



Original: English

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

Date: 2 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 "Prosecution's Request for the Admission of the
Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b)",
1 December 2016, ICC-01/04-02/06-1666-Conf**

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 the 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

Introduction

1. The Prosecution seeks the admission of the Expert medical report (“Medical Report”) for Witness P-0790 pursuant to rule 68(2)(b).¹

2. At the request of the Defence, Trial Chamber VI (the “Chamber”) appointed a medical expert to examine Witness P-0790.² The medical expert concluded that P-0790’s wounds are consistent (“*très compatibles*”) with the events as recounted by the Witness in his testimony.³ The Prosecution first requested admission of the report pursuant to article 69.⁴ The Chamber ruled that rule 68 was the more appropriate basis for admitting the Medical Report.⁵

3. The Medical Report is relevant to a confined issue in the case. The expert’s conclusions do not concern the acts and conduct of the Accused. His report is relevant, probative of the charges, bears sufficient indicia of reliability and is corroborative of Witness P-0790’s testimony. Admitting the report under rule 68(2)(b) is expeditious and best serves the interests of justice.

4. The nature and content of the Medical Report is such that the appearance of the Expert for cross-examination is unnecessary. To the contrary, all Parties will benefit from an expedited presentation of the Prosecution’s case. Nor would granting the Request cause any unfair prejudice to the Accused. The Medical Report conforms in all respects to the Chamber’s instruction to the expert. The Defence challenges to the Medical Report⁶ incorrectly represent the content of the report.

¹ Rules of Procedure and Evidence (“Rules”).

² ICC-01/04-02/06-1149-Conf-AnxA-Red, pp. 4-9.

³ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 12, 13.

⁴ ICC-01/04-02/06-1149-Conf-AnxA-Red.

⁵ ICC-01/04-02/06-1311.

⁶ ICC-01/04-02/06-1204.

5. Both the expert's declaration and the certification made by an authorised person⁷ have been filed by the Registry in accordance with rule 68(2)(b((ii) and (iii)).⁸

Confidentiality

6. This filing is classified as "confidential" under regulation 23*bis* of the Regulations as it contains identifying and medical information of protected Witness P-0790. The Prosecution will file a public redacted version of the filing in due course.

Procedural History

7. On 18 January 2016, during cross-examination, the Defence asked dual status Witness P-0790 whether he would consent to a medical examination to assess injuries he alleged he sustained in 2002-2003.⁹ The Witness provided his consent to an expert medical examination.

8. On 24 January 2016, the Defence filed a request for the Chamber to order that Witness P-0790 be examined by an independent medical expert.¹⁰

9. On 25 January 2016, the Prosecution and the Legal Representative responded to the Defence request and did not oppose it.¹¹

⁷ ICC-01/04-02/06-729.

⁸ ICC-01/04-02/06-1664-Conf-Anx.

⁹ ICC-01/04-02/06-T-54-CONF-ENG-ET, p. 49, lns. 3-10.

¹⁰ ICC-01/04-02/06-1101-Conf.

¹¹ See Email Communication from the Chamber to Parties, Participants, and Registry dated 25 January 2016 at 11:03 instructing the Prosecution and Legal Representative to respond on the same day by 15h30. 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.

10. That same day, the Chamber instructed the Registry to identify a medical doctor with relevant forensic expertise who would be available to conduct a medical examination of the Witness by 29 January 2016.¹²

11. On 26 January 2016, the Registry transmitted to the Chamber the *Curriculum Vitae* of a medical expert with forensic expertise, identified from its list of experts.¹³

12. On 27 January 2016, the Chamber granted the Defence request and appointed Dr Pierre Perich as medical expert ("Appointed Expert").¹⁴ The Chamber ordered the Legal Representative to seek the Witness's formal consent to the medical examination and to the transmission of the Medical Report to the Parties and participants.¹⁵ The Chamber instructed the Appointed Expert to assess and address in his report, to the extent possible, whether alleged injuries sustained by the Witness to [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.¹⁶ The Appointed Expert was provided with the transcripts of the Witness's trial testimony.¹⁷

13. On 28 January 2016, the Appointed Expert performed the medical examination of the Witness, in the presence of the Witness's Legal Representative and a Swahili-French interpreter.¹⁸

¹² ICC-01/04-02/06-T-57-CONF-ENG-ET, p. 44, ln. 25, p. 45, lns. 1-25, p. 46, lns. 1-12.

¹³ ICC-01/04-02/06-1107-Conf.

¹⁴ ICC-01/04-02/06-1110-Conf, p. 8.

¹⁵ ICC-01/04-02/06-1110-Conf, p. 8. The Legal Representative filed the Witness's consent forms on 28 January 2016, ICC-01/04-02/06-1114-Conf.

¹⁶ ICC-01/04-02/06-1110-Conf, para. 13.

¹⁷ ICC-01/04-02/06-T-53-CONF-FRA ET; ICC-01/04-02/06-T-54-CONF-FRA ET; ICC-01/04-02/06-T-56-CONF-FRA ET; and ICC-01/04-02/06-T-57-CONF-FRA ET.

¹⁸ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 3.

14. On 2 February 2016, the Appointed Expert submitted the Medical Report to the Registry, who transmitted it to the Chamber and the Legal Representative on 5 February 2016.¹⁹

15. On 8 February 2016, the Chamber instructed the Legal Representative to propose any necessary redactions to the Medical Report,²⁰ which the Legal Representative did on 15 February 2016.²¹

16. On 17 February 2016, the Chamber directed the Parties to file any submissions on the admissibility of the report within 21 days.²²

17. On 8 March 2016, the Prosecution sought admission of the Medical Report under articles 54(1), 64(2), (9)(a) and 69(3) and (4) of the Rome Statute and rules 63(2) and 64 of the Rules.

18. On 9 March 2016, the Legal Representative of the Victims of the Attacks filed submissions supporting admission of the Medical Report.²³

19. On 10 March 2016, the Defence opposed admission of the Medical Report, indicating that cross-examination would be necessary.²⁴

20. On 9 May 2016, the Chamber rejected the Prosecution's Request without prejudice, considering that an admission under rule 68 would be appropriate.

¹⁹ ICC-01/04-02/06-1149-Conf and annex A.

²⁰ See Email Communication from the Chamber to the Legal Representative dated 8 February 2016 at 13:36.

²¹ ICC-01/04-02/06-1171-Conf.

²² See Email Communication from the Chamber to Parties, Participants, and Registry dated 17 February 2016 at 10:02.

²³ ICC-01/04-02/06-1203-Conf.

²⁴ ICC-01/04-02/06-1311-Conf.

Submissions

21. In its “Decision on the conduct of proceedings”, the Chamber ruled that “Parties may file, in accordance with Rule 68(2) of the Rules, applications for the admission, in whole or in part, of previously recorded testimony of witnesses. The tendering party shall file the application together with copies of the previously recorded testimony and any supporting material, and it shall identify precisely which passages it wishes to tender into evidence.”²⁵

(i) *The Medical Report does not concern the acts and conduct of the Accused*

22. In accordance with the Chamber’s order, the Medical Report assesses the consistency between Witness P-0790’s account and the injuries observed during the medical examination. It does not concern the acts or conduct of Bosco Ntaganda.

(ii) *The Medical Report is relevant to issues at trial*

23. The Medical Report is relevant to corroborate Witness P-0790’s testimony – in particular in relation to Counts 1, 2, 3, 10, 12 and 13 for the UPC attack on Kobu and environs in February 2003 - and to Witness P-0790’s overall credibility. The Appointed Expert concludes in the Medical Report that the injuries sustained are consistent with Witness P-0790’s account: « *Dans leur ensemble, les lésions et troubles séquellaires observés sont très compatibles avec les faits tels qu’exposés par le témoin P - 0790 lors de ses auditions* ».²⁶

24. In its request for Witness P-0790 to be examined by an expert, the Defence itself argued that in its view, “an independent medical Expertise is the only way to

²⁵ ICC-01/04-02/06-619, para. 36.

²⁶ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 13.

corroborate witness P-0790's testimony".²⁷ In its response to the prior Request for Admission, the Defence recognised the relevance of the Medical Report.²⁸

(iii) The Medical Report is reliable and the Appointed Expert's methodology appropriate

25. The Medical Report has sufficient indicia of reliability. It was drafted by the Appointed Expert further to his medical examination of Witness P-0790; the Appointed Expert is entirely independent of any of the Parties to the proceedings; the Defence does not question his medical Expertise;²⁹ the Report is on letterhead and contains the title and signature of its author. The dates of the medical examination and of the Medical Report, the Chamber's instructions, the material reviewed by the Appointed Expert, the methodology, reasoning and conclusions are all clearly set out in the Medical Report.

26. The Prosecution disagrees with the arguments formulated by the Defence in its response to the prior Request for Admission: that the Medical reports lacks reliability because some of the wording seems to suggest that the Appointed Expert obtained additional information from the Witness not mentioned in his testimony; which in turn "impaired the partiality and reliability" of the Report.³⁰

27. The Expert was tasked to conduct a medical examination and to assess if certain injuries were present and, if so, were consistent with the Witness's account as set out in his testimony. There was no prohibition on the Appointed Expert talking to the Witness during the examination for the purpose of conducting his assessment. When examining P-0790 and his injuries, it is sensible and predictable that the Appointed Expert may have different questions than the Parties. Not allowing the Expert to communicate with the Witness in order to properly conduct

²⁷ ICC-01/04-02/06-1101-Conf, para.6.

²⁸ ICC-01/04-02/06-1204, para.3.

²⁹ ICC-01/04-02/06-1204, para.4.

³⁰ ICC-01/04-02/06-1204, paras. 18-20.

his examination and prepare his report could have hampered his ability to perform his expertise, as instructed.

28. Moreover, the Defence does not explain the concrete basis upon which it argues that any additional information provided by the Witness impacts the partiality and reliability of the Medical Report. The Expert sets out in a transparent and clear manner all relevant information he considered. Contrary to the Defence contention, the explicit distinctions made by the Appointed Expert between the “minutes”, “dires” and “doléances” from the Witness enhance the reliability of the report.

29. In any event, the Appointed Expert’s conclusion leaves no ambiguity that he has assessed the consistency of the Witness’s injuries against his testimony: « Dans leur ensemble, les lésions et troubles séquellaires observés sont très **compatibles avec les faits tels qu’exposés par le témoin P - 0790 lors de ses auditions.** »³¹

(iv) The Medical Report has probative value and fully complies with the Chamber’s instructions

30. The authenticity of the report is not in dispute. The Appointed Expert conducted the medical examination, prepared the Medical Report with his expert conclusions, transmitted it to the Registry, who filed it in the record of case and transmitted it to the Chamber and the Legal Representatives. Subsequently, a redacted version of the Medical Report was transmitted to the Parties.

31. The Appointed Expert fully responded to the Chamber’s instructions: “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

³¹ ICC-01/04-02/06-1149-Conf-AnxA-Red, p.14.

out in his trial testimony, including considerations such as location of injury, cause and approximate date".³² The Medical Report indicates – after clinical examination - that the injuries are corroborative of the Witness's account of how they were sustained, they injuries are old and could have been sustained at the time the Witness described.³³

32. The Defence incorrectly argues that the Medical Report is incomplete, and that "questions remain unanswered", pointing to a purported lack of information on the timing, mechanism of the injuries and on their compatibility with a subsequent [REDACTED] of the Witness.³⁴

33. First, the Appointed Expert does reach conclusions on the timing of the injuries, finding that the scars are old and could be contemporaneous with the facts described ([REDACTED] and 2003).³⁵ The Appointed Expert sets out the underlying information on which this conclusion is based.³⁶ The Appointed Expert describes the injuries and scars he observed in great detail before arriving at his conclusion on the possible date of the injuries.³⁷

34. Second, and again contrary to the Defence's assertions,³⁸ the Report does set out points of entry and exit of the bullet wounds. For example, regarding the bullet wound to [REDACTED] which the Witness testified occurred in 2003, the Expert reported that the bullet [REDACTED], with a front to back trajectory on the

³² ICC-01/04-02/06-1149-Conf-AnxA-Red, p.2.

³³ ICC-01/04-02/06-1149-Conf-AnxA-Red, p.13.

³⁴ ICC-01/04-02/06-1204, paras. 22-32.

³⁵ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 11, 13, 15 « *Les cicatrices sont anciennes et peuvent être contemporaines des faits.* ».

³⁶ ICC-01/04-02/06-1204, para.24.

³⁷ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 10-11.

³⁸ ICC-01/04-02/06-1204, para.25.

sagittal (median) and transverse (horizontal) planes. Anatomic descriptions and sketches are attached to the Report.³⁹

35. The Appointed Expert addressed the impact of the injuries on [REDACTED] of Witness P-0790 in the clinical history of the wounds section. The conclusions are based on the Witness's account and on the result of the medical examination. The Expert notes that, just after the 2003 shooting, the injury to [REDACTED].⁴⁰ Therefore, according to the Appointed Expert, there would not have been an issue in the Witness's ability to [REDACTED]. Similarly, no contradiction emerges from the nature of the injury, the ability of the witness to [REDACTED] and the fact that the witness [REDACTED].⁴¹

36. The Appointed Expert explored alternative ways in which the [REDACTED] injury could have been sustained when reaching his conclusions on the consistency of the Witness's account to the injuries.⁴² Indeed, the Appointed Expert concludes that the only alternative would be that the [REDACTED], but he quickly discounts this alternative because in that case the [REDACTED] would have been different, the [REDACTED] and the Witness would not have been able to [REDACTED].⁴³

(v) *The Medical Report is corroborative in nature*

37. The purpose of the Medical Report is confined to corroborating evidence, as envisaged by rule 68(2)(b). Indeed, it was at the Defence's request that the Chamber ordered the medical examination to test the testimony of Witness P-0790

³⁹ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 11-12.

⁴⁰ ICC-01/04-02/06-1149-Conf-AnxA-Red, p. 13: [REDACTED].

⁴¹ ICC-01/04-02/06-1204, paras.30-31.

⁴² ICC-01/04-02/06-1204, para.26.

⁴³ ICC-01/04-02/06-1149-Conf-AnxA-Red, p.11.

regarding his injuries.⁴⁴ The Defence had full opportunity to cross-examine Witness P-0790 on the circumstances in which he sustained his injuries and is able to present its arguments as to the credibility of the witness in view of the Medical Report.

(vi) The interest of justice is best served by the introduction of the Medical Report under rule 68(2)(b)

38. Rule 68 is designed to ensure that the Accused is tried without undue delay. Admitting the Medical Report in this manner would appropriately expedite the proceedings, given the confined issue it addresses.

39. Cross-examination is not necessary in this case, nor has the Defence established that cross-examination will assist the Chamber in evaluating the Medical Report. For example, it is unlikely that a more precise dating of the injury is possible, or this information would have been included in the Medical Report. Moreover, the Defence remains fully able to make arguments and present alternative scenarios to the timing or the circumstances of the wounds.

(vii) The requisite declaration and certification have been filed

40. The Registry filed the required accompanying declaration by the Expert, and witnessed by an authorised person.⁴⁵

⁴⁴ ICC-01/04-02/06-1101-Conf.

⁴⁵ ICC-01/04-02/06-1664-Conf-Anx.

Requested Relief

41. For the foregoing reasons, the Prosecution requests that the Medical Report relating to Witness P-0790 (ICC-01/04-02/06-1149-Conf-AnxA-Red) be admitted into evidence pursuant to rule 68(2)(b).



Fatou Bensouda
Prosecutor

Dated this 2nd day of February 2017

At The Hague, The Netherlands