

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 27 January 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

**Public redacted version of 'Order appointing an expert to conduct a medical
examination of Witness P-0790'**

Order 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 Luc Boutin

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 (6)(b), and 68(1) of the Rome Statute and Regulation 44 of the Regulations of the Court ('Regulations'), issues the following 'Order appointing an expert to conduct a medical examination of Witness P-0790'.

I. Background and submissions

1. On 18, 19 and 21 January 2016, Witness P-0790 ('Witness'), a dual status witness, testified before the court in the present proceedings.¹ He testified, *inter alia*, to having been shot [REDACTED] by UPC soldiers while fleeing from Kobu during an attack² and, upon being questioned by the defence team for Mr Ntaganda ('Defence'), indicated that he is 'ready to give [his] consent' to undertaking a medical examination to verify this injury.³
2. On 24 January 2016, the Defence filed the 'Request on behalf of Mr Ntaganda seeking an order from Trial Chamber VI that Witness P-0790 be examined by an independent medical expert' ('Request').⁴ The Defence avers that whether or not the Witness was shot by UPC/FPLC soldiers while fleeing 'is an important aspect of the Prosecution's case'⁵ and 'an issue that strikes at the core of [the Witness's] credibility'.⁶ In the Defence's view, an assessment by independent medical expert is the only way to corroborate the Witness's account⁷ and it therefore seeks that the Chamber appoint and instruct a medical expert to address: i) whether the Witness's body 'bears marks that he was shot [REDACTED] and [REDACTED]'; ii) whether the Witness's condition is consistent with his account of the event;

¹ Transcripts of hearing of 18, 19 and 21 January 2016, ICC-01/04-02/06-T-53-CONF-ENG ET; ICC-01/04-02/06-T-54-CONF-ENG ET; and ICC-01/04-02/06-T-56-CONF-ENG ET.

² ICC-01/04-02/06-T-53-CONF-ENG ET, page 47, lines 15-18.

³ 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-CONF-ENG ET, page 44, lines 10-11.

⁴ Notified on 25 January 2016, ICC-01/04-02/06-1101-Conf.

⁵ Request, ICC-01/04-02/06-1101-Conf, para. 4

⁶ Request, ICC-01/04-02/06-1101-Conf, para. 5.

⁷ Request, ICC-01/04-02/06-1101-Conf, paras 6 and 22.

iii) whether his condition can be the result of events which took place in 2003.⁸ The Defence also seeks that the Chamber require that the expert's report 'be transmitted to the [p]arties and [p]articipants without delay'.⁹

3. On 25 January 2016, the Chamber shortened the deadline for any response to the Request to 15:30 that same day, and instructed the Registry to also provide observations on the relief sought by the same deadline.¹⁰
4. The Legal Representative of the victims of the attacks ('Legal Representative'), appointed to represent the Witness, communicated his response to the Request via email on 25 January 2016.¹¹ Noting that the Witness 'expressed his consent to being examined by a medical expert', the Legal Representative does not oppose the Request. He, however, submits that, in light of the material disclosed to the Defence, which is clear as to the nature of the injury the Witness claims to have sustained and its reported consequence, the Request 'should have been presented at an earlier stage'. The Legal Representative submits that the Witness 'should be allowed to return home' 'without any further delay' and that any medical examination 'should be conducted at a later stage, and preferably in the field.' Finally, the Legal Representative notes that, in accordance with the 'Protocol on dual status witnesses', he should be allowed to attend any medical examination of his client, subject to the latter's consent.¹²
5. Later on the same day, the Prosecution communicated its response via email,¹³ in which it does not oppose the Request in principle but makes several observations on the modalities of implementation. The Prosecution notes that it may be more difficult to ensure that a 'qualified medical personnel perform the examination [...] near the [W]itness's place of residence than in The Hague'. Under the

⁸ Request, ICC-01/04-02/06-1101-Conf, para. 8.

⁹ Request, ICC-01/04-02/06-1101-Conf, paras 8 and 22.

¹⁰ Emails from the Chamber to the parties and participants on 25 January 2016 at 10:55 and 11:03.

¹¹ Email from the Legal Representative to the Chamber on 25 January 2016 at 13:08.

¹² Referring to ICC-01/04-02/06-464 and Annex 1 to ICC-01/04-02/06-430-Anx1.

¹³ Email from the Prosecution to the Chamber on 25 January 2016 at 14:46 ('Prosecution Response').

condition that the medical evaluation can be completed before the end of the week, and should there be no impact on the Witness's security, the Prosecution is of the view that 'it may be preferable for the [W]itness's stay to be extended [...] to complete the examination'. As to the relevant expertise, the Prosecution submits that the examination 'must be undertaken by a [REDACTED]', or possibly by a forensic pathologist, but not by a general practitioner, who 'does not have the necessary medical expertise for this examination'. The Prosecution further suggests that, to capture all three questions proposed by the Defence, the examination could be conducted 'to determine whether injuries [the Witness] allegedly sustained [REDACTED] are consistent with his account of the injury as set out in his trial testimony (including the location on the witness's body, the cause and the date of the alleged injury)'. The Prosecution finally submits that the trial testimony of the witness 'ought to be provided' to the expert appointed.

6. Also on 25 January 2016, the Registry provided its observations.¹⁴ It notes that it would require clear instructions from the Chamber to 'properly identify' suitable experts and that, based on the instructions provided, it would be in a position to review the list of experts maintained pursuant to Regulation 44 of the Regulations 'to propose to the Chamber a list of suitable candidates within approximately 3 days'. The Registry further indicates that it may 'liaise with the experts on their availability and make necessary arrangements for the examination taking into consideration the location of the [W]itness'.
7. During the hearing held in the afternoon of 25 January 2016, upon completion of the Witness's testimony and receipt of the above-mentioned responses and observations, the Chamber rendered a preliminary decision on the Request ('Preliminary Decision').¹⁵ The Chamber indicated that it was minded to grant the Request and noted that the Registry was in the process of identifying an

¹⁴ Email from the Registry to the Chamber on 25 January 2016 at 15:29.

¹⁵ 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.

independent expert who would be available to conduct a medical examination on an urgent basis. Based on the understanding that a medical examination could be conducted before the end of the week, the Chamber directed that the Witness remain in The Hague for the time being and instructed the Registry to provide, by the filing deadline on 26 January 2016, the name of a medical doctor with relevant forensic expertise who would be available to meet with the Witness in order to conduct a medical examination by 29 January 2016.

8. On 26 January 2016, the Registry transmitted the Curriculum Vitae of a doctor with forensic expertise, Dr Pierre Perich, who it identifies as a qualified professional who is available to conduct the examination of the Witness within the week.¹⁶ The Registry notes that it selected Dr Perich on the basis of the following considerations: specialisation, qualification, experience, availability, current location and language.

II. Analysis

9. From the outset, the Chamber notes that the Defence filed its Request, *inter alia*, on the basis of Articles 64(2) and 67(1) of the Statute. The Defence argues that the relief sought 'is consistent with the Chamber's duty to ensure that a trial is fair and expeditious and is conducted with full respect to the rights of the Accused, including to *effectively* have examined the witnesses against him'.¹⁷ In this regard, the Chamber notes that the Defence submits that 'no evidence expected to be adduced by the Prosecution [...] is likely to provide an opportunity to corroborate [the Witness]'s narrative in relation to' the injury he claims to have suffered¹⁸ and that, in its view, 'an independent medical expertise is the only way to corroborate [the Witness]'s testimony'.¹⁹

¹⁶ Registry Recommendations on the Expert to perform a Medical Examination on a Witness, ICC-01/04-02/06-1107-Conf and confidential annex I ('Registry Recommendations').

¹⁷ Request, ICC-01/04-02/06-1101-Conf, para. 24.

¹⁸ Request, ICC-01/04-02/06-1101-Conf, para. 3.

¹⁹ Request, ICC-01/04-02/06-1101-Conf, paras 6 and 22.

10. As indicated in the Preliminary Decision, in light of the Witness's expressed willingness to undergo a medical examination, and noting that neither the Prosecution nor the Legal Representative opposes the Request, the Chamber found it appropriate to order the medical examination of the Witness.
11. Prior to the medical examination being conducted, the Chamber instructs the Legal Representative to formally seek the Witness's consent to the medical examination ordered. The Legal Representative is to file in the record a notice of consent signed by the Witness by midday on 28 January 2016. In relation to the Legal Representative's request to be present, the Chamber agrees that, provided the Witness consents, and subject to the Legal Representative's presence not obstructing a proper medical examination, his attendance is permissible and in accordance with the Protocol on dual status witnesses.²⁰
12. The Chamber considers that a qualified doctor with relevant forensic expertise will be best placed to undertake the examination in question.²¹ The Chamber notes that the Registry identified Dr Perich as a forensic doctor with relevant expertise in '*balistique lésionnelle et en identification de masse*' and, having given due regard to his qualifications, the Chamber finds it appropriate to appoint Dr Perich to conduct the medical examination of the Witness ('Appointed Expert'). Moreover, the Chamber notes that the Appointed Expert will be able to conduct the examination in French,²² which is a language in which Witness P-0790 reports being proficient.²³ The Chamber finds it unnecessary to seek, at this stage, the parties' and participants' view on the Appointed Expert's qualifications, or generally on the selection of a medical expert, and notes, in this regard, that it is not aware of any information which would put into question his independence. As foreshadowed in the Preliminary Decision, the Chamber sets out below its

²⁰ 18 January 2015, ICC-01/04-02/06-464; and Annex 1 to 23 January 2015, ICC-01/04-02/06-430-Anx1.

²¹ ICC-01/04-02/06-T-57-CONF-ENG ET, page 46, lines 5-8.

²² Annex 1 to Registry Recommendations, ICC-01/04-02/06-1107-Conf-AnxI.

²³ DRC-OTP-2078-2373.

guidance to the Appointed Expert as to the scope of the examination required and relevant modalities.

13. Drawing on the parties' proposals as to the purpose of the examination to be conducted, the Chamber wishes the Appointed Expert to assess and address in his report, to the extent possible, whether alleged injuries to the Witness's [REDACTED] 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. To undertake this examination, the Chamber considers that the Appointed Expert shall be provided with the relevant confidential transcripts of the Witness's trial testimony.

14. The Chamber finds it appropriate that the Appointed Expert's report be communicated first to the Chamber and the Legal Representative. Upon receipt, and in light of the information contained therein, the Chamber will decide on the appropriate procedure for timely transmission to the parties, as well as the procedure relating to admissibility.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

ORDERS the medical examination of the Witness in accordance with paragraph 13 of the present decision;

APPOINTS Dr Pierre Perich to undertake the medical examination of the Witness;

ORDERS the Registry to notify the present decision to the Appointed Expert and to provide him all logistical assistance necessary to the performance of his task;

ORDERS the Legal Representative to seek the Witness's formal consent to the medical examination hereby ordered and to transmission of the Appointed Expert's

report to the parties and participants and to file a notice thereof in the record by midday on 28 January 2016;

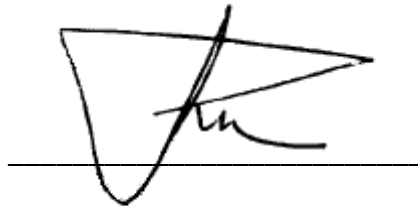
ORDERS the Registry to provide the Appointed Expert access to the following documents:

- ICC-01/04-02/06-T-53-CONF-FRA ET;
- ICC-01/04-02/06-T-54-CONF-FRA ET;
- ICC-01/04-02/06-T-56-CONF-FRA ET; and
- ICC-01/04-02/06-T-57-CONF-FRA ET.

ORDERS the Appointed Expert to provide his report to the Registry by 15 February 2016; and

DIRECTS the Registry to file confidential *ex parte* (Legal Representative only) the Appointed Expert's report in the record of the case upon receipt.

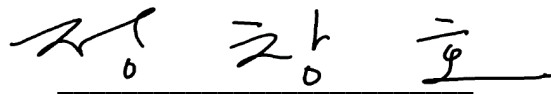
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 27 January 2016

At The Hague, The Netherlands