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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR**

v.

***FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND
MOHAMMED HUSSEIN ALI***

PUBLIC

**Defence Response to “Prosecution’s Application for Leave to Appeal the
“Decision with Respect to the Question of Invalidating the Appointment of
Counsel to the Defence” (ICC-01/09-02/11-185)”**

Source: Counsel for Ambassador Francis Kirimi Muthaura

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

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I. INTRODUCTION

1. Defence Counsel for Ambassador Francis Kirimi Muthaura (the “Defence”) files this response to the *Prosecution’s Application for Leave to Appeal the “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”* (ICC-01/09-02/11-185) (“Application”).¹
2. The Application fails to satisfy the standard for seeking leave to appeal under Article 82(1)(d) of the Rome Statute (“Statute”) and thus should be dismissed. The issues identified in the Application constitute a misrepresentation of the Single Judge’s Decision,² as well as a disagreement with the Single Judge’s assessment of the value of the evidentiary material put forth by the Prosecution in its original Requests.³ None of the issues identified in the Application is appealable and thus the Application should be summarily dismissed.
3. The Application also raises three profound and fundamental questions which go to the heart of the appropriateness of filing requests for leave to appeal before Chambers of this Court and which require appropriate comments from the Single Judge in order to preserve the integrity of these proceedings. These include: (a) whether a Chamber may abdicate its fact-finding judicial functions on an issue simply because another Chamber of equal jurisdiction has certified a similar issue for appeal without engaging in any analysis;⁴ (b) whether a Chamber may exercise legislative functions on an issue, in circumstances where the statutory framework of the Court has express provisions on such issue;⁵ and (c) whether it is appropriate to call upon the Appeals Chamber to render

¹ Prosecution’s Application for Leave to Appeal the “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence” (ICC-01/09-02/11-185), ICC-01/09-02/11-195, 26 July 2011.

² “Decision” is defined in paragraph 1 of the Application. It is filed in the record of the case as document ICC-01/09-02/11-185.

³ ICC-01/09-02/11-150-Conf and ICC-01/09-02/11-172-Conf-Exp and its annexes.

⁴ Ibid, introductory paragraph, wherein the Prosecution requested the Single Judge to defer ruling on the matter until the Appeals Chamber disposes of the *Yillah* appeal.

⁵ See Article 12 (1)(b) of the Code of Professional conduct for Counsel (“Code”).

advisory opinions on hypothetical questions of law, which have no material impact on the alleged prejudice that the requested appellate intervention is intended to cure.⁶

II. CERTIFICATION OF INTERLOCUTORY APPEALS

4. Interlocutory appeals under Article 82(1)(d) of the Statute are exceptional remedies which are only available if the moving party satisfies the relevant Chamber that strictly defined conditions are met.⁷
5. For leave to appeal an interlocutory decision to be granted, the moving party must establish that:
 - (a) the impugned decision involves an issue that would significantly affect either:
 - (i) the fair and expeditious conduct of the proceedings; or
 - (ii) the outcome of the trial; and
 - (b) an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.⁸
6. The definition of an “issue” under Article 82(1)(d) of the Statute is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An appealable issue must thus emanate from the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.⁹

⁶ See *Prosecutor v. Katanga & Ngudjolo*, Judgment on Admissibility Appeal, ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 38, wherein the Appeals Chamber stated that “[t]he Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it.”

⁷ See for example *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 28 (“*Lubanga Decision*”) & *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, ICC-01/04-01/07-946-tENG, 6 March 2009, para. 11.

⁸ Article 82(1)(d) of the Statute.

⁹ *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 11.

III. SUBMISSIONS

Failure to identify any appealable issues

7. Contrary to the Prosecution's position, neither of the two issues¹⁰ identified in the Application constitute appealable issues.¹¹ A proper consideration of both issues reveals that they fail to satisfy the requirement that they "emanate from the ruling of the decision concerned".¹² The identified issues fail to meet the basic threshold criteria set out in Article 82(1)(d) of the Statute and therefore ought to be dismissed.

8. The First Issue¹³ as framed by the Prosecution clearly does not arise from the Decision. Rather, its formulation is broad and hypothetical in nature and raises an abstract legal question, and so falls foul of the prohibition against seeking leave to appeal abstract questions.¹⁴ In its framing of the First Issue, the Prosecution is requesting the Single Judge to certify an issue based *solely* on a presumption that a conflict is taken to exist in circumstances where a Defence lawyer had been a staff member of the OTP at the time a case was open, notwithstanding that the Defence counsel had not been privy to any confidential information relating to that case. The request for an automatic bar excluding Defence counsel from acting in such circumstances is not founded on any concrete issue arising from the Decision for appellate intervention. If leave to appeal is granted on this issue, the Appeals Chamber would be invited to render an advisory opinion on a hypothetical question of law, a position which is

¹⁰ The Defence notes that at paragraph 32 of the Application the Prosecution requests that leave be granted in relation to three issues. However, the Defence assumes that this is simply a typographical error and the Application concerns only two issues, as stated at paragraph 2 of the same Application.

¹¹ Application, paras. 2 and 12.

¹² *Prosecutor v. Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-532, 18 September 2009, para. 12.

¹³ The "First Issue" is framed and defined in the first bullet point of paragraph 2 and 12 of the Application.

¹⁴ An appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern. See ICC-01/05-01/08-75, 25 August 2008, para. 11.

contrary to the Appeals Chamber's established jurisprudence and which does not in any way materially advance these proceedings.¹⁵

9. In addition and crucially, the First Issue should properly be characterised as a disagreement with the Single Judge's Decision. In this regard, an analysis of the Decision and the Prosecution's underlying Request is revealing. The Prosecution did not expressly seek a one-year ban in respect of Mr. Faal as part of the relief sought in its original Request. Rather, it invited the Chamber to delay disposing of its request pending the Appeals Chamber's resolution of a similar issue in the *Yillah* appeal.¹⁶ What the Prosecution proposed in its original Requests was for the Single Judge to presume a conflict of interest because of prior association with the OTP and impose a time bar based on its selected reading of a few national codes and in disregard of the clear provisions contained in the ICC Code of Conduct for Counsel.
10. The Single Judge did not accept the Prosecution's argument that a conflict of interest must be presumed simply because a Defence counsel had previously been employed in the OTP. Nor was the Single judge persuaded by the appropriateness of imposing a time bar by transplanting into the ICC jurisprudence certain rules from sundry national jurisdictions, in disregard of the clear provisions in the ICC corpus of laws. However, following an accurate and correct reading of the Court's instruments, the Single Judge properly found that "[t]he problem raised by the Prosecutor that safeguards should be put in place [...] in the context of a small office like the Prosecution Division, cannot justify that the Chamber acts as a legislative body in the sense of setting a time bar that

¹⁵ *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Pikis in the Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006 at para. 29 where Judge Pikis stated that, while reviewing a matter on appeal, the Appeals Chamber may not engage "in the elicitation of general legal principles outside the decision-making process for the disposition of a matter at issue, exceeding thereby the jurisdiction of the court. The Appeals Chamber would itself assume jurisdiction to prejudge the law applicable to pending and future proceedings." See also; ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 110, wherein the Appeals Chamber declined to enter findings where "any discussion by the Appeals Chamber of the issues raised would be abstract and hypothetical."

¹⁶ ICC-01/09-02/11-50-Conf, introductory paragraph.

is not envisaged by the Court's statutory provisions."¹⁷ While the Prosecution seeks a presumption of a conflict of interest and need to impose a time bar, it curiously omitted to inform the Single Judge that all the selected national codes it accurately identified expressly codify such time bars as distinct from the ICC Code of Conduct, which has no such express provisions.¹⁸

11. More importantly, the First Issue is not dispositive of the Prosecution's original Request. In other words, it is not a topic or subject the resolution of which was critical or central to determining the issue of alleged conflict of interest arising from Mr. Faal's appointment. The Prosecution requested the Single Judge to invalidate Mr. Faal's appointment on the basis that Mr. Faal was actually privy to and accessed confidential information in the case. The Single Judge assessed the materials in support of the Prosecution's Request and was not satisfied and properly found that "there is a lack of proof that Mr. Faal actually was aware of confidential information concerning the case [...]."¹⁹ This analysis demonstrates that the Single Judge would have disqualified Mr. Faal were she satisfied with

¹⁷ Decision, para. 28.

¹⁸ This distinction is significant because when faced with similar situations, courts in those national jurisdictions referred to by the Prosecution are expressly guided by such written codes imposing time bars, which is not the case with this Court. The ICC Code makes no express provision for a time bar for a former staff member joining a defence team. The Prosecution also failed to mention how common the practice is in the jurisdiction it cites. In this regard, in the US context see the following articles: (i) "A top prosecutor is switching sides" at http://articles.baltimoresun.com/2004-08-12/news/0408120186_1_bair-bennett-death-penalty; (ii) "Long time prosecutor Dixon moving to the defense table, U.S. attorney's 8-year stint in Savannah ends" at <http://savannahnow.com/stories/042401/LOCdixon.shtml>; (iii) "Prominent Defense Attorney Says Changing Sides to Prosecution isn't a Big Leap: She's Still an Advocate" at www.deseretnews.com/article/410811/PROMINENT-DEFENSE-ATTORNEY-SAYS-CHANGING-SIDES-TO-PROSECUTION-ISNT-A-BIG-LEAP-SHE-S-ILL-ADVOCATE.html; (iv) "Prosecutors make successful switch from offense to defense" at www2.gtlaw.com/pub/media/2009/Rubinstein09a.pdf; (v) "Ex-prosecutor finds changing sides trying" at www.patrickhanlylaw.com/CM/Custom/PatHanlyArticle13007.pdf; (vi) "Former D.C. Federal Prosecutor Joins Squire Sanders' White-Collar Defense Team" at <http://legaltimes.typepad.com/blt/2011/06/former-dc-federal-prosecutor-joins-squire-sanders-white-collar-defense-team.html>; (vii) "Prosecution and Defense – Switching Roles" at <http://edmondgeary.wordpress.com/2007/11/23/prosecution-and-defense-switching-roles>; (viii) "Prosecutors make successful switch from offense to defense" at www.allbusiness.com/legal/legal-services-law-practice-major-us-firms/12431918-1.html. As far as the practice in Canada is concerned see the following: (i) "Law switch makes partners in crime, THE LAW: Dad does a '180' for his daughter" at www.lfpress.com/news/london/2011/04/29/18085811.html; (ii) "Crossing the Street" in Legal Transitions, National Magazine's Legal Careers Supplement at www.legaltransitions.dgtlpub.com/data/issuePDF/LT/8500000513-LT.pdf. (All websites last accessed 1 August 2011).

¹⁹ Decision, para. 17. Note there is typographical error in the Decision as it includes two paragraph 17s. This citation is to the second paragraph 17 on page 8, which follows paragraph 18.

the evidence brought by the Prosecution independently and regardless of the Prosecution's proposal of a presumptive time bar.

12. Further, the First Issue also invites the Single Judge and by extension Chambers of this Court, to abdicate their judicial fact-finding functions on a legal issue because a similar legal issue has been certified by a Chamber of complimentary jurisdiction for appeal without any analysis and distinction. The Prosecution's erroneous and blanket reliance on Trial Chamber IV's jurisprudence is based on a selective and biased reading of the Trial Chamber IV decision in question. The Prosecution, while relying on a decision of Trial Chamber IV and a selected number of national jurisdictions fails to point out the reason why that Chamber granted leave to appeal on a similar issue.

13. Trial Chamber IV clearly stated that it did not focus its decision on addressing fully the issue of the time bar, but predicated its decision on whether or not Mr. Yillah was *effectively* in possession of confidential information.²⁰ This distinction is fundamental. The learned Single Judge, on the other hand, engaged in a considered analysis of the issue of whether the contended presumption, that a conflict of interest must be taken to exist and whether there was a need for the imposition of a time bar, was properly grounded within the framework of the Court's statutory instruments. The learned Single Judge properly concluded that to impose a time bar would essentially require the Chamber to act as a legislative body. An analysis of this issue clearly demonstrates that the First Issue "consists of 'nothing more than a disagreement' with a finding of the Chamber"²¹ and a desire on the part of the Prosecution to re-litigate its original Request.

14. Similarly, the Second Issue²² as framed by the Prosecution is a misrepresentation of the context and reasoning of the Single Judge's Decision in one part as well as

²⁰ ICC-02/05-03/09-179, para. 10.

²¹ *Prosecutor v. Katanga & Ngudjolo*, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges, ICC-01/04-01/07-727, 24 October 2008 ("*Katanga* Decision on Leave to Appeal Confirmation Decision"), p. 16, quoting the *Lubanga* Decision, para. 71.

²² The "Second Issue" is framed and defined in the second bullet point of paragraph 2 and 12 of the Application.

a disagreement with the Single Judge's assessment of the evidence. In this regard, a review of the Application is revealing. The introductory paragraph of the Application states that; "although the Prosecution established that Mr. Faal had access to confidential information related to this case during his time of employment for the OTP, the Single Judge concluded that the information though confidential was *de minimis*."²³ In addition, elsewhere in its Application, the Prosecution states that; "In the Single Judge's view, Mr. Faal had not become aware of more than *de minimis* confidential information."²⁴ Not only do these references in the Application amount to material misrepresentations of the Single Judge's findings, but they also demonstrate a disagreement with the Single Judge's assessment of the materials in support of its original Requests.

15. Nowhere in the Decision, did the Single make a finding of fact that Mr. Faal was actually privy to or accessed confidential information which was not more than *de minimis* in nature, as suggested in the Application. Rather, the Decision found that "[t]he Single Judge is not persuaded by the Prosecutor's argument given that upon the review of the Prosecutor's Observations and Reply and the annexes appended thereto, there is a lack of proof that Mr. Faal actually was aware of confidential information concerning the case of *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, let alone *de minimis* information."²⁵ Clearly this finding is independent of the *de minimis* threshold requirement. Although the Prosecution disguised the Second Issue as a legal standard, the above analysis clearly demonstrates that the Second Issue is a mere disagreement with the Single Judge's assessment of the materials supporting the Prosecution's original Requests. Even if leave to appeal were to be granted on the requested legal standard, it would be of no material consequence to the issue of Mr Faal's continued representation in the present case, because there has been no finding that, whilst an OTP staff member, he was actually privy to or accessed

²³ Application, para. 1.

²⁴ Application, para. 18, last sentence.

²⁵ Decision, para. 17, page 8.

confidential information in this case, let alone *de minimis* confidential information.²⁶

16. A disagreement with a Chamber's evaluation of evidence does not constitute an "issue" for the purposes of Article 82(1)(d). Specifically, in the *Katanga and Ngudjolo* case, Pre-Trial Chamber I found that Mr. Katanga's application seeking leave to appeal the Pre-Trial Chamber's confirmation of sexual violence charges "despite the lack of sufficient evidence concerning the requisite subjective elements"²⁷ was not an "issue" for the purposes of Article 82(1)(d), but merely a disagreement with the Chamber over "the assessment made by the majority of the Chamber of the evidence submitted by the Prosecution."²⁸ Similarly, in the *Al Bashir* case, Pre-Trial Chamber I ruled that two of the three claims put forward by the Prosecutor in his application seeking leave to appeal the decision not to include genocide charges in the arrest warrant "consist[ed] of a mere disagreement with the Majority's assessment of the evidence submitted by the Prosecutor to support his genocide-related allegations and, therefore, neither constitutes an 'issue' as defined by the Appeals Chamber."²⁹
17. Moreover, in framing the second issue, the Prosecution selectively overlooked the justification advanced by the Single Judge for her finding contained in paragraphs 19 to 24 of the Decision. The Single Judge properly concluded that the contents of the alleged confidential information have been overtaken by events; in particular, that the alleged confidential information is now in the possession of the Defence through various disclosures or alternatively are materials contained in public reports concerning the Situation in Kenya.

Failure to demonstrate that the fair & expeditious conduct of proceedings will be affected

²⁶ Decision, para. 17, p. 8.

²⁷ *Katanga* Decision on Leave to Appeal Confirmation Decision, p. 7.

²⁸ *Katanga* Decision on Leave to Appeal Confirmation Decision, p. 16.

²⁹ *Prosecutor v. Al Bashir*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-21, 24 June 2009, p. 8.

18. Even if either or both Issues are considered appealable, neither are ones which will significantly affect the fair and expeditious conduct of proceedings. The Defence notes that the plain language of Article 82(1)(d) states that, as part of the certification decision, the Chamber must be satisfied that the “fair and expeditious conduct of the proceedings” (emphasis added) will be affected. Any impact on fairness alone will, therefore, be insufficient.³⁰
19. In relation to fairness, the Defence notes that the Prosecution’s submissions fail to concretely demonstrate how the First or Second Issue will affect the fair conduct of the proceedings. In an effort to show how the identified issues affect the fairness of the proceedings, the Application seeks to rely on the decision of Trial Chamber IV without distinction, the Single Judge’s *proprio motu* intervention for seeking observations on any impediment to Mr. Faal’s representation as well as the general assertion that Mr. Faal is in possession of confidential information, which will allegedly give the Defence an insight into the strengths and weaknesses of the Prosecution’s case. None of these grounds concretely and manifestly affect the fair conduct of the proceedings.
20. With regard to the decision of Trial Chamber IV, the Defence reiterates its earlier submission that the Prosecution has read the same selectively and actually failed to specify the reason why that Chamber certified a similar issue for appeal.³¹ Granting leave on this basis would amount to requesting the Single Judge to abdicate her judicial functions in favour of another Chamber of complimentary jurisdiction without engaging in any reasoned or considered analysis. Such a practice is not only unsupported by any legal authority, but also prejudicial to the administration of justice. In short, the Defence submit that the Prosecution’s argument in this regard is singularly without merit.

³⁰ ICC-02/05-03/09-179, para. 18.

³¹ *Ibid*, para. 10.

21. Similarly, the Prosecution mischaracterises the nature of the Single Judge's decision first, in terms of triggering this litigation *proprio motu* and second in undertaking to keep the issue of conflict under review by raising the spectre of delay, irremediable harm and "most likely" further litigation that will be necessitated by the Single Judge's decision in this regard.³² Rather, the Defence submits that the Single Judge's decision in this regard constitutes a vigilant and proper measure designed to ensure the fairness of the proceedings. The decision should be acknowledged as such.³³ In considering the merits of the Prosecution Application, and the substance of the OTP's alleged complaints, it is not unimportant that the issue regarding any possible conflict arising from Mr. Faal's appointment to the Defence were triggered by the learned Single Judge in order to ensure that no prejudice arose from his appointment, even before the Prosecution filed its original Request.
22. The suggestion that Mr. Faal has knowledge of general information, which has been disclosed to the Defence and some of which are obtained from public reports does not in any way affect the fairness of the proceedings. It provides no advantage to the Defence because, as the Single Judge found, such information has either been disclosed to the Defence or contained in public reports.³⁴ How possession of information already in the Defence's knowledge through disclosures affects the fair conduct of proceedings is difficult to fathom. In these circumstances, it is reasonable to conclude that the Prosecution has failed to demonstrate how the identified issues would affect the fair conduct of the proceedings.
23. Similarly, possession of general information and strategy as to how the Prosecutor's Office functions does not of itself affect the fairness of proceedings. The Prosecution did not provide any explanation or a sample of its alleged secret strategies that Mr. Faal was said to be privy to, to enable the Single Judge to

³² Application, para. 25.

³³ Decision, para. 11.

³⁴ Ibid, para. 20.

determine whether Mr. Faal's presence in the Defence team would constitute an undue advantage to the Defence. How these unexplained and undisclosed so-called secret strategies in an Office that has extensive disclosure obligations in relation to its investigations and information in its possession and control might affect the fairness of proceedings has nothing to do with: (i) the First Issue and its focus on presumed conflict of interest and requirement to impose bans predicated on the possession of confidential information; or (ii) the Second Issue and its focus on the applicable legal standard for determining conflict of interest.

24. Most profoundly, the Application sidesteps and deliberately mischaracterises the important safeguard imposed by the Single Judge to ensure fairness - that the Chamber would keep the matter under continuing review and would disqualify Mr. Faal in the future in the event that any new information, not available at the time the Decision was rendered came to light.³⁵ In effect, the Single Judge has not foreclosed the possibility of revisiting the issue in the event that material evidence is available to require such action. The Prosecution has deliberately refused to accept the alternative legal avenue provided by the Single Judge and is instead seeking leave to appeal. In these circumstances, any suggestion that the Decision affects the fairness of the proceedings is without merit and should be disregarded.
25. More specifically, as regards the Second Issue, the Defence notes that this Issue is focused on the evaluation of information in relation to the alleged conflict of interest, though the same is deliberately disguised and formulated by the Prosecution as a legal standard. This practice is disingenuous and should be resisted. As only matters of general knowledge of the case already in the defence's possession and the general public are put before the Single Judge for her evaluation, it is clear that nothing manifestly unfair arises. Not one iota of unfairness is expected to arise in the future on account of Mr Faal's appointment,

³⁵ Decision, para. 30.

and if any unfairness arises, the Single Judge has undertaken to keep the matter under constant review.³⁶ No greater safeguard could fairly be asked for.

26. Equally, it is difficult to understand how either Issue will affect the expeditious conduct of proceedings. In support of its assertions, the Prosecution erroneously relies on the decision of Trial Chamber IV again without distinction, speculates on the potential for delay in the trial because it would lead to a possible disqualification of the entire defence team as well as a possible re-trial.³⁷ The Prosecution does not concretely explain how each of these scenarios would arise.
27. How a presumed conflict of interest based on prior association with the OTP and consequent imposition of a time bar would affect the expeditious conduct of the proceedings has not been fully explained and is difficult to understand. Similarly, how the determination of a legal standard, which is not based on a finding that Mr. Faal had access to *de minimis* confidential information, but rather that he did not actually access confidential information, let alone *de minimis* information would affect the expeditious conduct of the proceedings is equally difficult to understand.
28. If leave to appeal is granted and the Appeals Chamber were to presume a conflict of interest and consequently impose a time bar as requested by the Prosecution, it would have significant consequences which exceed defence representation in the Kenya case. It would, in effect, call for the disqualification of Mr. Nick Kaufman in the *Bemba case*,³⁸ and by extension the entire *Bemba Defence team*, given Kaufman's presence in the OTP at a time when the Bemba case was active. Why the Prosecution did not seek leave to appeal the *Kaufman Decision* in the *Bemba case* and seek to impose a time bar appears rather inconsistent with its contended (and the Defence submit wholly exaggerated)

³⁶ Decision, para. 30.

³⁷ Application, paras. 25 and 26.

³⁸ Kaufman Decision, ICC-01/05-01/08-769.

fears that if a time bar is not imposed, it would seriously affect the organisation and functioning of the whole Prosecution Division of the OTP.

29. As noted above, the Requests failed to persuade the Single Judge that Mr. Faal is actually in possession of confidential information which will inform and provide unfair advantage to the Defence in this case. Therefore, the submissions contained in the Application, rather than concretely setting out how the Issues will impact the proceedings, asks the Trial Chamber to speculate as to how the Prosecution might have to change its strategy, seek the disqualification of the entire Defence team or raise the matter on final appeal without ever explaining how these scenario's could come about in this particular case.³⁹ In short, the Prosecution fails to discharge its burden by demonstrating how the expeditious conduct of proceedings will be affected by the identified Issues.

30. The Application completely fails to even attempt to meet this burden as the Prosecution at no time identified the confidential information, not already disclosed to the defence, allegedly in the possession of Mr. Faal, which would give rise to any of the scenarios canvassed in paragraphs 24 to 26 of the Application. In the absence of submissions based on evidence (even disputed evidence) which clearly articulate how the expeditiousness of proceedings might be affected, it is submitted that this part of the Article 82(1)(d) test has not been satisfied.

Failure to establish that proceedings will be materially advanced

31. In order to certify an issue for appeal under Article 82(1)(d), the “ issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.’ Hence, the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that

³⁹ Application, paras. 25 and 26.

might taint either the fairness of the proceedings or mar the outcome of the trial.”⁴⁰ The Prosecution has failed to demonstrate that an appeal on either of the identified issues would materially advance the proceedings. With regards to the second issue (legal standard) any decision arrived at by the Appeals Chamber on the applicable standard will have no impact on the finding of fact by the Single Judge that there is a lack of proof that Mr. Faal actually was aware of confidential information concerning the case of *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, let alone *de minimis* information. In this regard, any suggestion that the identified issues would have an impact on the outcome of the proceedings is abstract, speculative and without foundation.

32. In addition, the opposite of the Prosecution’s position is true: an appeal at this stage would interrupt the process leading to the confirmation hearing and the confirmation proceedings. Similarly, an appeal on the purported issues is premature given that the Single Judge’s decision to revisit the matter as and when the need arises. The Prosecution’s disagreement with the Single Judge’s undertaking to constantly review this matter is not an appealable issue.
33. The Application also suggests the possibility of the disqualification of the entire defence team without explaining how this scenario would arise. Notwithstanding its scare mongering, the Prosecution fails to show how such disqualification of an entire defence team would advance the proceedings. Similarly, intervention by the Appeals Chamber would not materially advance the upcoming confirmation hearing, but would rather delay it given the proximity of the commencement of the slated confirmation hearings. Similar considerations apply to the contended presumption of conflict of interest and its consequent time bar and the legal standard that the Prosecution seeks certification for. How those two identified issues, if certified for appeal, would

⁴⁰ *Situation in the DRC*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para.14.

materially advance the proceedings is difficult to fathom and no compelling explanation to the contrary has been provided by the Prosecution.

34. Moreover, as noted by the Single Judge, it should be emphasised that at the time of issuing the Decision, the Prosecution's concerns have been overtaken by events, given the extensive disclosure of its investigations and investigative products to the Defence.⁴¹ As such, any concern on the outcome of the confirmation hearing is non-existent. While concerns relating to the perception and acceptance of the institution have been expressed, no compelling explanation has been provided as to how these concerns would be addressed, if leave to appeal is not granted.⁴² Rather, the Defence submits that the Decision of the Single Judge, which the Prosecution now seek to impugn, enhances confidence in the judicial process and demonstrates an independent judiciary within the Court, making proper enquiries and an institution that respects undertakings by lawyers, including those who formerly served the OTP.
35. The Prosecution states in its Application that "the very same issues that the Prosecution now seeks leave to appeal is before the Appeals Chamber in a different case."⁴³ This is incorrect and should be disregarded. The only issue certified for appeal by Trial Chamber IV in the Yillah disqualification issue is similar to the First Issue identified in the Prosecution's Application.⁴⁴ The Second Issue raised in the Application is not before the Appeals Chamber in that case.
36. As far as the OTP contention at footnote 39 of the Application is concerned, that there is a "singular issue of fairness" that militates in favour of leave to appeal being granted (namely that if it is not, a ruling by the Appeals Chamber in the *Banda and Jerbo* appeal could adversely affect Mr. Faal), the Defence are

⁴¹ Decision, para. 20.

⁴² Application, para. 29.

⁴³ Application, para. 31.

⁴⁴ ICC-02/05-03/09-179, para. 10.

compelled to state this is a rather cynical argument devoid of principle or merit. If such an argument had merit, it would militate in favour in all defence counsel in all cases before the court being granted leave to intervene in proceedings, or being granted leave to appeal in all matters, in all cases before the Appeals Chamber where a ruling on the law could possibly affect its own case. Such a proposition is not founded in the Statute or Rules which exhaustively provide the circumstances in which cases may come before the Appeals Chamber.

IV. CONCLUSION

37. For all the reasons detailed above, the Defence requests that the Application be dismissed.

Respectfully Submitted,



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Dated this 1st Day of August 2011

At Nairobi, Kenya