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

Date: **1 February 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 “Response on behalf of Mr Ntaganda to “Prosecution’s Request for the Admission of the Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)”, 27 December 2016, ICC-01/04-02/06-1704**

**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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**REGISTRY**

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Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the “Prosecution’s Request for the Admission of the Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)” submitted by the Office of the Prosecutor (“Prosecution”) on 1 December 2016 (“Prosecution Request”)<sup>1</sup>, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to “Prosecution’s Request for the Admission of the Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)”**

**“Defence Response”**

**INTRODUCTION**

1. The Defence opposes the Prosecution Request to admit the medical report for Witness P-0790 (“Medical Report”) as evidence without cross-examination. The Medical Report sought to be admitted does not meet the requirements for admission pursuant to Rule 68(2)(b).
2. First, the methodology of the Medical Report and the conclusions drawn by Dr Pierre Perich are in dispute as they are inherently linked to the assessment of testimony of Witness P-0790. Secondly, the Defence submits that the Medical Report lacks sufficient reliability for admission without cross-examination, in particular regarding the methodology, completeness and scope of the report. Accordingly, the Medical Report of Dr Perich can only be admitted after the Defence has had the opportunity to cross-examine the expert on these issues. That being said, the Defence would not oppose the admission of the report under Rule 68(3).

**PROCEDURAL BACKGROUND**

3. On 18 January 2016, during cross-examination by the Defence, Witness P-0790 gave [REDACTED] consent to an expert medical examination to assess the

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<sup>1</sup> ICC-01/04-02/06-1666-Conf.

purported injuries which constitute an important basis upon which [REDACTED] testimony can be assessed.<sup>2</sup>

4. On 24 January 2016, the Defence submitted a request seeking an order from the Chamber that Witness P-0790 be examined by an independent medical expert.<sup>3</sup>
5. On 25 January 2016, the Common Legal Representative of Victims of the Attacks (“Legal Representative”)<sup>4</sup> and the Prosecution<sup>5</sup> did not oppose the request.
6. On 27 January 2016, the Chamber appointed Dr Pierre Perich as medical expert.<sup>6</sup>
7. [REDACTED].<sup>7</sup>
8. [REDACTED].<sup>8</sup>
9. On 15 February 2016, the Legal Representative proposed redactions to the Medical Report.<sup>9</sup>
10. On 17 February 2016, the Chamber reviewed the redactions sought and found appropriate to transmit the suggested redacted version of the Report made by the Legal Representative.<sup>10</sup>
11. The Defence and the Prosecution received the Medical Report on the same day.<sup>11</sup>

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<sup>2</sup> ICC-01/04-02/06-T-54-CONF-ENG-ET, 49:3-10.

<sup>3</sup> ICC-01/04-02/06-1101-Conf.

<sup>4</sup> Email from the Legal representatives to the Chamber dated 25 January 2016 at 13:08.

<sup>5</sup> Email from the Prosecution to the Chamber dated 25 January 2016 at 14:46.

<sup>6</sup> ICC-01/04-02/06-1110-Conf.

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> ICC-01/04-02-06-1171-Conf.

<sup>10</sup> Email from the Chamber dated 17 February 2016 at 10:03.

<sup>11</sup> ICC-01/04-02/06-1149-Conf-AnxA-Red.

12. On 8 March 2016, the Prosecution sought the admission of Medical Report pursuant to Article 54(1), 64(2), (9)(a) and 69(3) and (4) and Rules 63(2) and 64.<sup>12</sup>
13. On 9 March 2016, the Legal Representative did not oppose the Prosecution request.<sup>13</sup>
14. On 10 March 2016, the Defence opposed the admission of the Medical Report unless the Defence has had the opportunity to cross-examine Dr Perich.<sup>14</sup>
15. On 9 May 2016, the Chamber rejected the Prosecution initial request and further considered “that it would be appropriate to seek the admission of the Report pursuant to Rule 68 of the Rules”<sup>15</sup>.
16. On 1 December 2016, the Prosecution submitted its request for admission of the Medical Report pursuant to Rule 68(2)(b).<sup>16</sup>
17. On 21 December 2016, the Legal Representative filed its submissions supporting the Prosecution Request. The Legal Representative added, however, that they would not be opposed to Dr Pierre Perich appearing before the Chamber for cross-examination pursuant to Rule 68(3).<sup>17</sup>

## SUBMISSIONS

### **I. Dr Perich’s Medical Report does not meet the minimum requirements pursuant to Rule 68(2)(b)**

18. In accordance with Rule 68(2)(b), the prior recorded testimony of a witness who is not present before the Court can only be admitted into evidence without cross-examination where it “goes to proof of a matter other than the acts and

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<sup>12</sup> ICC-01/04-02/06-1199-Conf.

<sup>13</sup> ICC-01/04-02/06-1203-Conf.

<sup>14</sup> ICC-01/04-02/06-1204-Conf.

<sup>15</sup> ICC-01/04-02/06-131, para. 15.

<sup>16</sup> ICC-01/04-02/06-1666-Conf.

<sup>17</sup> ICC-01/04-02/06-1696-Conf.

conduct of the accused” and if that condition is satisfied, the Chamber is further required to assess whether the statement<sup>18</sup>:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability

in order to determine if the prior record testimony should be admitted without cross-examination.

19. In the case of the Medical Report, at least two crucial criteria of Rule 68(2)(b) are not met as the Medical Report relates to issues that are materially in dispute and the Medical Report does not have sufficient indicia of reliability.

**A. The Medical Report relates to issues that are materially in dispute**

20. The Defence posits that witness P-0790’s narrative is not plausible in many ways, in particular with respect to the purported acts and conducts of the Witness [REDACTED]<sup>19</sup> and [REDACTED].<sup>20</sup> In this regard, Dr Perich’s examination of the Witness and medical report constitute important facts upon which the Chamber can evaluate the credibility of Witness P-0970 and on this basis, the probative value, in any, which can be attributed to his testimony.
21. Witness P-0790’s narrative, the plausibility of his narrative, the credibility of the Witness and the weight, if any, which can be attributed to his narrative are all materially in dispute. Accordingly, considering that the Medical Report is directly linked to the issues in dispute, it is necessary for the expert to be cross-examined before his report can be admitted.

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<sup>18</sup> Rule 68(1) of the Rules.

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

22. Moreover, considering that Dr Perich's Medical Report is based on new information provided to him by the Witness – information which was not provided by the witness during his testimony even though [REDACTED] had ample opportunity and would have been expected to provide such information – it is crucial to determine to what extent Dr Perich was influenced by this information, which can only be achieved by cross-examining the expert.
23. What is more, it is unknown whether more 'new information' was provided to Dr Perich by Witness P-0790 but which the expert chose not to include in his report. This is yet another reason why Dr Perich must be cross-examined before his report can be admitted.
24. Lastly, the Medical Report does not draw any conclusions on certain matters that are in dispute, such as the plausibility and possibility [REDACTED].<sup>21</sup> The precise nature of [REDACTED] would undoubtedly influence any conclusions that Dr Perich could draw on this issue.<sup>22</sup> These issues must be addressed during the cross-examination of Dr Perich.

**B. Dr Perich's Medical Report lacks sufficient reliability to be admitted without cross-examination**

25. The Defence maintains its position in its earlier submissions on behalf of Mr Ntaganda concerning the admissibility of the Appointment Expert's Medical Report regarding Witness P-0790 ("Defence Submissions")<sup>23</sup> in regards to the reliability of the Medical Report on the basis of the procedure followed by Dr Perich.<sup>24</sup> The Defence further submits that the Medical Report is not sufficiently reliable for admission pursuant to Rule 68(2)(b) and requires cross-examination.

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<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> ICC-01/04-02/06-1204-Conf.

<sup>24</sup> ICC-01/04-02/06-1204-Conf, para 5.

26. Additionally, the Medical Report does not address certain important issues related Witness P-0790's account that could very well impact the probative value that can be attributed to the report, which can only be remedied through the testimony of Dr Perich.
27. Dr Perich was asked to "assess and address in his report, to the extent possible, whether alleged injuries to the Witness's genital area are consistent with [REDACTED] account of the injury *as set out in his trial testimony*, including considerations such as location of injury, cause and approximate date".<sup>25</sup> However, it stands from the Medical Report that the conclusions drawn by Dr Perich are not derived solely from Witness P-0790's testimony before the Chamber but also on new information provided by Witness P-0790 during [REDACTED] medical examination.
28. By way of example, Dr Perich was informed that [REDACTED] Witness P-0790's injuries,<sup>26</sup> a fact that was not mentioned during [REDACTED] testimony before the Chamber only [REDACTED] days earlier. Any variation concerning the type of treatment or the timing of the treatment would affect not only the testimony of Witness P-0790 but also the conclusions drawn by Dr Perich.
29. It is not only necessary that this new and different information provided to Dr Perich by Witness P-0790 be addressed during cross-examination, it is also essential that Dr Perich provide an explanation as to his methodology and detail exactly on what his conclusions were drawn.
30. The reliability of the Medical Report cannot be determined until these questions are answered during cross-examination. Allowing the Medical Report to be admitted without cross-examination would result in conflicting information on Witness P-0790's narrative as well as uncertainty as to how the

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<sup>25</sup> ICC-01/04-02/06-1110-Conf, para.13 [emphasis added].

<sup>26</sup> ICC-01/04-02/06-1149-Conf-AnnA-Red, p.5 and 13; See ICC-01/04-02/06-1204-Conf, para.18.

conclusions of Dr Perich were drawn, being admitted into evidence. This can only be resolved by allowing the Defence to cross-examine Dr Perich on his methodology.

**E. The interests of justice will only be well-served by adducing the testimony of Dr Pierre Perich pursuant Rule 68(3)**

31. Article 69 of the Statute stipulates “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence”. As further stated by the Chamber, Rule 68 is an exception to “the principle of the primacy of orality before the Court”.<sup>27</sup>
32. The Chamber noted in the context of the Medical Report of Dr Perich “that experts’ reports have been admitted into evidence in the present case in accordance with the procedure set out in sub-rule (3) of Rule 68”.<sup>28</sup> At this stage numerous other experts have been made available for cross-examination by the Defence and their reports have been admitted pursuant to Rule 68(3).<sup>29</sup> Defence submits that there is no reason to deviate from this practice in the case of Dr Perich.
33. The Defence submits that the interest of justice is not best served by admitting a Medical Report that contains information and conclusions that remain in dispute.

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<sup>27</sup> ICC-01/04-02/06-1311, para.14.

<sup>28</sup> ICC-01/04-02/06-1311, para.14.

<sup>29</sup> Expert Witness P-0931: Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845; ICC-01/04-02/06-T-32-CONF-ENG p. 82 l.9-p.83 l.10; Expert Witness P-0933: ICC-01/04-02/06-T-84-CONF-ENG, p.3 l.5-7; Expert Witness P-0939: ICC-01/04-02/06-T-143-CONF-ENG, p.15 l.13-14; Expert Witness P-0810: ICC-01/04-02/06-T-176-CONF-ENG, p. 17 l.24 – p.18 l.4; Expert Witness P-0420: ICC-01/04-02/06-T-123-CONF-ENG, p.17 l.20-22, p.35 l.1-4, p.48 l.14-15; Expert Witness P-0937, ICC-01/04-02/06-T-126-CONF-ENG, p. 38 l.3-8, p.40 l.1-2; Expert Witness P-0945, ICC-01/04-02/06-T-124-CONF-ENG, p.87 l.2-4.

**II. Dr Pierre Perich<sup>30</sup> is not a witness of the Prosecution's List of Witnesses nor has there been notice that he would be called as a Prosecution expert witness**

34. The Defence deems necessary to highlight that Dr Perich is not on the Prosecution's List of Witnesses.<sup>31</sup> In addition, Dr Perich is not on the Prosecution's list of expert witnesses<sup>32</sup>.

35. The Defence acknowledges that Dr Perich was appointed by the Chamber at its request. His medical report was subsequently submitted to the Legal Representative and provided to the parties in a redacted form. The Prosecution did not add him to its list of witnesses nor did the Prosecution, to the Defence's knowledge, obtain the unredacted version of the Medical Report. These important procedural steps should not be overlooked.

**III. The Medical Report should be submitted in an unredacted form**

36. The Defence notes that the redactions proposed by the Legal Representative<sup>33</sup> were authorised by the Chamber on 17 February 2016.<sup>34</sup> However, as the Prosecution is now seeking admission of the Medical Report, the Defence submits that a revision of the current redactions is required and that a lesser redacted version be communicated to the parties and participants.

37. The Defence posits that certain sections of the Medical Report, such as any prior medical record<sup>35</sup>, information related to additional health issues<sup>36</sup>, other information<sup>37</sup> and some photographs<sup>38</sup> are material to the Defence's preparation if the Medical Report is to be admitted and/or Dr Perich is to testify before the

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<sup>30</sup> According to the Registry, the witness identification code of Dr Pierre Perich is P-0975. ICC-01/04-02/06-1664, para. 1.

<sup>31</sup> Prosecution's List of Witnesses, ICC-01/04-02/06-491-Conf-AnnA, 2 March 2015.

<sup>32</sup> Prosecution's list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness, ICC-01/04-02/06-560, 16 April 2015.

<sup>33</sup> ICC-01/04-02/06-1203-Conf.

<sup>34</sup> Email from the Chamber dated 17 February 2016 at 10:03.

<sup>35</sup> ICC-01/04-02/06-1171-Conf, para 19; ICC-01/04-02/06-1149-Conf-AnnA-Red, p.3.

<sup>36</sup> ICC-01/04-02/06-1171-Conf, para 20; ICC-01/04-02/06-1149-Conf-AnnA-Red, p.8.

<sup>37</sup> ICC-01/04-02/06-1171-Conf, para 21; ICC-01/04-02/06-1149-Conf-AnnA-Red, p.5.

<sup>38</sup> ICC-01/04-02/06-1171-Conf, para 22; ICC-01/04-02/06-1149-Conf-AnnA-Red, p.9.

Chamber. Furthermore, this information is necessary should the Defence consider consulting a counter-expert in this regard.

### **CONFIDENTIALITY**

38. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is submitted on a confidential basis as it refers to a filing bearing the same classification.

### **RELIEF SOUGHT**

39. In light of the above submissions, the Defence respectfully request the Chamber to **REJECT** the Prosecution Request.

**RESPECTFULLY SUBMITTED ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2017**

A handwritten signature in dark ink, appearing to read 'StB-' with a stylized flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands