

**Cour
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**International
Criminal
Court**



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Date: 23 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 the 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**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) who also represents Witness P-0790 in the latter’s capacity as victim [REDACTED] admitted to participate in the proceedings,¹ hereby respectfully presents his submissions on the admissibility of the Appointed Expert’s Medical Report in respect of P-0790 as ordered by Trial Chamber VI (the “Chamber”) on 17 February 2016. Given the Appointed Expert’s conclusions and recommendations regarding the Witness’s health conditions, the Legal Representative will refer the Witness to the Victims and Witnesses Section (the “VWS”) in order to provide him with the necessary medical and/or psychological assistance as appropriate, and reserves his right to seize the Chamber with the issue at a later stage, if need be.

II. PROCEDURAL BACKGROUND

2. On 24 January 2016, the Defence filed a “Request on behalf of Mr Ntaganda seeking an order from Trial Chamber VI that Witness P-0790 be examined by an independent medical expert” (the “Defence Request”).² On 25 January 2016, the Chamber shortened the deadline for responses thereto to 15:30 hours on the same day and instructed that such responses may be communicated by Email.³ The

¹ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II), No. ICC-01/04-02/06-211, 15 January 2015. In its Decision on victims’ participation in trial proceedings of 6 February 2015, Trial Chamber VI noted the status of victims authorised to participate at the confirmation stage of the proceedings and directed the Registry to re-assess their applications in order to ascertain whose application continued to fulfil the criteria for participation in the proceedings. See the “Decision on victims’ participation in trial proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-449, 6 February 2015, paras. 1, 24 (ii), (iii), (iv), (v), 43. [REDACTED] was found to continuously meet these criteria and was accordingly admitted to participate in the trial proceedings. See the “Fifth Transmission to the Chamber of Applications for Participation in Trial Proceedings”, No. ICC-01/04-02/06-665, 22 June 2015.

² See the “Request on behalf of Mr Ntaganda seeking an order from Trial Chamber VI that Witness P-790 be examined by an independent medical expert”, No. ICC-01/04-02/06-1101-Conf, 24 January 2016.

³ See Email Communication from the Chamber to Parties, Participants, and Registry dated 25 January 2016 at 10:55.

Chamber further instructed the Registry to provide observations on the relief sought by the same shortened deadline.⁴

3. Neither the Prosecution, nor the Legal Representative opposed the Defence Request in principle, given that Witness P-0790 had indicated his consent to such examination during the course of his testimony.⁵ The Legal Representative further requested that the Chamber authorise him to attend the medical examination as envisaged by the Protocol on dual status witnesses, in the event it was minded to grant the Defence Request.⁶

4. On 25 January 2016, the Chamber issued a preliminary oral decision on the Defence Request,⁷ whereby it *inter alia* instructed the Registry to identify a medical specialist with relevant forensic expertise to conduct a medical examination of Witness P-0790 by 29 January 2016, if possible.⁸

5. On 26 January 2016, the Registry transmitted to the Chamber the *Curriculum Vitae* of a medical specialist with forensic expertise whom it had identified from its list of experts as both qualified and available to conduct a medical examination of Witness P-0790 prior to 29 January 2016.⁹

6. On 27 January 2016, the Chamber issued the “Order appointing an expert to conduct a medical examination of Witness P-0790” (the “Order”) wherein it, *inter alia*,

⁴ *Idem*.

⁵ 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.

⁶ 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.

⁷ See Transcript of hearing held on 25 January 2016, No. ICC-01/04-02/06-T-57-ENG-ET CONF, pp. 44, line 25, p. 45, lines 1-25, p. 46, lines 1-12.

⁸ *Idem*, p. 46, lines 5-8.

⁹ See the “Registry Recommendations on the Expert to perform a Medical Examination on a Witness”, No. ICC-01/04-02/06-1107-Conf, 26 January 2016.

(i) granted the Defence Request;¹⁰ (ii) appointed the medical expert (the “Appointed Expert”) suggested by the Registry to conduct a medical examination of Witness P-0790,¹¹ and (ii) ordered the Legal Representative to seek the Witness’s formal consent to the medical examination and to the transmission of the expert’s report to the parties and participants.¹² The Chamber ordered the Legal Representative to file the witness’s written consent in the record of the case by midday on 28 January 2016.¹³ The Chamber further found it appropriate, provided the witness gave his consent, that the Legal Representative attend the medical examination as envisaged by the terms of the Protocol on dual status witnesses.¹⁴ In the same Order, the Chamber noted that it would be *“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.”*¹⁵

7. On 27 January 2016, the Legal Representative obtained P-0790’s written consent as requested by the Chamber in its Order, which he transmitted to the Chamber, parties and participants by way of a courtesy copy prior to formally filing it in the case record on 28 January 2016.¹⁶

8. On 28 January 2016, Witness P-0790 was examined by the Appointed Expert.

¹⁰ See the “Order appointing an expert to conduct a medical examination of Witness P-0790”, No. ICC-01/04-02/06-1110-Conf, 27 January 2016 (the “Order”), paras. 14.

¹¹ *Idem*, paras. 11 and 14.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 14.

¹⁶ See the “Notification to the Trial Chamber of Consent Forms in Relation to Medical Examination of OTP-0790 and Request to Provide the Witness with Assistance of a [REDACTED] Interpreter for the Purpose of his Medical Examination”, No. ICC-01/04-02/06-1114-Conf, 28 January 2016. See also *Ibid.*, Annexes A and B.

9. On 5 February 2016, the Registry submitted the Appointed Expert's medical report (the "Medical Report") to the Chamber and the Legal Representative on an *ex parte* basis.¹⁷

10. On 8 February 2016, the Chamber instructed the Legal Representative to "*propose any necessary redactions*" to the Medical Report by the filing deadline on 18 February 2016.¹⁸

11. On 15 February 2016, the Legal Representative submitted proposed redactions to the Medical Report and justifications therefore to the Chamber on an *ex parte* basis.¹⁹

12. On 17 February 2016, the Chamber approved the redactions the Legal Representative sought in light of the justifications provided and instructed the Registry to reclassify as confidential both the Legal Representative's submissions as well as the redacted Medical Report and notify these documents to the parties and participants in the case.²⁰ The Chamber further instructed that any submissions relating to the admissibility of the report transmitted shall be filed within 21 days of notification or the reclassified redacted Medical Report.²¹ The reclassified documents were notified on the same day.

¹⁷ See the "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", No. ICC-01/04-02/06-1149-Conf, 5 February 2016 and confidential *ex parte* only available to the Legal Representative of Victims Annex (the "Medical Report").

¹⁸ See Email Communication from the Chamber to the Legal Representative dated 8 February 2016 at 13:36.

¹⁹ See the "Request for Redactions to be applied to the Medical Report of the Appointed Expert Examining OTP-P-0790 for the purposes of transmission to the parties and participants", No. ICC-01/04-02/06-1171, 15 February 2016.

²⁰ See Email Communication from the Chamber to the Registry, parties and participants dated 17 January 2016 at 10:03.

²¹ *Idem*.

13. On 8 March 2016, the Prosecution submitted the “Prosecution’s Request to Admit the Expert Medical Report for Witness P-0790” wherein it requested that the Medical Report be admitted into evidence.²²

III. SUBMISSIONS ON THE ADMISSIBILITY OF THE MEDICAL REPORT

14. The Legal Representative respectfully submits that the Medical Report in its redacted form – as transmitted to the parties and participants – meets the admissibility criteria established in the legal framework of the Court, and should accordingly be admitted into evidence.

15. In accordance with articles 64(9)(a) and 69 of the Rome Statute and rule 63 of the Rules of Procedure and Evidence (the “Rules”), the basic general criteria for admissibility of evidence set forth by different Chambers of the Court²³ also apply to expert reports and related material²⁴ which is supported by a literal reading of the regulation 44(5) of the Regulations of the Court, according to which “[t]he Chamber may issue any order as to [...] the manner in which [expert] evidence is to be presented.” Furthermore, in the present case, 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.”²⁵

²² See the “Prosecution’s Request to Admit the Expert Medical Report for Witness P-0790”, No. ICC-01/04-02/06-1199-Conf, 8 March 2016.

²³ See the “Decision on Prosecution’s first request for the admission of documentary evidence” (Trial Chamber VI), No. ICC-01/04-02/06-1181, 19 February 2016, paras. 6-7; the “Decision on the Prosecution’s Request for Admission of Documentary Evidence (Trial Chamber VI), No. ICC-01/04-02/06-1353, 10 June 2014, paras. 13-14; the “Decision on the admissibility of four documents” (Trial Chamber I), No. ICC-01/04-01/06-1399-Corr, 20 January 2011, paras. 27-32.

²⁴ See e.g. the “Decision on the Prosecution’s application for admission of four documents from the bar table pursuant to Article 64(9)” (Trial Chamber I), No. ICC-01/04-02/06-2662-Conf, 16 December 2010 (reclassified as public as per the instruction of Trial Chamber I dated 20 January 2011), para. 9.

²⁵ See the “Decision on the conduct of proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, para. 36. See also the “Second Decision on the Prosecution’s Request for Admission of Documentary Evidence (Trial Chamber V(A))”, No. ICC-01/04-02/06-1931-Red, 20 July 2015, para. 7.

16. With regard to the reports of expert witnesses, the jurisprudence of the *ad hoc* tribunals also provides relevant guidance. The ICTR Appeals Chamber stressed in particular that “[j]ust as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.”²⁶ It also illustrates that a person providing an expertise must be so qualified and the content of his or her expert report must fall within the field of his or her accepted expertise in order to render it admissible.²⁷ Nevertheless, the report of an expert must not assume the role of the chamber in reaching conclusions or giving opinion on matters the determination of which falls within the exclusive purview of the chamber.²⁸ An expert report may only offer opinions and draw conclusions within the confines of the expert’s expertise.²⁹ Only those parts of the evidence which are based on the expert’s specialised knowledge, skills or training will be treated as expert evidence.³⁰ Furthermore, experts are obliged to testify or offer their opinion with the utmost neutrality and with scientific objectivity.³¹

²⁶ See ICTR, *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 949.

²⁷ See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, (Trial Chamber), 5 April 2013, para. 13, referring to ICTY, *The Prosecutor v. Vujadin Popović et al.* Case No. IT-05-88-AR73.2., Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 21; *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Admission of Expert Report of Geoffery Corn, 22 September 2009, para 5.

²⁸ See ICTY, *The Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on the Admission of the Expert Report of Mr Radomir Milašinović (Trial Chamber II) 1 June 2010, p. 2. In this case, the Trial Chamber excluded two pages from the report, but admitted the remainder. It found that the information contained on the two pages it excluded “solely provide opinions and conclusions on some of the most central and critical facts in this case, thus directly encroaching on the role of the Chamber.” See *ibid.*

²⁹ See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Request to Exclude Portions of Reports of Mile Poparić, 12 March 2013, para. 16; ICTY, *The Prosecutor v. Zdravko Tolimir*, Case No. IT-0588/2-T, Decision on Admission of Expert Report of Ratko Škrbić with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012, para. 14.

³⁰ See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Request to Exclude Portions of Reports of Mile Poparić, 12 March 2013, para. 16; ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission on the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis, 9 November 2006, para. 12

³¹ See ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appeal Judgement, 14 December 2015, para. 424. See also ICTR, *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 199; ICTY, *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 27.

17. The Legal Representative submits that in the present case, the Medical Report squarely meets all said criteria, as the conclusions drawn therein are exclusively based on the medical expertise of its author and do not make any determination that infringes upon the role of the Chamber as the trier of fact.

18. The Medical Report is *prima facie* relevant. The veracity of Witness P-0790's assertion that he had [REDACTED] has been called into question by the Defence who requested that he undergo a medical examination to this effect. Having ordered the medical examination, the Chamber implicitly accepted that the Medical Report would be relevant to issues in the proceedings. The Medical Report may assist the Chamber in assessing the credibility of Witness P-0790 as a whole as well as specifically that of the account Witness P-0790 has given of the circumstances in which he sustained the injury.

19. As regards the reliability of the Medical Report, it is printed on paper bearing a letterhead indicating the name, further particulars, and address of the Appointed Expert, as well as the date it was compiled and the Appointed Expert's signature. In these circumstances, the reliability of the document is clearly established on a *prima facie* basis.

20. As has previously been held by Trial Chamber I, "*ordinarily, the Chamber needs to consider, inter alia, whether it is fair to admit material without calling the relevant witnesses to give oral evidence*"³² but that in the circumstances of that case, namely where the defence had not objected and the Chamber itself had consented to the expertise being carried out, it was "*unnecessary to consider this particular issue further*".³³

³² See the "Decision on the Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9) (Trial Chamber I)", No. ICC-01/04-02/06-2662-Conf, 16 December 2010, (reclassified as public as per Trial Chamber I's instruction of 20 January 2011), para. 14.

³³ See the "Decision on the Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9) (Trial Chamber I)", No. ICC-01/04-02/06-2662-Conf, 16 December 2010, (reclassified as public as per Trial Chamber I's instruction of 20 January 2011), para. 14.

21. In the present case, the Chamber has previously admitted into evidence the report of an expert witness on the basis that the Defence neither challenged expert witness Garretón's qualification as an expert nor opposed the Prosecution request to tender his prior recorded testimony and associated exhibits – including the report – pursuant to rule 68(3) of the Rules, and acknowledged the relevance of his report to the present proceedings.³⁴

22. It is thus submitted that the fact that it was the Accused himself who requested that the Chamber order the medical examination of Witness P-0790, coupled with the fact that the Appointed Expert was appointed and instructed by the Chamber rather than by the opposing party or the participants, obviates the necessity to consider this issue further.

23. Accordingly, the Legal Representative respectfully submits that the Medical Report in its redacted form – as transmitted to the parties and participants – meets the admissibility criteria established in the legal framework of the Court and should be admitted into evidence.

24. Furthermore, the Legal Representative takes note of the Appointed Expert's conclusions and recommendations regarding the health conditions of Witness P-0790 contained in the Medical Report, in particular:

[REDACTED];³⁵

[REDACTED];³⁶

[REDACTED]³⁷

25. In light of said conclusions, it appears obvious that the impact P-0790's [REDACTED] injury has on the Witness's daily life [REDACTED], and that the

³⁴ See the "Preliminary Ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P0931 (Trial Chamber VI)", No. ICC-01/04-02/06-845, 21 September 2015, para. 15.

³⁵ See the Medical Report, *supra* note 17, p. 15.

³⁶ *Idem*, p. 14 (Emphasis added).

³⁷ *Ibid.*, p. 13 (Emphasis added).

Witness's physical injury may be addressed with appropriate medical assistance, such as [REDACTED]. Furthermore, it appears that the Witness may have suffered from [REDACTED] and accordingly may need [REDACTED] assistance.

26. Given the statutory duties of the Court to *"take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses"*,³⁸ and more specifically the responsibility of the VWS in assisting all witnesses and victims who appear before the Court *"in obtaining medical, psychological and other appropriate assistance"*,³⁹ the Legal Representative informs the Chamber that he will refer the Witness to the care of the VWS in order to provide him with the necessary [REDACTED] assistance as appropriate. The Legal Representative reserves his right to seize the Chamber with the issue at a later stage should the need to do so arise.

IV. CONFIDENTIALITY

27. Pursuant to regulations 23bis(1) and (2) of the Regulations of the Court, the present submissions are classified as "confidential" as they refer to the Medical Report marked with the same classification as well as to the sensitive information regarding the health conditions of Witness P-0790.

FOR THE FOREGOING REASONS the Legal Representative respectfully

REQUESTS the Chamber to rule that the Medical Report with regard to Witness P-0790 meets the admissibility criteria and to admit the Medical Report into evidence;

INFORMS the Chamber that he will refer Witness P-0790 to the VWS in order to provide him with the necessary [REDACTED] assistance as appropriate; and

³⁸ See article 68(1) of the Rome Statute.

³⁹ See rule 17(2)(a)(iii) of the Rules of Procedure and Evidence.

RESERVES his right to seize the Chamber at a later stage in relation to the issue of [REDACTED] assistance to be provided to Witness P-0790, should the need to do so arise.

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', followed by a period.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 23^{de} Day of May 2016
At The Hague, The Netherlands