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No.: ICC-01/04-02/12
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TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. MATHIEU NGUDJOLO***

Public

Decision on the *“Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome”*

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for Mathieu Ngudjolo

Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

States' Representatives

**Office of Public Counsel for the
Defence**

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court (“the Court”), in the case of *The Prosecutor v. Mathieu Ngudjolo* (“Ngudjolo”), acting pursuant to article 85 of the Rome Statute (“the Statute”) and rules 173-174 of the Rules of Procedure and Evidence (“the Rules”), issues the following decision.

I. Procedural background

1. On 18 December 2012, the formerly constituted Trial Chamber II (“Trial Chamber II, as constituted at the time”)¹ rendered, in the case at hand, its decision pursuant to article 74 of the Rome Statute, by which it acquitted Mr Mathieu Ngudjolo Chui (“Mr Ngudjolo”) of all charges against him (“Decision of Acquittal”).²
2. On 27 February 2015, the Appeals Chamber rendered its judgment in *Ngudjolo*, by which it upheld the decision of acquittal (“Appeal Judgment”).³
3. On 4 March 2015, Counsel for Mr Ngudjolo (“Counsel”) notified the Presidency of the Court (“the Presidency”) that a request for compensation pursuant to article 85 of the Statute was to be filed on 14 August 2015.⁴
4. On 17 March 2015, the Presidency referred the case to the Chamber under rule 173(1) of the Rules.⁵
5. On 2 April 2015, the Chamber dismissed Counsel’s request for a hearing, specifying that it was premature since a request for compensation under article 85 of the Statute had not yet been filed.⁶

¹ “Decision replacing two judges in Trial Chamber II”, 17 March 2015, decision notified on 18 March 2015, ICC-01/04-01/07-3530.

² “Judgment pursuant to article 74 of the Statute”, with four public annexes and one confidential annex, 18 December 2012, ICC-01/04-02/12-3-tENG.

³ “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’”, with three annexes, 27 February 2015, ICC-01/04-02/12-271 (a corrigendum was issued on 7 April 2015, ICC-01/04-02/12-271-Corr).

⁴ “Note d’information à la Présidence”, 4 March 2015, ICC-01/04-02/12-273, with one confidential *ex parte* annex.

⁵ “Decision referring the case of *The Prosecutor v. Mathieu Ngudjolo Chui* to Trial Chamber II”, 17 March 2015, notified on 18 March 2015, ICC-01/04-02/12-277-Conf-Exp.

6. On 24 April 2015, the Chamber, *inter alia*, refused another request⁷ by Counsel for instructions for the purpose of submitting its application for compensation.⁸

7. On 14 August 2015, Counsel filed a request for compensation under article 85 of the Statute (“Request for Compensation”).⁹ Counsel contended that Mr Ngudjolo’s arrest and detention had been unlawful and that a grave and manifest miscarriage of justice had occurred with regard to: (i) the Pre-Trial Chamber’s decision to join the cases of Mr Ngudjolo and Mr Katanga (“Decision on Joinder”); (ii) the Pre-Trial Chamber’s decision to confirm the charges against Mr Ngudjolo and Germain Katanga (“Decision on the Confirmation of Charges”); and (iii) the Decision of Acquittal. Consequently, Counsel requested, *inter alia*, that the Court award Mr Ngudjolo the sum of EUR 906,346 for the material and moral damage that he had suffered and that the Court order the implementation of awareness-raising campaigns in Bedu Ezekere in order to explain the reasons behind Mr Ngudjolo’s acquittal.¹⁰

8. On 18 September 2015, in accordance with the Chamber’s instructions,¹¹ the Office of the Prosecutor (“Prosecution”) filed its observations on the Request for Compensation, contending that it was inadmissible and that it had to be dismissed *in limine* (“Prosecution’s Response”).¹²

⁶ “Decision on the ‘*Requête de la Défense sollicitant la tenue d’une audience et d’un ordre assurant la présence physique de Mathieu Ngudjolo en application notamment de la règle 174(2) of the Règlement de procédure et de preuve*’”, 2 April 2015, ICC-01/04-02/12-283-tENG.

⁷ “Defence request for instructions from the Chamber for the purposes of submitting its application for compensation on the basis of article 85”, 9 April 2015, ICC-01/04-02/12-284-tENG.

⁸ “Decision on the ‘*Requête de la Défense sollicitant des instructions de la Chambre en vue de la soumission de sa requête en indemnisation sur pied de l’article 85*’”, 24 April 2015, ICC-01/04-02/12-285-tENG.

⁹ “*Requête en indemnisation sur pied de l’article 85 (1) et (3) du Statut de Rome*”, 14 August 2015, ICC-01/04-02/12-290.

¹⁰ Request for Compensation, p. 49; see also ICC-01/04-02/12-T-6-FRA, p. 14, line 21; p. 15, line 28; p. 18, lines 4-9.

¹¹ “Order instructing the Prosecution to file observations on the Request for Compensation”, 18 August 2015, ICC-01/04-02/12-291-tENG.

¹² “Prosecution’s response to Mathieu Ngudjolo Chui’s request for compensation”, 18 September 2015, ICC-01/04-02/12-292, with annex (ICC-01/04-02/12-292-AnxA); see, for example, paras. 1-5 and 95.

9. On 16 October 2015, with the leave of the Chamber,¹³ Counsel filed a reply to the Prosecution's Response.¹⁴

10. On 30 October 2015, the Chamber granted, in part, Counsel's Request¹⁵ for a hearing¹⁶ and scheduled a hearing for 23 November 2015.¹⁷ On the same day, the Chamber issued an order on the conduct of the hearing.¹⁸

11. On 23 November 2015, the Chamber held a hearing, during which both Counsel and the Prosecution made additional submissions on the Request for Compensation.¹⁹

¹³ "Decision on the request by Counsel for Mathieu Ngudjolo for leave to reply", 8 October 2015, ICC-01/04-02/12-296-tENG.

¹⁴ "Réplique du Conseil de Mathieu Ngudjolo Chui à 'Prosecution's response to Mathieu Ngudjolo Chui's request for compensation' (ICC-01/04-02/12-292) du 18 septembre 2015", 16 October 2015, ICC-01/04-02/12-298 ("Reply to Prosecution's Response").

¹⁵ "Requête de la Défense sollicitant la tenue d'une audience et d'un ordre assurant la présence physique de Monsieur Mathieu Ngudjolo Chui en application de l'article 67(1)(d) et (h) du Statut et de la règle 174(2) du Règlement de procédure et de preuve", 7 October 2015, ICC-01/04-02/12-295.

¹⁶ "Decision on the request by Counsel for Mathieu Ngudjolo for one or more hearings to be held and for an order to ensure that Mathieu Ngudjolo attends the hearing or hearings", 30 October 2015, ICC-01/04-02/12-299-tENG.

¹⁷ *Ibid.*, p. 7.

¹⁸ "Order on the conduct of the hearing of 23 November 2015", 30 October 2015, ICC-01/04-02/12-300-tENG.

¹⁹ ICC-01/04-02/12-T-6-FRA.

II. Analysis

1. Preliminary matter: decision in accordance with rule 173 of the Rules

12. The relevant provisions of rule 173(2) of the Rules of Procedure and Evidence state the following:

- [...] 2. The request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning:
- (a) The illegality of the arrest or detention under article 85, paragraph 1;
 - (b) [...]
 - (c) The existence of a grave and manifest miscarriage of justice under article 85, paragraph 3.

13. Accordingly, rule 173(2) of the Rules clearly states that the filing of a request for compensation must be preceded by a “decision of the Court” stating either that the arrest or detention had been unlawful or that a grave and manifest miscarriage of justice had taken place.²⁰

14. Counsel contended that the Appeal Judgment upholding Mr Ngudjolo’s acquittal amounted to a decision in accordance with rule 173(2) of the Rules of Procedure and Evidence and therefore provided grounds for Counsel’s Request for Compensation.²¹

15. The Chamber notes, however, that no such decision was issued and that Counsel did not file a request to obtain such a decision under rule 173 of the Rules. Nowhere in the Appeal Judgment is it mentioned that Mr Ngudjolo’s arrest or detention had been unlawful or that a grave and manifest miscarriage of justice had occurred during the course of the proceedings. In this respect, the Chamber considers that a decision of acquittal, in and of itself, does not constitute a grave and manifest

²⁰ “Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772, para. 4; see also “Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the *“Requête de mise en liberté”* submitted by the Defence for Jean-Jacques Mangenda’”, 11 July 2014, ICC-01/05-01/13-560, para. 48; see also, “Decision on the application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi”, 19 November 2012, ICC-01/09-02/11-534, footnote 17.

²¹ Request for Compensation, para. 33; see also ICC-01/04-02/12-T-6-FRA, p. 12, lines 23-26; p. 13, lines 6-10.

miscarriage of justice within the meaning of rule 173(2)(c) of the Rules.²² Moreover, the Chamber considers that a decision of acquittal does not automatically render an arrest or detention unlawful.²³

16. The Chamber nevertheless considers that, in the circumstances of the case, it would not serve the interests of justice to instruct Counsel to submit another request for compensation based on rule 173 of the Rules. In this regard, the Chamber notes that there is no provision in the applicable legal texts which states that a prior decision, concerning any of the situations listed in rule 173(2) of the Rules, should be issued by a chamber other than that seized of the request for compensation. Accordingly, the Chamber will proceed to examine the Request for Compensation despite the absence of a “decision of the Court” mentioned in rule 173(2) of the Rules. It will start by determining whether the arrest and detention were unlawful and, if appropriate, whether a grave and manifest miscarriage of justice took place. It is only after making that determination that the Chamber will decide whether it is appropriate to award compensation.

²² See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2013 edition, 14.208, p. 517: “Miscarriages of justice can therefore be distinguished from acquittals on appeal. Furthermore, pre-trial detention and the costs incurred in being forced to defend oneself in criminal proceedings do not constitute a ‘punishment’ for the purposes of article 14(6)”; European Court of Human Rights (“ECHR”), Grand Chamber, *Allen v. the United Kingdom*, 12 July 2013, No. 25424/09, para. 129; ECHR, 4th Section, *Adams v. The United Kingdom*, 12 November 2013, No. 70601/11.

²³ See also William A. Schabas, “Article 85 “ in William A. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 967, citing Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005), pp. 238-239; In the case of *WBE v. The Netherlands*, the Human Rights Committee stated that “arrest and pre-trial detention do not automatically become unlawful or wrongful, just because an accused has been acquitted. The fact that a person has spent time in pre-trial detention and is later acquitted, ‘does not in and of itself render the pre-trial detention unlawful’” (*WBE v. The Netherlands*, No. 432/1990, UN Doc, CCPR/C/46/D/432/1990).

2. Article 85(1) of the Statute: unlawful arrest and detention

17. With regard to Mr Ngudjolo's arrest and detention, Counsel seems to base its submissions on both article 85(1) and article 85(3) of the Statute.²⁴ The Chamber notes, however, that aside from making a brief general reference to article 85(1) of the Statute in the title of the Request for Compensation and its introduction,²⁵ Counsel did not undertake a detailed analysis of the requirement set out in that provision of the Statute and did not set forth any arguments concerning the way in which this requirement is allegedly satisfied in this instance. Indeed, the Request for Compensation seems to be based on the claim that a grave and manifest miscarriage of justice took place.²⁶

18. The Chamber notes further that Counsel confused the provisions of article 85(1) with those of article 85(3) of the Statute.²⁷ Article 85(1) of the Statute, whose wording is similar to that of article 9(5) of the International Covenant on Civil and Political Rights ("ICCPR"), provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."²⁸ Accordingly, article 85(1) of the Statute requires the applicant to demonstrate that his or her arrest had been unlawful. However, as stated above,²⁹ an arrest or pre-trial detention does not automatically become unlawful simply because the accused has been acquitted. It is not permissible to seek compensation if the pre-trial detention was based on properly reasoned decisions, in keeping with the provisions of the Statute, including article 58, interpreted in accordance with internationally recognised human rights law.³⁰

²⁴ Request for Compensation, title and para. 40.

²⁵ *Idem*.

²⁶ *Ibid.*, p. 15, title of Section 1; and paras. 6 and 41. See also ICC-01/04-02/12-T-6-FRA, p. 12, lines 23-26; p. 13, lines 6-10; p. 13, lines 14-23.

²⁷ ICC-01/04-02/12-T-6-FRA, p. 5, lines 5-7 and 14-18; p. 12, lines 23-26; p. 13, lines 3-5.

²⁸ Likewise, article 55(1)(d) of the Statute provides, *inter alia*, that "[i]n respect of an investigation under this Statute, a person [...] [s]hall not be subjected to arbitrary arrest or detention [...]".

²⁹ See para. 15, above.

³⁰ See "Decision on the application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi", 19 November 2012, ICC-01/09-02/11-534, para. 6; see also Christophe Staker and Volker Nerlich, "Article 85. Compensation to an arrested or convicted person" in Otto Triffterer and Ambos Kai, *The Rome Statute of the International Criminal Court – A Commentary*, 2015, pp. 2000-2002; see also,

19. The Chamber notes that, in principle, requests under article 85(1) must be submitted as soon as Counsel becomes aware of the reasons for the arrest carried out under article 58(1)(b) of the Statute.³¹ In this regard, the Chamber notes that, following his arrest on 6 February 2008, Mr Ngudjolo appeared before the Pre-Trial Chamber on 11 February 2008 and had the opportunity to file a request for compensation for unlawful arrest and detention.³² However, Counsel did not claim to have filed such a request on Mr Ngudjolo's behalf. While the Chamber acknowledges that the unlawfulness of an arrest warrant or detention may not come to light until a later stage in the proceedings, it notes that Counsel did not explain why the Request for Compensation under article 85(1) of the Statute had been filed late, i.e. after the termination of the proceedings.

20. Notwithstanding all the above, the Chamber considers that, in the interests of justice, the four categories of arguments presented by Counsel concerning the arrest warrant should be examined.

a. The referral of the Situation in the Democratic Republic of the Congo to the Court

i. Submissions of Counsel and the Prosecution

21. Counsel contended that, in referring the Situation in the Democratic Republic of the Congo ("DRC") to the Court, "[TRANSLATION] the Congolese Head of State" never described Mr Ngudjolo to the Prosecution "[TRANSLATION] as the presumed or actual perpetrator of the crimes committed".³³ Furthermore, Counsel submitted that "[TRANSLATION] had the Congolese authorities known that Mr Ngudjolo was

concerning the relevant provision of the ICCPR: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p. 239; see also Human Rights Committee, *Santullo Valcada v. Uruguay*, 1979, No. 9/77; *Portorreal v. Dominican Republic*, 1987, No. 188/84; *Bolaños v. Ecuador*, 1989, No. 238/87; see also ECHR, *N.C. v. Italy*, 18 September 2002, No. 24952/94; *Pantea v. Romania*, 3 June 2003, No. 33343/96; *Vachev v. Bulgaria*, 8 July 2004, No. 42987/98.

³¹ See also the public redacted version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" (ICC-01/04-01/07-1666-Conf-Exp-tENG), 20 November 2009, ICC-01/04-01/07-1666-Red, paras. 39-40, 48.

³² ICC-01/04-01/07-T-33-FRA.

³³ Request for Compensation, para. 42; see also paras. 9-14.

responsible for the havoc in this part of its territory, they would have tried him themselves, just as they tried Songo Mboyo".³⁴

22. The Prosecution maintained that the admissibility of a case cannot be challenged in post-appeal compensation proceedings.³⁵

ii. Analysis

23. The Chamber considers that the alleged absence of Mr Ngudjolo's name from the referral to the Court of the situation in DRC does not mean that the warrant for his arrest had been unlawful. As the Prosecution pointed out,³⁶ under article 14 of the Statute, a state may refer only a situation to the Court and not a particular case against an individual. Insofar as Counsel seems to be challenging the admissibility of the case against Mr Ngudjolo, this argument is without foundation and is clearly being made tardily, given that, under article 19(4) of the Statute, the admissibility of a case must be challenged prior to, or at the commencement of, the trial. In 2007, the Pre-Trial Chamber examined, *proprio motu*, and "in view of the interest of the person concerned", the question of admissibility in its decision on the warrant of arrest.³⁷

³⁴ Request for Compensation, para. 42.

³⁵ Prosecution's Response, para. 37.

³⁶ *Idem*.

³⁷ "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui", 6 July 2007, ICC-01/04-01/07-262, paras. 17-22.

b. The right to be heard

i. Submissions of Counsel and the Prosecution

24. Counsel contended that, pursuant to article 55(2) of the Statute and article 14 of the ICCPR, Mr Ngudjolo had the right to be heard when the Prosecutor requested the issuance of an arrest warrant.³⁸ Counsel noted that, in the instant case, Mr Ngudjolo had not been heard and “[TRANSLATION] did not have the opportunity to explain himself in respect of the facts alleged against him”.³⁹ Accordingly, Counsel maintained that the proceedings leading to Mr Ngudjolo’s arrest had been “[TRANSLATION] unlawful” and “[TRANSLATION] arbitrary, as they were unfair” in that they constituted “[TRANSLATION] a unilateral procedure from which the applicant was excluded”.⁴⁰ Counsel further submitted that “he [Mr Ngudjolo] would never have been heard by the Prosecution or by the Chamber if he had not taken the initiative to testify at his trial and make the statement provided for in article 67(1)(h) of the Statute”.⁴¹

25. The Prosecution submitted, *inter alia*, that the proceedings provided for in article 58 of the Statute are confidential and *ex parte* by nature to ensure that the subject of the arrest warrant does not evade its purpose.⁴² The Prosecution added that arrest warrants are not adversarial in nature and persons subject to arrest warrants are therefore not permitted to contest the facts or the reasons underpinning the necessity of such warrants.⁴³

ii. Analysis

26. The Chamber notes that article 55(2) of the Statute provides that a person is entitled to particular rights where “that person is about to be questioned either by

³⁸ Request for Compensation, paras. 44-47; see also ICC-01/04-02/12-T-6-FRA, p. 13, lines 12-13.

³⁹ *Ibid.*, paras. 44 and 47.

⁴⁰ *Ibid.*, para. 47.

⁴¹ *Idem.*

⁴² Prosecution’s Response, para. 24; see also ICC-01/04-02/12-T-6-FRA, p. 25, lines 14-28; p. 26, lines 1-7.

⁴³ Prosecution’s Response, para. 25.

the Prosecutor, or by national authorities [...]”. However, this provision does not require the Prosecution to examine every suspect individual. Moreover, as the Prosecution pointed out,⁴⁴ persons subject to arrest warrants are not permitted to file submissions on the merits of the proceedings against them.⁴⁵ The Court’s arrest warrants are issued “under seal” so as to facilitate their execution.⁴⁶ At his initial appearance, however, Mr Ngudjolo was informed of the tenor of the charges against him, including the reasons for his arrest and his right to apply for interim release.⁴⁷ Where article 14 of the ICCPR is concerned, aside from the reference that it made to this provision, Counsel did not address the question of whether it applies to situations in which a warrant for a person’s arrest is about to be issued or whether the ICCPR generally applies to the Court’s legal framework.

c. The Prosecution’s investigation methods

i. Submissions of Counsel and the Prosecution

27. Counsel submitted that the Prosecution’s choice of witnesses – witnesses who were not present at the time of the attack, or who lied in Court, or who gave contradictory testimonies⁴⁸ – shows that the Prosecution did not investigate incriminating and exonerating circumstances equally, as required under article 54(1)(a) of the Statute.⁴⁹ In this regard, Counsel notes that the Trial Chamber

⁴⁴ *Ibid.* para. 25.

⁴⁵ Situation in the Republic of Kenya, “Decision on Application for Leave to Submit Amicus Curiae Observations”, 18 January 2011, ICC-01/09-35, para. 10; Situation in the Republic of Kenya, “Decision on the ‘Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7)’”, 11 February 2011, ICC-01/09-42, para. 18.

⁴⁶ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Sous scellés Demande d’arrestation et de remise de M. Thomas Lubanga Dyilo adressée à la république démocratique du Congo”, 24 February 2006, ICC-01/04-01/06-9, reclassified as a public document by Decision ICC-01/04-01/06-42, 20 March 2006; *The Prosecutor v. Ntaganda*, “Sous scellés Demande d’arrestation et de remise de Bosco Ntaganda adressée à la république démocratique du Congo”, 8 March 2007, ICC-01/04-02/06-9, reclassified as a public document by Decision ICC-01/05-02/06-212-Conf-Exp, 16 January 2014; Pre-Trial Chamber III, Situation in the Republic of Côte d’Ivoire, “Sous scellés Ex parte, réservé à l’Accusation et au greffe, URGENT, Mandat d’arrêt à l’encontre de Laurent Koudou Gbagbo”, 23 November 2011, ICC-02/11-01/11-1, reclassified as a public document by Decision ICC-02/11-01/11-6-Conf, 29 November 2011.

⁴⁷ ICC-01/04-01/07-T-33-FRA.

⁴⁸ ICC-01/04-02/12-T-6-FRA, p. 6, lines 22-28; p. 7, lines 1-4; p. 12, lines 1-11.

⁴⁹ Request for Compensation, paras. 49-51, 53, 55 and 91; see also Prosecutor’s Response, para. 18.

drew up a list of grievances against the Prosecution, stating, for example, that it had not been to Zombe before it applied for the arrest warrant.⁵⁰

28. Moreover, Counsel considered that the failure to recognise the complexity of the investigation, and the public statement made by former Prosecutor Luis Moreno Ocampo regarding “[TRANSLATION] the applicant’s certain guilt”, show that the Prosecution investigated only incriminating circumstances.⁵¹ Counsel averred that the former Prosecutor’s public statement amounted to a violation of the “[TRANSLATION] fundamental principle of the presumption of [Mr Ngudjolo’s] innocence”.⁵²

29. The Prosecution considered that the choice to call certain witnesses did not prove that the Prosecution investigated only incriminating circumstances or that it failed to recognise the complexity of the case.⁵³ The Prosecution further submitted that the public statement purportedly made by Mr Ocampo concerning the charges brought against Mr Ngudjolo did not violate the presumption of the latter’s innocence.⁵⁴

ii. Analysis

30. The Chamber notes that article 54(1)(a) of the Statute requires the Prosecution to “establish the truth” and “[to] investigate incriminating and exonerating circumstances equally”.⁵⁵ However, Counsel’s submissions on this point are without foundation. The fact that Trial Chamber II, as constituted at the time, found some witnesses to be unreliable does not prove that the Prosecution investigated only incriminating circumstances. In this regard, the Chamber notes that Trial Chamber II,

⁵⁰ *Ibid.*, para. 54; see also ICC-01/04-02/12-T-6-FRA, p. 7, lines 27-28; p. 8, lines 1-3.

⁵¹ Request for Compensation, paras. 87-92.

⁵² *Ibid.*, para. 89, quoting from the testimony of Witness D-0088, ICC-01/04-01/07-T-302-Red-FRA WT of 01-09-2011, p. 42, lines 26-27: “[TRANSLATION] The Prosecutor, who you see there dressed in white, he spoke first. He said that Ngudjolo killed people in Bogoro.”

⁵³ Prosecution’s Response, para. 56; see also ICC-01/04-02/12-T-6-FRA, p. 26, lines 8-28; p. 27, lines 1-10; p. 32, lines 3-7.

⁵⁴ Prosecution’s Response, para. 57.

⁵⁵ “Article 54. Duties and powers of the Prosecutor with respect to investigations / *Devoirs et pouvoirs du procureur en matière d’enquête*”, in William A. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 675.

as constituted at the time, did not consider any evidence that it deemed unreliable. Furthermore, the Chamber notes that Trial Chamber II, as constituted at the time, acknowledged that:

[T]he Office of the Prosecutor would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information.⁵⁶

In any event, the Chamber is of the view that, in the absence of any indication of inappropriate conduct, the procedure set forth in article 85 of the Statute is not appropriate for conducting a review of the Prosecution's investigations, in particular the methods that the Prosecution used to choose witnesses for the trial.

31. Lastly, with regard to the statements purportedly made by Mr Ocampo, the Chamber notes that article 42(7) of the Statute and rule 34(1) of the Rules set forth a specific procedure concerning accusations of bias made against the Prosecution. Moreover, Counsel failed to show how the statements concerned may have rendered the arrest warrant or the subsequent detention unlawful.

d. Issuance of the arrest warrant

i. Submissions of Counsel and the Prosecution

32. Counsel contended that the issuance of the arrest warrant violated Mr Ngudjolo's individual freedom because the Pre-Trial Chamber had not reviewed "[TRANSLATION] the sufficiency of the evidence against [Mr] Ngudjolo".⁵⁷ In this regard, Counsel noted that the Pre-Trial Chamber had described Mr Ngudjolo as the "[TRANSLATION] highest ranking commander of the FNI"⁵⁸ while, in its Decision of Acquittal, Trial Chamber II, as constituted at the time, was seized of the issue of whether Mr Ngudjolo was the leader of the Lendu militia in Bedu Ezekere.⁵⁹

33. The Prosecution submitted that, pursuant to article 58(1)(b)(i) and (ii) of the Statute, the arrest warrant had been necessary to ensure Mr Ngudjolo's

⁵⁶ Decision of Acquittal, para. 115.

⁵⁷ Request for Compensation, paras. 52-53.

⁵⁸ *Idem*; see also ICC-01/04-02/12-T-6-FRA, p. 7, lines 15-18 and 22-25; p. 11, lines 23-26.

⁵⁹ *Ibid.*, paras. 31 and 79.

appearance at trial and to ensure that he did not obstruct or endanger the investigation or the court proceedings.⁶⁰

ii. Analysis

34. Counsel failed to demonstrate how the arrest warrant had been rendered unlawful by the fact that a difference existed between the way that Mr Ngudjolo's role was described at the start of the proceedings and the way in which it was analysed later in the proceedings. In this regard, the decision of acquittal issued by Trial Chamber II, as constituted at the time, resolved the question of Mr Ngudjolo's role on the basis of the amendment proposed by the Office of the Prosecutor.⁶¹ Finally, Counsel failed to demonstrate how the legality of the Pre-Trial Chamber's decision pursuant to article 58(1)(b)(i) and (ii) of the Statute could have been affected by the fact that Trial Chamber II, as constituted at the time, took this consideration into account.

e. Conclusion

35. Counsel failed to establish that the arrest and/or detention had been unlawful within the meaning of article 85(1) of the Statute. For this reason, this aspect of the Request for Compensation is dismissed.

⁶⁰ Prosecution's Response, paras. 30-32; see also ICC-01/04-02/12-T-6-FRA, p. 19, lines 16-18; p. 21, lines 24-29; p. 22, lines 1-13.

⁶¹ Decision of Acquittal, para. 350.

3. Article 85(3) of the Statute: grave and manifest miscarriage of justice

36. Counsel submitted that the Decision on Joinder, the Decision on the Confirmation of Charges and the Decision of Acquittal amounted to grave and manifest miscarriages of justice.⁶²

37. Article 85(3) of the Statute provides that:

In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

38. The Chamber notes, first of all, that the term “grave and manifest miscarriage of justice” is not defined in the Court’s statutory provisions. The Chamber recalls that the adoption of article 85(3) during the negotiations over the Statute of the Court was not without controversy. Indeed, the Working Group on Procedural Matters at the Rome Conference had this to say in its report:

[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. Other delegations considered this text to be too restrictive.⁶³

39. Furthermore, Trial Chamber II of the International Criminal Tribunal for Rwanda (“ICTR”) found the following in the case of *The Prosecutor v. Rwamakuba*:⁶⁴

[...] 27. On the basis of the above, the Chamber considers that there is insufficient evidence of State practice or of the recognition by States of this practice as law to establish that customary international law provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice.

40. The Chamber notes that no such regulation is found in the Statutes of the ad hoc Tribunals or in those of the Special Court for Sierra Leone. Lastly, article 85(3) of the Statute has no equivalent in any other international instrument.⁶⁵

⁶² Request for Compensation, paras. 35, 57 *et seq.*, 61 *et seq.*, 111 *et seq.*

⁶³ 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), article 84, p. 7, footnote 10.

⁶⁴ Decision on Appropriate Remedy, 31 January 2007, ICTR-98-44C-T.

⁶⁵ Article 21(2) of the Statute; Christopher Staker, “Revision of conviction or sentence” *in* Otto Triffterer, (Dir. Pub.), *Commentary on the Rome Statute of the International Criminal Court* (2008),

41. *Black's Law Dictionary* defines "miscarriage of justice" as "returning an unfair verdict based on the evidence presented as a legal justice failure".⁶⁶ The *Oxford Dictionary* defines a grave and manifest miscarriage of justice as a "failure of a court or judicial system to attain the ends of justice, especially one which results in the conviction of an innocent person".⁶⁷ In *Vocabulaire Juridique*, Gérard Cornu defines "erreur judiciaire" as:

[TRANSLATION] An error of fact, committed by a trial court in its assessment of the guilt of a charged person, which may, if it has led to a final judgment, be remedied under certain conditions by means of a retrial.⁶⁸

42. Trial Chamber III of the ICTR, in the case of *Protais Zigiranyirazo v. The Prosecutor*, used the term "grave and manifest miscarriage of justice" in reference to article 85(3) of the Statute.⁶⁹ It held that there are grounds for compensation when there has been a clear violation of the claimant's fundamental rights.⁷⁰

43. The European Court of Human Rights has stated that the term grave and manifest miscarriage of justice "[...] covers such matters as misdirections by the trial judge to the jury or wrong decisions on the admissibility of evidence, as well as breaches of natural justice".⁷¹

p. 1501; for the background to the negotiations concerning article 85, see Gilbert Bitti, "Compensation to an Arrested or Convicted Person" in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 623-625.

⁶⁶ *Black's Law Dictionary*, <http://thelawdictionary.org/miscarriage-of-justice/>

⁶⁷ *Oxford Dictionary*, <http://www.oxforddictionaries.com/definition/english/miscarriage-of-justice>

⁶⁸ Gérard Cornu, *Vocabulaire juridique*, Association Henri Capitant, 10th ed., 2014, p. 413.

⁶⁹ *Protais Zigiranyirazo v. The Prosecutor*, "Decision on Protais Zigiranyirazo's Motion for Damages", 18 June 2012, ICTR-2001-01-073, paras. 19-22.

⁷⁰ "Decision on Protais Zigiranyirazo's Motion for Damages", 18 June 2012, ICTR-2001-01-073, para. 21; see also, Appeals Chamber, *Jean Bosco Barayagwiza v. The Prosecutor*, "Decision on Prosecutor's request for review or reconsideration", 31 March 2000, ICTR-97-19-AR72, para. 71: "The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a cumulation of elements: [...] [T]he **fundamental rights** of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to **negligence**. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. [Emphasis added]"

⁷¹ ECHR, Chamber, *Granger v. The United Kingdom*, 28 March 1990, Application No. 11932/86, para. 26.

44. In domestic law, few countries use the precise term “miscarriage of justice”. Indeed, different countries define the notion in different ways, leading to the existence of disparities between compensation mechanisms. Differences also exist between common law and civil law countries.⁷² Thus, the term “miscarriage of justice” is most often used when a conviction is overturned on appeal or following a retrial.⁷³ The Chamber observes that the latter scenario is covered by article 85(2) of the Statute.⁷⁴ However, provisions similar to article 85(3) of the Statute can be found

⁷² Compensation schemes fall into five main categories: automatic compensation, compensation for unlawful detention, compensation after an appeal against a guilty verdict, compensation for a miscarriage of justice resulting in a final conviction, and the total absence of a compensation scheme (bearing in mind that some federal countries allow the states belonging to the federation to implement their own compensation schemes).

⁷³ See for example, Afghanistan (Article 81-83, *Code of Criminal Procedure*, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/0690C80A-4EB1-4AE1-907F-1DEB76D14A37/0/23CriminalProcedureCode.pdf>); Argentina (Article 488, *Código Procesal Penal*, <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/383/texact.htm>); Bolivia (Articles 421-426, *Código Procesal Penal*, http://www.wipo.int/wipolex/es/text.jsp?file_id=198177); Chile (Article 715, *Código de Procedimiento Penal*, <http://www.leychile.cl/Navegar?idNorma=22960>); China (Articles 15-16, *State Compensation Law*, http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21905705.htm); Costa Rica (Article 419, *Código Procesal Penal*, http://www.wipo.int/wipolex/es/text.jsp?file_id=220086#LinkTarget_1570); El Salvador (Articles 494-496, *Código Procesal Penal*, <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/codigo-procesal-penal>); Guatemala (Articles 453-462, *Código Procesal Penal*, <http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/gua/CodigoProcesalPenal.pdf>); Honduras (Article 773, *Código Procesal Penal*, <http://www.poderjudicial.gob.hn/juris/Leyes/CODIGO%20PROCESAL%20PENAL.pdf>); Ireland (Section 9, *Criminal Procedure Act*, <http://www.irishstatutebook.ie/eli/1993/act/40/enacted/en/print>); Lebanon (Article 328, *Code de Procédure Pénale Libanaise*, <http://www.stl-tsl.org/fr/documents/relevant-law-and-case-law/applicable-law/340-lebanese-code-of-criminal-procedure>); Mauritania (Article 545, *Code de Procédure Pénale*, <http://www.refworld.org/pdfid/491c21192.pdf>); Mexico (Articles 488-490, *Código Nacional de Procedimientos Penales*, http://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP_291214.pdf); Panama (Article 2464, *Código Procesal Penal*, http://www.oas.org/juridico/spanish/mesicic3_pan_cod_judicial.pdf); Peru (Article 444, *Código Procesal Penal*, https://www.unodc.org/res/cld/document/per/1939/codigo_de_procedimientos_penales_html/Codigo_procesal_penal.pdf); the Dominican Republic (Article 255, *Código Procesal Penal*, http://www.oas.org/juridico/spanish/mesicic3_rep_cod_pro_pen.pdf); Saudi Arabia (Article 206, *Law of Criminal Procedure*, http://www.wipo.int/wipolex/fr/text.jsp?file_id=239144); the United Kingdom (Part XI, *Criminal Justice Act for the UK*, <http://www.legislation.gov.uk/ukpga/1988/33/part/XI/crossheading/miscarriages-of-justice>); Venezuela (Article 275, *Código Orgánico Procesal Penal*, http://www.oas.org/juridico/spanish/cyb_ven_Cod_Org_Pro_Penal.pdf).

⁷⁴ Article 85(2) of the Statute reads as follows: “When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.”

in national legal systems. In some systems, any person who has been acquitted is awarded compensation for detention. In France, for example, a person can seek compensation for time spent in detention while on trial by proving that (material or psychological) harm has been suffered without having to show any proof of a miscarriage of justice.⁷⁵ Germany,⁷⁶ Norway⁷⁷ and Austria⁷⁸ have adopted similar standards.

45. In the light of the above, and the fact that “exceptional circumstances” are provided for by article 85(3) of the Statute, it is the view of the Chamber that a grave and manifest miscarriage of justice, within the meaning of the above-mentioned article, is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution.⁷⁹ The miscarriage of justice must have given rise to a clear violation of the applicant’s fundamental rights and must have caused serious harm to the applicant. Article 85(3) of the Statute sets a high threshold in this regard and it therefore follows that not every error committed in the course of the proceedings is automatically considered a “grave and manifest” miscarriage of justice.

46. Lastly, the Chamber notes that article 85(3) of the Statute does not provide for the right to compensation *even* when a grave and manifest miscarriage of justice has

⁷⁵ Article 149 of the Code of Criminal Procedure states that: “Without prejudice to the application of the provisions of the second and third paragraphs of article L. 781-1 of the Code of Judicial Organisation, a person who has been remanded in custody during the course of proceedings ended by a decision to drop the case or a discharge or acquittal decision that has become final has, at his request, the right to full compensation for any material or moral harm that this detention has caused him”; see also Pascal Combeau, *Responsabilité du fait des services judiciaires et pénitentiaires*, Jurisclasseur, 27 December 2013, paras. 56-63.

⁷⁶ Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen (StrEG) :

“§ 2 Entschädigung für andere Strafverfolgungsmaßnahmen

(1) Wer durch den Vollzug der Untersuchungshaft oder einer anderen Strafverfolgungsmaßnahme einen Schaden erlitten hat, wird aus der Staatskasse entschädigt, soweit er freigesprochen oder das Verfahren gegen ihn eingestellt wird oder soweit das Gericht die Eröffnung des Hauptverfahrens gegen ihn ablehnt”.

⁷⁷ Section 444 of the Criminal Procedure Act of the Kingdom of Norway: “Unless it is otherwise provided by section 446, a person charged is entitled to compensation by the State for any financial loss that the prosecution has caused him: a) if he is acquitted [...]”.

⁷⁸ Austria, *Bundesgesetz über den Ersatz von Schäden aufgrund einer strafgerichtlichen Anhaltung oder Verurteilung (Strafrechtliches Entschädigungsgesetz 2005 - StEG 2005)*.

⁷⁹ The Chamber notes that, in its oral submissions, the Prosecution offered a similar view regarding miscarriages of justice. See ICC-01/04-02/12-T-6-FRA, p. 23, lines 7-11.

occurred. Rather, it provides that the Court may award compensation at its discretion.

47. Ultimately, the wording of article 85(3) of the Statute does not permit the Chamber to act as another level of adjudication or to re-assess the merits of the various decisions which have been adopted – or have not been adopted, as the case may be – by other Chambers in the course of the proceedings.

48. The applicant must therefore give details of the elements that he considers to be within the purview of article 85(3) of the Statute. In particular, the applicant must supply specific references to the content of hearings and to any relevant decisions and must also show proof that the conditions set out above are satisfied. The above-mentioned conditions will not be satisfied by a simple claim, without any reference to transcripts, that an error was committed by the Pre-Trial Chamber or the Trial Chamber, or by the repetition of arguments which have already been brought before the Chambers and settled by them.

49. The Chamber has been mindful of the above considerations in analysing Counsel's submissions concerning the Decision on Joinder, the Decision on the Confirmation of Charges and the Decision of Acquittal.

a. The Decision on Joinder

i. Submissions of Counsel and the Prosecution

50. Counsel contended that the Decision on Joinder was “[TRANSLATION] the second grave and manifest miscarriage of justice”.⁸⁰ It maintained that Mr Ngudjolo and Mr Katanga could not have “[TRANSLATION] physically or intellectually conceived the plan for the attack on Bogoro” because they did not know each other.⁸¹ According to Counsel, “[TRANSLATION] the Prosecution and the Pre-Trial Chamber must have realised that the joinder of the Katanga and Ngudjolo cases was futile and inapplicable”.⁸² Counsel noted that the cases were ultimately severed.⁸³ It added that the Pre-Trial Chamber “[TRANSLATION] did not undertake a thorough assessment of the Prosecution’s allegations” but “[TRANSLATION] simply kept reminding the Defence that the confirmation of charges is not a ‘mini-trial’”.⁸⁴

51. The Prosecution submitted that the Pre-Trial Chamber had acted correctly in instructing the cases to be joined.⁸⁵ It considered that the severing of the cases at a later stage of the trial did not impugn the initial decision to join them or prejudice Mr Ngudjolo’s rights as an accused person.⁸⁶ On the contrary, the Prosecution maintained that the Pre-Trial Chamber had authorised the joinder primarily to safeguard Mr Ngudjolo’s rights and stated that the Appeals Chamber found the joinder to be consistent with the rights of the accused.⁸⁷

ii. Analysis

52. The Chamber notes that, on 10 March 2008, the Pre-Trial Chamber joined the *Ngudjolo* and *Katanga* cases. The Chamber also notes that, on 9 June 2008, the Appeals Chamber upheld the decision on joinder further to the appeal lodged by

⁸⁰ Request for Compensation, p. 20, Section 2; see also ICC-01/04-02/12-T-6-FRA, p. 13, lines 19-20.

⁸¹ *Ibid.*, para. 75; see also ICC-01/04-02/12-T-6-FRA, p. 11, lines 27-28.

⁸² *Ibid.*, para. 58.

⁸³ *Ibid.*, para. 59.

⁸⁴ *Ibid.*, para. 60.

⁸⁵ Prosecution’s Response, p. 34, Section II.

⁸⁶ Prosecution’s Response, paras. 62-64.

⁸⁷ *Idem*; see also ICC-01/04-02/12-T-6-FRA, p. 32, lines 15-22.

Mr Katanga (but not by Mr Ngudjolo).⁸⁸ In the end, Trial Chamber II, as constituted at the time, severed the two cases under rule 136 of the Rules on 21 November 2012.⁸⁹

53. The Chamber notes that assessing the merits of the decisions issued by the various Chambers during the course of the proceedings does not fall within the scope of article 85 of the Statute.⁹⁰ However, it is up to the applicant's Counsel to demonstrate that a decision was made that violated Mr Ngudjolo's fundamental rights or his right to a fair trial to the extent that the proper administration of justice was compromised. In the instant case, Counsel merely asserted that the Trial Chamber would have realised that the joinder was futile and inapplicable if "[TRANSLATION] it had applied a minimum of critical judgment".⁹¹ However, Counsel did not put forward arguments that might have shown how the joinder violated Mr Ngudjolo's fundamental rights.

54. Counsel therefore failed to demonstrate that a grave and manifest miscarriage of justice had occurred at the pre-trial stage as a result of the Pre-Trial Chamber's decision to join the two cases. For this reason, this aspect of the Request for Compensation is dismissed.

⁸⁸ "Judgment on the Appeal against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases", 9 June 2006, ICC-01/04-01/07-573.

⁸⁹ "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

⁹⁰ See para. 47, above.

b. The Decision on the Confirmation of Charges

i. Submissions of Counsel and the Prosecution

55. Counsel maintained that the Decision on the Confirmation of Charges is yet another miscarriage of justice.⁹² It contended that, although article 67(1)(b) of the Statute provides that the accused must have adequate time for the preparation of the defence, Mr Ngudjolo did not have sufficient time to prepare for the hearing on the confirmation of charges.⁹³ Counsel also argued that the “[TRANSLATION] decision on the confirmation of charges [...] is based solely on the evidence unilaterally presented to it by the Prosecution”⁹⁴ and that, in its view, this contravened the Pre-Trial Chamber’s obligation to determine the matter impartially.⁹⁵

56. Furthermore, Counsel contended that it had been unable to challenge the Prosecution’s evidence at the confirmation hearing and that, for this reason, Mr Ngudjolo’s rights under article 61(6) of the Statute had been violated.⁹⁶ Counsel further contended that the Pre-Trial Chamber had failed to meet its obligation to undertake a thorough assessment of the evidence.⁹⁷

57. Lastly, Counsel contended that the Appeal Judgment upholding the acquittal showed that the Pre-Trial Chamber had erred in confirming the charges against Mr Ngudjolo.⁹⁸

58. The Prosecution maintained that Counsel had misinterpreted the nature of the confirmation of charges proceedings, which are neither a mere formality nor a “mini-trial” but define the parameters of the charges for trial.⁹⁹ The Prosecution further maintained that the Defence had had adequate time to prepare for the

⁹² Request for Compensation, p. 21, Section 3; see also ICC-01/04-02/12-T-6-FRA, p. 13, lines 19-20.

⁹³ *Ibid.*, paras. 61-64 and 95-101.

⁹⁴ *Ibid.*, paras. 65-67 and 99-100.

⁹⁵ *Ibid.*, paras. 98 and 102-103.

⁹⁶ *Ibid.*, paras. 69-71, 101 and 104.

⁹⁷ *Ibid.*, paras. 68, 72, and 105-110.

⁹⁸ *Ibid.*, paras. 84 and 73-83.

⁹⁹ Prosecution’s Response, para. 70; see also ICC-01/04-02/12-T-6-FRA, p. 22, lines 14-20.

confirmation of charges.¹⁰⁰ Lastly, the Prosecution objected to Mr Ngudjolo's claim that he had been unable to challenge the Prosecution's evidence at confirmation.¹⁰¹

ii. Analysis

59. Article 67(1)(b) of the Statute must be interpreted in accordance with the circumstances and complexity of each case.¹⁰² In the instant case, the Chamber notes that the initial hearing was held on 11 February 2008.¹⁰³ The Single Judge scheduled the confirmation of charges hearing for 21 May 2008 but this date was postponed to 27 June 2008 at Mr Ngudjolo's request.¹⁰⁴ In any event, Counsel merely asserted that it had not been given adequate time and did not explain how the allotted time had adversely affected its ability to prepare for the confirmation of charges hearing or how it resulted in a grave and manifest miscarriage of justice.

60. The Chamber considers that Counsel's submissions concerning the basis of the Decision on the Confirmation of Charges are also devoid of substance. In claiming that the confirmation of the charges against Mr Ngudjolo was a miscarriage of justice that was confirmed by the decisions of acquittal, Counsel failed to realise that different standards of proof apply during the pre-trial phase and the trial phase.

61. In this regard, the Chamber notes that the confirmation of charges process does not require proof "beyond reasonable doubt"¹⁰⁵ but only substantial grounds to believe that a person committed the crime charged.¹⁰⁶ There may be sufficient evidence to establish reasons to believe that a person committed the crime(s) charged, and therefore to confirm the charges and send the case to trial, without

¹⁰⁰ Prosecution's Response, paras. 76-77.

¹⁰¹ Prosecution's Response, para. 78; see also ICC-01/04-02/12-T-6-FRA, p. 19, lines 19-21.

¹⁰² Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2005), p. 50; Antonio Conventi, "Article 67: Rights of the Accused" in William A. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 805; ICTY, *The Prosecutor v. Delalic et al.*, "Decision on the Applications for Adjournment of the Trial Date", 3 February 1997, IT-96-21-T.

¹⁰³ ICC-01/04-01/07-T-33-FRA.

¹⁰⁴ "Decision on the Defence Request for Postponement of the Confirmation Hearing", 25 April 2008, ICC-01/04-01/07-446, pp. 3-8; "Requête de la Défense de Mathieu Ngudjolo en vue de solliciter le report de la date de l'audience de confirmation des charges actuellement fixée par la Chambre préliminaire au 21 mai 2008", 18 April 2008, ICC-01/04-01/07-410.

¹⁰⁵ Article 66(3) of the Statute.

¹⁰⁶ Article 61(5) of the Statute.

there being sufficient evidence to establish the guilt of the accused person based on the more stringent standard of proof which is “beyond all reasonable doubt”.

62. For these reasons, this aspect of the Request for Compensation is dismissed.

c. The decision on acquittal

i. Submissions of Counsel and the Prosecution

63. Counsel submitted that Trial Chamber II, as constituted at the time, had violated the principle of the presumption of innocence. Trial Chamber II, as constituted at the time, wrote that “finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent”,¹⁰⁷ which led Counsel to submit that “[TRANSLATION] although Ngudjolo was acquitted, he was the victim of an unfortunate comment made in the Judgment of 18 December 2012 which cast doubt on his innocence”. In the view of Counsel, this statement by the Chamber implied that Mr Ngudjolo was guilty even though he had been acquitted.¹⁰⁸

64. The Prosecution submitted, firstly, that Trial Chamber II, as constituted at the time, had not failed in its duty to consider Mr Ngudjolo innocent until proven guilty; and, secondly, that the statement made in the Decision of Acquittal did not imply anything to the contrary.¹⁰⁹

¹⁰⁷ Decision of Acquittal, para. 111; see also, paras. 4, 35, 141 and 143-149.

¹⁰⁸ Request for Compensation, paras. 111 and 112; see also ICC-01/04-02/12-T-6-FRA, p. 13, lines 23-28; p. 14, lines 1-9; p. 14, lines 14-18.

¹⁰⁹ Prosecution’s Response, paras. 80-85; see also ICC-01/04-02/12-T-6-FRA, p. 19, lines 23-25; p. 27, lines 11-15; p. 32, lines 23-28; p. 33, lines 1-12.

ii. Analysis

65. Firstly, the Chamber notes that Counsel misquoted Trial Chamber II, as constituted at the time, by writing that “[TRANSLATION] stating that an accused person is not guilty does not necessarily mean that the Chamber believes him or her to be innocent”.¹¹⁰ In fact, Trial Chamber II, as constituted at the time, stated that: *“Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent”*.¹¹¹

66. The Chamber notes that, pursuant to article 66 of the Statute, everyone is presumed innocent until proved guilty before the Court in accordance with the applicable law. The Chamber notes that Trial Chamber II, as constituted at the time, explicitly wrote that, in respect of article 66 of the Statute, Mr Ngudjolo had been presumed innocent until proved otherwise. On that basis, it acquitted Mr Ngudjolo.¹¹²

67. Therefore, Counsel failed to establish that the statement made in the Decision of Acquittal, interpreting the applicable standard of proof,¹¹³ led to a grave and manifest miscarriage of justice.

68. Accordingly, this aspect of the Request for Compensation is dismissed.

d. Conclusion

69. Given that Counsel has failed to establish that Mr Ngudjolo suffered a grave and manifest miscarriage of justice, the Chamber does not deem it necessary to examine the other criteria set forth in article 85(3) of the Statute and therefore decides that there are no grounds for it to exercise its discretion to award compensation to Mr Ngudjolo.

¹¹⁰ Request for Compensation, para. 111.

¹¹¹ Decision of Acquittal, para. 34.

¹¹² Decision of Acquittal, para. 36.

¹¹³ Decision of Acquittal, paras. 34-36.

FOR THESE REASONS, the Chamber hereby:

DISMISSES the Request for Compensation in its entirety.

Done in English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut

Presiding Judge

[signed]

Judge Olga Herrera Carbuccion

[signed]

Judge Péter Kovács

Dated this 16 December 2015

At The Hague, the Netherlands