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No.: **ICC-02/05-03/09 OA**
Date: **25 July 2011**

THE APPEALS CHAMBER

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE DARFUR, SUDAN

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

Public

Prosecution's Appeal against Trial Chamber IV "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence"

Source: **Office of the Prosecutor**

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Introduction

1. On 30 June 2011 Trial Chamber IV decided[1] to deny the Prosecution's request to invalidate the appointment of Mr Ibrahim Yillah, a former trial attorney at the Office of the Prosecutor ("OTP") who joined the defence team in the *Banda and Jerbo case* two weeks after he left the Office of the Prosecutor ("the Decision"). The Chamber found that Mr Yillah was not "effectively in possession" of more than *de minimis* confidential information relevant to the case, and that his appointment should therefore not be invalidated.

2. The Prosecution submits that the Chamber committed two discernible legal errors that materially affect the impugned Decision: first, the Chamber erred when it refused to apply an objective standard, which the Prosecution submits would have led to Mr Yilah's disqualification. Second, the Chamber also erred when it required that Mr Yillah be *effectively* in possession of "more than *de minimis*" confidential information.

3. The importance of the Court's mandate, the particular context in which the Court operates and the need to protect the integrity of its proceedings require the adoption of standards that – in a manner fully consistent with the Court's statutory framework – provide the highest degree of protection to the integrity of the Court's proceedings. The Decision falls short of doing so; on the contrary, it embraces a test that is wrong in law and offers inadequate protection. The test is incorrect and particularly inadequate in view of practice within the OTP. Because of the essential need to freely consult and discuss factual, legal, and policy issues, lawyers have an obligation of confidentiality as to all information and an assumption that all interactions within the Prosecution Division will be unrestricted and therefore confidential.

[1] ICC-02/05-03/09-168.

4. The Prosecution accordingly requests the Appeals Chamber to reverse the impugned Decision, provide the correct legal standards, and either invalidate Mr Yillah's appointment or remand the matter to the Trial Chamber with directions to invalidate it.

Statement of Facts

5. At the time Mr Yillah left the OTP, the Prosecution Division ("PD") within the OTP had a maximum of approximately 40 lawyers – the exact number varies with resignations and new appointments – who were largely assigned to specific trial teams to prosecute 24 persons currently charged in 10 cases arising in seven different Situations. The trial teams themselves are of varying sizes and compositions. They are not physically set apart in separate pods; instead, lawyers share offices with colleagues on different teams and consult freely across team lines about strategy, legal, and factual issues. Strategy discussions by their nature do not involve public information; they are exclusively concerned with internal analysis and decisions. In conversations within PD of facts and legal issues, moreover, there is rarely a distinction between "confidential" facts or issues and public ones; all PD members have a duty of confidentiality and it is assumed that everything is confidential. Additionally, PD lawyers are frequently redeployed temporarily or permanently to other teams when circumstances warrant, because of the breadth of the work and the limited resources within PD. As a result, most PD lawyers are familiar to varying degrees with the pending strategy and legal issues, facts, and OTP challenges in all the currently open cases.

6. Mr Yillah joined PD on 15 August 2005, after having been a lawyer in his national legal system and in two international tribunals. He was assigned to the Uganda situation, to the *Katanga and Ngudjolo* case, and then to the *Bemba* case.

7. Mr Yillah left PD on 19 April 2011. Two weeks later, on 4 May 2011, the Counsel Support Section ("the CSS") notified the Office of the Prosecutor of Mr Yillah's proposed appointment to the Defence team in the *Banda and Jerbo* case. The Prosecution objected because of Mr Yillah's recent affiliation with the OTP, but CSS responded that it had no authority to refuse the appointment.

8. On 8 June 2011 the Prosecution requested Trial Chamber IV to invalidate the appointment ("Prosecution's Request").[2] It explained the working environment within the OTP, including the routine practice of consulting and sharing information within the Office. It also urged the Chamber to follow the lead of national jurisdictions that recognize the risk that prosecutors who worked in a close environment might thereafter divulge or use, even inadvertently, confidential information obtained in that position and accordingly restrict their appearance as defence counsel against the prosecution offices with which they had been affiliated.[3] The Prosecution argued that in light of the characteristics and working methods of the Office of the Prosecutor (small office that routinely shares information), Mr Yillah necessarily learned confidential information that impeded him to represent the accused under most national standards and Article 12(1)(b) of the Code.[4]

9. On 15 June the Defence responded to the Prosecution's Request ("Defence Response").[5] The Defence argued, *inter alia*, that no general principle of law could be derived from national jurisdictions and instead urged the standard set out by Trial Chamber III in the *Bemba* case -- whether the former PD lawyer "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

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[2] ICC-02/05-03/09-160.
[3] Prosecution's Request, paras.14-22.
[4] Ibid., paras.24; 29-31.
[5] ICC-02/05-03/09-163.

possess […]" (the "Bemba Decision").[6] The Defence also disagreed that Mr Yillah had confidential information.

10. On 30 June 2011 Trial Chamber IV denied the Prosecution's request.[7] The Chamber found that there was no general principle of law derived from national jurisdictions, and thus applied the Code of Professional Conduct and the Bemba Decision cited above.[8] Interpreting the Code and relying on *Bemba*, the Chamber defined the issue as "whether Mr Yillah became aware of more than '*de minimis* confidential information' relevant to the case which a member of the defence team should not possess".[9] It added that the Prosecution must prove that Mr Yillah was "effectively in possession" of this more-than-*de-minimus* confidential information.[10] Finding no proof of effective possession and taking into account Mr Yillah's unequivocal assertions that he is unaware of any relevant confidential information,[11] the Chamber held that there was no reason to find that a conflict existed or that Mr Yillah's appointment "is prejudicial to the present proceedings".[12]

11. On 13 July 2011 the Chamber granted leave to appeal the following issue: "Whether, as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution, or whether they should be barred for a period of time before joining the defence team".[13]

[6] Defence Response, paras.9-11; also ICC-01/05-01/08-769 ("Bemba Decision"),.
[7] ICC-02/05-03/09-168.
[8] Decision, paras.8-16.
[9] Decision, para.16; Bemba Decision, para.42.
[10] Decision, para.21; Bemba Decision, para.43.
[11] Decision, para.22 and Decision granting Leave to Appeal, para.10.
[12] Ibid., para.22.
[13] ICC-02/05-03/09-179, para.10 ("Decision granting Leave to Appeal").

Standard of Review

12. This case involves an error of law[14] that materially affected the impugned Decision.[15] The Appeals Chamber has not articulated a standard, but the Prosecution submits that as a general rule, legal errors should be subject to plenary, *de novo* review.[16]

Prosecution's Submissions

13. The Chamber exclusively relied on the Code of Conduct in order to determine whether Mr Yillah should be disqualified. However, in considering the issue under the Code the Chamber considered solely that Mr Yillah was not on the *Banda and Jerbo* trial team and did not participate in any proven meetings or discussions dealing with "highly confidential" strategy or policy issues, ignoring the reality of the way the OTP functions. Because the Prosecution cannot identify specifically what information he received on that case, and accepting Mr Yillah's assurance that he had no confidential information about the case, it determined that no conflict or prejudice to the Prosecution will occur by virtue of his association with the Defence.[17]

14. The Decision has serious consequences for the OTP and its ability to discharge its responsibilities. The Prosecution Division is not, as the Chamber's decision assumes, a conglomerate of independent trial teams. Rather, lawyers within PD constantly consult across team boundaries. As a new institution, this Court lacks

[14] "The Appeals Chamber has previously held that it may justifiably interfere with a sub judice decision 'if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues'". ICC-01/05-01/08-962 OA3, para.63.
[15] ICC-02/04-01/05-408OA3, para.48; ICC-01/05-01/08-962OA3, paras.102,106;133-134; ICC-01/05-01/08-1019OA4, para. 69.
[16] *Prosecutor v Dragomir Milosevic*, Appeals Judgment, IT-98-29/1-A, 12 November 2009, para.14 and footnotes cited therein.
[17] Decision, paras.19, 22.

established jurisprudence on many issues, and trial teams frequently confront issues of first impression in their particular Chambers or have to make submissions under expedited deadlines. When a problem or issue arises it is practical, even essential, to discuss it with colleagues to learn if, and how, other teams handled similar problems, or if and how other international tribunals or national systems resolved the matter. PD's hiring decisions take diversity of backgrounds into account precisely because the varying experiences inform the internal discussions and lend value to the OTP as a whole.

15. In these discussions, moreover, PD lawyers do not hold back the "confidential" facts, much less their confidential assessments of strengths and weaknesses or their confidential explanations of policy or strategy options. All have confidential duties, and work under that assumption. The OTP cannot effectively function if its attorneys cannot reveal confidential information in these discussions and consultations, or if they must document every fact or strategy revealed in every such conversation, however informal, in order to preserve a record should a participant leave the OTP and immediately sign on to a Defence team.

16. Other national systems work on the same premise. That is why many of them presume that persons who recently leave a prosecution office have confidential information and set limits on the ability of former prosecutors to immediately align with defence teams. Such a presumption preserves not only the integrity of the particular case, it also preserves the public confidence in the overall fairness of proceedings by eliminating the appearance of impropriety.

17. The Decision below ignores this reality and places the OTP in an untenable situation. It deprives the OTP of its ability to use the full resources of the Office without the risk that its internal discussions will be used, however inadvertently, by the Defence, even in the very cases about which the discussions were concerned. Either the Prosecution's effectiveness will be diminished or it will face the potential of serious prejudice to its interests. Requiring the Prosecution to

choose between these options is fundamentally unfair.[18] It also permits public criticism of the Court's processes and allows the Court itself to be held in disrepute.

18. It is also unnecessary. There are more than 300 qualified and competent lawyers available to assist on a Defence case.[19] The right of a suspect or accused to counsel of his choosing[20] is not absolute. It does not guarantee, for example, the right to retain a lawyer who is unqualified to practice, including because he has documented and irrefutable access to inside information, since that would create the possibility of an unfair trial and hold the process up to public disrepute. Thus, it cannot be said that the accused in this case have an absolute right to the assistance of Mr Yillah, who, if not demonstrably, then certainly "possibly" had recent and ongoing access to inside information, if allowing his participation would create the possibility of an unfair trial.

19. With these considerations as a backdrop, the Decision below is incorrect and unfair. The Trial Chamber erred in construing Article 12 of the Code as establishing a purely subjective standard, and then in authorizing Mr Yillah to join the defence team because it could not be proved that he "effectively possessed" – without explaining what that means - more than '*de minimis* confidential information' relevant to the case. Such a conclusion is inconsistent

[18] See Article 64 (2). The Prosecution stresses that the Appeals Chamber is asked not to act as a legislative body, but to interpret and apply the law consistent with Article 21, the particular features of this case, and the duty to best protect the integrity and fairness of the proceedings.

[19] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/ Counsel/List+of+Counsel/List+of+Counsel+before+the+ICC.htm It is noteworthy that during the last month three lawyers who left the OTP have subsequently appeared on behalf of suspects or accused persons in this Court. Each was initially recruited by the same Defence counsel, and three were appointed within a few weeks of their departure from the OTP. It is clearly not necessary for the effective assistance of counsel that the Defence retain recently separated PD lawyers; in this case, for example, the Defence also retained a highly respected and qualified former prosecutor who appeared in other national and international courts. Given the demonstrable availability of many competent lawyers, the concentration on recent PD lawyers suggests that, in counsel's view, PD lawyers provide a contribution that non-PD lawyers may lack. Without accusing counsel of deliberately attempting to gain specific confidential information, the likelihood that this unique contribution is tied to their recent service in the OTP is inescapable.

[20] Article 67(1)(d).

with the duty to ensure a fair trial under Article 64 in light of the unique characteristics of this Court and the OTP.[21]

20. Had the Chamber correctly applied an objective standard – that a former Prosecution lawyer may not join the defence against his former office in a a case that was open when he/she worked for the Prosecution - due to the presumption that the lawyer was privy to confidential information, it necessarily would have invalidated Mr Yillah's appointment. Therefore, the Chamber's legal error materially affected the impugned Decision.[22]

I. The Trial Chamber erred by failing to disqualify Mr Yillah based on an objective, not subjective, standard under Article 12 of the Code and its obligations under Article 64 of the Rome Statute.

21. The Prosecution submits that there is a real possibility that a lawyer working for the OTP, and most particularly in PD, at the time when a case was open has access (thus, is privy) to confidential information with respect to that case. Allowing the lawyer to join the Defence in that case will give him or her an undue advantage over the Prosecution, which could detrimentally impact the fairness of the proceedings. It also has the potential to erode the trust in the integrity and fairness of the Court's process.

22. It is clear that a lawyer in this situation cannot faithfully serve the interests of his new client without violating the rights of his former client. Thus he may be required as an ethical matter to be disqualified.[23] The concern here, however, is

[21] Decision, para.16 read with paras.21-22 (emphasis added); and Bemba Decision, para.43 (cited in fn.27). See also Decision granting Leave to Appeal, para.10.
[22] ICC-02/04-01/05-408 OA3, para.48; ICC-01/05-01/08-962 OA3, paras.102,106;133-134; ICC-01/05-01/08-1019 OA4, para. 69.
[23] It will also require the attorney to resolve his or her divided loyalty in a way that will serve either the Prosecution or the present client (and disserve the other). The inevitability of this conflict – Mr Yillah's inside knowledge of confidential policies, practices, strategies, and his exposure to case-specific information must inform and influence his recommendations, decisions and actions as defence counsel – requires Mr Yillah to

beyond attorney ethics, it is how to interpret the Code in a manner that best guarantees the fairness of the proceedings. The ethical conundrum may also be a matter for the counsel himself, but the issue is the risk that the proceedings will be harmed by the practice of appointing recently departed prosecutors to defence teams in cases that were open when the former prosecutor was affiliated with the OTP.

23. The Prosecution submits that the characteristics and working methods of the OTP and the imperative need to protect the integrity of the Court's proceedings require that in cases as Mr Yillah's an objective test – articulated above[24] - be utilized when assessing whether there exists an impediment to representation. This is consistent with the practice of a number of national systems.

(i) The characteristics and working methods of the Office of the Prosecutor

24. As noted previously, the OTP is a single office, not a loose association of separate trial teams. Its Prosecution Division is small compared to major prosecution offices. Exchange of information and mutual support among lawyers involved in different cases is an extended and necessary practice in PD. The ICC is a young institution with new procedures, and its jurisprudence is still evolving. It is natural that lawyers discuss factual and legal issues arising in their cases with their colleagues in search for advice. This is particularly necessary in light of the staff members' experience in other cases in this Court, in their domestic jurisdictions or in other international criminal courts.

25. Sometimes these exchanges and disseminations of information occur on a formal basis (staff meetings, circulation of weekly summaries and/or decisions and filings, etc.) and can be documented through meeting minutes or email/TRIM records. But the vast majority occurs informally, in ad hoc and individual

share his assessment with his client, to the prejudice of the Prosecution, or withhold it, to the prejudice of the Defence.

[24] See para.20 above.

consultations or casual meetings and conversations. There is no mechanism to track these consultations or control or record the content of the discussions.

26. These working methods maximize the limited resources of the Office.[25] They also are essential to enable the OTP's adoption of coherent, informed and consistent positions in the litigation before different Chambers of the Court and to identify applicable jurisprudence in their submissions.[26] In that context, attorneys need to know not only the decisions of other Chambers – confidential as well as public -- but also the facts and the reasons underlying OTP arguments in those cases. There is also an expectation that lawyers will respect the confidential nature of this material.

27. The Deputy Prosecutor presented these facts to the Registrar, her report was filed in the record of the case,[27] and its accuracy has never been questioned. Proper consideration of this report demonstrates that, contrary to what the Trial Chamber stated, working for the Prosecution at the time a case is open provides that person with much more than a mere knowledge of the "insight into the functioning of the Office […] and […] knowledge pertaining to ongoing investigations".[28] Rather, the attorney has actual access to confidential information in all open cases.[29]

(ii) The need to protect against the appearance of impropriety

28. The cases before this Court, involving the most serious crimes of concern to the international community,[30] are complex and lengthy and implicate the interests

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[25] State Parties expect the Prosecution to use resources flexibly in the exercise of its mandate. For instance, since 2007 the Committee on Budget and Finance (CBF) has endorsed and recommended the OTP's practice of rotating staff between situations and cases adopted by the OTP. See CBF Report from September 2007 (ICC-ASP/6/12), para. 59 and CBF Report from September 2008 (ICC-ASP/7/15), para. 76. Both reports were endorsed by the ASP.
[26] For instance, Trial Chamber III requires parties to address all relevant jurisprudence in their submissions. See ICC-01/05-01/08-682, para.25.
[27] ICC-02/05-03/09-160-Conf-Exp-AnxB. See also Prosecution's Request, paras.2-3;10-12;23-24.
[28] Decision, para.21.
[29] A US Court found that a lawyer who participated in meetings and discussions could have gained access to confidential material. LaSalle Nat.Bank v. Lake County, 703 F.2d 252 (7th Cir. 1983).
[30] Preamble, para.4.

and rights of many parties and participants.. Their importance and complexity require the highest protection for the integrity and expediency of the proceedings and the well-being of their vulnerable victims and witnesses. In this context, the only responsible course of action is to invalidate the appointment when there is a real possibility that the proceedings will be prejudiced.[31] As other international tribunals and domestic jurisdictions have noted, "the appearance of a just procedure is as important as a just result for a fair trial".[32] The Chamber must always consider its duty to ensure public confidence in the fairness and integrity of the proceedings.[33]

29. For that same reason, some domestic jurisdictions require disqualification of counsel (even if the ethical rules would not require it) if counsel's appointment creates an appearance of impropriety from the perspective of a reasonable layperson.[34] These jurisdictions highlight the need for an objective standard to promote public confidence in the legal system.[35] For example, a US federal court disqualified an entire law firm from representing a person charged with a tax offense because an attorney in the firm had previously worked for the prosecutor and had oversight of tax cases. The actual lawyer representing the charged person had not himself previously been a prosecutor, and the former prosecutor had had no provable connection to the particular tax case. The appellate court affirmed "to prevent *any suspicion* that the attorney had indirectly profited from a case in which he had a conflict of interest or had shared confidential information with a partner who had appeared in the case".[36] In another case where a law firm was

[31] *Prosecutor v. Hadzihasanović 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.46 ("Hadzihasanovic Decision").
[32] Ibid.
[33] Article 64 (2).
[34] See Heringer v. Haskell, 536 N.W.2d 362,367 (N.D. 1995); State v. Tate, 925 S.W.2d 548, 558 (Tenn. Crim. App. 1995) where the entire district's attorney general's office was disqualified based on the appearance of impropriety.
[35] Lee v. Todd, 555 F. Supp. 628, 632 (W.D. Tenn. 1982); where the Court concluded that the objective opinion of the public should govern rather than the subjective and biased perceptions of the litigants.
[36] United States v Miller (1980, CA3 NJ) 624 F2d 1198 (emphasis added)

disqualified due to a prior representation, the court noted that the "appearance of impropriety was enhanced by high profile of the case".[37]

30. Like those national systems, if former OTP prosecutors may cycle rapidly into employment as defence counsel in cases pending while they were prosecutors, and notwithstanding the appearance of "impediments to representation"[38], this will necessarily damage the public perception of this Court. In fact, in a scenario akin to the instant one, media reports and public blogs describe the Court as corrupt and ineffective because a former Senior Trial Lawyer working for the Prosecution almost immediately joined the Defence in another case which was open and active while he was working with the Prosecution.[39] All cases before this Court are high profile. The appearance of fairness and integrity is essential to foster and preserve the public trust and confidence in the Court. Allowing a lawyer who had access to confidential prosecution information to join the Defence team can only erode the public confidence in the Court's proceedings.[40]

[37] Appearance of impropriety alone warranted disqualification of law firm from representing defendant tobacco company in tort action brought by group health insurers, based on the firm's prior representation of insurers in unrelated matters; such appearance of impropriety was enhanced by high profile of case and mass tort context. Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc., 53 F. Supp. 2d 338 (E.D. N.Y. 1999).

[38] Code of Conduct, Article 12.

[39] http://www.nation.co.ke/News/Ocampo+top+lawyer+joins+Muthaura+s+defence+team++/ - /1056/1184908/ - /sr1tb7z/ - /index.html; Daily Nation: OTP2011/000024396 Kenya - Open Source - Essa Faal Quits ICC Prosecution to Defend FrancisMuthaura - 190611 and Strategic Intelligence News: OTP2011/000024396 Kenya - Open Source - Essa Faal Quits ICCProsecution to Defend Francis Muthaura - 190611; CitizenTV, 19 Jun 2011,http://www.youtube.com/watch?v=jtggmjm_0MQ; OTP2011/000024398 Kenya - Open Source - JUKWAA Kenyan Discussion Platform - ICC Hague Confirmationof Charges developments, p.2

[40] State v. Tate, 925 S.W.2d 548, 555 (Tenn. Crim. App. 1995); Watson v. Ameredes, No. 03-A-01-9704-CV-00129, 1997 Tenn. App. LEXIS 884, at *18 (Tenn. Ct. App. Dec. 10, 1997).

(iii) National legal systems impose restrictions on ex-prosecutors' affiliation with the Defence in cases before their former offices

31. Where the Chamber is asked to determine the means best suited to guarantee a fair trial and the appearance of legitimacy, it is fitting that it consider national practices, which universally recognize the need for safeguards to protect their proceedings, even if such practices may vary in operation.

32. Almost all jurisdictions accept limits to the appearance as defence counsel of a recently departed prosecutor. A few jurisdictions, primarily derived from United Kingdom law, place no time restrictions on the ability of a lawyer departing a prosecution office or judicial chamber to appear as defence counsel or before the same judicial chamber; they trust the individual lawyer to comply with his or her ethical obligations.[41] Other jurisdictions presume a conflict and impose objective safeguards. These latter systems recognize that when lawyers previously worked in a closed environment there is a real risk that, even inadvertently, they may use or divulge confidential information acquired in their prior positions. Some impose a fixed period of time before which an attorney may appear against the Prosecution office for which he previously worked, reflecting a presumption on the time necessary for pending cases to be resolved. For instance, former French magistrates (i.e. prosecutors and judges) are barred for five years from practising as solicitor or lawyer within the jurisdiction of the court where they had practiced.[42] In Italy, former members of the judiciary (i.e. judges and prosecutors) are barred for two years from practicing as lawyers in the judicial district in which they had worked for three years or more prior to leaving before

[41] As noted below, however, the UK is unlike most jurisdictions in allowing independent barristers to act as prosecutor in one case and defence in the next; thus, barristers will not be permanently situated in a formal prosecutor's office.

[42] Article 9-1 de l'Ordonnance n°58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069212&dateTexte=20110523.

they had left the judiciary.[43] Article 36 of the Chinese Law on the Profession of Lawyer[44] prohibits a former prosecutor or judge from serving as defence counsel within two years of his/her resignation from that post. In Germany, the German Federal Law on Lawyers[45] states that a lawyer may not practice "if he/she has already been concerned with the same legal issue as a judge, an arbitrator, a public prosecutor […]."

33. In short, though there are differences in the approaches, national systems generally reflect the objective principle that a former prosecutor cannot immediately join the Defence.

II. The Trial Chamber erred by failing to find that the possibility that Mr Yillah had access to confidential information impedes his representation of the Defence under Article 12(1)(b) of the Code of Conduct

34. Article 12(1)(b) requires disqualification if the attorney was "privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear". The phrase "privy to confidential information" is not defined.[46] However, three Chambers, including the Chamber below, conclude that being privy to confidential information requires more: it imposes a materiality condition, that the exposure must be to something beyond "*de minimis* confidential information relevant to the case", an interpretation not based on the provision's language.[47] Trial Chamber IV further requires that the person be

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[43] Regio Decreto convertito in Legge 22 gennaio 1934, n. 36 (in Gazzetta Ufficiale, 30 gennaio 1934, n. 24) - Ordinamento delle professioni di avvocato e di procuratore." The relevant provision therein is: *Titolo II, Articolo 26*.

[44] Law on Lawyers and Legal Representation of China (1998), Article 36 reads as "Lawyers who have acted as a judge or a public procurator are prohibited from acting as a representative or a defender for a lawsuit within two years of leaving their posts at the people's courts or people's procuratorates.", full text at: http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/law-on-lawyers-and-legal-representation.html (last accessed 30 May 2011)

[45] Bundesrechtsanwaltsordnung of 1 August 1959 available at: http://bundesrecht.juris.de/ brao/index.html, English translation available at http://www.brak.de/seiten/pdf/Berufsregeln/ BORA_1.7.2008_engl.pdf

[46] ICC-01/09-02/11-185,para.17.

[47] Decision, para.16; ICC-01/09-02/11-185, para.17, all referring to Bemba Decision, para.42.

"*effectively* in possession of any confidential information",[48] an additional gloss on the plain language in the provision. Then, while acknowledging that Mr. Yillah's prior employment as a prosecutor "might have provided him […] with knowledge pertaining to ongoing investigations",[49] it declined to find the same access to knowledge pertaining to ongoing prosecutions or to disqualify him based on that possibility.

35. Thus, there are two errors: whether "[being] privy to confidential information" requires subjective "effective" possession of information – the standard created by the Chamber but not found in the Code -- or is satisfied by an objective possibility that the person had access to confidential information; and whether the confidential information must reach a sufficient level of importance. As argued to the Chamber below, Article 12(1)(b) expressly *excludes* a requirement of importance of the information, in contrast to the requirement in Article 12(1)(a) and 12(3) that the information be substantial. It is also, in this respect, significantly different than Article 14(c) of the ICTY Code of Professional Conduct, which requires disqualification when counsel "participated personally and substantially".

36. The Prosecution submits that "*effective possession*" of confidential information and a requirement of importance exceed the Code's language. It also is inadequate as a test in protecting the interests of the Prosecution and the integrity of the Court's proceedings. Requiring proof that the person had "effective possession" of important confidential information places an unrealistic evidentiary burden that, in all but the most blatant cases, will be impossible to meet. For instance, though it cannot be disputed that informal consultations and discussions occur regularly, they cannot readily be documented.

[48] Decision, para.21; Decision granting Leave to Appeal, para.10. See also Bemba Decision, para.43.
[49] Decision, para. 21

37. As noted above, the harm to the integrity of the proceedings arising from an erroneous assignment may be too great to redress. When the Defence team obtains insider access to confidential information (including not simply facts, but also the Prosecution's strategic and legal analysis) by retaining a newly available former prosecutor, it may be impossible to undo the ensuing prejudice to the Prosecution and damage to the reputation of the Court. Chambers must prevent foreseeable harm and guarantee the fairness and integrity of the proceedings under Article 64(2) and 64 (3)(a).

38. The Prosecution finally notes that, notwithstanding the different rules in the ICTY, a Chamber in that Tribunal deliberately adopted the "possibility" test, rejecting the Registry's position that "the *possibility* that a person had access to [confidential] information is not [...] a criterion for disqualifying him as a counsel whereas the *probability* of such access is".[50] As it explained, "in judicial proceedings a misstep in procedure with "possibly" adverse consequences will equally affect the integrity of the proceedings [...]".[51]

39. The "possibility" test is also consistent with domestic cases that have required disqualification where the would-be defence lawyer previously "was in position where he *could have* received" sensitive or privileged prosecution information, or "was likely to have come across" such information.[52]

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[50] *Hadzihasanovic,* para.45 .
[51] Ibid.
[52] See *United States v. Miller,* cited in fn. 36 above. The Court explained, moreover, that nothing barred courts "from holding former employees of the federal government to standards more demanding than the minimal requirements of the criminal law." 624 F.2d at 1202. Federal courts in the US thus can disqualify a lawyer when the lawyer's conduct tends to taint underlying trial, specifically, when that attorney was in position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client. *Frontline Communications Intern. v. Sprint Communications Co. L.P., 232 F. Supp. 2d 281 (S.D. N.Y. 2002).* In another case, an attorney was properly disqualified from representing a client in an action against his former client where the present action was of substantially the same nature as the previous action and the attorney's involvement in prior case was such that he was *likely* to have come across relevant privileged information. *Government of India v. Cook Industries, Inc.,* 569 F.2d 737 (2d Cir. 1978*).* An attorney may be disqualified from representing client in a particular case if that attorney had access to, or was likely to have had access to, relevant privileged_information in course of prior representation of the previous client. *Colorpix Systems of America v. Broan Mfg. Co., Inc., 131 F. Supp. 2d 331* (D. Conn. 2001).

Conclusion

40. For all the aforementioned reasons, the Prosecution requests the Chamber to entertain the submissions enclosed herein and, for the reasons set out above, overturn the Decision, find as a matter of law that Mr Yillah is disqualified from appearing for the Defence in light of his engagement as a prosecutor in this Court, or alternatively refer the matter to the Trial Chamber and direct the Chamber to apply the correct test.

Luis Moreno-Ocampo, Prosecutor

Dated this 25th day of July 2011

At The Hague, The Netherlands