

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **18 January 2017**

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 under Rule 68(2)(b) of the Rules**

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) and (9)(a), 67, 68 and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2) and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules'.

I. Background

1. On 9 May 2016, the Chamber issued a decision ('First Decision'),¹ in which it rejected a request by the Office of the Prosecutor ('Prosecution') for admission of the medical report ('Report')² related to Witness P-0790 ('Witness') pursuant to Article 69 of the Statute. The Chamber indicated that it considered, however, that 'it would be appropriate to seek the admission of the Report pursuant to Rule 68 of the Rules'.³
2. On 19 October 2016, the Chamber issued the 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution', in which it, *inter alia*, ordered that any further requests under Rule 68(2) of the Rules that were not specified in its updated list of witnesses be filed by 3 February 2017.⁴
3. On 1 December 2016, the Prosecution filed a request for admission of the Report pursuant to Rule 68(2)(b) of the Rules ('Second Request').⁵

¹ Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790, ICC-01/04-02/06-1311. The Chamber incorporates by reference the 'Background and submissions' set out therein at paragraphs 1 to 12.

² See ICC-01/04-02/06-1149-Conf-AnxA-Red; ICC-01/04-02/06-1149-Conf-Exp-AnxI.

³ First Decision, ICC-01/04-02/06-1311, para. 15.

⁴ See Corrigendum of 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution', 19 October 2016, ICC-01/04-02/06-1588, ICC-01/04-02/06-1588-Corr, paras 6-7.

⁵ Prosecution's Request for the Admission of the Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b), ICC-01/04-02/06-1666-Conf.

4. On the same day, the Registry notified the declaration of the author of the Report and the certification made by an authorised person in accordance with Rule 68(2)(b)(ii) and (iii) of the Rules ('Declaration').⁶
5. On 21 December 2016, the Legal Representative of the victims of the attacks ('LRV') filed a response ('LRV Response'),⁷ supporting the Second Request.
6. On 27 December 2016, the defence team for Mr Ntaganda ('Defence') filed a response ('Defence Response')⁸ urging the Chamber to reject the Second Request.

II. Submissions and Analysis

7. In relation to Rule 68(2)(b) of the Rules, the Chamber incorporates by reference the applicable law as previously set out by it.⁹

Whether the Report goes to proof of a matter other than the acts and conduct of the accused

8. The Chamber notes that the phrase 'acts and conduct of the accused' should be given its ordinary meaning, and refers to the 'personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged'.¹⁰ The Chamber considers that, as submitted by the Prosecution,¹¹ the

⁶ See Registry submission of the declarations made by prosecution witness DRC-P-0975 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, dated 30 November 2016 and notified on 1 December 2016, ICC-01/04-02/06-1664-Conf, plus one confidential annex (ICC-01/04-02/06-1664-Conf-Anx).

⁷ Response of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Request for the Admission of the Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b), ICC-01/04-02/06-1696-Conf.

⁸ Response on behalf of Mr Ntaganda to "Prosecution's Request for the Admission of the Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)", ICC-01/04-02/06-1704-Conf.

⁹ See Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf ('P-0773 Decision'), paras 6-8.

¹⁰ P-0773 Decision, ICC-01/04-02/06-1667-Conf, para. 11.

¹¹ Second Request, ICC-01/04-02/06-1666-Conf, para. 22.

Report addresses the consistency between the Witness's account and the injuries noted during the medical examination by the appointed expert who authored the Report ('Expert'). Noting further that the Defence does not dispute the fulfilment of this requirement, the Chamber considers that the Report does not in any way concern the acts or conduct of the accused.

Whether the introduction of the Report under Rule 68(2)(b) is appropriate in light of the factors listed under Rule 68(2)(b)(i)

9. The Prosecution submits that the Report is reliable, relevant, and probative of the charges, and that it corroborates the Witness's testimony, being relevant to the Witness's overall credibility.¹² The Prosecution emphasises that the Expert was appointed by the Chamber at the request of the Defence and that the Report produced 'fully responded to the Chamber's instructions'.¹³ The Prosecution submits that it is in the interests of justice to admit the Report under Rule 68(2)(b), emphasising that the Defence had the opportunity to cross-examine the Witness on the circumstances in which he incurred his injuries and that cross-examining of the Expert would not assist the Chamber in evaluating the Report, given the low likelihood that any issues therein may be further clarified.¹⁴
10. The Defence argues that the Report does not meet the minimum requirements of Rule 68(2)(b) of the Rules, as it relates to issues that are materially in dispute, including the plausibility of and the weight that can be accorded to the Witness's narrative as to how he sustained his injuries, and the Witness's credibility.¹⁵ The Defence submits further that the Report lacks sufficient indicia of reliability to be admitted without cross-examination, as new information was provided by the Witness to the Expert that would have informed the latter's conclusions in the

¹² Second Request, ICC-01/04-02/06-1666-Conf, paras 3 and 23. *See also* LRV Response, paras 19-20.

¹³ Second Request, ICC-01/04-02/06-1666-Conf, para. 31. *See also* paras 24-37.

¹⁴ Second Request, ICC-01/04-02/06-1666-Conf, paras 37-39. *See also* LRV Response, paras 21-22.

¹⁵ Defence Response, ICC-01/04-02/06-1704-Conf, paras 18-24.

Report, and that the Expert ought to be subject to cross-examination as to his methodology in preparing the Report, as has been the procedure for other experts whose reports were admitted by way of Rule 68(3).¹⁶

11. In assessing whether the introduction of the Report under Rule 68(2)(b) is appropriate in light of the factors listed under Rule 68(2)(b)(i), the Chamber recalls that it appointed the Expert at the request of the Defence to provide an opinion on a very confined issue, namely, 'to assess and address in his [R]eport, to the extent possible, whether alleged injuries to the Witness[...] are consistent with his account of the injury as set out in his trial testimony, including considerations such as location of injury, cause and approximate date' ('Instructions').¹⁷ The Chamber considers that the Report conforms to these Instructions, insofar as it details: (i) the location of the Witness's injuries, including photographs and detailed descriptions thereof; (ii) the likely cause of the Witness's injuries, including exploration of alternative theories of causation; and (iii) the potential timeframe in which the injuries were sustained, including the reason for this conclusion.¹⁸

12. Further, while the Report contains additional information to that addressed in the Witness's testimony, including a narrative provided afresh to the Expert by the Witness as to how his injuries were sustained, the Report addresses the relevant excerpts of the Witness's in-court testimony as a basis for comparison with the nature of the injuries, in conformity with the Instructions.¹⁹ Moreover, while the issue underlying the Report is materially disputed by the Defence, namely the Witness's narrative as to the manner in which his injuries were sustained, the Chamber considers that the Report is confined in scope, is

¹⁶ Defence Response, ICC-01/04-02/06-1704-Conf, paras 25-35.

¹⁷ Order appointing an expert to conduct a medical examination of Witness P-0790, 27 January 2016, ICC-01/04-02/06-1110-Conf, para. 13.

¹⁸ Report, ICC-01/04-02/06-1149-Conf-AnxA-Red, pages 8-14.

¹⁹ Report, ICC-01/04-02/06-1149-Conf-AnxA-Red, pages 3-8.

appropriately tailored to the Chamber's Instructions, and is being tendered exclusively for corroborative purposes in respect of a discrete matter.²⁰ The Chamber further considers that the Report satisfactorily sets out the basis for the findings made, and the methodology adopted.

13. In assessing the reliability of the Report, the Chamber recalls its finding in the First Decision that the Defence does not challenge the Expert's qualifications nor the relevance of his Report to the present case.²¹ In addition, the Chamber notes that the Report: (i) was prepared by an independent expert appointed by the Chamber, following directions given by the Chamber; (ii) bears the Expert's signature, and appears on the Expert's letterhead; (iii) contains excerpts of the Witness's in-court testimony as a basis for comparison with the Witness's injuries; (iv) resulted from a medical examination conducted in the presence of, and with the aid of, a Swahili-French interpreter;²² and (v) as noted above, is potentially corroborative of the testimony of the Witness.
14. The Chamber does not consider the purported deficiencies in the Report, argued by the Defence, to impact the Report's *prima facie* reliability. Nor, in light of the factors mentioned above and the fact that the Defence had a full opportunity to cross-examine the Witness on the circumstances of his injuries, does the Chamber consider that denying the Defence an opportunity to cross-examine the Expert would render admission of the Report under Rule 68(2)(b) prejudicial to the rights of the accused.

²⁰ See, in this regard, Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 15, and First Decision, ICC-01/04-02/06-1311, para. 15.

²¹ First Decision, ICC-01/04-02/06-1311, para. 15.

²² See 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), 4 February 2016 and notified on 5 February 2016, ICC-01/04-02/06-1149-Conf, para. 3.

III. Conclusion

15. In light of the factors discussed above, and noting that the relevant declaration has been filed in accordance with Rule 68(2)(b)(ii) and (iii),²³ the Chamber concludes that it is in the interests of justice and appropriate to admit the Report under Rule 68(2)(b) of the Rules, in both redacted and unredacted (as noted below) forms.

Reclassification

16. The Chamber notes the Defence submission that certain redacted sections of the Report are material to its preparation, and requests their reclassification accordingly.²⁴ Having further reviewed the redactions in question, and the LRV's reasons therefor,²⁵ the Chamber finds that a version of the Report without redactions ought now to be made available to the parties and participants. Given the sensitive nature of the presently-redacted material in the Report, the Chamber instructs the parties to treat it with utmost caution in order to ensure full respect for the dignity and wellbeing of the Witness, as required by, *inter alia*, Article 68 of the Statute.

²³ Declaration, ICC-01/04-02/06-1664-Conf-Anx.

²⁴ Defence Response, ICC-01/04-02/06-1704-Conf, paras 36-37.

²⁵ 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.

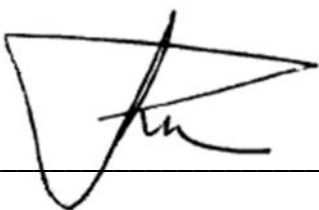
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Second Request;

ORDERS the Registry to reclassify the version of the Report at ICC-01/04-02/06-1149-Conf-Exp-AnxI to 'confidential'; and

ORDERS that public redacted versions of the Second Request (ICC-01/04-02/06-1666-Conf), Defence Response (ICC-01/04-02/06-1704-Conf) and LRV Response (ICC-04-02/06-1696-Conf) be filed within two weeks of the date of issuance of this decision.

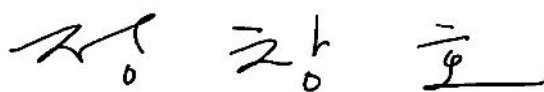
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 18 January 2017

At The Hague, The Netherlands