

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **30 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***

Confidential

**Prosecution's response to the Defence application for leave to appeal the
Chamber's decision to admit the medical report related to Witness P-0790
under Rule 68(2)(b)**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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

I. Introduction

1. The Defence's Application¹ seeking leave to appeal Trial Chamber VI's² decision to admit the Medical Report relating to Witness P-0790³ should be dismissed because it does not meet the threshold requirements for leave to appeal under article 82(1)(d) of the Rome Statute.

2. The Issue referred to in the Application⁴ does not qualify as an appealable issue within the meaning of article 82(1)(d) and it does not arise from the Decision. In addition, the Defence fails to demonstrate that the Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and that the Appeals Chamber's immediate intervention may materially advance the proceedings.

II. Level of Confidentiality

3. Pursuant to regulation 23bis(2) of the Regulations of the Court, this filing is submitted as confidential because it responds to the Application that is subject to the same classification. The Prosecution does not object to the re-classification of this filing as public.

III. Submissions

a. The Issue is not an appealable issue and does not arise from the Decision

4. The Issue, namely "[w]hether a report: (i) prepared by a qualified expert, in relation to testimony of a fact witness and potentially corroborative of the witness's

¹ ICC-01/04-02/06-1748-Conf ("Application").

² ("Chamber").

³ ICC-01/04-02/06-1731 ("Decision") ("Medical Report").

⁴ ("Issue").

testimony; (ii) commissioned by the Chamber; (iii) contested by the Defence; and (iv) which was prepared contrary to the Chamber's directions, is admissible pursuant to Rule 68(2)(b), without providing the Defence an opportunity to cross-examine the expert on the impact of his failure to abide with the Chamber's directions"⁵ is not an appealable issue within the meaning of article 82(1)(d).

5. As held by the Appeals Chamber, an "issue" is an identifiable and discrete subject or topic requiring a decision for its resolution and not merely a matter over which there is disagreement or conflicting opinion.⁶ The Issue raised in this Application is nothing but a general question whether the Chamber's decision to admit the Medical Report pursuant to rule 68(2)(b) is correct. The Defence fails to allege a concrete error or raise a subject underlying the Decision which would impact on its correctness. In fact, when elaborating on the Issue, the Defence merely repeats its prior arguments,⁷ which were rejected by the Chamber,⁸ and submits that the Medical Report relates to issues that are materially in dispute,⁹ that it exceeds the scope defined by the Chamber¹⁰ and that the Defence should therefore be given an opportunity to question the author of the Medical Report.¹¹ This falls short of establishing an appealable issue and is no more than a disagreement with the Chamber's Decision.

6. In addition, the Defence misappreciates the scope of the Decision and the Issue does therefore not arise from it. The Chamber admitted the Medical Report into evidence merely to assist it in determining the credibility of P-0790's evidence by addressing the question whether P-0790's injuries as noted during a medical

⁵ Application, para. 1; *see also* paras. 15-18.

⁶ *See* ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁷ ICC-01/04-02/06-1704-Conf, paras. 18-30.

⁸ Decision, paras. 9-15.

⁹ Application, paras. 16-17.

¹⁰ Application, para. 17.

¹¹ Application, paras. 16, 18.

examination are consistent with P-0790's narrative during his trial testimony.¹² In particular, the Chamber admitted the Medical Report insofar as it details: (i) the location of the Witness's injuries, including photographs and detailed description thereof; (ii) the likely cause of the Witness's injuries, including exploration of alternative theories of causation; and (iii) the potential timeframe in which the injuries were sustained, including the reason for this conclusion.¹³

7. The Chamber held that the Medical Report correctly assessed the consistency of P-0790's injuries as noted during a medical examination with P-0790's trial testimony.¹⁴ To the extent that the Medical Report includes additional details that P-0790 had raised during the medical examination,¹⁵ the Chamber expressly held that these details exceed the scope of the Medical Report.¹⁶ Accordingly, the Chamber will not consider them in its final judgment under article 74. In addition, the Defence does not argue that these additional details are inconsistent with P-0790's trial evidence. It therefore fails to show that they materially impacted on the conclusion reached in the Medical Report. Accordingly, the Issue does not arise from the Decision.

8. The Application should be dismissed on that basis alone.

b. The Issue does not affect the other article 82(1)(d) criteria

9. In any event, the Issue does not meet the other article 82(1)(d) criteria. The Defence fails to demonstrate either that the Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and that the

¹² Decision, paras. 8, 11-12; *see also* ICC-01/04-02/06-1110-Red, para. 13.

¹³ Decision, para. 11.

¹⁴ Decision, para. 12.

¹⁵ Application, paras. 17-18.

¹⁶ Decision, para. 12.

Appeals Chamber's immediate resolution of the Issue may materially advance the proceedings. The Application should also be dismissed on that basis.¹⁷

10. The Issue does not significantly affect the fair *and* expeditious conduct of the proceedings. The Defence's sole argument that the fairness of the proceedings is significantly affected rests on the erroneous and unsupported view that the admission of the Medical Report pursuant to article 68(2)(b) affects the Accused's right under article 67(1)(e) to examine witnesses and to challenge the evidence against him.¹⁸ However, this amounts to nothing more than a general disagreement with article 69(2) and rule 68(2)(b) that expressly allow for exceptions to the Accused's rights under article 67(1)(e). The Defence fails to make any concrete argument of unfairness in this case and merely states that the Chamber will have an "unbalanced portrayal of the evidence".¹⁹

11. The Defence further does not provide any arguments to explain how the Issue significantly affects the expeditious conduct of the proceedings, which is a cumulative part of the test. In addition, it does not even attempt to argue that the proposed Issue affects the outcome of the trial.

12. Finally, the immediate resolution of the Issue by the Appeals Chamber will not materially advance the proceedings.²⁰ The Defence's sole argument rests on the incorrect assumption that the Decision indicates that Chamber, in its judgment under article 74, will take into consideration facts included in the Medical Report that

¹⁷ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

¹⁸ Application, paras. 19-20. Note that the Defence incorrectly refers to article 67(1)(d), when paraphrasing from article 67(1)(e).

¹⁹ Application, para. 20.

²⁰ *Contra*, Application, paras. 21-23.

exceed the scope of the directions of the Chamber. As noted above,²¹ this is not the case and the Defence's argument has therefore no merit.

13. Immediate resolution of the Issue by the Appeals Chamber also will not materially advance the proceedings because the broad nature of the Issue is quintessentially a matter of discretion under rule 68(2)(b)(i). The Defence incorrectly asserts that any error in relying on portions of the Medical Report that are not properly introduced into evidence cannot be remedied.²² However, the Accused has the right to appeal the final judgment on the Chamber's reliance on any evidence including the Medical Report.

IV. Relief requested

14. For all the reasons above, the Application should be dismissed.



Fatou Bensouda
Prosecutor

Dated this 30th day of January 2017
At The Hague, The Netherlands

²¹ See para. 7 above.

²² Application, para. 23.