

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-02/06**
Date: **28 October 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***

Confidential

**Decision on Defence request for independent medical evaluation and related
matters**

The Office of the Prosecutor

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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Defence**

States' Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Patrick Craig

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Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64 and 67 of the Rome Statute ('Statute'), Rule 135 of the Rules of Procedure and Evidence ('Rules'), Regulation 103 of the Regulations of the Court ('Regulations') and incorporating by reference the applicable law, as previously set out by the Chamber,¹ issues this 'Decision on Defence request for independent medical evaluation and related matters'.

I. Procedural history and submissions

1. On 13 September 2016, following a request by the defence team for Mr Ntaganda ('Defence'),² and having heard oral submissions, the Chamber ordered, *inter alia*, that a medical expert be identified for the purpose of assessing Mr Ntaganda's fitness pursuant to Rule 135 of the Rules ('Order of 13 September 2016').³ The Chamber also encouraged the Registry to continue to make arrangements for Mr Ntaganda to be seen as soon as possible by an appropriately qualified medical professional, to the extent possible being someone with whom Mr Ntaganda could easily converse.⁴
2. On 14 September 2016, the Defence, *inter alia*, requested to be provided with Mr Ntaganda's medical records and indicated that Mr Ntaganda would consent to the Chamber also being provided with such records.⁵
3. On 16 September 2016, in accordance with the Chamber's directions, the Registry provided the Chamber with the name of an expert who could conduct the fitness assessment which had been ordered.⁶

¹ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 13.

² Transcript of hearing dated 13 September 2016, ICC-01/04-02/06-T-130-Red-ENG WT, page 4, line 20 – page 8, line 13.

³ ICC-01/04-02/06-T-130-Red-ENG WT, page 18, lines 18-23.

⁴ ICC-01/04-02/06-T-130-Red-ENG WT, page 16, lines 23-25.

⁵ Transcript of hearing dated 14 September 2016, ICC-01/04-02/06-T-131-Red-ENG WT, pages 3-6. *See also* page 13, lines 11-13 (in respect of Mr Ntaganda's consent to the Chamber having access to his medical records).

4. On 20 September 2016, the Defence filed a confidential *ex parte*, Defence and Registry only, request seeking the Chamber to order the Registry to: (i) obtain an external medical evaluation of Mr Ntaganda's state of health; and (ii) disclose all medical records relating to Mr Ntaganda to the Defence on a rolling basis not later than 24 hours after they have been created ('Request').⁷ The Defence submits, in particular, that the roles of the treating and reporting medical officers should be bifurcated.⁸
5. On 21 September 2016, the Chamber was informed that Mr Ntaganda had resumed his engagement with the case and expressed his intention to commence eating again as of that date.⁹ The Chamber noted that in light of those developments, it would be reconsidering the necessity of its decision to appoint an independent medical expert.¹⁰ In that regard, the Prosecution submits that the planned independent medical assessment appears unnecessary.¹¹ The Defence noted that it maintains the Request, indicating that in its view, the purpose of a medical assessment would go beyond 'immediate fitness to attend proceedings' and, in particular, that it is 'important to find out what was [Mr Ntaganda's] mental state when he made th[e] decision' to interrupt eating and attending the proceedings.¹²

⁶ E-mail from the Registry to the Chamber on 16 September 2016 at 20:39.

⁷ Urgent request on behalf of Mr Ntaganda for an external medical evaluation of Mr Bosco Ntaganda, and for prompt disclosure of medical information, ICC-01/04-02/06-1517-Conf-Exp. The Chamber notes that although the Request was filed as confidential *ex parte*, the relief sought reflects matters discussed in open session and therefore finds it appropriate to address the request by way of the present classification.

⁸ Request, ICC-01/04-02/06-1517-Conf-Exp, para. 10.

⁹ E-mail from the Registry to the Chamber on 21 September 2016 at 09:00; E-mail from the Defence to the Chamber on 21 September 2016 at 12:50. *See also* transcript of hearing dated 21 September 2016, ICC-01/04-02/06-T-136-CONF-ENG, page 2, line 17 - page 3, line 9.

¹⁰ ICC-01/04-02/06-T-136-CONF-ENG, page 5, lines 7-8.

¹¹ ICC-01/04-02/06-T-136-CONF-ENG, page 5, lines 20-24.

¹² ICC-01/04-02/06-T-136-CONF-ENG, page 5, lines 13-18; page 6, lines 3-11.

6. Also on 21 September 2016, pursuant to a prior request therefor,¹³ the Chamber received a confidential hardcopy of Mr Ntaganda's medical records from the Registry.¹⁴
7. On 28 September 2016, having been directed to do so,¹⁵ the Registry filed its observations on the Request ('Registry Observations').¹⁶ The Registry submits that, should Mr Ntaganda still wish to be visited by an external medical professional, the procedure under Regulation 103 of the Regulations and Regulation 157 of the Regulations of the Registry should be followed.¹⁷ With regard to disclosure of medical records, the Registry states that all relevant medical files related to Mr Ntaganda's physical and mental health in the context of his fast were provided to the Chamber and the Defence on 21 and 28 September 2016.¹⁸ It submits that, should further medical records be sought, the specific written consent of Mr Ntaganda would be required pursuant to Regulation 156(2) of the Regulations of the Registry, and in accordance with the 'highest international standards on medical ethics' as applied by the Detention Centre.¹⁹ It submits that, for those same reasons and given that the Court's Medical Officer is bound by his national deontological code, disclosure 'on an imprecise rolling basis' cannot take place, and that the Registry also could not ensure disclosure within the 24-hour deadline specified due to competing medical priorities for the Medical Officer at the Detention Centre.²⁰

¹³ E-mails from a Legal Officer of the Chamber to the Registry on 14 September 2016 at 10:38 and on 19 September 2016 at 14:41.

¹⁴ On 28 October 2016, an addendum to a specific part of the medical records was provided to the Chamber by way of confidential hardcopy.

¹⁵ E-mail from Legal Officer of the Chamber to the Registry on 23 September 2016 at 15:52.

¹⁶ Registry's Observations on Mr Ntaganda's request for an external medical evaluation and for prompt disclosure of medical information, ICC-01/04-02/06-1550-Conf-Exp, notified on 29 September 2016.

¹⁷ Registry Observations, ICC-01/04-02/06-1550-Conf-Exp, para. 6.

¹⁸ Registry Observations, ICC-01/04-02/06-1550-Conf-Exp, para. 7.

¹⁹ Registry Observations, ICC-01/04-02/06-1550-Conf-Exp, paras 8-9.

²⁰ Registry Observations, ICC-01/04-02/06-1550-Conf-Exp, paras 10-11.

II. Analysis

8. The Chamber notes that since the date of the Order of 13 September 2016 significant new facts and circumstances have arisen, which, in the Chamber's view, warrant re-consideration of that decision. These new facts and circumstances include, in particular, Mr Ntaganda's termination of his fast and re-engagement with the case. The Chamber considers that those circumstances render moot the question of Mr Ntaganda's fitness within the context in which the Order of 13 September 2016 was made. Accordingly, the Chamber finds that an independent medical assessment of the accused, as ordered on 13 September 2016, is no longer warranted.
9. With regard to the Defence submission that an independent medical evaluation is required outside of a 'fitness' framework, the Chamber, having considered the submissions and observations received and the medical information now before it, is not persuaded that a formal independent evaluation is required at this stage. It is noted that a significant factor originally underlying the Request appears to have been the alleged need to bifurcate the roles of 'treating' and 'reporting' physicians, and that this aspect is now moot. Further, the Chamber is not persuaded that such an evaluation would now be of significant further assistance in understanding Mr Ntaganda's state of mind at the time of undertaking the fast. The Chamber nonetheless emphasises that it considers it imperative that Mr Ntaganda continue to receive such medical, and in particular psychological, support as he may require.
10. In respect of the request for disclosure of medical files, the Chamber notes the Registry's submission that all relevant medical files related to Mr Ntaganda's fast have since been disclosed to the Defence. The Chamber considers that such matters should ordinarily be capable of resolution, in accordance with the applicable regulations, without the Chamber's intervention, and finds that to be a more appropriate basis for proceeding should any further records be required.

Noting, however, that the records in question were not made available to the Defence until 21 and 28 September 2016, the importance of timely access is emphasised.

11. While issuing this decision as confidential, the Chamber notes that the majority of the issues addressed have been referred to in public session. Nonetheless, given the particular nature of the subject matter, the Chamber invites the Registry and Defence to identify any specific redactions they feel are necessary, which the Chamber will take into consideration in creation of a public redacted version of this decision.

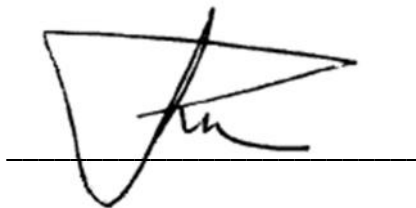
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

RECONSIDERS the Order of 13 September 2016, and decides not to proceed with an independent medical assessment of Mr Ntaganda's fitness;

REJECTS the Request; and

DIRECTS the Defence and Registry to identify any redactions they consider necessary to this decision by 7 November 2016.

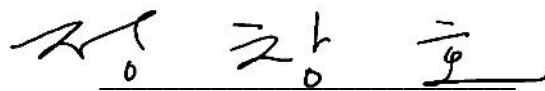
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki' in a cursive style.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters.

Judge Chang-ho Chung

Dated 28 October 2016

At The Hague, The Netherlands