

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **9 May 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

**Decision on Prosecution request seeking the admission of the medical report
related to Witness P-0790**

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Dr Pierre Perich

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), (6)(b) and (9)(a), 67(1) and 69(2) to (4) of the Rome Statute ('Statute'), Rules 63(2), 64(2) and 68 of the Rules of Procedure and Evidence and Regulation 44 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790'.

I. Background and submissions

1. On 18, 19 and 21 January 2016, Witness P-0790 ('Witness') testified to having been shot by UPC soldiers¹ and, upon being questioned by the defence team for Mr Ntaganda ('Defence'), indicated that he was ready to give his consent to undergo a medical examination to verify this injury.²
2. On 24 January 2016, the Defence filed a request seeking an order from the Chamber that the Witness be examined by an independent medical expert and requesting that the report produced by that expert be transmitted to the parties and participants ('Defence Request').³
3. As instructed by the Chamber,⁴ on 25 January 2016, the Office of the Prosecutor ('Prosecution')⁵ and the Legal Representative of the victims of the attacks ('Legal Representative'),⁶ appointed to represent the Witness, communicated their respective responses in which they did not oppose the Defence Request, but

¹ See, for example, Transcript of hearing on 18 January 2016, ICC-01/04-02/06-T-53-CONF-ENG ET, page 47, lines 15-18.

² Transcript of hearing on 19 January 2016, ICC-01/04-02/06-T-54-CONF-ENG ET, page 48, line 22 to page 49, line 6; ICC-01/04-02/06-T-54-CONG-ENG ET, page 44, lines 10-11.

³ Request on behalf of Mr Ntaganda seeking an order from Trial Chamber VI that Witness P-0790 be examined by an independent medical expert, notified on 25 January 2016, ICC-01/04-02/06-1101-Conf.

⁴ Emails from a Legal Officer of the Chamber to the parties and participants on 25 January 2016 at 10:55 and 11:03.

⁵ Email from the Prosecution to the Chamber on 25 January 2016 at 14:46.

⁶ Email from the Legal Representative to the Chamber on 25 January 2016 at 13:08.

made observations on the modalities of implementation. The Registry provided its observations on the same day.⁷

4. Also on 25 January 2016, upon receipt of the above-mentioned responses and observations, the Chamber rendered a preliminary decision,⁸ indicating that it was minded to grant the Defence Request and instructing the Registry to select a medical doctor with relevant forensic expertise from the list of experts.
5. On 26 January 2016, the Registry transmitted the *Curriculum Vitae* of Dr Pierre Perich to the Chamber.⁹
6. On 27 January 2016, the Chamber issued its 'Order appointing an expert to conduct a medical examination of Witness P-0790',¹⁰ whereby it: (i) granted the Defence Request; (ii) appointed Dr Pierre Perich ('Appointed Expert') to undertake a medical examination of the Witness; and (iii) set out his mandate as well as the modalities of the medical examination to be conducted.
7. On 4 February 2016, as instructed, the Registry transmitted the Appointed Expert's report to the Chamber and the Legal Representative.¹¹
8. On 15 February 2016, as instructed by the Chamber,¹² the Legal Representative filed on an *ex parte* basis, and for the purpose of notification to the parties, a proposed redacted version of the report.¹³

⁷ Email from the Registry to the Chamber on 25 January 2016 at 15:29.

⁸ Transcript of hearing on 25 January 2016, ICC-010/4-02/06-T-57-CONF-ENG ET, page 44, line 44 to page 46, line 12.

⁹ Registry Recommendations on the Expert to perform a Medical Examination on a Witness, ICC-01/04-02/06-1107-Conf and confidential Annex I.

¹⁰ ICC-01/04-02/06-1110-Conf ('Order of 27 January 2016'). A public redacted version was filed on the same day (ICC-01/04-02/06-1110-Red).

¹¹ Registry Transmission of the report of the appointed expert pursuant to the "Order appointing an expert to conduct a medical examination of Witness P-0790" (ICC-01/04-02/06-1110-Conf), notified on 5 February 2016, ICC-01/04-02/06-1149-Conf with one confidential, *ex parte*, only available to the Legal Representative, Annex.

¹² Email from a Legal Officer of the Chamber to the parties and participants, 8 February 2016, 13:36.

¹³ Request for Redactions to be applied to the Medical Report of the Appointed Expert Examining OTP-0790 for the purposes of transmission to the parties and participants, 15 February 2016, ICC-01/04-02/06-1171-Conf-Exp

9. On 17 February 2016, having reviewed the redactions sought, the Chamber instructed the Registry to reclassify the proposed redacted version of the report as 'confidential' ('Report') and indicated that any submissions as to its admissibility shall be filed within 21 days of notification.¹⁴

10. On 8 March 2016, the Prosecution sought admission of the Report pursuant to Articles 54(1), 64(2), (9)(a) and 69(3) and (4) of the Statute and Rules 63(2) and 64 of the Rules ('Request for Admission').¹⁵ The Prosecution recalls that, at the request of the Defence, the Chamber appointed and instructed a medical expert to examine the Witness and notes that the Appointed Expert concluded that the Witness bears scars of injuries that are consistent with the Witness's account of events. The Prosecution further submits that the Appointed Expert's conclusions are *prima facie* relevant to issues at trial, that his Report bears sufficient indicia of reliability and that its probative value outweighs any prejudicial effect its admission would have to the accused.

11. On 9 March 2016, the Legal Representative filed his submissions on the admissibility of the Report,¹⁶ in which he submits that the Report meets the admissibility criteria and should therefore be admitted into evidence.

12. On 10 March 2016, the Defence opposed admission of the Report unless the Appointed Expert is called to testify before the Chamber.¹⁷ The Defence acknowledges the relevance of the Report and recognises the qualifications of the Appointed Expert.¹⁸ It however takes issue with the reliability of the Report in light of the procedure followed by the Appointed Expert. It submits that, should

and confidential, *ex parte*, only available to the Legal Representative, Annex. Both were reclassified as confidential on 17 February 2016 (ICC-01/04-02/06-1171-Conf and ICC-01/04-02/06-1149-Conf-AnxA-Red).

¹⁴ Email from a Legal Officer of the Chamber to the parties and participants, 17 February 2016, 10:03.

¹⁵ Prosecution's Request to Admit the Expert Medical Report for Witness P-0790, ICC-01/04-02/06-1199-Conf.

¹⁶ Submissions by the Common Legal Representative of the Victims of the Attacks on the Admissibility of the Appointed Expert's Medical Report Regarding Witness P-0790, ICC-01/04-02/06-1203-Conf.

¹⁷ Submissions on behalf of Mr Ntaganda concerning the admissibility of the Appointed Expert's Medical Report regarding Witness P-0790, ICC-01/04-02/06-1204-Conf ('Defence Submissions').

¹⁸ Defence Submissions, ICC-01/04-02/06-1204-Conf, paras 3-4.

the Defence not be given an opportunity to cross-examine him, the prejudicial effect of admitting the Report far outweighs its probative value. In this regard, the Defence underscores the need for it to cross-examine the Appointed Expert, amongst other things on his methodology, given that, contrary to the scope of the examination ordered,¹⁹ it appears his conclusions are based on the account of facts reported directly by the Witness during his medical examination.²⁰ Finally, the Defence submits that the Report is incomplete as several questions that strike at the core of the Witness's credibility remain unanswered, such as the timing of the injuries suffered and the way they were caused.²¹

II. Analysis

13. The Chamber recalls that it has broad discretion in deciding on the admissibility of documents sought to be tendered into evidence, particularly in application of Regulation 44(5) of the Regulations of the Court. Additionally, in accordance with Articles 64(9)(a) and 69(4) of the Statute, the admissibility of a document shall be determined on the basis of its relevance, probative value and any prejudice that its admission may cause to the fairness of the trial.²² As previously indicated, the Chamber shall apply these admissibility criteria when expert's reports are submitted for admission into evidence.²³

14. The principle of the primacy of orality before the Court may be derogated from in accordance with the Statute and Rules.²⁴ As previously noted by this Chamber, Rule 68 of the Rules lays down one such exception,²⁵ providing that 'previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony' may be considered for admission if the requirements of one or more of the sub-rules are met. In this regard, the Chamber

¹⁹ Referring to Order of 27 January 2016, ICC-01/04-02/06-1110-Red, paras 13-14.

²⁰ Defence Submissions, ICC-01/04-02/06-1204-Conf, paras 16-21.

²¹ Defence Submissions, ICC-01/04-02/06-1204-Conf, paras 22-32.

notes that experts' reports have been admitted into evidence in the present case in accordance with the procedure set out in sub-rule (3) of Rule 68.²⁶

15. Concerning the Request for Admission, the Chamber notes, from the outset, that the Defence does not challenge the Appointed Expert's qualifications nor the relevance of his Report to the present case.²⁷ It further notes that the Report is being tendered as corroboratory material. In the circumstances, should the Prosecution wish to pursue its admission, the Chamber considers that it would be appropriate to seek the admission of the Report pursuant to Rule 68 of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Admission without prejudice; and

²² Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 36. *See also*, Decision on Prosecution's first request for the admission of documentary evidence, 19 February 2016, ICC-01/04-02/06-1181, paras 6-7.

²³ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 37.

²⁴ Article 69(2) of the Statute. *See also*, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9), 16 December 2010, ICC-01/04-01/06-2662, para. 13.

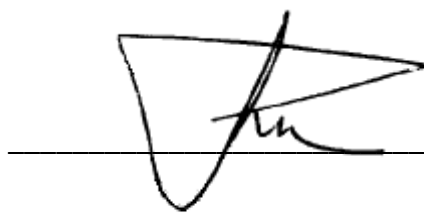
²⁵ Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845, para. 6; Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029, para. 46. *See also* Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 OA10, para. 84.

²⁶ Expert Witness P-0931: Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845; and Transcript of hearing on 25 September 2015, ICC-01/04-02/06-T-32-CONF-ENG ET, pages 82, line 9 to page 83, line 10. Expert Witness P-0933: Transcript of 18 April 2016, ICC-01/04-02/06-T-84-CONF-ENG ET, notably pages 11, line 22 to page 5, line 10; and page 47, lines 10-18; and Transcript of 21 April 2016, ICC-01/04-02/06-T-87-CONF-ENG ET, page 4, lines 7-18. *See also*, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rule 68(3) and 67, 19 February 2016, ICC-01/05-01/13-1641; and ICTY, *The Prosecutor v. Stanislav Galić*, Appeals Chamber, Decision on interlocutory appeal concerning Rule 92bis(C), 7 June 2002, IT-98-29-AR73.2, para. 40.

²⁷ Defence Submissions, ICC-01/04-02/06-1204-Conf, paras 3-4.

ORDERS the parties and participants to file public redacted version of their respective submissions on the admissibility of the Report (ICC-01/04-02/06-1199-Conf; ICC-01/04-02/06-1203-Conf; and ICC-01/04-02/06-1204-Conf) within 21 days of notification of the present decision.

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 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one in Latin script and one in Korean script, written over horizontal lines.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 9 May 2016

At The Hague, The Netherlands