

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **14 September 2016**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Partially dissenting opinion of Judge Robert Fremr on the oral rulings on Mr
Ntaganda's absence and request for adjournment**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

**Victims Participation and Reparations
Section**

Others

Partially dissenting opinion of Judge Robert Fremr
on the oral rulings on Mr Ntaganda's absence and request for adjournment

1. On 8 September 2016, Mr Ntaganda did not appear in the courtroom for the hearing that was scheduled to start at 9:30. Having received submissions from the parties and participants on Mr Ntaganda's absence, the Chamber adjourned to allow the defence team for Mr Ntaganda ('Defence') to meet with its client and at the same time convey to him the Chamber's intention to resume the proceedings in the afternoon, if necessary in the accused's absence. Upon resuming, the Defence provided the Chamber with further information about the reasons for Mr Ntaganda's absence. It explained that '[t]he position of Mr Ntaganda at this time is that he is not in either a psychological or a physical condition, or due to his psychological and physical condition at the present time, he is not able to attend the proceedings'.¹ At the same time it stressed that Mr Ntaganda had declined to sign a waiver with respect to his right to be present and that the Defence had not received a mandate to represent him in his absence.²
2. That same afternoon, the Chamber, by majority, decided to proceed in Mr Ntaganda's absence.³ I partially dissented to this decision, indicating that my opinion would follow in due course. I respectfully disagree with my colleagues in the manner described hereafter and place my position on the record by way of the present opinion.
3. The Majority decided that

while the voluntary absence of an accused cannot be presumed, it can be inferred. The present circumstances are such that the Chamber considers that Mr Ntaganda, having been informed of the continuation of the

¹ Transcript of hearing of 8 September 2016, ICC-01/04-02/06-T-126-ENG ET, p. 14.

² ICC-01/04-02/06-T-126-ENG ET, pp 18-19.

³ ICC-01/04-02/06-T-126-ENG ET, pp 26-28.

proceedings today, and while having been provided the opportunity to attend, has voluntarily waived his right to do so. Having permitted a short adjournment for the purposes of allowing Defence counsel to further consult with the accused and [...] having considered all relevant circumstances, including the nature of the hearing, the Chamber sees no reasonable alternative other than to now proceed with the testimony of the next witness in Mr Ntaganda's absence.⁴

4. I agree with the Majority that a waiver of the right to be present and follow the proceedings need not necessarily be explicit, or made in writing, and can be inferred from an accused's actions. However, in light of the Defence's reference to Mr Ntaganda's psychological condition, considering the limited information available to the Chamber at the time of the aforementioned ruling, and in the absence of an examination by a qualified medical specialist, who could attest to Mr Ntaganda's ability to appreciate the consequences of his actions as well as the impact these actions may have on his defence, I do not consider the Chamber to have been in a position to conclude that Mr Ntaganda's absence ought to be construed as a voluntary waiver of his right to be present and follow the proceedings. I would therefore have adjourned for a brief period to allow for the Chamber to receive more information about Mr Ntaganda's condition and for a medical examination of Mr Ntaganda's ability to make informed decisions to take place.⁵
5. On 13 September 2016, the Defence requested an adjournment to allow for the assessment of Mr Ntaganda's mental fitness.⁶ The Chamber, by majority, myself

⁴ ICC-01/04-02/06-T-126-ENG ET, p. 22.

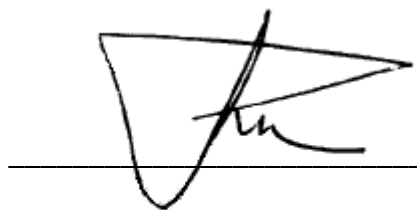
⁵ I note in this regard that since that time more information has become available, including the Defence's observation that Mr Ntaganda appears to have voluntarily decided not to be present. See Transcript of hearing of 14 September 2016, ICC-01/04-02/06-T-131-ENG RT, pp 9-10.

⁶ Transcript of hearing of 14 September 2016, ICC-01/04-02/06-T-130-CONF-ENG ET, pp 4-8. The Defence submitted, *inter alia*, that 'the assessment of whether or not there has been a voluntary self-inflicted form of discipline in itself requires that your Honours be apprised of the mental -- at least the mental state of the accused. That would be a precondition, I would suggest to your Honours, of making that determination that there was a voluntary decision that led to self-inflicted disability.' Ibid, p. 8.

partially dissenting, rejected the request for an adjournment, as it did 'not see a basis to modify its earlier decision. In the Majority's view the circumstances [were] not such as to raise genuine questions as to Mr Ntaganda's fitness'.⁷ The Defence's request was partially granted, namely 'to the extent of appointing a medical expert to assess Mr Ntaganda's fitness pursuant to Rule 135 and in accordance with [the Chamber's] obligation under Article 64'.⁸

6. I agree with the decision to appoint a medical expert to assess Mr Ntaganda, but in line with my considerations as set out above in relation to the oral ruling of 8 September 2016, I would have adjourned for the assessment to first take place, in order for the Chamber to be able to take the findings of the medical expert into account when deciding whether Mr Ntaganda can be considered to have voluntarily waived his right to be present to follow the proceedings.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'm', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Dated this 14 September 2016

At The Hague, The Netherlands

⁷ ICC-01/04-02/06-T-130-CONF-ENG ET, p. 18.

⁸ ICC-01/04-02/06-T-130-CONF-ENG ET, p. 18.