

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Public Redacted Version of the “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)”, 21 December 2016, ICC-01/04-02/06-1696-Conf

Source: Office of Public Counsel for Victims (CLR2)

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 represents Witness P-0790 as participating victim [REDACTED] in the proceedings,¹ hereby files his response to the “Prosecution’s Request for the Admission of the Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)” (the “Prosecution Request”) filed on 1st December 2016.²

2. The Legal Representative supports the Prosecution’s Request. The Expert Medical Report meets the criteria for admissibility and admission pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”) and should therefore be admitted into evidence under that provision. However, the Legal Representative would not, in principle, be opposed to the Medical Expert appearing before the Chamber for cross-examination and the Medical Report being admitted pursuant to rule 68(3) of the Rules instead.

II. PROCEDURAL BACKGROUND

3. 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”).³ On 25 January 2016, 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. Victim [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 “Prosecution’s Request for the Admission of the Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)”, No. ICC-01/04-02/06-1666-Conf, 1st December 2016 (the “Prosecution Request”).

³ 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.

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.⁴ The Chamber further instructed the Registry to provide observations on the relief sought by the same shortened deadline.⁵

4. 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 testimony.⁶

5. On 25 January 2016, the Chamber issued a preliminary ruling, instructing the Registry to identify a medical specialist with relevant forensic expertise to conduct a medical examination of Witness P-0790 by 29 January 2016.⁷

6. On 26 January 2016, the Registry transmitted to the Chamber the *Curriculum Vitae* of a medical specialist whom it had identified from its list of pre-approved experts as both qualified and available to conduct a medical examination of Witness P-0790 prior to 29 January 2016.⁸

7. On 27 January 2016, the Chamber issued its “Order appointing an expert to conduct a medical examination of Witness P-0790” (the “Order”) wherein it, *inter alia*, (i) granted the Defence Request;⁹ (ii) appointed the medical expert (the “Medical Expert”) suggested by the Registry to conduct a medical examination of Witness P-

⁴ See Email Communication from the Chamber to Parties, Participants, and Registry dated 25 January 2016 at 10:55.

⁵ *Idem*.

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 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.

⁹ 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, para. 14.

0790,¹⁰ 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.¹¹ The Chamber ordered the Legal Representative to file the witness's written consent in the record of the case by midday on 28 January 2016.¹² It further ruled that it "*will decide on [...] the procedure relating to admissibility.*"¹³

8. 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 2016.¹⁴

9. On 28 January 2016, Witness P-0790 was examined by the Medical Expert.

10. On 5 February 2016, the Registry submitted the Medical Report to the Chamber and the Legal Representative on an *ex parte* basis.¹⁵

11. 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 2016.¹⁶

12. On 15 February 2016, the Legal Representative made submissions on proposed redactions to the Medical on an *ex parte* basis to the Chamber.¹⁷

¹⁰ *Idem*, paras. 11 and 14.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 14.

¹⁴ 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 Swahili-French 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.

¹⁵ 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").

¹⁶ See Email Communication from the Chamber to the Legal Representative dated 8 February 2016 at 13:36.

13. On 17 February 2016, the Chamber approved the sought redactions 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.¹⁸ Any submissions relating to the admissibility of the redacted Medical Report were to be filed within 21 days of its notification.¹⁹

14. 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 (the "8 March Request").²⁰

15. On 9 March 2016, the Legal Representative filed his submissions on the admissibility of the Medical Report, arguing that the criteria for admission were met and that the Medical Report should hence be admitted as evidence in the case.²¹

16. On 10 March 2016, the Defence filed its submissions on the admissibility of the Medical Report.²² It argued that, while the Medical Report was relevant, its admission would not be appropriate without the Medical Expert appearing before the Chamber for cross-examination on the methods used during his examination.²³ The Defence further contended that the Medical Report lacked sufficient reliability and was incomplete in that it did not address several important questions.²⁴

¹⁷ 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.

¹⁸ See Email Communication from the Chamber to the Registry, parties and participants dated 17 January 2016 at 10:03.

¹⁹ *Idem*.

²⁰ 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.

²¹ See 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", No. ICC-01/04-02/06-1203-Conf, 9 March 2016 (the "LRV Submissions on Admissibility"), paras 14-23 and 27.

²² See the "Submissions on behalf of Mr Ntaganda concerning the admissibility of the Appointed Expert's Medical Report regarding Witness P-0790", No. ICC-01/04-02/06-1204-Conf, 10 March 2016 (the "Defence Submissions on Admissibility").

²³ *Idem*, paras. 2-4, 21 and 36.

²⁴ *Ibid.*, para. 22.

17. On 9 May 2016, the Chamber rendered its decision on the Prosecution's 8 March Request, rejecting it without prejudice and indicating that any renewed request could appropriately be made pursuant to Rule 68 of the Rules.²⁵

18. On 1st December 2016, the Prosecution filed the Request, whereby it seeks admission into evidence of the Medical Report pursuant to rule 68(2)(b) of the Rules.²⁶

III. SUBMISSIONS ON THE ADMISSIBILITY OF THE MEDICAL REPORT

19. As such, the Medical Report meets all the criteria for admissibility in that it is probative, relevant, reliable, and its admission would not be prejudicial to the Accused. In this regard, the Legal Representative incorporates by reference his previous detailed submissions on the admissibility of the Medical Report.²⁷ He further concurs with the Prosecution in that, contrary to the Defence's previous submissions, the Medical Expert included his conclusions on the timing of the injuries, as well as his findings on the entry- and exit points of the bullet wounds, and the injury's impact on P-0790 mobility in the Medical Report.²⁸ Any further conclusions on these matters are for the Judges to draw and are not within the ambit of the Medical Expert's role.

20. In the Legal Representative's submission, admission pursuant to rule 68(2)(b) of the Rules would be the most appropriate avenue for admission of the Medical Report in the circumstances. Given its probative value, relevancy, and reliability, it meets the requirements for admission under rule 68(2)(b) of the Rules. The Medical Report relates to an issue that is not materially in dispute, given that it relates to a matter collateral to the *viva voce* testimony of a witness heard in the case. It is in fact

²⁵ See the "Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790" (Trial Chamber VI), No. ICC-01/04-02/06-1311, 9 May 2016, para 15.

²⁶ See the Prosecution Request, *supra* note 2, paras. 1 and 41.

²⁷ See the LRV Submissions on Admissibility, *supra* note 21, paras. 14-23.

²⁸ See the Prosecution Request, *supra* note 2, paras. 33-35.

of a corroborative nature and moreover does not relate to the acts and conduct of the Accused. Accordingly, it would be most appropriate to be admitted under rule 68(2)(b) of the Rules.²⁹

21. The Legal Representative, however, notes that the Defence previously argued that the Medical Report “cannot be admitted before cross-examination of the Medical Expert by the Defence”³⁰ and pointed to several matters it considered needed to be explored with the Medical Expert before the Medical Report could be admitted into evidence.³¹ While the Legal Representative does not in principle oppose that the Medical Expert be called for cross-examination, he nevertheless avers that admission pursuant to rule 68(2)(b) would be the most expeditious way to deal with this ancillary matter. The Appeals Chamber has held that “Trial Chambers may take good trial management into account when making a determination under rule 68(3) of the Rules”³² and is “not obliged to consider factors beyond formal requirements.”³³

22. The Medical Report should be admitted into evidence at this stage. It is in the interests of victim [REDACTED] – who is a participating victim in this case – to admit the Report so as to put on the record the extent of the harm he has suffered as a result of the events about which he testified. It is equally fair and just to admit it for

²⁹ See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), No. ICC-02/11-01/15-744, 3 November 2016 (the “Gbagbo and Blé Goudé Judgment”), para. 65.

²⁹ See rule 68(2)(b)(i) of the Rules. See also the Gbagbo and Blé Goudé Judgment, *supra* note 29, para. 102. The Appeals Chamber stated that “[it] finds it useful to consider the relevant jurisprudence of that tribunal [of ICTY] given that the wording of rule 68(2)(b) of the Rules is based on the wording of rule 92 bis of the ICTY Rules.” Also, see the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386, 3 May 2011, para. 78. See ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, *Decision on Defence Motion to Admit the Evidence of Dragan Gajić Pursuant to Rule 92bis*, 17 December 2015, para. 8; *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, *Decision on Prosecution 39th Motion to Admit Evidence Pursuant to Rule 92bis – Witness RM-378*, 17 December 2013, paras. 10 and 12; *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, *Decision on Prosecution Motion to Admit GH-164’s Evidence pursuant to Rule 92 bis*, 22 April 2013, para. 8.

³⁰ See the Defence Submissions on Admissibility, *supra* note 22, para. 6.

³¹ *Idem*, para. 22.

³² See the Gbagbo and Blé Goudé Judgment, *supra* note 29, para. 1.

³³ *Idem*, para. 3.

the simple reason that considerable litigation and resources have been spent on its creation. As the Chamber has previously declined to admit the Medical Report pursuant to articles 54(1), 64(2) and 64(9)(a), 69(3) and (4) of the Statute and rules 63(2) and 64 of the Rules indicating that it would consider it appropriate that admission be sought pursuant to rule 68 of the Rules, the Chamber should grant the Prosecution's Request or *proprio motu* secure the attendance of the Medical Expert for cross-examination and admit the Medical Report pursuant to rule 68(3) of the Rules.

IV. CONFIDENTIALITY

23. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as "confidential" as they refer to documents marked with the same classification.

FOR THE FOREGOING REASONS the Legal Representative respectfully

REQUESTS that the Chamber admit the Medical Report into evidence.

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 27th Day of January 2017

At The Hague, The Netherlands