

ANNEX XXXIX

PUBLIC

From: Trial Chamber IX Communications
Sent: 21 May 2019 14:28
To: [REDACTED]
Subject: Trial Chamber IX Communications; [REDACTED]
 Decision on the Defence Request for Information regarding a Member of the CLRV Staff
Follow Up Flag: Follow up
Flag Status: Flagged

Dear parties and participants,

The Chamber notes the Defence request and the subsequent exchange between the CRLV and the Defence.

As to the arguments presented by the CLRV, it notes that the Defence does not claim that article 12(1)(b) of the Code of Professional Conduct for counsel prohibits that [REDACTED] works on the Ongwen Case.

At this point in time, the Defence merely requests information which confidential *ex parte* filings, if any, [REDACTED] has accessed.

Her pause to work on the Ongwen case is requested as a temporary measure, merely for the period of time until the Defence receives more information and is able to decide whether to make a further request or not.

Accordingly, the Chamber considers any arguments by the CRLV and Defence whether [REDACTED] is allowed to continue working on the Ongwen case as premature.

As for the argument that the Defence has not shown any proof of a potential conflict of interest, this is precisely why the request to confirm whether [REDACTED] accessed certain filings or not is made.

Pursuant to Article 64(2) and 6(f) of the Statute, the Chamber hereby orders that the Registry verify whether [REDACTED] has accessed the following filings ('Requested Information'):

ICC-02/04-01/15-444-Conf-Exp;
 ICC-02/04-01/15-658-Conf-Exp-AnxB;
 ICC-02/04-01/15-702-Conf-Exp-AnxI;
 ICC-02/04-01/15-1189-Conf-Exp;
 ICC-02/04-01/15-1189-Conf-Exp-AnxA;
 ICC-02/04-01/15-1200-Conf-Exp;
 ICC-02/04-01/15-1200-Conf-Exp-Anx;
 ICC-02/04-01/15-1236-Conf-Exp-AnxF;
 ICC-02/04-01/15-1264-Conf-Exp;
 ICC-02/04-01/15-1302-Conf-Exp;
 ICC-02/04-01/15-1307-Conf-Exp;
 ICC-02/04-01/15-1307-Conf-Exp-Anx;
 ICC-02/04-01/15-1393-Conf-Exp-AnxA;
 ICC-02/04-01/15-1403-US-AnxI;
 ICC-02/04-01/15-1405-Conf-Exp;
 ICC-02/04-01/15-1405-Conf-Exp-AnxA;
 ICC-02/04-01/15-1415-Conf-Exp;
 ICC-02/04-01/15-1485-Conf-Exp;
 ICC-02/04-01/15-1485-Conf-Exp-AnxB; and
 ICC-02/04-01/15-1485-Conf-Exp-AnxC.

The Registry is to inform the Defence and the CLRV of the result of this enquiry as soon as possible.

If available, the Requested Information is to be transmitted with any available related information such as, for example, the duration or number of times a document was accessed.

Upon receiving the Requested Information, the Defence is to file any further request in a written filing, should it wish to do so.

Until the provision of the Requested Information, [REDACTED] shall refrain to work on the Ongwen case.

The Chamber stresses that this is a purely intermediary measures for the time that the Defence gathers the necessary information and determines whether it wishes to make a further request or not. In no way should this to be understood as a pronouncement on the propriety or permissibility of [REDACTED] to work on the Ongwen case as a member of the CLRV staff.

After having received the Requested Information, should the Defence decide not to file any further request, it is to immediately inform the CLRV.

In this case the temporary block of [REDACTED] to work on the Ongwen case is considered to be lifted.

Kind regards,
Trial Chamber IX

From: [REDACTED]
Sent: 21 May 2019 10:22
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - Defence Request for

[Message sent on behalf of \[REDACTED\]](#)

Dear All,

Following the Defence response, the CLRV wishes to clarify as follows.

The CLRV agrees that under article 7(4) CoC, Counsel shall ensure that members of his/her team comply with the Code but only with those provisions that are applicable to them. Article 12 CoC which provides for impediments to representation expressly mentions only 'counsel' and 'associate' who are bound by its provisions. That is because they are obviously those who lead the team. Therefore, the CLRV posits that it cannot be said that these provisions should be equally applicable to other members of the team, including clerks and researchers, who are far from being those who lead the team. In this regard, the CLRV also notes that article 16 CoC, when placing on counsel the obligation to ensure that no conflict of interest arises, refers to counsel only and does not mention any other members of team who should comply with the requirements under article 12 CoC.

Kind regards,
[REDACTED]

From: [REDACTED]
Sent: 21 May 2019 09:05
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - Defence Request for

Dear All,

The Defence replies to correct key facts not included in the CLRV's answer below.

In the matter of [REDACTED] (ICC-01/09-02/11-365 OA3), the Office of the Prosecutor had free access to [REDACTED] digital footprint in the ICC system. This is evidenced by the annexes discussed by the Appeals Chamber in its decision (see ICC-01/09-02/11-365, paras 18-21). The Office of the Prosecutor, in that case, was able to determine whether

■ accessed specific files, and even noted that an email requesting legal advice went unanswered. (ICC-01/09-02/11-365, para. 19)

The issue of substantial knowledge or mere speculation of knowledge was not applied in the abstract. The Office of the Prosecutor investigated the issue with due diligence to determine his accesses to information first, and the Pre-Trial Chamber and Appeals Chamber were able to make a highly informed decision about his knowledge of the Kenya 2 case. As the Defence cannot access her digital footprint, it has no way to determine whether there are substantial grounds to believe that the person in question accessed confidential ex parte or under seal information. After such knowledge is gained by the simple investigation described in the Defence's email from 20 May 2019 at 07h51, the Trial Chamber may have enough information to make an informed decision about the issue-at-bar.

The Defence reminds everyone that the Appeals Chamber noted that Pre-Trial Chamber II started the proceedings in the matter of ■ proprio motu "as it was 'keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved' and that the issue would be determined on the basis of such an approach." (ICC-01/09-02/11-365, para. 14, internal citations omitted) This is exactly what the Defence asks, to protect the integrity of the proceedings.

Finally, the Defence disagrees with the CLRV's interpretation of Article 12 of the Professional Code of Conduct for Counsel and notes the absences of any references to Article 16 of the Code or Article 7(4) which makes the Code applicable to those whom the Counsel supervises.

Very best,

■
On behalf of Co-Counsels

Ext. ■

From: ■

Sent: Monday, May 20, 2019 4:40 PM

To: ■ Trial Chamber IX Communications; ■

Subject: RE: OTP vs Ongwen - Defence Request for

Message sent on behalf of Ms Paolina Massidda

Dear All,

The CLRV notes the wording of article 12(1)(b) of the Code of Professional Conduct for Counsel (the "CoC") according to which : *"Counsel shall not represent a client in a case in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. [...]"*.

The CLRV posits that, in accordance with article 1 of the CoC, said provision only applies to counsel and to associates (lawyers) and not to case-managers, insofar it describes instances wherein *"counsel"* shall not represent a client in a case, a situation which does not arise for case manager who do not represent clients. This interpretation is indeed confirmed by the ICC jurisprudence which only deals with issues related to appointment of counsel (as recalled below).

Therefore, the Defence's request shall be rejected on this basis alone.

However, should the Chamber, by extraordinary, deem the provision of article 12 of the CoC applicable to case-managers, the CLRV recalls the governing principles applicable *mutatis mutandis* as established by the ICC jurisprudence in particular by the Appeals Chamber in its decision ICC-01/09-02/11-365 OA3 dated 10 November 2011 related to a matter of a former OTP legal staff who subsequently appeared as defence **counsel** in the given case (namely paras. 58, 60, 68 and 69), according to which *"there is nothing in the wording of article 12 of the Code, nor indeed in any other provision of the Court's governing texts, that indicates that there should be a general bar – whether limited by reference to cases that were open at the time of their employment or otherwise - on former staff members of the OTP representing the defence"* (para. 58).

Moreover, the ICC jurisprudence in the matter establishes that any allegation of conflict of interest must be substantiated and cannot be merely speculative (see ICC-01/09-02/11-405 dated 9 March 2012, para. 32).

In the case at hand, the CLRV argues that the Defence has not even shown a potential conflict of interest.

Consequently, the CLRV respectfully requests the Chamber to dismiss the Defence's request.

Kind regards,

From: [REDACTED]
 Sent: 20 May 2019 07:51
 To: Trial Chamber IX Communications; [REDACTED]
 Subject: OTP vs Ongwen - Defence Request for
 Importance: High

Dear Trial Chamber IX,

I write on behalf of Counsel for Dominic Ongwen.

On 26 April 2019, the OPCV informed the Chamber, Parties and Participants that [REDACTED] started working for the OPCV as a Case Manager on the Ongwen case. Noting that [REDACTED] has worked at the Court for a little less than two years, the Defence has not been provided with any official documentation showing that she is not conflicted out of this position because of her previous work in CMS and the Appeals Chamber.

The Defence requests an order for [REDACTED] to be temporarily removed from the Ongwen case and reassigned to other duties within OPCV until this matter has been resolved.

The Defence requests such an action until such time that it can be verified to the Defence that [REDACTED] did not access confidential *ex parte* documents in case ICC-02/04-01/15 during her time with CMS. The Defence concerns relate, but are not limited, to the following documents:

ICC-02/04-01/15-444-Conf-Exp
 ICC-02/04-01/15-658-Conf-Exp-AnxB
 ICC-02/04-01/15-702-Conf-Exp-AnxI
 ICC-02/04-01/15-1189-Conf-Exp
 ICC-02/04-01/15-1189-Conf-Exp-AnxA
 ICC-02/04-01/15-1200-Conf-Exp
 ICC-02/04-01/15-1200-Conf-Exp-Anx
 ICC-02/04-01/15-1236-Conf-Exp-AnxF
 ICC-02/04-01/15-1264-Conf-Exp
 ICC-02/04-01/15-1302-Conf-Exp
 ICC-02/04-01/15-1307-Conf-Exp
 ICC-02/04-01/15-1307-Conf-Exp-Anx

As a staff member within CMS, [REDACTED] could have had available access to the above mentioned confidential *ex parte* documents. The Defence requests that an independent member of the Registry ensure that she did not access the abovementioned documents while working in CMS. There are further documents classified with an *ex parte* status, but the Defence is currently reviewing some documents for possible reclassification.

Furthermore, the Defence notes that [REDACTED] was in the Appeals Chamber for the previous six months (approximate) before her appointment in the OPCV. The Defence concerns relate, but are not limited, to the following documents:

ICC-02/04-01/15-1393-Conf-Exp-AnxA
ICC-02/04-01/15-1403-US-AnxI
ICC-02/04-01/15-1405-Conf-Exp
ICC-02/04-01/15-1405-Conf-Exp-AnxA
ICC-02/04-01/15-1415-Conf-Exp
ICC-02/04-01/15-1485-Conf-Exp
ICC-02/04-01/15-1485-Conf-Exp-AnxB
ICC-02/04-01/15-1485-Conf-Exp-AnxC

As a staff member within the Appeals Chamber, [REDACTED] could have had access to the abovementioned confidential *ex parte* document and one Under Seal document. The Defence requests that a member of the Trial Chamber or Appeals Chamber staff review Ms Peña's accesses, and that of her employer, to ensure that she did not access the abovementioned documents while working in the Appeals Chamber under her name or under that of her employer.

Should the Chamber wish for the Defence to file an official complaint in the case record, the Defence shall comply.

Highest regards,

[REDACTED]

On behalf of Counsel and Co-Counsels for Dominic Ongwen