



Original: **English**

No.: **ICC-01/04-02/06**
Date: **27 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 “Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s ‘Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules’, 18 January 2017, ICC-01/04-02/06-1731”,
24 January 2017, ICC-01/04-02/06-1748**

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) Trial Chamber VI (“Chamber”)’s *Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules* of 18 January 2017 (“Impugned Decision”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s
“Decision on Prosecution request seeking the admission of the medical report
related to Witness P-0790 under Rule 68(2)(b) of the Rules”**

“Defence Request for Leave to Appeal”

1. The Defence respectfully seeks leave to appeal the Impugned Decision whereby the Chamber found admissible under Rule 68(2)(b) the medical report of Dr Pierre Perich related to Witness P-0790 without cross-examination of the expert. The Defence seeks to appeal the Impugned Decision on the following issue:

Whether a report: (i) prepared by a qualified expert, in relation to testimony of a fact witness and potentially corroborative of the witness’s 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 with an opportunity to cross-examine the expert on the impact of his failure to abide with the Chamber’s directions.

(“Issue”)

2. The Issue significantly affects the fair and expeditious conduct of the proceedings as it is directly linked to the Chamber’s appreciation of the

¹ ICC-01/04-02/06-1715-Conf.

evidence provided by a material witness. The Issue also has the potential to significantly affect the outcome of the trial as expert evidence, potentially corroborating evidence of a fact Witness, is admitted without the Defence being given the opportunity to cross-examine the evidence. The immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings as the expert may still be heard before the Prosecution ends the presentation of its case.

APPLICABLE LAW

3. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

4. The Appeals Chamber has defined an “issue” as:

an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of the matter arising for determination in the judicial process. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.²

5. The issue must further be one that

its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.³

² *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“Leave to Appeal Judgment”), para. 9.

³ Leave to Appeal Judgment, para. 14.

BACKGROUND

6. On 18 January 2016, during cross-examination by the Defence, Witness P-0790 gave his consent to an expert medical examination to assess the purported injuries which constitute an important basis upon which his testimony can be assessed.⁴
7. 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.⁵
8. On 27 January 2016, the Chamber appointed Dr Pierre Perich as medical expert.⁶
9. On [REDACTED], Dr Perich examined Witness P-0790 in the presence of his legal representative and a Swahili French interpreter.
10. [REDACTED].⁷
11. 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 64.⁸
12. 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”.⁹
13. On 1 December 2016, the Prosecution submitted its request for admission of the Medical Report pursuant to Rule 68(2)(b).¹⁰

⁴ ICC-01/04-02/06-T-54-CONF-ENG-ET, 49:3-10.

⁵ ICC-01/04-02/06-1101-Conf.

⁶ ICC-01/04-02/06-1110-Conf.

⁷ [REDACTED].

⁸ ICC-01/04-02/06-1199-Conf.

⁹ ICC-01/04-02/06-1311, para. 15.

¹⁰ ICC-01/02/06-1666-Conf.

14. On 18 January 2017, the Chamber rendered its Decision admitting the Medical Report under Rule 68(2)(b) and without cross-examination of the expert.

SUBMISSIONS

I. The Issue constitutes an appealable issue

15. The Defence respectfully submits that the appealable issue at hand is not a mere disagreement between the Parties or the Chamber as to the manner in which the Medical Report is introduced by the Prosecution. Moreover, the factual matters addressed in the Medical Report concerning the testimony of Witness P-0790 are materially in dispute.
16. Whether expert evidence that could potentially be corroborative of a fact witness who testified *viva voce* before this Chamber and which is materially disputed by the Parties can be admitted without cross-examination constitutes an appealable issue. Witness P-0790 has previously testified and been cross-examined by the Defence. The Medical Report would now, according to the Prosecution, corroborate the Witness's testimony, thereby tipping the probative value attributed to the testimony of Witness P-0790 in their favour. It is only fair and in the interest of the proceedings that the Defence get the same opportunity to challenge this evidence, and contradictions therein, in the same way it did during the testimony of Witness P-0790 – by cross-examining the expert.
17. Furthermore, not only is the evidence related to Witness P-0790 materially in dispute, the Medical Report itself is also contested. The Defence respectfully submits that the Medical Report was not “confined in scope”¹¹ and “appropriately tailored to the Chamber's Instructions”¹² as the instructions were to assess whether the alleged injuries were consistent with the narrative

¹¹ Decision, para 12.

¹² Decision, para 12.

of Witness P-0790 as set out in his trial testimony.¹³ Departing significantly from the Chamber's directions, Dr Perich proceeded to assess whether Witness P-0790's alleged injuries were consistent with his 'new' narrative provided to him during his examination of the witness. Allowing this deviation from the Chamber's directions to remain unaddressed, would taint the evidence and potentially the outcome of the proceedings.

18. By not limiting his assessment solely to the testimony of Witness P-0790, new information provided by the Witness were considered – which might be considered by the Chamber in its final assessment of the evidence - that would have otherwise, had they come up during his testimony, been challenged during cross-examination. The additional new information provided by Witness P-0790 to Dr Perich must be addressed in the same way as the *viva voce* testimony of Witness P-0790 was.

II. The Issue significantly affects the fair and expeditious conduct of the proceedings

19. The appealable Issue at hand strikes at the core of the Accused fundamental right to examine the witnesses against him in accordance to Article 67(1)(d).
20. The Chamber, when assessing the probative value of the testimony of Witness P-0790, will now have an unbalanced portrayal of the evidence on the record. This undoubtedly affects the fairness of the proceedings and the fundamental right to the Accused to challenge the evidence brought forth against him by the Prosecution.

III. Immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings

21. The appealable issue necessitates immediate resolution by the Appeals Chamber as it consists of unfair balance of evidence that could otherwise be

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

relied on by the Chamber in its Judgement to the detriment of the rights of the Accused.

22. The appealable issue necessitates immediate resolution as the Defence will have no other opportunity, considering the witnesses remaining in the final evidentiary block, to challenge this particular evidence before the Prosecution closes its case.
23. Furthermore, should the Appeals Chamber determine upon appeal on the merits, that a material error was in fact committed by Dr Perich by failing to abide with the directions of the Chamber during his medical examination of Witness P-0790 it would be too late to remedy the prejudice as the probative value of the evidence would have already been assessed.

CONFIDENTIALITY

24. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it addresses matters raised in confidential filings.

RELIEF SOUGHT

25. In light of the above, the Defence respectfully requests the Chamber to **GRANT** leave to appeal the decision on the above outlined Issue.

RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF FEBRUARY 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands