19 of an international arrest warrant issued by the ICC.

20 As early as 7 February 2008, he was transferred to the detention centre in  
21 Scheveningen, in The Hague, where he remained until 21 December 2012. 1,781  
22 days of detention from his native country in a cold country where he was able to be  
23 visited only by his immediate family for a total period of 17 days. 1,781 days that  
24 took him away from the Kinshasa military academy, and he will no longer be able to  
25 catch up with the opportunity to become a senior officer exercising a position of

1 command within the army of his country. 1,781 days of detention, which  
2 irrevocably neutralised his hopes of obtaining upward professional mobility in the  
3 military and deprived him of all the advantages linked to the status of officer in the  
4 DRC.

5 Your Honours, Mathieu Ngudjolo was not and had never been the highest-ranking  
6 military commander of the FNI as the Prosecutor claimed. He was not even the head  
7 of the Lendu militia of Bedu-Ezekere, which was present in Bogoro on the day of the  
8 attack.

9 Mathieu Ngudjolo had never sealed a criminal enterprise agreement with Germain Katanga  
10 to wipe out the village of Bogoro on 24 February 2003.

11 This theory, awkwardly defended by the Prosecutor, is the consequence of his complacent  
12 investigation of the interested person. The investigation focused attention on the claims of  
13 witnesses which were incompetent, inconsistent and incorrect. It is an investigation that  
14 deliberately overlooked competent witnesses who could have provided the Court with factual  
15 information on the situation in Ituri, which at the time was occupied by the Ugandan army  
16 and where the Congolese State itself was non-existent.

17 The testimonies of Katanga and Ngudjolo as witnesses in their own case made it possible to  
18 establish the physical or material truth of the facts. These testimonies which the Prosecutor  
19 never really questioned regarding their credibility led to the severance of charges between the  
20 two accused on 21 October 2012.

21 And as was to be expected, Mathieu Ngudjolo was acquitted on 18 December 2012. And his  
22 acquittal was upheld by the Appeals Chamber on 27 February 2015.

23 Sentenced to 12 years on 7 April 2013, Mr Katanga has just been granted a reduction of his  
24 sentence and he will be released on 16 January 2016.

25 Ever since then, there is a single truth that has come out of the case between the

1 Prosecutor and the former co-accused. Ngudjolo is not a leader of the Lendu militia  
2 of Bedu-Ezekere. Katanga was found guilty as a complete -- an accomplice in the  
3 crimes of war and crimes against humanity whose instigators and perpetrators are  
4 still circulating freely today.

5 Ever since 27 February, Mathieu Ngudjolo has been of the opinion that serious and manifest  
6 miscarriages of justice have been perpetrated against him and today he feels that other  
7 prejudices have been caused against him, hence the present request for compensation, which  
8 was respectfully submitted to your Chamber on 14 August 2015. Its admissibility and merits  
9 do not -- are not subject to any doubt.

10 Regarding admissibility, it has to be examined under *ratione materiae* and *ratione*  
11 *temporis*. Article 85 states that anyone who has been the victim of unlawful arrest or  
12 detention shall have a right to compensation.

13 There is also Rule 173(2) of the Rules of Procedure and Evidence, which states that the request  
14 for compensation must be submitted at the latest six months as from the date on which the  
15 subject was informed regarding the existence of the miscarriage of justice.

16 You will understand, Mr President, your Honours, that in his response to the request  
17 for compensation from Mathieu Ngudjolo, the Prosecutor did not challenge the  
18 admissibility of this request.

19 Regarding the merits of the request, the applicant listed three manifest and serious  
20 miscarriages of justice perpetrated against him in all the stages of the proceedings except the  
21 sentencing.

22 First of all, the arrest warrant was issued and the detention ordered in the absence of  
23 all objective and impartial investigation of the Prosecutor.

24 Secondly, the joinder of the Katanga and Ngudjolo cases and the confirmation of charges is a  
25 result of the same error committed by Pre-Trial Chamber I. They are the result of the lack of

1 critical assessment of the OTP.

2 Lastly, having been acquitted the -- having acquitted the applicant, the Trial Chamber  
3 II, against everything, led a sense of doubt to linger. You will understand that the  
4 arrest warrant was issued without any questioning of the witness. The Pre-Trial  
5 Chamber confirmed the charges in the absence of any adversarial proceedings. And  
6 the Defence was disadvantaged because they had no time to study the voluminous  
7 dossier, whereas the Prosecutor had already been working on this case for four years.  
8 Regarding the joinder, if the Defence had been able to present exculpatory evidence, that  
9 joinder would not have been adopted. And the evidence provided indicates that there was  
10 no evidence.

11 The violation of the presumption of innocence after an acquittal is a violation of international  
12 principles. Belgium, Spain and Greece have already paid for that at the court Strasbourg.  
13 In summary, the statutory rights of the applicant were violated by the Prosecutor under  
14 Article 55(2) of the Statute and Article 61(2)(b) of the Statute.

15 The applicant is still suffering in the hands of the Prosecutor despite his acquittal and  
16 his suffering from a presumption of guilt even though the Chamber has acquitted  
17 him.

18 But the Chamber stated that finding an accused person not guilty does not mean that  
19 that person is innocent.

20 There are two types of prejudices: There are material benefit -- prejudices and moral  
21 prejudices.

22 Regarding the material prejudices, there was a brutal and final interruption of his training in  
23 the military academy. And he missed his chance to make a career in the government.  
24 He lost his advantages under law number 124 of 15 January 2013, including housing loans  
25 and vehicle loans to which each officer is entitled. He also has a right to the purchase of a

1 house under Article 132. The means of transport can be estimated also while the house can  
2 be estimated at 300,000 dollars.

3 In fact, the prejudice suffered by Mathieu Ngudjolo can be calculated as follows:

4 1. 1,781 days of detention at the rate of €80 per day. This was taken from the Amsterdam  
5 court which paid this amount, which requested that this amount be paid to Mr Ngudjolo  
6 because of his illegal detention in Schiphol. And that is a total of €142,000.

7 2. Purchase of a means of locomotion, €9,000.

8 3. Purchase of a house, €270,000.

9 4. Expenses for his children, which is in annex, it is estimated as €24,973 times 5,  
10 which is a total of €124,000. And therefore the general total is €546,346.

11 Now regarding moral prejudices, there are several of them, your Honours:

12 1. The shock of being imprisoned far away from his native country.

13 2. The non-compliance with the principle of the presumption of innocence.

14 3. The feeling of insecurity in his own country.

15 4. The attack on his reputation and dignity.

16 5. The delay in his career.

17 6. The indifference of the Prosecutor towards the true perpetrators of the Bogoro attack,  
18 EVD-00136 is that exhibit. And it is the Samba letter that shows the true perpetrators of the  
19 Bogoro attack.

20 These moral prejudices, your Honour, are difficult to quantify based on certain  
21 European and national case laws. The applicant estimates these prejudices at  
22 €360,000.

23 In total, Mr Ngudjolo is asking for a global figure of €906,346 for all prejudices.

24 Mr President, your Honours, in his will to fight against this request for compensation, the  
25 Prosecution will try to convince you that Mr Ngudjolo does not deserve this compensation

1 because he does not understand the proceedings before the ICC, that he confuses the situation  
2 and the case, and that he tried to corruptly influence witnesses.

3 To this day, the Defence is convinced that the Prosecution is still incapable of proving  
4 that Mr Ngudjolo was the highest commanding officer of the FNI, that the plan, the  
5 massacre in Bogoro with Germain Katanga. The Prosecution wanted to use an  
6 empty detention file, empty of any offences in order to obtain the conviction of the  
7 accused.

8 The Prosecution says that it is not obliged to hear the applicant, that it can hold an ex  
9 parte proceedings, and that doing in any other manner would be paramount to an  
10 obstacle to its work.

11 To this argument, that is not a legal argument, the Defence responds that the ICC is not  
12 functioning at the time of the inquisition and that an ex parte proceedings is not an arbitrary  
13 proceedings.

14 We hear today that in the various cases pending before the Court currently, the  
15 Prosecution is now in the habit of hearing parties and witnesses via the police  
16 authorities and local judicial authorities. This was entirely feasible with regard to  
17 Mr Ngudjolo, who was a student officer at the CSM and who had no reason  
18 whatsoever to abscond from the jurisdiction of the Court.

19 Now, Mr President, your Honours, should we remind you that on the day of the  
20 definitive acquittal of Mr Mathieu Ngudjolo, Madam Fatou Bensouda, the Prosecutor,  
21 in her press communiqué saluted a very fair judgment and proceedings.

22 The Appeals Chamber today dismissed in a decision, with the majority of three to two,  
23 the appeal against the acquittal of Mr Mathieu Ngudjolo in December 2012 for  
24 charges of crimes against humanity and crimes of war in relation to the attack on the  
25 village of Bogoro on 24 February 2003. This decision marks the closing of the case.

1 This decision does not deny the fact that the crimes had in fact been committed in  
2 Bogoro or that the victims indeed suffered.

3 "My office" -- Ms Madam Prosecutor continued to say, "My office has not saved any  
4 efforts in prosecuting this case and has used all of the possible judicial remedies to  
5 this end."

6 "The final result today", says Madam Prosecutor, "was established with the help of an  
7 independent judicial proceedings that is impartial in nature and that respects all the  
8 rights of parties and participants to the proceedings. My office is entirely committed  
9 to put an end -- to putting an end to impunities for mass crimes perpetrated in the  
10 DRC. This crucial work will continue in an unrelenting manner." End of quote.

11 What can be observed here unfortunately, that instead of continuing this work and  
12 pursuing the true perpetrators of the crime in Bogoro, the Prosecutor has been  
13 hell-bent on blaming Mathieu Ngudjolo whilst bringing -- and also paradoxically by  
14 calling into question his acquittal. It is as if the response to the request for  
15 compensation was a third means of appeal that has been offered to him in order to  
16 counter the judicial decision against him.

17 It has been said that Ngudjolo attempted to corruptly influence his -- the witnesses  
18 from his place of detention as if a dissenting opinion in minority was in fact a judicial  
19 decision that was applicable and bore the seal of approval of the authority of the case  
20 judged, tried and convicted.

21 So, Mr President, your Honours, it behoves the Court and the Bench to grant to the  
22 applicant the full amount of the request for compensation of €906,346 for all the  
23 prejudice caused.

24 For all the organs of the Court in charge of the outreach activities will be able to explain the  
25 innocence of Mr Ngudjolo towards the population in Ituri and will be able to comment over



1 the various radio programmes and television channels in the various national languages of  
2 the DRC. Thank you.

3 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) I would like to thank  
4 Maître Bokolombe and Maître Kilenda for your submissions. We listened to you with great  
5 attention. I would like to now draw my attention or turn to the Office of The Prosecution.  
6 We now have the possibility of continuing and starting your submissions  
7 immediately or we can go for a break if you prefer?

8 MS BRADY: Your Honour, I'm in your hands. Our submission should run for about  
9 40 minutes. So we could start now, run for 20 minutes and take the break and then continue.  
10 We don't mind, basically, if you want to take the break now or to continue.

11 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) Well, thank you very  
12 much. We are ready to move forward. I think that we have two hours as a limit, so I do not  
13 believe that it is an inconvenience if we remain within this time frame of two hours for us to  
14 listen to what you have to say and then we'll take the break afterwards. Thank you.

15 MS BRADY: Thank you very much.

16 Your Honours, the Prosecution's position in relation to Mr Ngudjolo's compensation  
17 request is clear: He has not met the high standard required for compensation under  
18 Article 85 of the Statute and should receive no compensation from this Court.

19 He was not unlawfully arrested or detained within the meaning of Article 85(1) of the  
20 Statute, and, although acquitted, he has not shown that he suffered a grave and  
21 manifest miscarriage of justice under Article 83 amounting to exceptional  
22 circumstances which would warrant compensation.

23 His request should be dismissed. Indeed, in the Prosecution's view it is so specious  
24 that this Chamber could even find it inadmissible.

25 To recap briefly, your Honours, Mr Ngudjolo was arrested and detained pursuant to

1 a lawful arrest warrant issued by the Pre-Trial Chamber under Article 58 of the Rome  
2 Statute. His charges were confirmed by the Pre-Trial Chamber after an inter partes  
3 confirmation hearing conducted fairly and in accordance with Article 61.

4 He was jointly tried with his co-accused, Germain Katanga, and following a trial,  
5 which lasted three years, a trial in which he was accorded all due rights and  
6 procedural guarantees under the Statute, he was acquitted by the Trial Chamber on  
7 the basis of a reasoned judgment issued in accordance with Article 74.

8 In the pre-trial and trial period, his detention was lawfully maintained throughout in  
9 accordance with Article 58.

10 And finally, Mr Ngudjolo's acquittal was confirmed on appeal by the Appeals  
11 Chamber in a three-two decision following the Prosecution's appeal under Article 81  
12 and, again, with all due substantive and procedural guarantees under the Statute  
13 having been observed.

14 Nothing in the Prosecution's actions, nor in the decisions taken and the procedure  
15 followed by the respective pre-trial, trial and Appeals Chambers, which heard  
16 Mr Ngudjolo's case, can be deemed unlawful, let alone amount to a grave and  
17 manifest miscarriage of justice so as to give rise to compensation.

18 This morning my colleagues, Ms Narayanan and Mr Gallmetzer, will respond to some  
19 of the more specific submissions made by Mr Ngudjolo supporting his request. But  
20 before they do so, I would like to highlight five key points that your Honours should  
21 bear in mind when deciding on this request.

22 First, just because Mr Ngudjolo was acquitted at trial doesn't mean he is entitled to  
23 receive compensation under the Statute. While some national jurisdictions do  
24 recognise an acquitted person's right to compensation based on an acquittal per se,  
25 Maître Bokolombe mentioned some of these this morning, we know that the Rome

1 Statute system does not. There is a test that must be met.

2 And as we've detailed in our brief, the drafters of the Statute were clear that an acquittal per  
3 se would be insufficient to support a request for compensation. Rather, by using the words  
4 "a grave and manifest miscarriage of justice" and the phrase "exceptional circumstances" in  
5 Article 85(3), the drafters clearly proposed a higher standard.

6 And Mr Ngudjolo himself bears the burden to meet this high standard. Absent such a  
7 demonstration, and a finding by the Chamber that Mr Ngudjolo's rights were violated, he  
8 cannot be compensated.

9 Secondly, and contrary to the submissions made by Maître Bokolombe this morning,  
10 the fact that Mr Ngudjolo was ultimately acquitted by the Trial Chamber does not in  
11 and of itself establish that his prior arrest or detention was unlawful.

12 In other words, a subsequent or later acquittal does not affect the legitimacy of a prior arrest.

13 Why? Well, the standards of proof differ. Nor does the acquittal affect the legitimacy of a  
14 prior detention. Why? Because an acquittal does not render the Chambers' earlier  
15 determinations of detention-justifying grounds illegitimate. Nor does the later acquittal per  
16 se show that the person has suffered a grave and manifest miscarriage of justice. Again, the  
17 applicant must show he meets these tests. And in the case of Mr Ngudjolo, he has not done  
18 so.

19 Third, regarding the standard in Article 85(1), the first limb of Article 85 relating to  
20 unlawful arrest or detention, the critical word here is the word "unlawful." And as  
21 the ICTR case law, which we've detailed in our brief, informs us, and these are the  
22 cases in particular at the ICTR of Zigiranyirazo and the Rwamakuba case,  
23 compensation is only due if a specific and fundamental right of the person has been  
24 violated. In this case, no such unlawfulness exists because his arrest and detention  
25 prior to and during trial were both substantively justified and procedurally

1 safeguarded.

2 Mr Ngudjolo was lawfully arrested based on a reasonable suspicion that he had  
3 committed crimes within the Statute. This is the standard in Article 58 and which  
4 fully accords with international human rights law and is used in a number of  
5 domestic jurisdictions.

6 From this moment on, he was afforded all procedural guarantees under the Statute.

7 He had rights under Article 59 vis-à-vis the arrest proceedings in the DRC; he had the  
8 right to apply for interim release under Article 60; and the right to challenge the  
9 admissibility of his case under Article 19. And even though he did not take up that  
10 right himself, the Pre-Trial Chamber did that on its own motion.

11 His detention continued to be maintained throughout the pre-trial and trial period on  
12 substantively correct standards and with all due respect to the procedural rights and  
13 guarantees in Articles 58 and 60 of the Statute.

14 And his charges were confirmed by the Pre-Trial Chamber based on its application of  
15 the correct standard in Article 61; namely, that substantial grounds existed to believe  
16 that he committed crimes in the Court's jurisdiction.

17 Again, a standard that fully accords with international human rights law and used by,  
18 or even higher than that applied, in many domestic jurisdictions to send a case to  
19 trial.

20 The fourth, the fourth key point your Honours should bear in mind when  
21 determining this matter, and this concerns the standard in Article 85(3) of the Statute,  
22 that limb of Article 85, which concerns whether he suffered a grave and manifest  
23 miscarriage of justice.

24 It's very important to remember and to highlight that this provision begins with the  
25 phrase that it applies in exceptional circumstances. As I already mentioned, the

1 drafters of the Statute rejected the notion that an acquittal per se should automatically  
2 lead to compensation under Article 85(3), but rather should be awarded only  
3 exceptionally. One could say in rare cases.

4 The applicant must show not only that he suffered a miscarriage of justice to meet this  
5 test, but that this caused him "grave" and "manifest" harm. These are cumulative  
6 criteria. Another word or words for "grave" are "egregious" or "critical." This  
7 comes from the Oxford English dictionary. Other words for "manifest" would be  
8 "obvious" or "unmistakable" or "apparent."

9 In our view, this standard in Article 85(3) should be akin to that adopted in many  
10 countries of "malicious Prosecution," which requires mala fides or, at the very least,  
11 serious misconduct by the Prosecution or the Court. Nothing even approaching that  
12 standard is met in this case.

13 To the contrary, Mr Ngudjolo was lawfully arrested and detained and had a normal  
14 pre-trial, trial and appeal process with all due procedural and substantive rights and  
15 guarantees afforded to him. He cannot meet the standard required for either limb of  
16 Article 85.

17 And the fifth and final point your Honours, it would run counter to basic principles of  
18 justice to compensate Mr Ngudjolo for an alleged injustice when he himself has acted  
19 improperly in these proceedings.

20 Simply put, he does not come to this Court with clean hands, and one need look no  
21 further than the Appeals Judgment to see that he was reasonably suspected of acts of  
22 witness interference and disclosing confidential information about witnesses through  
23 external contacts. This is something that both the majority and dissenting Judges  
24 acknowledged.

25 Your Honours, this concludes my opening remarks and my colleagues will now

1 respond on the more specific bases relied upon by Mr Ngudjolo for his request.

2 I believe we have at least 10 minutes before the break. So we can continue on I think at this  
3 point.

4 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) Thank you. I would  
5 simply like to point out that you should speak slowly so as to facilitate the task of the  
6 interpreters.

7 MS NARAYANAN: Good morning, your Honours. Mr Ngudjolo's request fails in law and  
8 in fact. As Ms Brady has stated, request advances untenable legal principles, none of which  
9 are capable of meeting the high threshold under Article 85. And as Mr Gallmetzer and I will  
10 show, the request wrongly narrates the facts and the case record; it misunderstands how this  
11 Court, or indeed any criminal court, works; and it fails to identify the proper scope of these  
12 compensation proceedings.

13 Turning first, your Honours, to Mr Ngudjolo's factual challenge to the Prosecution's  
14 conduct.

15 Your Honours, Mr Ngudjolo's narration of the Prosecution's conduct in this case is simply  
16 inaccurate. Although he attempts to impugn a string of procedural and substantive  
17 decisions in this case, ranging from the DRC's referral of the situation to this Court, the  
18 admissibility of this case, his arrest and subsequent detention, and the investigation and  
19 prosecution of the case, none, your Honours, none of his challenges show that his rights were  
20 violated in any manner.

21 To the contrary, every decision in this case shows that he was treated according to  
22 international standards, with the Prosecution fully respecting his rights and guaranteeing due  
23 process at every stage of the proceedings.

24 Mr Ngudjolo's factual challenge also fundamentally misunderstands how criminal  
25 court works. Your Honours, a criminal trial is conducted with eyes firmly on the

1 road ahead. It is not conducted and indeed it cannot be conducted by looking in the  
2 rear-view mirror at every step of the way. Merely because a case progresses  
3 differently in the course of trial does not void legally-founded decisions made earlier.  
4 And merely because Mr Ngudjolo was acquitted at the end of the proceedings, does  
5 not make his arrest and detention pending trial unlawful in any manner, much less  
6 vitiate the initial decision to investigate and prosecute him.

7 Your Honours, we have in our brief addressed all of Mr Ngudjolo's challenges. We  
8 will not repeat them at this stage. Two examples at this stage will suffice to  
9 demonstrate why his claim should fail.

10 Turning to the first example: Mr Ngudjolo's challenge to his arrest by this Court.  
11 His claim is unfounded. On the one hand, he claims he should have been heard  
12 before being arrested. On the other hand, he claims rights under Article 55(2) that he  
13 could have had only if he was questioned prior to arrest. Mr Ngudjolo was not  
14 heard prior to his arrest. He had no such right, and there was no need to do so.  
15 And contrary to the submissions made earlier this morning, this is not an arbitrary  
16 procedure. It's well recognised in decisions of this Court and endorsed by the judges  
17 of this Court.

18 Your Honours, deciding to arrest persons of interest is neither an inter partes  
19 procedure nor is it an adversarial one; nor, your Honours, is it a negotiation between  
20 the Prosecution and the person on whether or not he may be arrested. This would  
21 defeat the very purpose of arrest proceedings, and this would have been particularly  
22 true in Mr Ngudjolo's case where his arrest and continued detention was found  
23 necessary, among others, because he and his associates had threatened witnesses  
24 relating to both the Prosecution's investigations and national proceedings.

25 Moving on to the second example: Mr Ngudjolo's challenge to the Prosecution's

1 investigation and prosecution of the case:

2 Your Honours, the Prosecution has investigated and prosecuted this case according to  
3 its obligations under the Statute, the Rules and its own Code of Conduct. The  
4 Prosecution, however, cannot guarantee a particular result or outcome of its  
5 investigation and prosecution. Mr Ngudjolo's acquittal cannot unravel ex post facto  
6 the decision to bring proceedings against him in the first place.

7 Nor can Mr Ngudjolo now challenge how the Prosecution chose to present its case.

8 It remained the Prosecution's discretion to decide which witnesses to call and how  
9 best to present its case. And it was certainly not obliged to call witnesses favoured  
10 by Mr Ngudjolo, Chef Manu included. That was Mr Ngudjolo's choice to make, as  
11 he did during his trial when he presented a defence.

12 And once again, the mere fact that Prosecution witnesses were found unreliable at  
13 trial cannot show that Mr Ngudjolo's rights were violated. Your Honours, Mr  
14 Ngudjolo's claim here is no different from Mr Rwamakuba's failed argument before  
15 the ICTR chambers. I'd like to refer you, your Honours, to the ICTR Rwamakuba  
16 appeals decision of 13 September 2007, paragraphs 11 and 12.

17 Like Mr Rwamakuba, Mr Ngudjolo's assertions that the evidence against him was  
18 false or tainted are unfounded. He only repeats his earlier opinion on why certain  
19 witnesses were unreliable. The ICTR Appeals Chamber has dismissed such  
20 arguments. They do not show prejudice. They cannot result in compensation.

21 We submit that your Honours should decide similarly.

22 Mr Ngudjolo fails to show that his rights were violated in the Prosecution's conduct  
23 of this case. The record simply do not support his claims of either unlawful arrest or  
24 detention under Article 85(1) or a grave and manifest miscarriage of justice under  
25 Article 85(3). To the contrary, that he was acquitted is only further confirmation of



1 the fairness of the proceedings against him and this Court's integrity in conducting  
2 these proceedings.

3 Your Honours, the Court simply cannot be faulted in this case. Indeed, if anyone  
4 was at fault, it was Mr Ngudjolo himself. He simply does not come before you with  
5 clean hands. He acted improperly during the proceedings. And although Mr  
6 Ngudjolo now seeks to prevent this Chamber from relying on the totality of the  
7 record, it would be fully within your remit, your Honours, to consider the existing  
8 record of the case, which shows that Mr Ngudjolo did act improperly from the  
9 Court's detention centre.

10 First, Mr Ngudjolo's improper conduct from the detention centre in violation of the  
11 Chamber's orders is a matter of public record, contained in court filings and  
12 documents. This public record which contains Mr Ngudjolo's own words to various  
13 associates over the telephone needs no further analysis at this stage. It speaks for  
14 itself. Your Honours need look no further than the information already present in  
15 no less than seven Registry reports, nine Trial Chamber decisions, and the Appeals  
16 Judgment in this case.

17 Second, that Mr Ngudjolo acted to exert a negative influence on the administration of  
18 justice is not disputed, not even by Mr Ngudjolo. Following the Registry's  
19 determinations, judicial findings of the Chambers acknowledge Mr Ngudjolo's  
20 improper conduct. The Trial Chamber noted, quote "the particular gravity of  
21 Mr Ngudjolo's conduct committed on a regular basis over an extended period of  
22 time." And on appeal, both the Majority and the Minority Judges acknowledge that  
23 Mr Ngudjolo had acted improperly. The Majority noted that the Trial Chamber was,  
24 quote, "aware of his possible efforts to distort witness testimony or the truth finding  
25 process." And the Dissenting Judges went even further recognising, quote, "the

1 abusive means he employed to mount his defence and to define his strategy."

2 Mr Ngudjolo cannot deny that he acted improperly. Quite to the contrary. The  
3 content of the monitored conversations is clear, and as the case record shows, in  
4 giving his, quote, "word of honour" that he would no longer seek the assistance of  
5 third parties, give instructions or pass on information which would harm witnesses,  
6 he implicitly acknowledged that he had done so in the past.

7 And third, and this is my last point, contrary to his submissions, references to  
8 findings and statements in a public judicial record cannot violate any of  
9 Mr Ngudjolo's rights, especially since this is now a civil proceeding.

10 Mr Ngudjolo is also wrong to suggest that his acquittal affected these findings and  
11 information on his improper conduct. As we know, the Prosecution's case against  
12 Mr Ngudjolo and the subsequent trial and appeal judgments concerned his alleged  
13 involvement in the crimes committed in Bogoro on 24 February 2003. He was not  
14 tried for his improper conduct in the detention centre, nor was it essential that he was  
15 prosecuted under Article 70 for this Chamber to now consider his improper actions.  
16 Nor did the appellate proceedings disturb these findings in any way. Rather, the  
17 Appeals Chamber, in considering the Prosecution's Article 81 appeal limited its  
18 review to a different issue, namely, whether the Trial Chamber erred in managing the  
19 trial and whether the Prosecution's right to present and prove its case was materially  
20 affected. In other words, the Appeals Chamber's review was limited to the impact of  
21 Mr Ngudjolo's conduct and not the improper conduct itself.

22 And contrary to the submissions this morning, this is not a second appeal.

23 To conclude, your Honours, Mr Ngudjolo cannot show that he was a victim of  
24 unlawful arrest or detention or that he suffered a grave and manifest miscarriage of  
25 justice by way of the Prosecution's conduct in this case. And his own improper

1 conduct likewise only serves to highlight that he does not deserve compensation.

2 My colleague, Mr Gallmetzer, will now deal with the factual challenges with respect  
3 to the Chambers' conduct and decisions. Thank you very much, your Honours.

4 MR GALLMETZER: Good morning, your Honours. I'll address you on Mr Ngudjolo's  
5 argument that the Pre-Trial Chamber and the Trial Chamber committed a number of errors.

6 In particular, Mr Ngudjolo alleges that the Pre-Trial Chamber erred in three ways, namely:

7 First, by authorising the arrest warrant.

8 Second, by joining the Ngudjolo and Katanga cases; and

9 Thirdly, by confirming the charges, without having given the Defence sufficient time

10 to prepare and without having properly evaluated the evidence before it.

11 Mr Ngudjolo also submits that the Trial Chamber erred by making a comment in the

12 judgment of acquittal which allegedly failed to safeguard his presumption of

13 innocence.

14 For a detailed analysis, I refer you to our written submissions in response to

15 Mr Ngudjolo's Compensation Request. But today I would like to emphasise the

16 following: In addressing these allegations, your Honours should bear in mind the

17 scope of the functions of this Chamber. A compensation procedure is not an

18 appellate process. This Chamber is not a second appeals chamber, nor is it a revision

19 chamber. In fact, this Chamber should only assess whether Mr Ngudjolo has

20 established any grounds for compensation under Article 85. The Chamber's

21 examination is, therefore, confined to assessing whether Mr Ngudjolo has been the

22 victim of an unlawful arrest or detention or whether there has been a grave and

23 manifest miscarriage of justice in the proceedings against him. Beyond this, the

24 Chamber should not examine whether the other chambers which heard his case made

25 any errors in their decisions.

1 In fact, while the Appeals Chamber hearing a final appeal must determine, according  
2 to Article 83(2), whether the proceedings were unfair in a way that affected the  
3 reliability of the decisions or whether a decision was materially affected by an error,  
4 this Chamber applies a different and a higher standard. A Chamber hearing a  
5 compensation request can only award compensation where the applicant can  
6 establish that one of the grounds under Article 85 is met. The high standard  
7 expressed in that provision necessarily implies that this Chamber should defer to the  
8 Pre-Trial Chamber's and the Trial Chamber's exercise of discretion.

9 In particular, to determine whether Mr Ngudjolo was unlawfully detained, the  
10 Chamber should not make a new assessment of the evidence that was before the  
11 Pre-Trial Chamber when it issued the warrant of arrest or when it confirmed the  
12 charges. Short of a demonstration of a ground for compensation, it should also not  
13 review the correctness of the Pre-Trial Chamber's procedural decisions. Instead, this  
14 Chamber should only assess whether the arrest warrant or the confirmation decision  
15 was vitiated in such a fundamental way that it would amount to a violation of the  
16 Statute or internationally recognised human rights law so as to render Mr Ngudjolo's  
17 arrest or detention unlawful.

18 Similarly, when determining whether any of the Pre-Trial Chamber's or the Trial  
19 Chamber's decisions give rise to a compensation claim, this Chamber need not assess  
20 whether it agrees with their legal or factual findings or whether their decisions were  
21 indeed correct. It should rather determine whether the effects of those decisions  
22 resulted in a "grave and manifest miscarriage of justice." In other words, your  
23 Honours, a mere error in a decision would be insufficient to give rise to compensation.  
24 Mr Ngudjolo is only entitled to compensation if any of the challenged decisions  
25 resulted in a violation of his fundamental rights that reach the threshold of a grave

1 and manifest miscarriage of justice.

2 Your Honours, it is our position that Mr Ngudjolo has not discharged his burden to  
3 show that he is entitled to compensation under any ground under Article 85.

4 As Mr Narayanan has shown, Mr Ngudjolo's challenge relating to the Prosecution's  
5 conduct fails. Likewise his allegations regarding the Pre-Trial Chamber's errors  
6 resulting from the Prosecution's conduct of investigations are unsubstantiated and do  
7 not support Mr Ngudjolo's claim that his arrest or detention were unlawful.

8 Similarly, Mr Ngudjolo fails to demonstrate any unfair prejudice or a miscarriage of  
9 justice resulting from the process of confirming the charges. This Chamber should  
10 not reassess the manner in which the Pre-Trial Chamber weighed the evidence to  
11 determine that the threshold for confirmation of charges was met. Also,

12 Mr Ngudjolo's argument that his procedural rights were not respected are  
13 unsupported and in any event would not make his arrest or detention unlawful.

14 Further, Mr Ngudjolo's arguments regarding the joinder of his case with  
15 Mr Katanga's also fall short of establishing a grave and manifest miscarriage of justice.  
16 He merely re-litigates issues that have been already settled by the Pre-Trial Chamber  
17 and the Appeals Chamber. In fact, the Appeals Chamber held that the joinder of the  
18 two cases was "consistent with the rights of the accused." Mr Ngudjolo disagrees  
19 with the joinder decision, but provides no argument to demonstrate that it resulted in  
20 a grave and manifest miscarriage of justice.

21 Finally, the Trial Chamber's single comment in the judgment of acquittal that, and I  
22 quote, "finding an accused person not guilty does not necessarily mean that the  
23 Chamber considers him or her to be innocent," end of quote, is irrelevant to this  
24 application.

25 This Chamber should not reassess the appropriateness of the Trial Chamber's

1 comment, but should only determine whether it resulted in a grave and manifest  
2 miscarriage of justice.

3 Clearly, the Trial Chamber did not violate Mr Ngudjolo's presumption of innocence.

4 First, the Trial Chamber did not say that it believed that Mr Ngudjolo was not

5 innocent. Its comment was of a more abstract nature. Second, the decision

6 containing this challenged comment in fact acquitted Mr Ngudjolo of all charges,

7 which is hardly an indication that the Trial Chamber had violated his presumption of

8 innocence. In any event, even if, arguendo, the Trial Chamber's comment could be

9 considered inconsistent with Mr Ngudjolo's acquittal, it has not been shown to have

10 cost him any unfair prejudice, let alone can it establish that he suffered a grave and

11 manifest miscarriage of justice.

12 To conclude, your Honours, because Mr Ngudjolo's request fails in law and in fact,

13 his request should be dismissed. Mr Ngudjolo has not shown that any of his rights

14 were violated, much less that any of the grounds for compensation under Article 85

15 have been established.

16 As a result, no discussion on the amount of compensation is even necessary. In any

17 event, his claim of almost 1 million euros is clearly excessive and does not even

18 closely approximate any harm that Ngudjolo claims to have suffered. His request

19 should therefore be dismissed in its entirety. And this concludes our submissions.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) I would like to thank

21 Mr Gallmetzer, Madam Brady, Madam Narayanan for their submissions on behalf of the

22 Office of The Prosecution.

23 I would suggest that we now take a break of half an hour and that we reconvene

24 at 11.25. This would enable the Defence for Mr Ngudjolo to prepare their rebuttal

25 submissions and we will then be able to listen to them. Thank you.

1 THE COURT USHER: All rise.

2 (Recess taken at 10.55 a.m.)

3 (Upon resuming in open session at 11.27 a.m.)

4 THE COURT USHER: All rise.

5 Please be seated.

6 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) We will resume the  
7 hearing and we will listen to the reply from the Defence of Mr Ngudjolo, Mr Kilenda.

8 MR KILENDA: (Interpretation) Thank you very much, Mr President. Mr President, your  
9 Honours, on 12 May 2008 in this same courtroom, your Honours, at the end of the sixth  
10 seminar of ICC counsel, a Japanese colleague, who was seated to your left next to the OTP,  
11 took the floor before the Registrar and said that he was proud to be a member of the list of the  
12 ICC counsel. And he said that we were here at the very summit of criminal law.

13 We were very happy to hear that because we hoped and we have always hoped that  
14 at the ICC justice, criminal justice should be administered at the very highest level.

15 Mr President, your Honours, after listening to the Prosecution, we are saddened by  
16 the fact that even before you in this compensation hearing, the Prosecution continues  
17 to violate the innocence, the presumption of innocence of Mr Ngudjolo.

18 On several occasions the members of the OTP have referred to the problem of the  
19 phone monitoring of Mr Ngudjolo, something that was litigated and closed in the  
20 judgment of February 2015 by the Appeals Chamber. And the Appeals Chamber as  
21 far as I remember never reclassified this judgment, which remains confidential.

22 I do not want to insult the Prosecutor by saying that they do not observe the Statute,  
23 but they are not only a party in cases here, but they are an organ of the Court, and  
24 they have to be objective and impartial, and they should be the first to comply with  
25 the decisions of the Court.

1 Mr Ngudjolo was declared innocent and that is the reality. All legal minds have to  
2 follow the law. Mr Ngudjolo was declared innocent by the Trial Chamber II and the  
3 Appeals Chamber in its judgment of 27 February 2015. So the Prosecutor cannot  
4 once again call into question the innocence of Mr Ngudjolo.

5 If there is anybody considering that this is an occasion, an opportunity for them to  
6 appeal once again, it is the Prosecution that is doing that, not the Defence.

7 The OTP has said that Mr Ngudjolo does not understand the proceedings before the  
8 OTP, that he is confusing between situations and cases, and that the Pre-Trial  
9 Chamber did not err in any way. And my colleague, Mr Bokolombe, will comment  
10 on the excerpt that we have mentioned in our written submissions, but I will dwell  
11 myself on the confirmation of charges.

12 Mr President, in this Court a Pre-Trial Chamber has already released a suspect by not  
13 confirming the charges. You are all aware of the Mbarushimana case in which the  
14 Chamber properly assessed the evidence. And the Prosecutor appealed. But the  
15 Appeals Chamber stated that it was the task of the judges at all the various phases of  
16 the proceedings to assess the evidence.

17 Now, what is happening in the Ngudjolo case? It is that the guilt of the  
18 Prosecutor -- or, rather, the Prosecutor actually presumed that the suspect was guilty  
19 at the stage of the investigation. He did not even question Mr Ngudjolo, but  
20 considered him as guilty. So the Prosecution worked on the basis of the  
21 presumption of guilt, and that is a miscarriage of justice. And even the conduct of  
22 the Prosecution today before you shows that they consider Mr Ngudjolo as guilty,  
23 whereas he has been declared innocent by landmark decisions of the Trial Chamber  
24 and the Appeals Chamber.

25 So by working on the basis of a presumption of guilt, they misled the Pre-Trial



1 Chamber. And the Pre-Trial Chamber adopted or repeated that error because they  
2 did not properly assess the evidence. They considered Mr Ngudjolo as the  
3 highest-ranking commander of the FNI by document D03-0044, which is the  
4 agreement that was assigned. And when you look at that document it states that it is  
5 Mr Floribert Ndjabu, who is actually the president of the FNI. Mr Ngudjolo's only  
6 signed that document as an elder or notable of the Djugu community.

7 The Pre-Trial Chamber accepted the Prosecution's statement that Mr Ngudjolo was  
8 the highest-ranking commander of the FNI.

9 And in the confirmation decision, which is more than 200 pages long, the Pre-Trial Chamber  
10 all the time describes Mr Ngudjolo as a commander-in-chief of the FNI. But when we  
11 presented our Defence evidence, it was clear that the FNI was not even operational in the  
12 Bedu-Ezekere groupement at the time of the events.

13 Now, in the final conclusions, the Prosecution changed its theory and described  
14 Mr Ngudjolo as the leader of the Lendu militia in Bedu-Ezekere, but even then the  
15 Prosecution was unable to prove that beyond a reasonable doubt.

16 The Prosecutor has referred to the Rwamakuba case, but they overlooked the fact that the  
17 Appeals Chamber granted compensation in that case to Mr Rwamakuba.

18 I will end there. I do not want to take more time. I believe that everything is  
19 included in our filing. We have established that there is conduct that must be  
20 compensated because it constitutes a veritable miscarriage of justice. And I will give  
21 over the floor to my colleague, Mr Bokolombe, who will speak on the other aspect of  
22 these violations that continue to be carried out before you. That was my submission,  
23 your Honours. Thank you.

24 MR BOKOLOMBE: (Interpretation) Mr President, your Honours, I feel at ease to be  
25 addressing Judges who are as experienced as yourselves because we have to inform the

1 Prosecutor that detaining somebody is not something to be taken lightly, because a custodial  
2 sentence is the highest sentence in international law and is not for nothing that the UN  
3 principles consider detention as an exception.

4 The fact that Mr Ngudjolo spent more than four years in detention awaiting trial  
5 made him a pariah.

6 The Prosecution overlooks this fact and feels that spending four years of his life in prison does  
7 not constitute a prejudice against Mr Ngudjolo. So I wonder what the Prosecution thinks  
8 about the law when it comes to someone's individual life.

9 They have said that the almost €1 million requested by Mr Ngudjolo for the various  
10 material and moral prejudices is a matter of milking the Court. I'm wondering  
11 whether freedom has a price in the eyes of the OTP.

12 If the material and moral prejudices against Mr Ngudjolo have a price, at least I can  
13 state that we have requested actually the minimum based on what the Dutch  
14 jurisdictions have awarded in the past.

15 Now, regarding the presumption of innocence referred to by the OTP, I would like to  
16 recall that the Human Rights Court, and this is included in our filing, paragraphs 144  
17 to 147, but I would like to reread those "In the Vasilios Stravopoulos case, the Court  
18 reproached Greece for having cast doubt on the acquittal of Mr Vasilios. The Court  
19 recalled that the presumption of innocence, set out in paragraph 2 of Article 6, is part  
20 of the principle of fairness in part 1 of the same document.

21 These guarantees would have been overlooked if a judicial decision relating to a  
22 suspect reflects the feeling that he or she is guilty whereas his or her guilt has not  
23 been established.

24 In the Panella case, Spain was ordered to pay €12,000 to Mr Panella for the violation  
25 of his presumption of innocence. And in that case, the Court stated that Article 6(2)

1 of the Human Rights Convention is applicable even to proceedings subsequent to the  
2 acquittal. In another case, Tendam against Spain, Spain was ordered to pay the  
3 amount of €15,600 for the 135 days spent in detention.

4 What about the more than four years of detention in the case of Mr Ngudjolo?

5 Mr President, your Honours, everything has been said. We stand by our request and we  
6 firmly believe that you will grant our request in all its aspects. That was my submission and  
7 thank you.

8 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: (Interpretation) Thank you very much.

9 I would like to thank Maître Kilenda and Maître Bokolombe. I would like to see whether my  
10 colleagues have any questions. It appears there are no questions.

11 So I believe that there is no further need to continue. The Chamber will of course  
12 take into consideration all the submissions that were made today. We will  
13 endeavour to render our judgment on this request as quickly as possible.

14 The Court Officer has reminded me that this is the last hearing that is being held in  
15 this courtroom. And there have been great moments in this courtroom; there have  
16 been four major cases, landmark cases that have taken place in this courtroom, so it is  
17 quite logical that this last hearing is also a new type of hearing, and we are proud that  
18 we have contributed to all of this and all of you have contributed to all of this.

19 I thank you all.

20 I would like to thank the interpreters, the court reporters and all the Registry staff that have  
21 supported us.

22 The hearing is adjourned. Thank you.

23 (The hearing ends in open session at 11.43 a.m.)

#### 24 CORRECTIONS REPORT

25 The Language Services Section has brought the following corrections in the transcript:

1 \*Page 3 lines 8 to 13:

2 “We thought, and we continue to think, that the issue of compensation that we have  
3 set has -- that this problem was no longer relative and that it really was beyond any  
4 point of quarrel. However, from the Office of The Prosecution, we have had many  
5 responses, lyrical in form, and that is why we would like to react to these.

6 Today, we would like to bring this discussion back to your hearing by putting the  
7 most simple of questions, precisely what are we dealing with here.” Is corrected by

8 “We thought, and we continue to think, that  
9 the issue of compensation that we raised –

10 to the extent that the criminal phase of the

11 proceedings has been brought to a close with a common consensus –

12 was no longer relevant and that it was beyond any arguments, alas, however.”

13 \*Page 3 lines 21 to 24:

14 “That means that we need to implement the fundamental judicial principle which  
15 holds that personal action -- and this is what -- when I talk here of physical or moral  
16 persons, be recompensed or sanctioned according to the law.” Is corrected by

17 “ That means that we need to implement the fundamental judicial principle which  
18 holds that personal actions (by which I mean those of natural or legal person) must be  
19 punished or recompensed according to their merits in the eyes of the law, and only  
20 the law.”

21 \*Page 3 line 25 to page 4 line 1:

22 “The following phases exceed or complete those phases.” Is corrected by “The  
23 following phases exceed or complete those phases by annulling or confirming them.”

24 \*Page 4 lines 6 to 8

25 “Any fact or event that causes prejudice to others obliges him to be compensated, not

1 only to be compensated by the facts or events, but also by virtue of the negligence or  
2 imprudence imposed.” Is corrected by

3 “Any fact or event that causes prejudice to others obliges the person who caused such  
4 harm to repair it. Each individual is responsible for the harm caused not only in itself  
5 but also by virtue of any imprudence or negligence.”

6 \*Page 5 line 19

7 “Now, all of these have been brought together” is corrected by “Several, if not nearly  
8 all of these have been brought together”

9 \*Page 5 lines 20 to 23:

10 “In its final conclusions, the Defence, on a number of occasions, underlined the  
11 obstination of the Prosecution to investigate in violation of the obligation upon it of  
12 the Statute under Article 55 -- 54.1. is corrected by

13 “In its final conclusions, the Defence repeatedly denounced the Prosecution’s  
14 obstinate habit of only investigating inculpatory material, in violation of the  
15 obligation upon it of the Statute under Article 55 – 54.1”

16 \*Page 6 lines 15 to 17:

17 “The Prosecutor filed -- appealed on the basis of false testimony, incompetent  
18 witnesses and called upon them who had not experienced the facts and put to one  
19 side true witnesses because they were in favour of Mr Ngudjolo.” Is corrected by  
20 “The Prosecutor called false witnesses, incompetent witnesses who had not  
21 experienced the facts and side-lined the true witnesses because their account was  
22 exculpatory for Mr Ngudjolo.”

23 \*The following paragraph is inserted - Page 6 lines 21 to 23:

24 “These witnesses and intermediaries fabricated and produced false exhibits such as:  
25 birth certificates and voters’ cards all of which were adduced before the Chamber in

1 order to prove their false civil status”

2 \*Page 6 lines 24-25 and page 7 line 1

3 “The ignorance towards the forensic expertise was pinpointed by the Trial Chamber  
4 in its decision to acquit Mr Mathieu Ngudjolo in paragraph 147 in its very terms as it  
5 is to be wished.”

6 Is corrected by

7 “The ignorance of the forensic experts.... in paragraph 147 in these terms: It is equally  
8 desirable, where practicable, to make as many factual findings as possible – in  
9 particular, forensic findings.”

10 \*Page 7 lines 1 to 3

11 “Every time that this proves possible to proceed in the best possible way, and in order  
12 to abusively conclude that he was the highest commander of the FNI,”

13 Is corrected by

14 “An error in the interpretation of evidence was committed by the Pre-Trial Chamber  
15 which based itself on the Cessation of Hostilities Act signed by M. Ngudjolo as one of  
16 the notables of the Lendu community in Djugu territory, thereby reaching the  
17 erroneous conclusion that he was the highest-ranking FNI commander.”

18 \*Page 8 lines 7 to 10:

19 “The consultation on parliamentary works says that the intention of any individual  
20 who has not been declared guilty may seek compensation in reparation for the  
21 prejudice caused to them for provisional detention, whatever the cause for the  
22 non -- for the declaration, or for the finding of non-guilt.”

23 Is corrected by

24 “The consultation on parliamentary works declared that the intention of the legislator  
25 was to confer upon any person who had not been declared definitively guilty the

1 right to compensation for the prejudice caused by provisional detention, whatever the  
2 reason for the not guilty verdict.”

3 \*Page 8 lines 11 to 17:

4 “Some national legal systems provide for the exclusion of compensation. Firstly, the  
5 person who has been the object of provisional detention and who has been accused  
6 or -- and also when the person has been -- in the present case, Mr Ngudjolo was not  
7 the subject of any further Prosecution either before or after.”

8 Is corrected by

9 “By virtue of comparison, some national systems provide for the exclusion to the  
10 right to compensation when:

11 Firstly, when an individual who has been the subject of provisional detention has  
12 voluntarily and freely let themselves be wrongly accused in order to enable the true  
13 perpetrator to escape. Mr Ngudjolo pleaded not guilty.

14 Then, when the person is concurrently detained in another case. Mr Ngudjolo was not  
15 the subject of any other prosecution, either before or after.”