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TRIAL CHAMBER IV

Before:

Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*
v.
ABDALLAH BANDA ABAKAER NOURAIN
&
SALEH MOHAMMED JERBO JAMUS

Public Document
with Confidential and *ex parte* Annexure A available only to the Prosecution, Registry and Defence and Public Annexures B, C and D

Defence Response to the "Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team"

Sources: **Defence Team of Abdallah Banda Abakaer Nourain**

Defence Team of Saleh Mohammed Jerbo Jamus

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

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I. Introduction

1. The Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (the "Defence") file this Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team ("Request")[1]. The Request ignores established jurisprudence from this court, relies on flawed assumptions and factual inaccuracies and makes unfounded and speculative assertions regarding the existence of a conflict of interest which would prevent Mr. Ibrahim Yillah ("Co-Counsel" or "Mr. Yillah") from continuing to act as co-counsel for the Defence. The Request argues for the Trial Chamber imposing on defence teams an arbitrary one-year ban on transfers from the Office of the Prosecutor ("OTP") when the Prosecution itself has regularly hired persons from other organs of the court with no such restriction. Accordingly, in the respectful submission of the Defence, the Request should be summarily dismissed.

2. In assessing the Request, it is important to recall that the Prosecution, as the moving party, bears the burden of proof. As detailed below, the Prosecution have failed to discharge that burden and have also failed to have any proper regard to the clear jurisprudence of this Court.[2]

II. Background

3. On 4 May 2011, the Counsel Support Section ("CSS") of the Registry informed the OTP that Mr. Karim A. A. Khan QC ("Lead Counsel") had requested the Registry to assign Mr. Yillah as co-counsel/associate counsel for the defence in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09) (the "*Banda & Jerbo* case").[3]

4. On 19 May 2011, the OTP, acting through the Deputy Prosecutor, Madam Fatou Bensouda, objected to the assignment of Mr. Yillah on the ground of alleged conflict of interest.[4]

5. On 21 May 2011, Lead Counsel responded to the OTP's objections.[5] Lead Counsel indicated that he had considered all the arguments raised by the OTP and that,

[1] Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team, 8 June 2011, ICC-02/05-03/09-160.
[2] P*rosecutor v. Jean-Pierre Bemba Gombo*, Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, 7 May 2010, ICC-01/05-01/08-769 ("Kaufman Decision").
[3] CSS/2011/252.
[4] OTP/PD/19.05.2011/FB/AO-bn. (Confidential and *ex parte* Annex B to the Request)

consistent with his obligations under the ICC's Code of Professional Conduct for counsel (the "Code of Conduct"), he had not identified any evidence adduced by the OTP demonstrating any actual conflict of interest or the appearance thereof arising from the assignment of Mr. Yillah as co-counsel in this case.

6. Later that day, Mr. Yillah provided his own observations to Lead Counsel on the content of the OTP's objections to his assignment in the present case.[6] Mr. Yillah confirmed that he had not identified any issue that would impede his appointment as co-counsel in this case. Mr. Yillah maintained that he did not work on the Darfur Situation or on any of the cases arising from that Situation and challenged the OTP to adduce evidence to the contrary. In the same letter, Mr. Yillah disagreed with the purported working environment of the OTP as set out by the Deputy Prosecutor in her response to CSS. Mr. Yillah further informed Lead Counsel that, in his considered assessment, there was no conflict of interest arising from his assignment as co-counsel in this case and none is expected to arise in the future. This letter was forwarded to CSS by Lead Counsel under cover of a further letter by him dated 22 May 2011.[7]

7. On 25 May 2011, the Registry appointed Mr. Yillah as co-counsel/associate counsel in the present case.[8]

III. Submissions

(A) The Request fails to apply the applicable law

8. Article 21 of the Rome Statute sets out the law to be applied by the ICC. Article 21(1) "clearly imposes a hierarchy of sources, with a three tiered cascade of applicable norms."[9] Article 21(1)(a) provides that the Court shall apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence ("Rules") in the first place. The Code of Conduct directly derives from Rule 8 of the Rules. The Defence submit, therefore, that the Code of Conduct should prevail over general principles of law

[5] Letter from Lead Counsel to Chief of the CSS on 21 May 2011. (Confidential and *ex parte* Annexure A) This letter, as well as the letters included as Annexures B and C, are redacted in part as they make reference to imputations that were ultimately retracted by the Prosecution and which led to the issuance of the *Corrigendum* included at Confidential and *ex parte* Annex B of the Request. Annexure A quotes portions of confidential and *ex parte* Annex B to the Request, and for this reason is likewise classified as confidential and *ex parte*.

[6] Letter from Mr. Yillah to Lead Counsel of 21 May 2011. (Annexure B)

[7] Letter from Lead Counsel to CSS of 22 May 2011. (Annexure C)

[8] CSS/2011/278.

[9] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (OUP, Oxford, 2010) p. 385.

derived from national law of the legal systems of the world, referred in Article 21(1)(c).[10]

9. Be that as it may, the Prosecution fail to accurately identify the general principle of law which can be discerned from the selected survey of comparative legal systems included in the Request. Indeed, there is good reason for such failure: It could not withstand scrutiny.[11] The very same issue (whether a member of the OTP should be barred from moving to the Defence) was considered in the *Hadžihasanović* case at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). After conducting a comparative survey of the law and practice in various national jurisdictions, the ICTY Pre-Trial Chamber concluded:

> *On the basis of this survey, the Chamber can already come to no other conclusion than that national practices differ so much from each other on even the principal issues behind the question with which the Chamber is confronted, that it can derive no guidance from national practices, in the absence of applicable provisions in the Rules, the Directive and the Code of Conduct of the International Tribunal itself.*[12]

10. The Chamber in the present matter, however, is not without guidance on this issue. Article 21(2) of the Rome Statute enjoins the Court to strive towards a consistency of approach and provides that "[t]he Court should apply principles and rules of law as interpreted in its previous decisions." While it is acknowledged that Trial Chamber decisions at the ICC do not create binding precedents on other Trial Chambers, for reasons such as judicial comity and the fundamental principle that like cases should be treated alike, prior decisions of other Chambers should not be lightly departed from.[13]

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[10] Indeed, of relevance is the fact that the primacy of the ICC's Code of Conduct over any other code of ethics or professional responsibility is explicitly stated at Article 4 of the Code of Conduct. This further minimises the relevance of national practices.

[11] The Defence note that an attempt to identify a general principle is made at paragraph 22 of the Request. However, as discussed at paragraphs 18 to 29 of this Response, the Prosecution's assessment of national practices is flawed, thus fatally undermining the Prosecution's conclusion at paragraph 22.

[12] *Prosecutor v. Hadžihasnović et. al.*, IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, para. 42 ("*Hadžihasnović* Decision"). (emphasis added)

[13] In the *Lubanga* Case, the Trial Chamber held that the "statutory and regulatory framework [of the Court] undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber." However, in relation to the relationship between a Pre-Trial Chamber and a Trial Chamber, the *Lubanga* Trial Chamber also stated that a "Trial Chamber should only disturb the Pre-Trial Chamber's Decisions if it is necessary to do so. Not least for reasons of judicial comity, this Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach". *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, paras 5 and 6. (emphasis added) It is submitted that the same reasoning applies as regards the relationship between ICC Trial Chambers. See for example *Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to Decision on the participation of victims in the trial and on 86

11. In this regard, it is as surprising, as it is regrettable, that the Request relegates the unchallenged jurisprudence of this court on this issue to a mere footnote.[14] The Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team" ("Kaufman Decision") in *Bemba* raised an almost identical question to the one raised in the Request. The Prosecution application in that case was rejected, the Trial Chamber finding that "[t]he determinative issue is whether Mr. Kaufman, whilst working for the prosecution, became aware of more than *de minimis* confidential information relevant to the case, which a member of the defence team should not possess [...]"[15] The Prosecution shies away from addressing this jurisprudence and the standard to be applied in any meaningful manner. Nevertheless, the reasoning in the Kaufman Decision is clearly dispositive of the issue and, in the respectful submission of the Defence, should be followed by the Trial Chamber unless compelling reasons are advanced to the contrary. Such compelling reasons are not advanced in the Request.

12. The guidance given in the *Bemba* case aside, the Court's jurisprudence provides that "if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law".[16] Thus, the relevant jurisprudence of other international courts and tribunals, which operate in a similar context to the ICC, is of persuasive authority.

13. Thus, contrary to the Prosecution's argument that Article 12(1)(b) of the ICC Code of Conduct differs from Article 14(c) of the ICTY Code of Professional Conduct,[17] the Defence submit that the jurisprudence of the ICTY is relevant in this case. Further, the approach taken by the ICTY is similar to the one taken by the Trial Chamber in *Bemba*.

14. As noted above, the ICTY Pre-Trial Chamber in *Hadžihasanović* ruled on the assignment of a former OTP attorney as defence counsel. When assessing the

applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 69. (surveying and then adopting the approaches of Trial Chambers I and II with respect to the participation of anonymous victims)

[14] Request, fn 6.

[15] Kaufman Decision, para. 42. While the Trial Chamber found that the Code of Conduct was not directly applicable to Mr. Kaufman as a legal consultant, the Trial Chamber held that had it applied the Code of Conduct to Mr. Kaufman it would have reached the same decision. Kaufman Decision, para. 46. The Trial Chamber later dismissed a Prosecution application challenging Mr. Kaufman's appointment as co-counsel in the same case, holding that no new information had been presented that would require a re-evaluation of the Chamber's earlier Article 16(1) analysis of Mr. Kaufman's appointment. P*rosecutor v. Jean-Pierre Bemba Gombo*, 2 December 2010, ICC-01/05-01/08-T-42-Red-ENG WT, p. 2, line 9 to p. 4, line 13.

[16] *Prosecutor v. Thomas Lubanga Dylio,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/01-01/06, para. 44.

[17] Request, fn 18.

arguments of the parties and the Registry on the conflict of interest issue, the Chamber applied a "real possibility test".[18] It held that "[a] party seeking disqualification of counsel under the pretext of fair trial interests always bears the burden of persuading and convincing a Chamber that [...] prior association [with the OTP] is such that it would amount to a real possibility of a conflict of interests."[19]

15. As also noted above, the Trial Chamber in *Bemba* required the former OTP attorney to be in possession of "more than *de minimis* confidential information relevant to the case" in order for him to be disqualified from acting as legal consultant on the case.[20]

16. Therefore, both Trial Chamber III in *Bemba* and the ICTY Pre-Trial Chamber in *Hadžihasanović* required the Prosecution to properly substantiate their concerns by providing concrete proof to show the alleged conflict of interest. In the present case, the Prosecution have failed to provide any such proof.

(B) Reliance on national codes or laws governing the conduct of counsel is flawed

17. The Prosecution have failed to argue, never mind establish, the existence of a general principle of law from a survey of selected jurisdictions. The Defence submit that this should be the end of the matter, especially when there is clear and unchallenged ICC jurisprudence that provides guidance on this issue.

18. Notwithstanding this, and for the sake of completeness, the following consideration of the majority of national examples referred to by the Prosecution demonstrates that they cannot be relied on as they are either misstated, of questionable authority, or so severed from their national context that their relevance in the ICC setting is of questionable, if any value.

(i) Canada, United States and Germany

19. The Prosecution's reliance on codes of conduct and legal provisions from Canada, the United States ("U.S.") and Germany in support of its submissions is wholly without merit. Not only do the Prosecution misrepresent the content of these sources (at least with respect to the Canadian and U.S. systems), the Prosecution's summarisation and interpretation of these references contradict the Prosecution's own stated position. As indicated in paragraphs 19, 20 and 21 of the Request, it is said that the Canadian,

[18] *Hadžihasnović* Decision, paras 46 and 49.
[19] *Ibid*.
[20] Kaufman Decision, para. 42.

American and German legal traditions preclude a former government lawyer from acting in matters only where the said lawyer had "acted for or provided advice to the" government *on that specific matter* (Canada – Conflict of Interest Act),[21] or it is "*the same or a substantially related matter*" on which the lawyer was working when employed by the government (U.S.)[22], or the lawyer "has already been concerned with *the same legal issue* as a [...] public prosecutor" (Germany)[23]. As the Request makes clear, Mr. Yillah, while employed by the Prosecution, was not involved in this case or in the Darfur Situation and the Request makes no specific allegation that Mr. Yillah worked on "the specific matter", the "same or a substantially related matter" or "the same legal issue."[24] Applying the provisions cited and interpreted by the Prosecution would in no way bar Mr. Yillah from acting as co-counsel in the present case. In other words, the references cited by the Prosecution do not support the proposition being advanced in the Request.

20. With respect to the American legal tradition, the Prosecution cite to Rule 1.11 of the American Bar Association's Model Rules of Professional Conduct ("ABA Rules") for the proposition that written informed consent is required "from a government agency where the lawyer previously worked".[25] A full exposition of the rule makes clear that such consent is required <u>only</u> "in connection with a matter in which the lawyer participated <u>personally and substantially</u> as a public officer or employee [...]"[26] As stated above, Mr. Yillah was not involved while employed with the Prosecution with the Darfur Situation or this case in particular, and certainly did not participate "personally and substantially". As the commentary to Rule 1.11 explains, "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government."[27] Yet, this restriction is precisely what the Prosecution would have the Court impose.

[21] Request, para. 19, citing Section 34(1) of the Conflict of Interest Act (S.C. 2006, c. 9, s. 2), Part 3: Post-employment Rules for All Former Public Office Holders, http://laws-lois.justice.gc.ca/eng/acts/C-36.65/page-11.html#h-13. The Prosecution also cite to Section 34(2). This provision would not prohibit the engagement of Mr. Yillah as Defence counsel, but rather compels former public office holders from giving advice "using information that was obtained in his or her capacity as a public office holder and is not available to the public." The Prosecution's citation to Section 33 of the Act merely sets out the general proposition that: "No former public office holder shall act in such a manner as to take improper advantage of his or her previous public office"; it is not a bar to engagement as counsel with respect to Mr. Yillah.
[22] Request, para. 20, quoting Rule 1.9(a) of the ABA Model Rules.
[23] Request, para. 21, quoting the German Federal Law on Lawyers.
[24] Request, para. 3.
[25] *Ibid.*, para. 20.
[26] http://www.abanet.org/cpr/mrpc/rule_1_11.html. (emphasis added)
[27] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_11_special_conflicts_of_interest_for_former_current_government_officers_employees/comment_on_rule_1_11.html.

Thus, the American example contradicts the Prosecution position as postulated in its Request.

21. As noted previously, the Prosecution cite to provisions of the Canadian Conflict of Interest Act that are inapplicable to Mr. Yillah's situation. Additionally, the Prosecution misstate and selectively refer to the Values and Ethics Code for the Public Service of Canada by paraphrasing: "former public servants, including prosecutors, must undertake to minimize the possibility of real, apparent or potential conflicts of interest […]."[28] The actual wording of the code reads: "former public servants should undertake" to minimize this possibility. More importantly, the Prosecution omit the beginning of this provision: "Without unduly restricting their ability to seek other employment, former public servants should undertake […]."[29]

22. The issue at hand is more directly addressed in the Canadian Bar Association's Code of Professional Conduct, which states: "After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving because to do so would give the appearance of impropriety even if none existed."[30] Mr. Yillah had no responsibility, let alone "substantial responsibility" over cases in the Darfur Situation. Likewise, Mr. Yillah unequivocally states he had no access to confidential information related to this case or the Darfur Situation.

(ii) Chinese Law

23. At paragraph 18 of the Request, the Prosecution refer to the Chinese Law on the Profession of the Lawyer. The Defence note that the source of this information is the website of the private Chinese law firm, Lehman, Lee & Xu. A private law firm cannot be considered an authoritative source of Chinese law and no information is provided on the site which indicates the law's official or authoritative source. Further, the very site on which the Prosecution would have the Trial Chamber rely expressly advises against any such reliance. The website's terms of use state:

[28] Request, para. 19. (emphasis added)
[29] Chapter 3: Post-Employment Measures of The Values and Ethics Code for the Public Service of Canada of 1 September 2003, http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.asp. (emphasis added) The full provision is as follows: "Without unduly restricting their ability to seek other employment, former public servants should undertake to minimize the possibility of real, apparent or potential conflicts of interest between their new employment and their most recent responsibilities within the federal public service."
[30] The Canadian Bar Association, The Code of Professional Conduct, Revised 2009, http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf, Chapter XIX, Commentary 3: Duty after Leaving Public Employment. (emphasis added)

> *The information contained in Lehman, Lee & Xu Website is provided for informational purposes only, and should not be construed as legal advice or legal opinion on any specific facts or circumstances. No users of the [...] Website [...] should act or refrain from acting on the basis of any content included in the website without seeking appropriate professional advice. Although we endeavor to keep this [...] Website current and accurate, the content on the site may not reflect current legal developments.*[31]

(iii) The French system

24. The Prosecution's reference to French legislation is not relevant. The French regulation on the status of the "magistrats" must be read in light of the unique particularities of the French legal system regarding the organs of a court and parties to court proceedings.

25. The French regulation on the status of the "magistrats", i.e. judges and prosecutors, states at Article 9-1:

> *Les magistrats et anciens magistrats ne peuvent exercer la profession d'avocat, d'avoué, de notaire, d'huissier de justice, de greffier de tribunal de commerce, d'administrateur judiciaire ou de mandataire-liquidateur ou travailler au service d'un membre de ces professions dans le ressort d'une juridiction où ils ont exercé leurs fonctions depuis moins de cinq ans.*
>
> *Les dispositions de l'alinéa précédent ne s'appliquent pas aux magistrats de la Cour de cassation.*[32]

26. This provision provides that a serving or former "magistrat" may not practice as a defence counsel within the jurisdiction of the court at which they have practiced. However, the national context is crucial to understanding this provision.

27. In France, the "magistrats" follow a different career path than lawyers (i.e. defence counsel) ("avocat"). To become a "magistrat", a person needs to be admitted and trained by the "École national de magistrature" ("ENM"). Candidates for the ENM are not required to be admitted to the bar, but need to have a university degree or be functionaries of the State.[33] Defence counsel, on the other hand, are required to hold a law degree and have passed the "Certificat d'aptitude à la profession d'avocat" ("CAPA") by completing an 18 month training and a series of courses and

[31] http://www.lehmanlaw.com/index.php?id=3220.
[32] Ordonnance n°58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature, Article 9-1.
[33] *Ibid.*, Article 16 (1) and Article 17 (1) and (2). Note that Article 17 (3) provides for a third group of potential candidates.

placements.[34] Each defence counsel is a member of an independent legal entity called "barreau" of the respective French "département".[35]

28. For a "magistrat" to become a defence counsel, in the likely case that he has not already passed the CAPA, completion of an 18 month training is required. Therefore, to become a "magistrat" is a far more definitive career choice than to join the Office of the Prosecutor.[36] French legislation on the modalities of such a career change thus cannot be used in the ICC context.

29. Of additional note is that Article 9-1 cited above does not apply to a "magistrat" of the "cour de cassation". As the cour de cassation is the only national court in France on criminal (or civil) matters[37], if the provision were to apply, a "magistrat" working at this court would be prevented from working in any lower court since they all form part of the same jurisdiction, in the sense of Article 9-1.[38] These concerns apply equally to the ICC. Imposing a fixed period of time before which an attorney who worked in the Office of the Prosecutor could become a Defence counsel is unreasonable.[39]

(C) The Prosecution does not abide by its proffered principles when hiring staff members

30. In addition to the foregoing, the disingenuous nature of the Prosecution's submissions is demonstrated by a cursory review of the OTP's own hiring practice.

31. If persons working for other organs of the Court "were exposed to and could have participated in or just overhead formal and informal office discussions concerning confidential information"[40] not otherwise in the Prosecution's possession (such as confidential and *ex parte* Defence filings and communications) relating to *any* of the cases presently before the Court, then, *according to the Prosecution's own stated position*, that person should not be appointed or a minimum one-year time bar to employment with the Prosecution should be imposed. At the very least, the OTP should have implemented a stated policy that it would not hire such individuals without such a time lapse. No such policy has been adopted or implemented by the OTP. Despite this,

[34] See J. Bell, S. Boyron and S. Whittaker (Eds.), Principles of French Law (OUP, Oxford, 2008), p. 73.
[35] See *Ibid.*, p.74.
[36] See *Ibid.*, p.67. Bell, Boyron and Whittaker state that French judges dedicate their entire career to the judiciary. It is the submission of the Defence that the same is true for French prosecutors.
[37] *Ibid.*, p. 46.
[38] Senat Débat parlamentaires, Journal officiel de la République Française, 27 October 1993, « Première session ordinaire de 1993 – 1994 », Compte rendue intégrale, p. 2791, http://www.senat.fr/comptes-rendus-seances/5eme/pdf/1993/10/s19931006_2777_2806.pdf, accessed on 10 June 2011.
[39] See *infra* para. 52 to 56.
[40] Request, para. 3.

the OTP now wishes to impose such a restriction on Mr. Yillah. This unequal and unprincipled approach cannot be used to justify a Trial Chamber taking the drastic step of preventing a suspect or accused from exercising a right guaranteed under the Statute and engaging counsel of his own choice in the absence of any discernable conflict.

32. The paucity of principle underlying the Request is exposed by reference to just a few examples: Several persons currently or previously employed by the Prosecution came to the Office directly from either Chambers or the Registry. Yet, the Prosecution has not deemed such prior appointment as grounds for disqualification from employment in the OTP.

33. For instance, Mr. Phakiso Mochochoko, Head of the Prosecution's Jurisdiction, Complementarity and Cooperation Division (JCCD) since February of this year, served as Senior Legal Advisor in the Registry from 2004 to January 2011.[41] In that capacity Mr. Mochochoko may[42] have been privy to confidential and *ex parte* positions of various Defence teams and individual counsel on current and proposed Court policies and protocols, confidential and *ex parte* defence requests to the Registry and confidential and *ex parte* Defence requests for cooperation to states or international organisations.[43] The Defence note that the Head of JCCD is a member of the Prosecution's Executive Committee (ExCom),[44] and therefore takes part in the overall governance of the Prosecution and participates in confidential and high-level decision making concerning every case and situation before the Court.

34. Ms. Adesola Adeboyejo moved in unbroken succession from the Office of Public Counsel for Victims (OPCV) to the Victims Participation and Reparations Section (VPRS) and then in 2009 to the Prosecution Division of the Prosecution. She is currently serving as Trial Lawyer in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11).

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[41] http://www.icccpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/biographies/jcod?lan=en-GB.

[42] Of course the Defence, unlike the Prosecution, <u>do not</u> accept that the mere <u>suggestion</u> of access to confidential information is sufficient grounds upon which to found a conflict claim.

[43] This includes, *in the present case*, the contents of the following confidential and *ex parte* Defence only annexure – ICC-02/05-03/09-146-Conf-Exp-AnxC – which was transmitted to the United Nations Office of Legal Affairs through official Registry channels.

[44] http://unjobs.org/vacancies/1278759432500.

The Defence note that Ms. Adeboyejo's name and signature appear on the victim application forms of several victims in the present case.[45]

35. To the best of the Defence's knowledge, in 2007, Mr. Reinhold Gallmetzer, then an Associate Legal Officer to Her Honour, Judge Anita Ušacka, became a counsel in the appeals section of the Prosecution.[46] There are other examples, and also examples of members of the OTP moving to other sections of the Court. The Defence does not consider it necessary to recite all these in this Response. Suffice it to say, a uniformity of approach, a policy driven by principle, would have required the Prosecutor to have objected to each and every instance of former staff members that moved to other organs of the Court. Such objection has not been consistently taken. Rather, it is submitted that such movement between organs of the Court and between organs and the Defence has capacity to enrich and indeed enhance the administration of justice by bringing different perspectives and accumulated experience to inform the work of different sections.[47] No barrier should be erected to such movements except where a staff member of an organ of the Court seeks to work on a case where they became aware of more than *de minimis* confidential information relevant to the case while working for another organ.

D. Defence submissions on factual matters arising out of the Prosecution's submissions

36. The Defence respectfully submit that for the reasons detailed above, the Request should be rejected. Despite this, the Defence will proceed to address certain factual averments made by the Prosecution in its Request.

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[45] See, e.g., ICC-02/05-03/09-50-Conf-Exp-Anx45-Red, pp. 13 and 16; ICC-02/05-03/09-50-Conf-Exp-Anx47-Red, pp. 13 and 15.
[46] International Criminal Law Services, Board of Directors, http://www.iclsfoundation.org/about/people/board-of-directors.
[47] A review of the practice of just one sister Tribunal shows how the administration of justice may be enhanced, and at least not harmed, by such transfers. Previous employees in the OTP of the ICTY that have acted as Defence Counsel before the same court include lead counsel in the present case (Karim A. A. Khan QC), Andrew T. Cayley, Gregory Kehoe, Rodney Dixon, Stéphane Bourgon and Payam Akhavan. Employees of the ICTY Registry that have later worked for the OTP include David Tolbert (who moved from Chef de Cabinet in Chambers, to Deputy Registrar and then to Deputy Prosecutor). Employees of Chambers that later moved to the Registry include the current ICTY Registrar, Mr. John Hocking. Members of Chambers staff at the ICTY who have moved to the Defence include Stéphane Bourgon, Steven Powles, John Jones and Guénaël Mettraux. Previous Defence counsel who have moved to the Bench include Judge Orie and Judge Morrison. Judge (later ICTY President) Meron moved as an advisor and then counsel engaged by the Prosecutor in the *Tadić* Interlocutory Decision on Jurisdiction to the Bench. Contrary to the Prosecution averment at paragraph 32 of the Request, none of this has "undermine[d] the confidence of the victims and the public in the system of justice" at that international Tribunal. The Defence submit that the Prosecution contention in this regard is not only unsupported by of any empirical or other evidence, but it is contradicted by the actual experience at the ICTY and numerous examples already in the ICC. Many similar examples could also be given having regard to other international and internationalised courts. The Defence submit that this compels but one conclusion: That the Prosecution averments in this regard should be rejected.

37. As outlined above, the international jurisprudence establishes that for the Request to succeed, the Prosecution must detail the full particulars of the relevant confidential information allegedly disclosed to Co-Counsel. General or vague allegations are insufficient. Nevertheless, the Request is characterised by supposition, conjecture and unsupported leaps of logic.[48]

38. In addition, the Request includes various inaccurate submissions as to the contended factual realities of the OTP's office structure and practice and argues that these require the drastic step of invalidating Mr. Yillah's appointment as co-counsel. As argued below, the Prosecution's submissions in this regard are little more than a regurgitation of the submissions made, considered and rejected in the Kaufman Decision.

(i) Response to the submission that offices are shared by lawyers from different teams & therefore Mr. Yillah *may* have been exposed to confidential information

39. In the *Bemba* case the OTP argued that:

> *[...] Mr Kaufman is aware of the strengths and weaknesses of the Bemba case as well as the reasons underlying the prosecutorial strategy. The prosecution submits he may have gained this knowledge through formal meetings or informal discussions with former prosecution colleagues, especially Mr Scaliotti, a trial lawyer in the Bemba case, and with whom Mr Kaufman shared an office and spoke about matters of mutual interest. In addition, it is submitted that Mr Kaufman participated in Division meetings, and he was involved in discussions on prosecutorial policies, including on the mode of liability and the disclosure system in the Bemba case.*[49]

40. Notwithstanding the fact that the above argument was *not* accepted in *Bemba*, the Prosecution continue to rely upon it in the present case.[50] In *Bemba*, the Prosecution argument, weak though it was, was still stronger than that presented by the Prosecution in the present case. Mr. Yillah has never shared an office with any lawyer from the *Banda & Jerbo* case,[51] unlike the situation of Mr. Kaufman, who was sharing an office with a P4 lawyer from the *Bemba* case.

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[48] For example, the Prosecutor contends at paragraph 3 of the Request that Mr Yillah "could have participated in or just overheard formal and informal office discussions concerning confidential information relating to this case". (emphasis added) Bizarrely, the paragraph concludes, based only upon the previously detailed, unsupported conjecture, that "[t]his presents a real risk that he could inadvertently use such information in his proposed new role." It gives the Defence no joy to state that, on any objective assessment, this constitutes guesswork, not legal argument.

[49] Kaufman Decision, para. 17

[50] Request, paras 2 and 12.

[51] Letter of Mr. Ibrahim Yillah to Lead Counsel, dated 12 June 2011, p 2. (Annexure D) The business telephone and personal email address of Mr. Yillah have been redacted in order to classify this annexure as "public".

41. Further, the submissions of the Prosecution suggesting that it is one office and implying that the Prosecution Division ("PD") is indivisible[52] is incorrect. A perusal of the organisational structure of the OTP as detailed in its Regulations shows that, with the exception of members of the OTP ExCom and co-ordinators of the various divisions in the OTP, it is hardly accurate to assert that all members of the OTP, including P3 Trial Lawyers, have access to confidential information across all situations and cases.

42. Indeed, the OTP has, when commenting on Article 70 proceedings, itself relied upon the concepts of independently functioning OTP teams and OTP staff members. In *Lubanga*, in relation to its authority with regard to Article 70, the Prosecution's stated position was:

> *Clearly, if a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to* <u>*members of the OTP who were uninvolved with the proceedings*</u> *or, in an extreme situation, to an independent investigator.[…]"*[53]

43. In other words, the Prosecution was apparently submitting that there were separate teams or staff members within its Office capable of curing what would otherwise be a conflict of interest. This is incompatible with the argument that "there is only one team in PD".[54] The OTP cannot selectively argue the existence or non-existence of these concepts depending on the particular cause it is seeking to promote at any given instance.

(ii) Response to the submission on the *possibility* that confidential information *may* have been shared in OTP hallways

44. The Prosecution contend that confidential information *may* have been shared informally between Mr. Yillah and OTP lawyers from other teams in the hallways and other open areas which are accessible to anyone within PD.[55] These same arguments were canvassed in the *Bemba* case. As the Trial Chamber in that case recalled:

> *The prosecution submits he [Mr. Kaufman] may have gained this knowledge through formal meetings or informal discussions with former prosecution colleagues, […]*[56]

[52] Request, paras 2, 12 and 24.
[53] ICC-01/04-01/06-T-350-ENG RT 14-04-2011 T, p.14, lines 12 to 15 and p. 17, lines 11 to 16.
[54] Request, para 24.
[55] *Ibid.*, para 2.
[56] *Ibid.*, para. 17.

45. Rather than taking the jurisprudence in *Bemba* as guidance and adjusting its policies or refining its arguments, the Prosecution have sought to transplant virtually identical arguments to the present case. The result is clear: The Request fails to identify a single piece of confidential information relating to the *Banda & Jerbo* case that was shared with Mr. Yillah in the hallways of the 8th floor of the Arc Building or anywhere else. Further, Mr. Yillah attests that no such discussions took place informally with lawyers from the *Banda & Jerbo* case.[57]

(iii) Response to the submission as to the possibility that Mr. Yillah *may* be privy to confidential information

46. In the *Bemba* case, the Trial Chamber noted that:

> *"[…]it is submitted that Mr Kaufman participated in Division meetings, and he was involved in discussions on prosecutorial policies, including on the mode of liability and the disclosure system in the Bemba case.*
>
> *18. The prosecution asserts that Mr Kaufman was aware of the under seal, non-redacted application for warrant of arrest in the Bemba case, which has not been disclosed to the defence."*[58]

47. No such assertions have been made by the Prosecution in this case and the Prosecution fail to identify *any* instance where Mr. Yillah was actually exposed to confidential information relating to the *Banda & Jerbo* case. Also, unlike Mr. Kaufman, Mr. Yillah did not participate in discussions concerning witness protection or the disclosure regime in the *Banda & Jerbo* case, and was never listed in the Court Management Services as a recipient of confidential, under seal or *ex parte* filings in the *Banda & Jerbo* case.

(iv) Response to the submission that Mr. Yillah would have been exposed to confidential information relating to OTP investigative and prosecutorial strategies

48. The Prosecution submit that the confidential information that Mr. Yillah *may* have been exposed to include the office policy, as well as investigative and prosecutorial strategies. The Prosecution unsuccessfully canvassed these same arguments when it sought to disqualify Mr. Kaufman.[59] Accordingly, these arguments should be similarly dismissed in the instant case. To be clear, the only Prosecution strategies that Mr. Yillah was privy to were those conveyed to him by the Senior Trial Lawyers or the P4 Trial Lawyers in the cases he actually worked on, which are the *Bemba* case, the

[57] Letter of Mr. Ibrahim Yillah to Lead Counsel, dated 12 June 2011, p 2. (Annexure D)
[58] Kaufman Decision, paras 17 and 18.
[59] *Ibid.*, para. 17.

Uganda Situation and the DRC Situation cases which were under investigation at the time Mr. Yillah was on the respective teams. Mr. Yillah was not informed of or privy to – be it formally or on the hallways of the OTP – any investigative or prosecutorial strategies in the *Banda & Jerbo* case.[60]

49. Indeed, the submissions of the Prosecution are, in fact, perilous to the obligations of confidentiality of the Prosecutor. It is expected that there would be a regime in place to avoid, rather than encourage such careless and unregulated sharing of highly sensitive case related information. It is to Mr. Yillah's credit that he has not engaged in hallway-gossip of sensitive and confidential information about the individual cases including the *Banda & Jerbo* case, being handled by the Prosecutor.[61]

(v) Response to the submission that Mr. Yillah provided no information that he was going to join a defence team in the near future

50. The Prosecution assert that Mr. Yillah did not provide information that he was going to join a defence team in the near future.[62] This is completely irrelevant and indeed indicative of a Request that is devoid of substance or real argument. Mr. Yillah is under no obligation, be it contractually or morally, to inform the OTP of his future career plans.

51. The Prosecution's submission is also incorrect. While the point is irrelevant, the wholly inaccurate averment by the Prosecution is a cause for concern. Mr. Yillah informed the Deputy Prosecutor and many of his colleagues (including several Senior Trial Attorneys) that he was returning to private legal practice, which is the capacity in which he takes on the position of co-counsel in this case. Mr Yillah further informed colleagues that he would be making an application to be admitted on the list of counsel.[63] Importantly, prior to his departure, Mr. Yillah informed the acting Senior Trial Lawyer, Mr. Adebowale Omofade, and other lawyers from the *Banda & Jerbo* OTP team that he had been invited to join the *Banda & Jerbo* Defence. In these circumstances, the best that can be said is that the OTP has been carelessly remiss in failing to make proper inquiry from the lawyers having conduct of this case.

[60] Letter of Mr. Ibrahim Yillah to Lead Counsel, dated 12 June 2011, p 2. (Annexure D)
[61] *Ibid*.
[62] Request, para. 13.
[63] Letter of Mr. Ibrahim Yillah to Lead Counsel, dated 12 June 2011, p 2. (Annexure D)

(vi) Response to the submission on the imposition of a time bar within which Mr. Yillah should not be permitted to appear as Defence Counsel before the ICC

52. The Prosecution have made submissions on the merits of a one year "restraint of trade" on Mr. Yillah with respect to his ability to take up any defence cases before the ICC.[64] Curiously, whilst the Prosecution make extensive submissions on this issue, it is not in the relief sought in the Request.

53. The Defence submit that the OTP simply does not have in place any such restriction capable of binding its lawyers. No such restriction was included as a clause in Mr. Yillah's employment contract with the OTP. Nor was any separate undertaking required of him by the OTP at the time of his employment or at any time during his employment by that Office. The law on such restraints of trade, be it in Australia or in Belgium is clear:

> *[...] any employer seeking to prevent a former employee from competing with their business must rely on an enforceable clause in their contract of employment with the former employer. Thus, it must be in writing and acknowledged by both parties. In order to be enforceable, the terms of a restraint of trade must be clear, certain and not vague. [...] Thus, even if an employer has a valid need to protect its interests, the restraining clause must be drafted with sufficient clarity and certainty.*[65]

54. If OTP lawyers joining a Defence team in cases which were opened at the time of their employment was a matter of such serious prejudice to the Prosecution, as it says it is, and one that even a one-year ban could not cure, one could have reasonably expected that the Kaufman Decision in the *Bemba* case would have triggered the Prosecution to action. Indeed, this issue is hardly unheralded and the case law and jurisprudence on this issue dates to at least 2002.[66] If such a restriction on employment of former employees were both legal and necessary, it surely would be part of the contract of Prosecution employees and the Prosecution would have sought its inclusion in the Code of Conduct. It is not for the Trial Chamber to remedy what the Prosecution believes are failures of its own personnel policies. If Mr. Yillah's contract had contained such an express obligation he would have had the opportunity to have made an informed choice as to whether or not he should accept such a GTA contract of employment with the ICC under those conditions. Furthermore, it is pertinent to note that in all those jurisdictions

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[64] Request, paras 4, 24-25.
[65] Ius Laboris, Non-Compete Clauses: An International Guide, pp. 19 and 46, *available at* http://www.iuslaboris.com/Files/non-compete-clauses-an-international-guide.pdf.
[66] *Hadžihasnović* Decision.

referred to by the Prosecution where a time period is specified,[67] the period is codified in domestic legislation. There is no such specified restriction in the Code of Conduct.

55. If what the Prosecution wants is for the Chamber to fill perceived lacunae in the OTP's own internal procedures, the ICTY Pre-Trial Chamber in *Hadžihasnović* discerned a similar improper intent by the Prosecutor of that tribunal. The Chamber noted that:

> *The Chamber observes in this context, that it might have been useful if certain general guidelines or rules had been established in the past that would have provided guidance as to how to avoid having former Prosecution Office employees resign and start working as Defence counsel before this Tribunal. This guidance would have avoided, or at least controlled, the issue of advantage or undue advantage. However, as discussed at length above, no such norms have been established and, so far as the Chamber is aware, no steps have ever been taken by the Office of the Prosecutor to put such norms in place. Failing such norms, it is not for the Chamber itself to "legislate" and develop them.*[68]

56. The absence of a restraint of trade in OTP contracts of employment, the absence of similar provisions in the Code of Conduct and the existence of a plethora of jurisprudence where prosecution lawyers have not been disqualified from representing the defence at the same courts and tribunals, creates a legally binding legitimate expectation that Mr. Yillah would be allowed to move from the OTP to another organ of the Court, or to the Defence, provided no real possibility of conflict exists.

IV. Conclusion

57. The Defence submit that Mr. Yillah is in full compliance with Articles 12 and 16 of the Code of Conduct. The Code places the obligation on counsel to identify any conflict of interest arising from counsel's assignment. Co-Counsel has turned his attention to his time at the OTP and has carefully considered his confidentiality obligation to his former employer. Co-Counsel has not identified any confidential information that he may either be in possession of or privy to which may place him in a situation of a conflict of interest.[69]

58. The OTP has manifestly failed to discharge its burden of proof. It has not brought forth any concrete evidence in support of the Relief requested. Instead, the Request is largely composed of generalised assertions, unsupported by evidence, which must be

[67] Request, paras 16, 17 and 18.
[68] *Hadžihasnović* Decision, para. 52.
[69] Letter of Mr. Ibrahim Yillah to Lead Counsel, dated 12 June 2011, p 3. (Annexure D)

disregarded. Properly considered, the Request merely confirms Co-Counsel's assessment, in line with his obligations under the Code, that no actual conflict of interest exists that would disqualify him from participating in this case.

59. In disposing of this issue, it is important to bear in mind that Co-Counsel is a member of the Bar and is bound by the ICC Code of Conduct. A margin of deference must always be given to undertakings by counsel, absent any suggestion of bad faith. The Defence submit that there is no reason to doubt Mr. Yillah's integrity and, as held in the *Bemba* case, "the Chamber is entitled to rely on his clear undertakings, particularly given his position as one of the lawyers on the list of counsel."[70]

V. Relief Requested

60. For the reasons detailed above, the Defence respectfully request that the Trial Chamber dismiss the objections contained in the Request as unfounded and without merit.

61. The Defence also respectfully request that the issue is considered as a matter of priority by the Trial Chamber in order to minimise any impact on Defence preparations for trial.

Respectfully Submitted,

Mr. Karim A. A. Khan QC Lead Counsel	Mr. Nicholas Koumjian Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 15th Day of June 2011 At Nairobi, Kenya	Dated this 15th Day of June 2011 At Los Angeles, United States

[70] Kaufman Decision, para. 45.