

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 CHUI*

Public

**Prosecution's Response to
Mathieu Ngudjolo Chui's request for compensation hearing**

Source: Office of the Prosecutor

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

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Section****Other**

A. Overview

1. Mr Ngudjolo's Request¹ to hold a hearing on compensation should be rejected because the Compensation Request² itself should be dismissed *in limine* as inadmissible.³ Although rule 174(2) of the Rules of Procedure and Evidence provides that "[a] hearing shall be held if [...] the person seeking compensation so requests," if an applicant cannot meet the threshold standard in article 85 such that his request is deemed inadmissible, this rule—and his right to have a hearing—is inapplicable.

2. However if the Chamber were to decide that a hearing regarding Mr Ngudjolo's compensation request should be held, his participation should be *via* video-link rather than through his physical presence before the Court in The Hague.

B. The Request should be dismissed

3. As argued in the Prosecution's Response,⁴ Mr Ngudjolo's Compensation Request is inadmissible because it is flawed, speculative and unfounded in law and in fact. Mr Ngudjolo has not even attempted to demonstrate in sound terms based on the record that he suffered a "grave and manifest miscarriage of justice" or was "unlawfully detained" in the terms of article 85. As such, the Compensation Request should be dismissed *in limine*⁵ and a hearing need not be held.

4. First, oral submissions cannot further substantiate his Compensation Request or assist the Chamber to determine the matter. Second, an applicant filing a flawed and frivolous request should not be allowed an opportunity to further dissipate the Court's time and resource on the matter.

¹ ICC-01/04-02/12-295 ("Hearing Request" or "Request")

² ICC-01/04-02/12-290 ("Compensation Request").

³ See ICC-01/04-02/12-292 ("Prosecution's Response"), paras. 1-3, 95.

⁴ Prosecution's Response, paras. 1-3, 95.

⁵ Prosecution's Response, para. 95.

5. Mr Ngudjolo having failed to properly address the article 85 standard for compensation, rule 174(2) becomes inapplicable. The request for a hearing should accordingly be rejected.

C. The Applicant may participate *via* video-link

6. Alternatively, if the Chamber wishes to hold a hearing pursuant to rule 174(2), Mr Ngudjolo need not be physically present in any such hearing in the Court in The Hague to fully participate in it. He can equally participate in such a hearing *via* video-link from a suitable location within the Democratic Republic of the Congo (“DRC”). The circumstances of this case in fact militate against Mr Ngudjolo travelling back to The Netherlands and being physically present before the Court.

7. Mr Ngudjolo sought asylum in The Netherlands twice, in 2012, and in 2015 following the rendering of the trial and appeal judgements in his case. Both applications were rejected. He was eventually deported to the DRC by the Dutch authorities in May 2015.⁶ If Mr Ngudjolo were to return to The Netherlands, at a minimum the Dutch authorities would need to be consulted about their possible concerns regarding his return.⁷ In these circumstances Mr Ngudjolo’s participation in the hearing by way of video-link appears to be more appropriate.⁸

⁶ See <http://www.ijmonitor.org/2015/04/ngudjolos-asylum-proceedings-the-saga-continues/>.

⁷ ICC-BD/04-01-08 Headquarters Agreement between the International Criminal Court and the Host State, Art. 34 “(1) The Court shall cooperate with the competent authorities to facilitate the enforcement of the laws of the host State, to secure the observance of police regulations and to prevent the occurrence of any abuse in connection with the privileges, immunities and facilities accorded under this Agreement. (2) The Court and the host State shall cooperate on security matters, taking into account the public order and national security of the host State. (3) Without prejudice to their privileges, immunities and facilities, it is the duty of all persons enjoying such privileges, immunities and facilities to respect the laws and regulations of the host State. They also have the duty not to interfere in the internal affairs of the host State.” Art. 38 “(3) The host State may attach such conditions or restrictions to the visa as may be necessary to prevent violations of its public order or to protect the safety of the person concerned. (4) Before applying paragraph 3 of this article, the host State will seek observations from the Court.”

⁸ Logistical difficulties in arranging a witness’s travel to The Hague may justify the use of video-link technology, See ICC-01/05-01/08-2525-Red, para. 7.

8. Further, Mr Ngudjolo would not be prejudiced in any way if he were to participate *via* video-link. His participation *via* video-link in this case would be on par with his physical presence in a hearing before the Court. In the context of video-link testimony for a witness, the Trial Chamber in *Bemba* held that “[t]he term ‘given in person’ used by Article 69(2) of the Statute, does not imply that witness testimony shall necessarily, under any circumstances, be given by way of live testimony in court.”⁹ The Trial Chamber of the Special Tribunal for Lebanon has also noted that: “video-conference link in proceedings conducted under the principles of international criminal law should be viewed today as an extension of the courtroom.”¹⁰ By participating *via* video-link, Mr Ngudjolo will be able to effectively address the Court and instruct his Counsel.

9. There are no legal obstacles in the way of Mr Ngudjolo’s participation *via* video-link. Video-link participation does not infringe the principle of orality *per se*. To the contrary, it is used in the context of this Court’s proceedings to good effect. For instance, under rule 134*bis*, an accused subject to a summons may “be present through the use of video technology”. Similarly, under rule 224, hearings to discuss reduction of sentence “may be conducted by way of a videoconference”. Regulation 30 of the Regulations of the Court allows the Chamber to hold a status conference by way of video-link. And rule 67 permits witnesses to give *viva voce* oral testimony before the Court by means of audio or video technology.

10. Mr Ngudjolo is not an *accused* in a criminal proceeding, but a claimant seeking monetary compensation for an alleged harm he claims to have suffered. Article 63 on the accused’s presence during trial does not apply in this case. Although Mr Ngudjolo

⁹ ICC-01/05/01/08-947, para. 10. In the context of the accused’s participation in a status conference in *Muthaura and Kenyatta*, the Trial Chamber held: “Given that [the] issues [to be discussed] impact directly on the accused, the Chamber considers this to be a hearing requiring the accused’s *attendance* [...] *either in person or via video link*.” ICC-01/09-02/11-620, para. 1, *emphasis added*.

¹⁰ Special Tribunal for Lebanon, *The Prosecutor v. Salim Jamil Ayyash et al*, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014, para. 21.

may be entitled to a hearing under rule 174(2)—if the Chamber were to decide *not* to dismiss his request *in limine* for failing to meet the threshold standard in article 85—his references to article 67 do not assist.¹¹ Similarly, the international human rights instruments that Mr Ngudjolo relies upon for the *principle of orality* and in relation to an accused’s right to be present in the courtroom in the context of criminal proceedings¹² are inapplicable to any hearing on compensation under article 85. This is reflected in rule 174(2) itself which allows the Chamber to determine the matter on the basis of written observations, unless a hearing is expressly requested by one of the parties, thus making the holding of a hearing an exception.

D. Relief

11. Mr Ngudjolo’s Hearing Request should be dismissed. The Court’s time and resources should not be unnecessarily spent by holding a hearing to discuss an inadmissible Compensation Request. In these circumstances rule 174(2) does not apply.

12. However, if the Chamber were to decide to hold a hearing on Mr Ngudjolo’s Compensation Request, Mr Ngudjolo’s participation in such a hearing should be *via* video-link from a suitable location in the DRC, instead of requiring his travel back to The Hague and physical presence in the hearing before the Court.



Fatou Bensouda, Prosecutor

Dated this 16th day of October 2015
At The Hague, The Netherlands

¹¹ *Contra*, Hearing Request, para. 16.

¹² Hearing Request, paras. 19, 21-22, 26-27.