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

Date: **26 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 "Submissions on behalf of Mr Ntaganda concerning the admissibility of the Appointed Expert's Medical Report regarding Witness P-0790", 10 March 2016, ICC-01/04-02/06-1204-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to : (i) the *Order appointing an expert to conduct a medical examination of Witness P-0790* (“Chamber’s Order”) dated 27 January 2016¹; (ii) the instructions communicated by Trial Chamber VI (“Chamber”) to the Parties and Participants by way of email on 17 February 2016, and ; (iii) reclassification as Confidential of ICC-01/04-02/06-1171-Conf-Exp and its Annex A (redacted version of the Appointed Expert’s Medical Report relating to Witness P-0790) on 17 February 2016, Counsel representing Bosco Ntaganda (“Defence”) hereby submit these:

**Submissions on behalf of Mr Ntaganda concerning the admissibility of the
Appointed Expert’s Medical Report regarding Witness P-0790**

“Defence Submissions”

INTRODUCTION

1. The Defence hereby files its submissions regarding the admissibility of the Appointed Expert’s Medical Report regarding Witness P-0790 (“Expert Report”).
2. For the reasons set out below, the Defence opposes the admission of the Expert Report at least until Dr Eric Perich, the Expert appointed by the Chamber (“Medical Expert”) is called to testify *viva voce* before the Chamber and the Defence is given the opportunity to cross-examine him.
3. The Defence acknowledges the relevance of the Expert Report.
4. The Defence also recognizes the qualifications of the Medical Expert appointed by the Chamber to conduct a medical examination of Witness P-0790.

¹ ICC-01/04-02/06-1110-Conf.

5. Nonetheless, the Defence takes issue with the reliability of the Expert Report on the basis of the procedure followed by the Appointed Medical Expert.
6. More importantly, the Expert Report's failure to address important issues going to the credibility of Witness P-0790 undermines its probative value to such an extent that it cannot be admitted before cross-examination of the Medical Expert by the Defence.

BACKGROUND INFORMATION

7. On 18, 19 and 21 January 2016, Witness P-0790 testified *inter alia*, to having been shot '[REDACTED]' by UPC soldiers while fleeing from Kobu during an attack. Cross-examined by the Defence, Witness P-0790 indicated that he was 'ready to give [his] consent' to undertaking a medical examination to verify this injury.²
8. On 24 January 2016, the Defence filed its Request on behalf of Mr Ntaganda seeking an order from the Chamber that Witness P-0790 be examined by an independent medical expert.
9. The Defence submitted that whether or not Witness P-0790 was shot by UPC/FPLC soldiers while fleeing 'is an important aspect of the Prosecution's case' as well as 'an issue that strikes at the core of its credibility' which significantly affects the probative value that can be attributed to his testimony.³
10. Indeed, in his statement given to the Prosecution as well as during his testimony before the Chamber, Witness P-0790 stated that when fleeing from Kobu in February 2003, *inter alia*: (i) UPC soldiers shot him in [REDACTED], after which he fell down and started crawling to [REDACTED] where he

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

³ ICC-01/04-02/06-1101, para. 5.

could hide; (ii) when his family saw his injuries, there was no longer any bullet in his body; (iii) as there was no medicine available, they turned to a traditional healer who gave him herbs; (iv) he was bleeding during the night and the next morning got another dose of traditional medicine; (v) within three days he felt better and started walking again; (vi) as a result of the gunshot, he cannot [REDACTED]; (vii) despite the injury he claims to have suffered, Witness P-0790 managed, after only three days, to travel by foot to the following destinations, [REDACTED] ; and (viii) after the war, he went to [REDACTED] to the hospital for surgery and the doctors found out that part of [REDACTED] had been damaged by the bullets.

11. Consequently, the Defence requested the Chamber to appoint and instruct a medical expert to determine: (a) whether Witness P-0790's body bears marks that he was shot in [REDACTED] and is [REDACTED]; (b) if so, whether Witness P-0790's condition is consistent with his account of the event, and; (c) whether his condition can be the result of events which took place in 2003.⁴
12. On 27 January 2016, the Chamber granted the Defence Request and appointed Dr Pierre Perich as Medical Expert.⁵ The Chamber instructed the Medical 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."*⁶
13. On 28 January 2016, between 11 am and 4pm, the Medical Expert examined Witness P-0790 in the presence of his legal representative and a Swahili interpreter.

⁴ ICC-01/04-02/06-1101-Conf, para. 8.

⁵ ICC-01/04-02/06-1110-Conf.

⁶ ICC-01/04-02/06-1110-Conf, para. 13.

SUBMISSIONS

I. The Expert Report lacks sufficient reliability

14. According to the Chamber's Order, the Medical Expert was to "assess and address [...] 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".⁷
15. Consequently, when setting out the modalities of the medical examination of Witness P-0790 – and as suggested by the Prosecution⁸ – the Chamber ordered the Registry to provide the Medical Expert with the transcript of his *viva voce* testimony before the Chamber.
16. Significantly, it appears from the Expert Report that the Medical Expert based its conclusion not only on the basis of Witness P-0790's testimony but also on the basis of extensive information obtained directly from Witness P-0790 during his medical examination.
17. Indeed, the Expert Report refers on several occasions⁹ to: "*Selon les dires de P-0790*" and provides an account of facts reported directly to him by the witness, which go way beyond medical information referred to by the Medical Expert in his report as "*doléances*".¹⁰
18. To provide but one example, the Medical Expert mentions in his report: «*La plaie sera recousue par un guérisseur et il sera soigné suivant des méthodes*

⁷ ICC-01/04-02/06-1110-Conf, para. 13 (emphasis added).

⁸ Email from the Prosecution to the Chamber on 25 January 2016.

⁹ ICC-01/04-02/06-1149-Conf-AnxA-Red, pages 3, 4 and 5. Moreover, on page 14 of the Expert Report, the Expert mentioned the "auditions" he had with the witness which support the fact that the Expert conducted a real interview with the witness.

¹⁰ ICC-01/04-02/06-1149-Conf-AnxA-Red, page 8.

traditionnelles », a fact never mentioned before by Witness P-0790 on which the Medical Expert ground his report.¹¹

19. Evidently, in obtaining detailed factual information directly Witness P-0790 and using the same to arise at his conclusion, the Expert ventured outside the scope of the requested expertise.
20. Indeed, the collection of such subjective as well as new information and its use to arise at its conclusions impairs the partiality and reliability of the Expert Report.
21. As a consequence, and at a minimum, the Expert Report cannot be admitted into evidence before the Defence is given the opportunity to cross-examine the Medical Expert on his methodology.

II. The Report is incomplete

22. The Defence posits that the Expert Report is incomplete and that several questions remains unanswered that need to be addressed during the testimony of the Expert, which is required.
23. Firstly, while the Medical Expert addresses the nature of the scares and other marks on the body of Witness P-0790, several questions remains unanswered concerning the timing of these injuries and the manner in which the injuries would have be caused to Witness P-0790.
24. Regarding the former, the Medical Expert concludes that the “*cicatrices sont anciennes et peuvent être contemporaines des faits*” without providing medical or scientific information as to when these injuries took place.

¹¹ ICC-01/04-02/06-1149-Conf-AnxA-Red, pages 5 and 13.

25. Regarding the latter, the Medical Expert provides little if any information regarding issues such as points of entries, points of exit and direction of the bullet wound Witness P-0790 would have suffered.
26. Moreover, in drawing conclusion on this issue, the Medical Expert refers to information obtained directly from Witness P-0790 without exploring other scenarios.
27. Secondly and more importantly, the Medical Expert fails to address significant issues which go directly to the credibility of Witness P-0790 when comparing the scares and marks on his body today with his testimony.
28. For example, the Expert did not draw any conclusion regarding the account provided by the witness that he walked four to five kilometers “dans la brousse” while bleeding heavily from a severe and opened wound.
29. Strikingly, the Medical Expert did not address whether the account of the witness that three days after being shot he was able to walk long distances for several hours going from town to town to obtain various information¹² – is plausible given the nature of the injury sustained.
30. This is particularly important in the light of the information provided by Witness P-0790 to the Expert, namely that : (i) «*Longtemps après, j’ai consulté un médecin en raison d’un saignement et de douleurs quand je travaillais*»¹³; (ii) «*il dit ne plus éprouver de douleurs locales au niveau [REDACTED], excepté lors des efforts ou d’un travail fatigant*»¹⁴, and ; (iii) «*Il a consulté un médecin il y a longtemps qui avait vérifié la plaie, lui avait donné un médicament pour la douleur*»¹⁵.

¹² ICC-01/04-02/06-T-57-Conf-Eng, page 9 line 7 – page 12 line 2: Witness P-0790 testified that three day after being shot in [REDACTED], he walked between [REDACTED] and [REDACTED], [REDACTED] and [REDACTED].

¹³ ICC-01/04-02/06-1149-Conf-AnxA-Red, page 5 (emphasis added).

¹⁴ ICC-01/04-02/06-1149-Conf-AnxA-Red, page 8 (emphasis added).

¹⁵ ICC-01/04-02/06-1149-Conf-AnxA-Red, page 8 (emphasis added).

31. The Expert did not draw any conclusion on how these two ostensible conflicting facts may or may not be compatible while this strikes at the core of Witness P-0790's credibility.
32. Consequently, the Expert's failure to address this matter undermines the probative value of its Expert Report which cannot be admitted, at least until he is cross-examined by the Defence.

III. Cross-examination of the Expert is necessary before his report being admitted

33. On the contrary of what the Legal Representative argues in its submissions¹⁶, the fact that the Defence itself requested that the Chamber order the medical examination of Witness P-0790 and that the Expert was appointed and instructed by the Chamber, does not preclude the Defence to cross-examine the Expert.
34. In this regard, the Legal Representative misrepresents the position of the Defence and of the Chamber on such an important question when stating that "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"¹⁷ without mentioning that the Defence had the opportunity to cross-examine Mr Garretón.
35. The Prosecution itself argued regarding the admission of Expert Reports, that even if the Defence was challenging the relevance of these reports, competence of the Experts and lack of impartiality of the Experts, the Defence

¹⁶ ICC-01/04-02/06-1203-Conf, para. 20-22.

¹⁷ ICC-01/04-02/06-1203-Conf, para. 21.

will have the opportunity to question the Experts on these issues during cross-examination.¹⁸ Furthermore, on this subject, the Chamber deferred consideration of the admissibility of the proposed expert reports.¹⁹

36. Consequently, the Defence posits that the admission of Dr Perich's Expert Report should be postponed until the Expert is called to testify *viva voce* before the Chamber and the Defence being given the opportunity to cross-examine him.

CONCLUSION

37. In light of the above, bearing in mind the lack of reliability of the Expert Report and the fact that it failed to address significant issues going to the credibility of Witness P-0790, the Defence respectfully submits that it cannot be admitted unless the Medical Expert is called to testify *viva voce* before the Chamber as the prejudicial effect of admitting the report far outweighs its probative value in its present state.

CONFIDENTIALITY

38. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, these Defence Submissions are classified as confidential, as it refers to filings bearing the same classification.

¹⁸ Prosecution's response to "Supplementary submissions on behalf of Mr Ntaganda in relation to proposed Expert witnesses, ICC-01/04-02/06-1032-Conf", ICC-01/04-02/06-1044, para. 12, 18, 26 and 31.

¹⁹ Decision on Defence preliminary challenges to Prosecution's expert witnesses, ICC-01/04-02/06-1159.

RESPECTFULLY SUBMITTED ON THIS 26th DAY OF MAY 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands