

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/11-01/15**
Date: **13 October 2015**

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

**Confidential, *EX PARTE*, only available to the Prosecution, Defence team for
Laurent Gbagbo and Registry**

**Prosecution's response to "Notification par la Défense de l'absence de
consentement de Laurent Gbagbo à ce que son dossier médical soit transmis à M.
Lamothe" (ICC-02/11-01/15-285-Conf-Exp)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution responds to Laurent Gbagbo's ("Accused") notification of his refusal to consent to the transfer of his medical record to Dr Pierre Lamothe ("Notification"),¹ one of the Trial Chamber appointed experts. Contrary to the Defence position, the Prosecution submits that the Trial Chamber has the power, under article 64(6)(f) of the Statute, to order the transfer of the Accused's medical record. This power is a necessary corollary to the Trial Chamber's power to order a medical examination of the Accused under rule 135 of the Rules of Procedure and Evidence ("Rules").

Confidentiality

2. The Prosecution files this submission as confidential – *ex parte* only available to the Prosecution, the Gbagbo Defence and Registry since it refers to a confidential – *ex parte* notification filed by the Gbagbo Defence.² The Prosecution otherwise sees no reason to file this response other than as confidentially. The Prosecution will submit a redacted version of this request upon the further instruction of the Chamber.

Submissions

Trial Chamber's power to order the transfer of the Accused's medical record

3. The Trial Chamber has the power, under rule 135, to order a medical, psychiatric or psychological examination of the Accused, in order to satisfy itself that the Accused understands the nature of the charges (article 64(8)(a) of the Statute). The Trial Chamber exercised this power on 7 September 2015, in ordering a medical examination of the Accused.³

¹ ICC-02/11-01/15-285-Conf-Exp.

² ICC-02/11-01/15-285-Conf-Exp.

³ ICC-02/11-01/15-206-Conf-Exp.

4. The Trial Chamber also has the power, derived from article 64(6)(f) of the Statute, to order the transfer of the Accused's medical records to Dr Lamothe. This power is a necessary corollary to the power under rule 135 to order a medical, psychiatric or psychological examination of the accused. Where the Accused's fitness to stand trial is in doubt, a medical, psychiatric or psychological examination provides a means whereby the Trial Chamber can assess the Accused's medical condition, in reliance upon medical or other expertise, and upon the provision of (an) expert report(s). A complete assessment of the Accused's medical condition requires the provision of medical records, including a medical history. The refusal to provide such records has the effect of frustrating the full implementation of the Trial Chamber's order under rule 135. There is no cogent reason why, a medical examination having been ordered, provision of the Accused's medical records should be refused in their entirety.
5. The Accused relies on regulation 156 of the Regulations of the Registry ("RoR") in support of his refusal to consent to the transfer of his medical file to Dr Lamothe. Regulation 156 establishes obligations for the Registry with respect to the management and consultation of a detainee's medical record. The Regulations of the Registry were adopted in accordance with rule 14 of the Rules of Procedure and Evidence, which provides that "[i]n discharging his or her responsibility for the *organization and management* of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry."⁴
6. Consistent with international human rights law, regulation 156 provides for the disclosure of a detained person's medical records in limited situations. In particular, disclosure to the Chamber can occur with the written consent of the detained person (regulation 156(4)). Regulation 156(5) provides that where the detained person refuses to consent to the Chamber being provided with his or her medical record, the Registrar shall inform the Chamber accordingly, anticipating the Trial Chamber's power – under the Statute - to so order. Regulation 156 does

⁴ Emphasis added. See also Regulation 1 of the RoR.

not trump the Chamber's power to order the transfer of the medical records of the Accused to experts it appointed to ascertain if the Accused understands the charges against him, as required by article 64(8)(a).

7. The Prosecution also recalls its previous submissions on medical confidentiality and the right to privacy.⁵ The medical reports of the Accused would be provided to three court-appointed experts who are bound by orders of the Chamber, including as to the confidentiality of the Accused's medical record. They are also bound by applicable codes of ethics. Therefore, the Prosecution submits that these are sufficient guarantees to ensure respect for the Accused's right to medical confidentiality and privacy.

The Accused does not provide any legitimate reasons in support of his refusal

8. In his Notification, the Accused refuses to consent to the transfer of his medical record to Dr Lamothe, on the grounds of the expert's alleged lack of "professionalism" in 2012.⁶ The Prosecution notes that, under rule 113 of the Rules - within the context of ordering a medical examination of a person having rights under article 55(2) - consent is but one factor for the Chamber to consider in the exercise of its discretion.
9. Further, as the Chamber has noted, Dr Lamothe's alleged lack of professionalism has never been raised as an issue by the Gbagbo Defence, despite Dr Lamothe examining Mr Gbagbo - and reporting and testifying thereon - more than three years ago.⁷ The Gbagbo Defence merely offers a blanket refusal - with no specific or legitimate explanation as to why Dr Lamothe should not, in examining the Accused, have access to an accurate record of his medical history.

⁵ ICC-02/11-01/15-219-Conf-Exp, para. 23.

⁶ ICC-02/11-01/15-280-Conf-Exp, para. 6.

⁷ ICC-02/11-01/15-281-Conf, para. 7.

Conclusion

10. For the foregoing reasons, the Prosecution requests that the Chamber order the immediate transfer of the Accused's medical record to Dr Lamothe so that the medical examination may proceed without delay.



Fatou Bensouda, Prosecutor

Dated this 13th day of October 2015

At The Hague, The Netherlands