

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 October 2009

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

**URGENT
Confidential**

**Victims and Witnesses Unit report on
confidentiality of medical records and consent to disclose medical records**

Source: Registrar

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

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Unrepresented Victims

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**Unrepresented Applicants for
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REGISTRY

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Defence Support Section

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**Victims Participation and Reparations
Section**

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Other

-

The Registrar of the International Criminal Court (the Court);

NOTING the Trial Chamber's order by way of email sent by the legal advisor on 1 October 2009 ("email communication")¹;

NOTING Articles 43(6) and 68(1), (3) and (4) of the Rome Statute, Rules 16 to 19, 73, 76, 87 to 89 of the Rules of Procedure and Evidence, Regulations 23*bis* and 41 of the Regulations of the Court and Regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that the Trial Chamber indicated that it was necessary to resolve "[w]hether there are circumstances when a Chamber can order the communication of a medical report of any kind without the consent / informed consent of the individual concerned" and ordered the "Registry (VWU) [...] to file written submissions on the issue [...] by 15 October 2009";

SUBMITS the Victims and Witnesses Unit's report on confidentiality of medical records and consent to disclose medical records.

1. The report is submitted on a confidential basis pending further consideration on the topic. Upon the Chamber's request, the Registrar will reclassify this submission to public.

I) Confidentiality and informed consent

2. Medical information about an individual, by its very nature, concerns details of a most personal nature. It, therefore, follows that the right to keep this information confidential will be encompassed in an individual's fundamental

¹ Email sent by legal advisor of the Trial Chamber to all parties, participants and Registry on 1 October 2009.

right to privacy, and has been recognised as such by international human rights law² and the legal framework of the Court.³

3. This is of particular importance as confidentiality is widely considered to be a crucial aspect of a trusting relationship and necessarily includes the relationships between health care professionals and their patients.⁴ It is essential that patients have full trust in the health care professional with whom they are dealing, as usually the nature of the information they will share will be of a deeply personal nature. Without this relationship, the patient may be deterred from revealing certain information, which could be detrimental to his or her health, or the health of those around him or her⁵ and, consequently, may violate an individual's right to the highest attainable standard of health.⁶
4. Consequently, when an individual discloses personal information to a health care professional, whether through words or examination, there is an implicit understanding that the healthcare professional will not disclose the information to others, unless the person concerned gives explicit and informed consent to the disclosure.⁷ This duty of confidentiality conforms to high standards and will be compromised even if the records are disclosed to any other person, including members of other public authorities and so to a wider

² See, for example, Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights (ECHR). See also decisions of the European Court of Human Rights (ECtHR) "*Z v. Finland* – 25/02/1997" (app no: 22009/93), para.95 and "*LL v France*" – 10 Oct 2006 (app: 7508/02), para.44. See also Human Rights Committee's Definition of Privacy in *Coerl and Aurik v The Netherlands* (453/91) and the Human Rights Committee's Comments on Portugal (CCPR/CO/78/PRT, 5 July 2003, para.18).

³ See, for example, Article 68(1) of the Rome Statute, Rule 73(3) of the Rules of Procedure and Evidence, Regulation 156 of the Regulations of the Registry.

⁴ See ECtHR decision "*Z v. Finland* – 25/02/1997" (app no: 22009/93), para. 95."

⁵ The European Court of Human Rights noted in *Z v Finland* (1988) that "The protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention ... Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community."

⁶ See article 25, Universal Declaration of Human Rights; article 12, International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities.

⁷ See, for example, WHO Recommendations, page 18. See also the American Psychological Association's definition of confidentiality, article 4.01 of the «Ethical Principles of Psychologists and Code of Conduct» ("APA Principles"). Similarly, the International Code states: "A doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him". <http://www.apa.org/ethics/code2002.html>.

circle of public servants.⁸ Unless the circumstances are exceptional, therefore, medical information must only be disclosed to the extent which the person it concerns has consented.⁹

5. Therefore, as a general rule, medical information can only be disclosed with the consent of the individual concerned.¹⁰ Given the high level of protection afforded to such information, when seeking disclosure it is important to not only gain consent, but to gain informed consent from the individual concerned.
6. When seeking informed consent to disclose medical records, the patient should be informed of the nature of the information to be revealed, to whom it will be revealed, the purpose for which the information will be used and the consequences.¹¹ In order to be able to provide informed consent the individual, or in the case of a minor also the legal guardian, should be able to comprehend, retain, believe and balance the information provided before arriving at a decision.¹²
7. Notwithstanding the great importance of confidentiality, it is not an absolute requirement. There may be exceptional circumstances where health care professionals are required to break the confidentiality agreement by statute, court order or because it is in the best interest of the individual concerned.¹³

⁸ See, for example, the Judgment of the ECtHR in *M.S. v Sweden* of 27 August 1997, (app no: 20837/92), para.35.

⁹ See, for example, Statement of Ethical Principles of the European Association for Psychotherapy ("EAP Statement") providing that psychotherapists "reveal information to others only with consent of the person [...] , except in those unusual circumstances in which not to do so would probably result in clear danger to the person or to others". (Principle 4).

¹⁰ See, for example, Article 458 of the Belgian Penal Code which lays down criminal sanctions for disclosure without consent. See, also, GMC Guidance: www.gmc-uk.org/standards. See also Article. 4.05 of APA Principles, and Article 458 of the Belgian Penal Code.

¹¹ See, for example, the GMC Guidance which covers methods of obtaining informed consent <http://www.gmc-uk.org/guidance/current/library/confidentiality.asp#Protecting%20information>. See also article 3.10 of the APA Principles <http://www.apa.org/ethics/code2002.html>. See also EAP Statement that provides that psychotherapists "inform their clients of the legal limits of confidentiality" (Principle 4).

¹² See Special Rapporteur's *Report on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/64/272, para.10 ("Report of Special Rapporteur") (with further references).

¹³ See, for example, UK General Medical Council guidance 'Seeking patients' consent: the ethical considerations': there are three circumstances when clinicians can release confidential clinical information: (i) where a patient is incapable of giving consent then any disclosure which is in their best interests would be permissible, (ii) civil and criminal courts have powers to make orders requiring a doctor or holder of health records to disclose confidential information for the purposes of litigation, (iii) where the public interest in maintaining confidentiality is outweighed by the public interest in disclosing specific information. In addition,

II) Approach by the VWU

8. By virtue of the VWU's mandate, the VWU will both have access to medical records¹⁴ generated by external medical professionals in a therapeutic context not necessarily related to the work of the Court and will also generate medical records itself.
9. Establishing a professional relationship of trust with witnesses¹⁵ is a key element of the VWU's operations. This is of particular importance as the VWU, as part of the Registry, is a neutral body of the Court which protects the best interests of witnesses and victims. In order to maintain both this role and the perception of this role, it needs to be able to maintain confidential information and avoid situations whereby its medical records could be requested as evidence in the cases before the Court.

a) Medical records generated by the VWU

10. The VWU will only get into contact with victims and witness upon the referral of a party or participant ("referring party") and the VWU's interaction with victims and witnesses will always be within the context of the Court.
11. The VWU often fulfils a double role as it might not only offer support and protection to witnesses, including protection of the interest and well-being of

various statutes and statutory instruments require doctors to reveal information, which would otherwise be considered confidential. Indeed criminal sanctions might arise from non-disclosure, for example the reporting of notifiable diseases (Public Health Control of Diseases Act 1984) or notification of terminations of pregnancy (Abortion Regulations, 1991) (SI 1991/499), www.gmc-uk.org/standards. See also American Psychological Association Ethics Code: "Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose". (article. 4.05).

¹⁴ Medical records shall refer to all documents containing or relating to medical information, including information addressing the mental health and psychosocial condition of an individual following the mandate of the Victims and Witnesses Unit.

¹⁵ For ease of reference, witnesses shall refer to all individuals receiving services within the mandate of the VWU as stipulated in 43 (6) of the Rome Statute.

witnesses, but it can also be tasked to advise the Court on matters related to protection, trauma, vulnerable witnesses and other matters.

12. VWU staff will always explain to witness that they can share information with VWU staff in confidence. However, it is also important for witnesses to understand that the Unit operates within a judicial context and consequently may share information relating to medical records with colleagues within the Unit and might need to disclose such information to the referring party and the Chamber. The witness needs to provide informed consent to this before proceeding. The witness will also be informed that should there be specific information that he or she does not want to give to anybody outside the VWU, he or she can inform the VWU staff of this.¹⁶
13. As an additional safeguard, before conducting interviews for specific assessment purposes for special measures or psycho-social suitability to participate in the Court's protection programme, VWU staff reminds the witness that some information contained in the medical records might have to be shared with other colleagues from the VWU, and perhaps the party calling the witness and the Judges.
14. Whenever it is necessary for the VWU to provide information relating to medical records to the referring party or the Chamber, the VWU will strive to limit disclosure to the essential information and avoid unnecessary disclosure of personal information in order to ensure maximum protection of privacy and dignity of the witness concerned.
15. If it becomes necessary to disclose information relating to medical records to the other entities of the Court or the wider public, the VWU will seek the specific consent of the witness.

¹⁶ See, for example, *Code déontologique des psychologues belges* which discusses the duty of a psychologist in Belgium in his/her capacity as an expert both in civil and criminal legal matters. See also article 3.10 of the American Psychological Association Ethics Code: "When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding".

b) Medical records generated by external health care professionals¹⁷

16. In some cases the VWU is provided with medical records by external health care professionals concerning the witness within the VWU's care. Usually these reports will have been prepared in a therapeutic context and are the results of a consultation and intervention with a therapeutic objective, contrary to the VWU records which were created in the context of judicial proceedings.
17. Consequently, should the VWU need to disclose such documents, the VWU will seek the informed consent of the witness to disclose this information.

III) Absence of consent

18. In terms of safeguarding the confidentiality of medical records, the VWU does its utmost to disclose only with the informed consent of the witness. However, there may be cases where the VWU is not in a position to obtain the informed consent of the witness. This may be due to the witness refusing to consent, the witness not being reachable to give consent or the witness not being capable of providing informed consent.
19. In cases where the VWU cannot obtain informed consent, the VWU does not consider itself to be in a position to disclose the medical records, as a general rule. If the lack of informed consent relates only to specific parts of the medical records, the VWU will inform the Chamber accordingly.
20. In exceptional circumstances, where emergency situations so require and where it is assessed to be in the best interest of the witness, the VWU will disclose medical records without the informed consent of the witness.¹⁸

¹⁷ External health care professionals shall refer to all persons in the health profession, including physicians, clinical psychologists, counsellors and social workers, who are or have been in a professional, therapeutic relationship not related to the Court with a victim / witness and whose communications are privileged.

¹⁸ See, for example, article 82 of the GMC's "Professional Conduct: Fitness to Practise", the Blue Booklet, January, 1993 http://www.gmc-uk.org/guidance/archive/prof_cond_dis_fitness_to_practice_jan_1993.pdf. See also GMC Guidance where one of the circumstances when clinicians can release confidential clinical information is "where a patient is incapable of giving consent then any disclosure which is in their best interests would be permissible", www.gmc-uk.org/standards.

21. In non-emergency situations, the decision as to whether there is a sufficient legal basis for disclosure and whether the interests of justice require disclosure without the consent of the individual concerned will ultimately be a judicial one.¹⁹
22. Given the importance of the right to privacy, disclosure of information relating to medical records should always remain exceptional and be restricted to the extent possible.
23. In cases where the information was provided by external health care professionals, disclosure of information relating to medical reports can also be subject to the restrictions provided under domestic law.

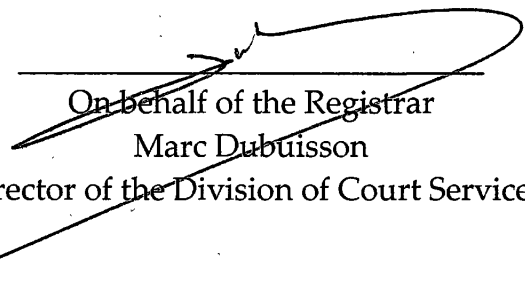
IV) Conclusion

24. Where medical records are generated by the VWU, the VWU will seek informed consent of the witness from the start to disclose reports on those records to the party referring the witness and the Chamber, should the need arise. The VWU will seek additional consent, if it becomes necessary to disclose information relating to medical records to other entities within the Court or the wider public.
25. Where medical records are generated by external health care professionals, the VWU will seek the specific consent of the witness to disclose those records to appropriate persons, should the need arise.
26. Should the witness not consent to the disclosure of medical records either generated by the VWU or external health care professionals, the VWU will inform the referring party and the Chamber accordingly, as appropriate.
27. The VWU will only disclose information related to medical records without the informed consent of the witness involved in exceptional circumstances,

¹⁹ See, for example, GMC Guidance where "civil and criminal courts have powers to make orders requiring a doctor or holder of health records to disclose confidential information for the purposes of litigation", www.gmc-uk.org/standards.

either when it considers disclosure necessary and in the best interests of the witness or upon order by a Chamber.

28. Similar considerations apply to the parallel right of any health care professional, be it within the VWU or external, to refuse testimony on the grounds of confidentiality of medical records.



On behalf of the Registrar
Marc Dubuisson
Director of the Division of Court Services

Dated this 15 October 2009

At The Hague, The Netherlands