Cour Pénale Internationale

International Criminal Court

Original: **English**

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

Date: **20 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

Public redacted version of "Prosecution's Request to Admit the Expert Medical Report for Witness P-0790", 8 March 2016, ICC-01/04-02/06-1199-Conf

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution seeks the admission of the expert medical report ("Medical Report") for Witness P-0790,[1] in accordance with articles 54(1), 64(2) and 64(9)(a), 69(3) and (4) of the Rome Statute ("Statute") and rules 63(2) and 64 of the Rules of Procedure and Evidence ("Rules").

2. At the request of the Defence, Trial Chamber VI ("Chamber") appointed and instructed a medical expert to examine Witness P-0790 and provide an expert medical opinion as to whether injuries sustained by Witness P-0790 to [REDACTED] are consistent with the Witness's account of how such injuries were incurred, including considerations such as location of injury, cause and approximate date. Witness P-0790 stated in testimony that he had been shot [REDACTED] 2003.[2]

3. The medical expert examined injuries to the Witness's [REDACTED] and concluded that the scar on Witness P-0790's [REDACTED] is consistent with a gunshot wound, as recounted by the Witness.[3] The medical expert further concluded that the Witness's [REDACTED] injury is consistent with a gunshot wound as recounted by the Witness, that the scarring is old and could have been sustained at the time of events as described by the Witness.[4]

4. The expert's conclusions are *prima facie* relevant to material issues at trial, the Medical Report has *prima facie* probative value and bears sufficient indicia of reliability to be admitted, and its probative value outweighs any prejudicial effect. Further, its admission would assist the Chamber in the determination of the truth.

[1] ICC-01/04-02/06-1149-Conf-AnxA-Red.
[2] ICC-01/04-02/06-1149-Conf-AnxA-Red, pp. 4-9.
[3] ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 12.
[4] ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 13.

Confidentiality

5. This filing is classified as "confidential" under regulation 23*bis*(1) and (2) of the Regulations in line with the classification of documents to which it refers. In addition, the Chamber granted Witness P-0790 in-court protective measures to protect his identity from the public.[5] This filing concerns information of an identifying nature regarding the Witness's health condition.

Procedural History

6. On 18 January 2016, during cross-examination, the Defence asked dual status Witness P-0790 (victim a/30234/15) whether he would consent to a medical examination to assess injuries he testified he sustained in 2002-2003.[6] The Witness provided his consent to an expert medical examination.

7. On 24 January 2016, the Defence filed a requested for the Chamber to order that Witness P-0790 be examined by an independent medical expert.[7]

8. On 25 January 2016, the Prosecution and the Legal Representative responded to the Defence request and did not oppose.[8]

9. That same day, the Chamber instructed the Registry to identify a medical doctor with relevant forensic expertise who would be available to conduct a medical examination of the Witness by 29 January 2016.[9]

[5] ICC-01/04-02/06-1083-Conf.
[6] ICC-01/04-02/06-T-54-CONF-ENG-ET, p. 49, lns. 3-10.
[7] ICC-01/04-02/06-1101-Conf.
[8] See Email Communication from the Chamber to Parties, Participants, and Registry dated 25 January 2016 at 11:03 instructing the Prosecution and Legal Representative to respond on the same day by 15h30. See Email Communication from the Legal Representative to the Chamber, Parties, Participants, and the Registry dated 25 January at 13:08. See also Email Communication from the Prosecution to the Chamber, Defence, Participants, and the Registry dated 25 January 2016 at 14:46.
[9] ICC-01/04-02/06-T-57-CONF-ENG-ET, p. 44, ln. 25, p. 45, lns. 1-25, p. 46, lns. 1-12.

10. On 26 January 2016, the Registry transmitted to the Chamber the *Curriculum Vitae* of a medical expert with forensic expertise, identified from its list of experts.[10]

11. On 27 January 2016, the Chamber granted the Defence request and appointed Dr Pierre Perich as medical expert ("the Appointed Expert").[11] The Chamber ordered the Legal Representative to seek the Witness's formal consent to the medical examination and to the transmission of the Medical Report to the Parties and participants.[12] The Chamber instructed the Appointed Expert to assess and address in his report, to the extent possible, whether alleged injuries sustained by the Witness to his [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.[13] The Appointed Expert was provided with the transcripts of the Witness's trial testimony.[14]

12. On 28 January 2016, the Appointed Expert performed the medical examination of the Witness, in the presence of the Witness's Legal Representative and a Swahili-French interpreter.[15]

13. On 2 February 2016, the Appointed Expert submitted the Report to the Registry, who transmitted it to the Chamber and the Legal Representative on 5 February 2016.[16]

[10] ICC-01/04-02/06-1107-Conf.
[11] ICC-01/04-02/06-1110-Conf, p. 8.
[12] ICC-01/04-02/06-1110-Conf, p. 8. The Legal Representative filed the witness's consent forms on 28 January 2016, ICC-01/04-02/06-1114-Conf.
[13] ICC-01/04-02/06-1110-Conf, para. 13.
[14] 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.
[15] ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 3.
[16] ICC-01/04-02/06-1149-Conf and annex A.

14. On 8 February 2016, the Chamber instructed the Legal Representative to propose any necessary redactions to the Medical Report,[17] which the Legal Representative did on 15 February 2016.[18]

15. On 17 February 2016, the Chamber directed the Parties to file any submissions on the admissibility of the report within 21 days.[19]

Submissions

Applicable Law

16. Article 64(9)(a) of the Statute authorises the Chamber's to rule on the "admissibility or relevance of evidence". Article 69(4) guides the factors to be considered when making admissibility assessments.[20] According to article 69(4), a Chamber may rule on "the relevance or admissibility of any evidence, taking into account, *inter alia*, [its] probative value […] and any prejudice that [it] may cause to a fair trial or to a fair evaluation of the testimony of a witness."

17. In its "Decision on the conduct of proceedings", the Chamber ruled that it "shall determine the admissibility of a document on the basis of its relevance, probative value, and any prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness".[21] The Chamber noted that the assessment of both relevance and probative value is conducted on a *prima facie* basis; and that the assessment of materiality for the purposes of admissibility is a distinct question from the evidentiary weight ultimately attached to admitted evidence.

[17] See Email Communication from the Chamber to the Legal Representative dated 8 February 2016 at 13:36.
[18] ICC-01/04-02/06-1171-Conf.
[19] See Email Communication from the Chamber to Parties, Participants, and Registry dated 17 February 2016 at 10:02.
[20] ICC-01/09-01/11-1353, para. 14.
[21] ICC-01/04-02/06-619, para. 36.

18. The admissibility of evidence other than testimony requires a consideration of three key factors: (i) its relevance to issues at trial;[22] (ii) its *prima facie* probative value;[23] and (iii) its prejudicial effect as weighed against its probative value.[24]

Prosecution's Submissions

(i) The Medical Report is prima facie relevant to issues at trial

19. In its request for Witness P-0790 to be examined by an expert, the Defence itself argued that in its view, "an independent medical expertise is the only way to corroborate witness P-0790's testimony".[25]

20. The Medical Report assesses the consistency between Witness P-0790's account - of being attacked by UPC soldiers and shot [REDACTED] February 2003 - and the injuries observed during the medical examination. It is relevant to corroborate the testimony of this Witness and his overall credibility.

21. The Medical Report concludes, among other things, that the injuries to the Witness's [REDACTED] are consistent with Witness P-0790's account: « *Dans leur ensemble, les lésions et troubles séquellaires observés sont très compatibles avec les faits tels qu'exposés par le témoin P - 0790 lors de ses auditions* ».[26]

22. As such, the Medical Report is relevant to issues at trial, *inter alia*, whether or not the Witness should be believed when he testified to the UPC attacking Kobu and environs in February 2003, shooting at civilians - such as himself - and killing

[22] ICC-01/04-01/06-1399-Corr, para. 27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras. 13-14; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.
[23] ICC-01/04-01/06-1399-Corr, paras. 28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras. 13 and 15; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 15.
[24] ICC-01/04-01/06-1399-Corr, paras. 31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras. 13, 16-17; ICC-01/05-01/08-2299-Red, para. 8; ICC-01/09-01/11-1353, para. 16.
[25] ICC-01/04-02/06-1101-Conf, para. 6.
[26] ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 13.

[REDACTED]. The Witness's testimony is relevant to Counts 1, 2, 3, 10, 12 and 13.

(ii) The Medical Report has prima facie probative value

23. The Medical Report has *prima facie* probative value as it is useful to prove a material fact at trial that is in dispute: it provides objective and independent corroboration for Witness P-0790's testimony and is material to an assessment of the Witness's credibility. The Medical Report is reliable, authentic, trustworthy, accurate and voluntary, and thus should be admitted into evidence.

24. At the outset it is significant that the Medical Report was requested by the Defence. It is axiomatic that they would not have done so if they did not consider that the findings of the medical expert would be relevant to the issues at hand.

25. The Chamber appointed and instructed the Appointed Expert, who thereafter conducted the medical examination and prepared the Medical Report in accordance with these instructions. Similarly, the Chamber would presumably not have done so if they did not also consider that the findings of the medical expert potentially relevant.

26. The authenticity of the report is beyond question. The Appointed Expert transmitted the Medical Report to the Registry, who filed it in the record of case and transmitted it to the Chamber and the Legal Representatives. Subsequently, a redacted version of the Medical Report was transmitted to the Parties.

27. The Medical Report itself has sufficient indicia of reliability: it was drafted by the Appointed Expert further to his medical examination of Witness P-0790; the Appointed Expert is entirely independent of any of the Parties to the proceedings; there has been no suggestion that the Appointed Expert lacks the necessary medical expertise to have conducted the examination; the Medical Report is on letterhead and

contains the title and signature of its author. The dates of the medical examination and of the Medical Report, the Chamber's instructions, the material reviewed by the Appointed Expert, the methodology, reasoning and conclusions are all clearly set out in the Medical Report.

(iii) The report's probative value outweighs any prejudicial effect

28. The Medical Report is highly probative. It comprises the findings of an independent medical expert following his personal examination of the Witness's injuries.

29. The admission of the Medical Report is not unfairly prejudicial to the Accused. Indeed, it was at the Defence's request that the Chamber ordered the medical examination for the very purpose of assessing whether or not the Witness has injuries that are consistent with his testimony.[27] The Defence also had full opportunity to cross-examine the Witness on the circumstances in which he sustained his injuries.

30. The probative value of the Medical Report in corroborating Witness P-0790's account thus outweighs any possible prejudicial effect to the Accused. The Appointed Expert's conclusions are relevant to contested issues in the case and are reliable.

[27] ICC-01/04-02/06-1101-Conf.

Requested Relief

31. For the foregoing reasons, the Prosecution requests that the Appointed Expert's Medical Report relating to Witness P-0790 (ICC-01/04-02/06-1149-Conf-AnxA-Red) be admitted into evidence.

Fatou Bensouda
Prosecutor

Dated this 20th day of May 2016
At The Hague, The Netherlands