

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/04-02/12**
Date: **30 October 2015**

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 CHUI***

Public Document

**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**

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

Ms Helen Brady

Counsel for Mathieu Ngudjolo

Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States' Representatives

**Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Mr Herman von Hebel

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”), acting pursuant to article 85 of the Rome Statute (“the Statute”) and rule 174(2) of the Rules of Procedure and Evidence (“the Rules”), issues the following Decision.

I. Procedural history

1. On 14 August 2015, Counsel for Mathieu Ngudjolo (“Counsel” and “Mr Ngudjolo”, respectively) filed a request for compensation pursuant to article 85 of the Statute (“the Request for Compensation”).¹
2. On 7 October 2015, under article 67(1)(d) and (h) of the Statute and rule 174(2) of the Rules, Counsel filed a request for one or more hearings to be held and for Mr Ngudjolo to attend the hearing or hearings (“the Request”).²
3. On 16 October 2015, pursuant to the Chamber’s instructions,³ the Prosecution filed a response to the Request, calling for it to be dismissed *in limine* (“the Response”).⁴

II. Analysis

(a) Preliminary matter

4. In its Response, the Prosecution submitted that the Request must be dismissed *in limine* as the Request for Compensation was inadmissible. To that end, the Prosecution argued that the Request for Compensation was “flawed, speculative and unfounded in law and in fact” and that it failed to meet the conditions set out in

¹ “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, with public annexes I and IV and confidential annexes II, III and V. On 18 September 2015, pursuant to the Chamber’s order (ICC-01/04-02/12-291), the Prosecution filed a response to the Request for Compensation (ICC-01/04-02/12-292, with annex). On 8 October 2015, the Chamber granted the request by Counsel for leave to reply to the Prosecution’s response (ICC-01/04-02/12-296). Counsel filed a reply on 16 October 2015 (ICC-01/04-02/12-298).

² “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.

³ E-mail addressed to the Prosecution by the Legal Officer of the Chamber, at 14:51 on 9 October 2015, instructing the Prosecution to file submissions on the Request by 16 October 2015.

⁴ “Prosecution’s Response to Mathieu Ngudjolo Chui’s request for compensation hearing”, 16 October 2015, ICC-01/04-02/12-297.

article 85 of the Statute.⁵ Consequently, the Prosecution took the view that rule 174(2) was inapplicable.⁶

5. The Chamber does not share the view of the Prosecution. The Chamber is of the opinion that the merits of the Request for Compensation can be determined only by considering the substance while the question of whether or not to hold a hearing is a matter of which procedure to apply. The Chamber will not rule on the merits of the Request for Compensation until the applicable procedure has been completed.

6. Consequently, the Prosecution's argument is dismissed.

7. The Chamber notes that, in the Request, Counsel calls, on the one hand, for one or more hearings to be held and, on the other, for Mr Ngudjolo to attend the hearing or hearings.

8. The Chamber will now examine these two points.

(b) The holding of one or more hearings

9. Counsel submits that rule 174(2) of the Rules provides for a hearing to be held if one party so requests.⁷

10. The Chamber notes that the first sentence of rule 174(2) of the Rules provides that the Chamber "[...] may either hold a hearing *or* determine the matter [the Request for Compensation] on the basis of the request and any *written* observations by the Prosecutor and the person filing the request".⁸ The Chamber also notes, however, that the second sentence of rule 174(2) provides that a hearing "[...] *shall* be held if the Prosecutor or the person seeking compensation so requests".⁹

11. Consequently, the Chamber considers that it must order that a hearing be held. In the view of the Chamber, however, a single hearing will be sufficient in this case to rule on the Request for Compensation.

12. The conduct of the hearing will be set out in a separate order.

⁵ Response, para. 3.

⁶ *Ibid.*, para. 5.

⁷ Request, para. 12 and p. 8.

⁸ [Emphasis added].

⁹ [Emphasis added].

(c) Mr Ngudjolo's attendance at the hearing

13. Counsel relies on article 67(1)(d) and (h) of the Statute to support its request for Mr Ngudjolo to attend the hearing.¹⁰ Counsel argues that the rights provided for under article 67 of the Statute are applicable to all stages of the proceedings and, therefore, to compensation proceedings.¹¹

14. Firstly, the Chamber notes that article 67 of the Statute refers to "the accused" and recalls that Mr Ngudjolo is no longer an accused. These compensation proceedings, which are civil proceedings,¹² involve both Mr Ngudjolo, as applicant, and the Court.

15. Secondly, the Chamber notes that the decision issued by Pre-Trial Chamber I ("the Pre-Trial Chamber") to which Counsel refers¹³ does not consider the question of the accused/applicant's attendance at all the proceedings before the Court.¹⁴ In its decision, the Pre-Trial Chamber relies on the jurisprudence of the Inter-American Court of Human Rights in order to establish that the right to a fair trial is also applicable to the preliminary phase of the proceedings, in particular, to the investigation stage.¹⁵ In this regard, the Chamber notes that the Pre-Trial Chamber's reasoning in respect of the right to a fair trial relates only to criminal proceedings.¹⁶

¹⁰ Request, paras. 14-16.

¹¹ *Ibid.*, paras. 16-17 and 22.

¹² European Court of Human Rights (ECtHR), *Judgment in the case of Georgiadis v. Greece*, 29 May 1997, no. 21522/93, para. 35; ECHR, *Judgment in the case of Werner v. Austria*, paras. 32-40.

¹³ Request, para. 16, referring to the Situation in the Democratic Republic of the Congo, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 31 March 2006, ICC-01/04-135-tEN (Decision of 31 March 2006), paras. 34-35.

¹⁴ See the Decision of 31 March 2006, paras. 33 and 35-36. See also Situation in the Democratic Republic of the Congo, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-100-Conf-Exp-tEN, paras. 34-35 and 38.

¹⁵ Decision of 31 March 2006, paras. 35-36.

¹⁶ *Ibid.*, para. 35.

16. The Chamber also notes that the two other cases mentioned by Counsel in support of its arguments¹⁷ concern only the right to a public hearing with oral proceedings and not the applicant's attendance at the hearing.

17. In the view of the Chamber, therefore, the jurisprudence relied on by Counsel establishes neither the obligation nor the need for Mr Ngudjolo to attend the requested hearing.

18. Lastly, the Chamber is of the view that, in accordance with the case law of the European Court of Human Rights, concerning the standard applicable to civil proceedings,¹⁸ the applicant's presence at the compensation proceedings is neither obligatory nor necessary as the presence of his Counsel will be sufficient for his personal circumstances to be presented at the hearing.

19. Consequently, this part of the Request is dismissed.

¹⁷ Request, paras. 21-22, referring to the case of *Rodríguez Orjuela v. Colombia* of 20 September 2002, before the Human Rights Committee, and the case of *Döry v. Sweden* of 12 November 2002, before the ECtHR.

¹⁸ ECtHR, *Judgment in the case of OOO 'Vestī' and Ukhov v. Russia*, 30 May 2013, no. 21724/03, para. 89; ECtHR, *Judgment in the case of Miller v. Sweden*, 8 February 2005, no. 55853/00, para. 34; ECtHR, *Judgment in the case of Andersson v. Sweden*, 7 December 2010, no. 17202/04, para. 57; ECtHR, *Judgment in the case of Fexler v. Sweden*, 13 January 2012, no. 36801/06, para. 67.

FOR THESE REASONS, the Chamber,

GRANTS the Request in part;

ORDERS a hearing to be held on Monday, 23 November 2015, in the presence of Counsel and the Prosecution and;

DISMISSES the remainder of the Request.

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

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccia

[signed]

Judge Péter Kovács

Dated this 30 October 2015

At The Hague, the Netherlands