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THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
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 Document
with Public Annexures A, B and C**

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

Sources: Defence Team of Abdallah Banda Abakaer Nourain
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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”) oppose the *Prosecution’s Appeal against Trial Chamber IV “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”* (“Appeal”).¹ The Appeal should be dismissed in whole as Trial Chamber IV made no errors of law in dismissing the Office of the Prosecutor’s (“OTP”) request to invalidate the appointment of Mr. Yillah to the Defence (“Impugned Decision”).²
2. In short, the Trial Chamber applied the correct legal test, as laid down in Article 12(1)(b) of the Code of Professional Conduct for Counsel (“Code of Conduct”), which is whether Mr. Yillah was “privy to confidential information”.³ The Trial Chamber correctly dismissed the Prosecution’s Request⁴ because, as the OTP now concedes, “the Prosecution cannot identify specifically what information [Mr. Yillah] received on the case.”⁵
3. Critically, the Appeal does not seek to remedy any legal errors but, rather, asks the Appeals Chamber to implement a wholesale rule change in conflict of interest matters. The OTP are left to seek such an extraordinary remedy because of their own failure to fairly substantiate the allegation that Mr. Yillah was privy to confidential information. In effect, the Appeal seeks to transform the Appeals Chamber from judicial body to legislator by arguing for the imposition of a legal standard regarding conflict of interest matters which finds no basis either in the

¹ Prosecution’s Appeal against Trial Chamber IV “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, 25 July 2011, ICC-02/05-03/09-184. For the purposes of these Appeal proceedings the Defence adopt their submissions before the Trial Chamber contained in the Defence Response. (the term “Defence Response” is defined in the Appeal at para. 9.).

² Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011, ICC-02/05-03/09-168.

³ Impugned Decision, paras 10-16.

⁴ “Prosecution’s Request” is defined at Appeal, para. 8.

⁵ Appeal, para. 13.

governing legal instruments of this Court or the applicable international jurisprudence.⁶

4. Further, the Appeal improperly seeks to retrospectively and unilaterally amend the employment contracts of OTP lawyers to their detriment by barring them from joining ICC defence teams for a period of time regardless of whether a conflict of interest exists or not. The request for the imposition of such a “restraint of trade” by the Appeals Chamber in these circumstances is contrary to general principles of employment law. If such restraints of trade have a role to play, then it is for the OTP to introduce them into their employment contracts; it is not the province of the Appeals Chamber to do so, least of all retrospectively.

II. SCOPE OF THE APPEAL & STANDARD OF REVIEW

5. A preliminary criticism of the Appeal separate from its substantive errors is that it strays into areas well beyond the one issue certified for appeal.⁷ The OTP make submissions in relation to a *second* purported error of law concerning the interpretation of the phrase “privy to confidential information” in Article 12(1)(b) of the Code of Conduct. This is clearly unrelated to the issue on appeal and, thus, outside the scope of the appeal.⁸
6. The Appeals Chamber has taken a strict approach in the past and has refused to address matters which were not properly the subject of the appeal. Accordingly, the Defence invite the Appeals Chamber to reject the OTP’s submissions in relation to this second purported error of law which was not certified for appeal.⁹ Notwithstanding the above, the Defence will address the arguments made by the

⁶ The absence of any proper basis on which to found the OTP’s proposed legal standard throws into stark relief the OTP’s claims at footnote 18 of the Appeal that it is not asking the Appeals Chamber to act as a legislative body.

⁷ Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, 13 July 2011, ICC-02/05-03/09-179, paras 2(a), 22 & 28. The OTP notes this fact at Appeal, para. 11.

⁸ Appeal, paras 34-39.

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VMU”, 8 October 2010, ICC-01/04-01/06 OA 18, para. 45.

OTP in relation to this second purported legal error in the event that the Appeals Chamber decides to determine this issue.¹⁰

7. In relation to the standard of appellate review, useful guidance on interlocutory appeals concerning errors of law is provided by the Special Court for Sierra Leone. This jurisprudence clarifies that such errors should only be subject to “plenary, *de novo* review”¹¹ if “the error renders the decision invalid.”¹²

III. GROUNDS & SUBMISSIONS IN RESPONSE TO THE APPEAL

Factual Background

8. The fundamental flaw in the Prosecution’s Request, which the OTP improperly seek to remedy via this Appeal, is acknowledged at the outset of, and indeed throughout, the OTP’s submissions – “the Prosecution cannot identify specifically what information [Mr. Yillah] received on [the *Banda and Jerbo*] case”.¹³ It is remarkable that, despite investing the resources to bring the underlying request and Appeal, the OTP are unable to identify one single item of confidential information to which Mr. Yillah was privy. The result is that the Prosecution’s Request was dismissed, not because the Trial Chamber erred by applying the wrong legal standard¹⁴ (or even because the current legal standard is inadequate, albeit that the adequacy or otherwise of rules is not the proper concern of an appeal but of a rule change),¹⁵ but simply because the OTP failed to discharge their burden of proof in order to satisfy the correct legal standard. This Appeal must fail for the same reason.

¹⁰ *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 7.

¹¹ Appeal, para. 12 (footnotes omitted).

¹² *Prosecutor v. Sesay et al.*, SCSL-04-15-T-956, Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 7.

¹³ Appeal, para. 13. See also Appeal, para. 25.

¹⁴ Notably three different ICC Chambers have all applied the same test when determining conflict of interest matters: Trial Chamber III in *Prosecutor 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 (“*Bemba Decision*”); Trial Chamber IV in the Impugned Decision; and the Single Judge of Pre-Trial Chamber II in *Prosecutor v. Muthaura, Kenyatta & Ali*, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, ICC-01/09-02/11-185, 20 July 2011 (“*Muthaura Decision*”).

¹⁵ For submissions on the adequacy of the current legal test, see Appeal, para. 3.

First Ground: the Trial Chamber erred when it refused to apply an objective standard

9. Contrary to all the OTP's arguments under this ground of appeal, the Trial Chamber did not err in law by failing to apply the OTP's proposed standard in reaching the Impugned Decision.¹⁶ The proposed standard finds no basis in either the governing legal instruments of this Court or the applicable international jurisprudence. This is glaringly evident from the three reasons advanced by the OTP in support which concern: (i) the characteristics and working methods of the OTP;¹⁷ (ii) the need to protect against the appearance of impropriety;¹⁸ and (iii) the restrictions imposed in certain national legal systems on ex-prosecutors in relation to joining the defence.¹⁹ None of these reasons provides a tangible legal basis for the standard proposed by the OTP.

10. The Rome Statute ("Statute") establishes a clear hierarchy of applicable law that is ignored by the OTP in the Appeal. 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. In resolving this issue, the Court must, therefore, apply the Code in the first place.

11. If the answer to an issue is not apparent from the Statute or the Rules, then the Court shall apply "in the second place, where appropriate [...] the principles and rules of international law": Article 21(1)(b). This 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".²⁰ Thus, the relevant jurisprudence of other international courts and tribunals, which operate in a similar context to the ICC, is of persuasive authority.

¹⁶ Appeal, paras 21-33.

¹⁷ *Ibid.*, paras 24-27.

¹⁸ *Ibid.*, paras 28-30.

¹⁹ *Ibid.*, paras 31-33.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, 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.

12. Lastly, “general principles derived [...] from national laws” only become relevant, according to Article 21(1)(c), if an issue cannot be resolved by reference to Article 21(1)(a) or (b).
13. In addition, Article 21(2) 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.”²¹
14. Operating within this framework, the Chamber properly identified Article 12(1)(b) of the Code of Conduct as the applicable provision. Specifically, it correctly identified that the issue was whether Mr. Yillah “was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear”.²² The Chamber also determined that satisfaction of this standard requires proof of actual access to confidential or privileged information and that mere presumption of such access was insufficient.²³
15. The Trial Chamber’s approach was entirely correct. Article 12(1)(b) explicitly deals with the situation where a “staff member of the court” moves to represent a client before the Court. Since the Code of Conduct derives its authority from the Rules, the Chamber was obliged by Article 21(1)(a) to apply the Code “in the first place”.
16. The wording of Article 12(1)(b) bears no resemblance to the test proposed by the OTP. It is simply not possible to read Article 12(1)(b) as imposing an absolute ban on OTP lawyers joining the defence in a case that was open at the time

²¹ It is acknowledged that Trial Chamber decisions at the ICC do not create binding precedents on other Trial Chambers but, 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. See *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 & 6 (examining the relationship between a Pre-Trial Chamber and a Trial Chamber). 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 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).

²² Impugned Decision, para. 15.

²³ *Ibid.*, paras 20-21.

he/she worked for the OTP, as the Appeal contends. Article 12(1)(b) only prevents a lawyer from joining the defence if they were “involved” in the case or “privy to confidential information” relating to the case. This second limb of Article 12(1)(b) necessarily entails an assessment of whether the information was “confidential” and then if counsel had access to it.

17. Thus, the Trial Chamber was also correct that it should only find that an impediment to representation exists when actual proof is brought forward by the party challenging counsel’s appointment. This follows from the basic principle that the moving party bears the burden of proof. It also follows from the jurisprudence of this Court and that of the other international tribunals to which this Chamber should have regard (see above).
18. In *Bemba*, the Trial Chamber found 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 [...]”²⁴
19. Moreover, and persuasively, the ICTY Pre-Trial Chamber in the *Hadžihasanović* case ruled on the assignment of a former OTP attorney as defence counsel. In ruling on the conflict of interest issue, this Chamber found that “prior association alone does not justify disqualification of a former employee of the Prosecution from becoming a defence counsel”,²⁵ applied a “real possibility test”²⁶ and 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.”²⁷ Further, in the *Karemera* case at the ICTR, the issue of the appointment of a former defence legal assistant to the

²⁴ *Bemba* Decision, para. 42.

²⁵ *Prosecutor v. Hadžihasanović 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 (“*Hadžihasanović* Decision”), para. 53.

²⁶ *Ibid.*, paras 46 & 49.

²⁷ *Ibid.*, para. 53.

Prosecution was considered.²⁸ The ICTR Trial Chamber found that the defence had not presented any concrete evidence that the challenged lawyer had provided any confidential information to the Prosecution and so rejected the defence's allegations.²⁹

20. Plainly, in this legal framework and context, the approach taken to Article 12(1)(b) by Trial Chamber IV was not wrong in law. Trial Chamber III in *Bemba*, the ICTY Pre-Trial Chamber in *Hadžihasanović* and the ICTR Trial Chamber III in *Karemera* have all required the moving party to substantiate its concerns by providing concrete proof. Further, in a decision subsequent to the Impugned Decision, the Single Judge in Pre-Trial Chamber II noted that the test proposed by the OTP featured nowhere in the Court's statutory documents and dismissed the Prosecution's Request as the OTP failed to discharge their burden of proof.³⁰
21. In contrast to the clear analysis in the Impugned Decision, the three arguments relied upon by the OTP in support of its proposed standard have no basis in law.
22. As to the characteristics and working methods of the OTP, nothing in the Court's governing documents or the applicable international jurisprudence mandates that a Trial Chamber take such extraneous factors into account when interpreting an ICC provision. In any event, contrary to the OTP's submissions otherwise, the test mandated by Article 12(1)(b) and applied in the Impugned Decision does not have "serious consequences for the OTP and its ability to discharge its responsibilities".³¹ The legal standard applied by the Chambers to date simply requires the party challenging an appointment to substantiate its claim and properly identify the confidential information to which it alleges a person has been made privy. This is not an unreasonable or impossible standard. Allegations may be substantiated through a variety of means which can more

²⁸ *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*, ICTR-98-44-T, Décision sur la Requête Urgente pour Matthieu Ngirumpatse aux Fins d'Annulation de la Poursuite et aux Fins de Mise en Liberté Immédiate, 11 April 2011.

²⁹ *Ibid.* paras 7, 8 & 9.

³⁰ *Muthaura* Decision, paras 17 & 27.

³¹ Appeal, para. 14. See the OTP's similarly exaggerated claims at Appeal, paras 15 & 17.

than adequately deal with the sometimes informal ways in which confidential information is transmitted. For example, sworn affidavits can attest to informal discussions whether conducted in corridors or otherwise.³² The OTP, as the prosecuting organ of this Court, should be no stranger to the different methods and means of proving and substantiating allegations which are available to it.

23. Equally irrelevant to the determination of the applicable legal standard in conflict of interest matters is the need to protect against the appearance of impropriety. A plain reading of the rule does not require that such a factor be taken into account.³³ Even if it were a factor, there is no appearance of impropriety when there is no evidence that defence counsel was privy to any confidential information on this case.
24. On the contrary, the Prosecutor's request for a drastic rule, which restricts an accused person's right to free choice of counsel³⁴ and limits the employment opportunities of former OTP staff based on unexplained fears that OTP practices will be revealed, can only raise public suspicion and erode confidence in the OTP, as an integral organ of the Court. The OTP's general practices should be transparent to both those accused of crimes before the Court and the general public when viewed in light of the extensive disclosure obligations upon it in relation to its investigations and the fruits of the same. It is hard to understand, and no elucidation is provided in either the underlying Prosecution's Request or the Appeal, exactly what OTP secret practices the Prosecutor fears will be revealed and how knowledge of those practices by defence counsel would in any way damage the fairness of the proceedings. Further, it has never been the Defence's position that former OTP lawyers can join ICC defence teams without restriction. Appointments can be challenged and judicially scrutinised according

³² In the *Muthaura* case, the Court Management Section was able to provide a considerable amount of information to the Court regarding access (or the lack thereof) to confidential information. The OTP in that case submitted more than 9 annexes in support of their claims. See *Muthaura* Decision, paras 4 & 9 and footnote 15.

³³ Note the Single Judge's comments on this point in the *Muthaura* Decision at para. 16.

³⁴ This right is guaranteed by Article 67(1)(b) and (d) and is particularly important because these proceedings are at a crucial stage when the start of trial is imminent.

to the correct standard as has occurred in this case, the *Bemba* Decision and the *Muthaura* Decision.

25. In support of its submissions concerning the need to protect against impropriety, the OTP rely on just one national jurisdiction – the United States. But the factual circumstances of the cases selected are, by and large, so divorced from the situation of counsel practicing before the ICC as to be without any relevance.³⁵ The one case³⁶ cited by the OTP that actually involves a former prosecution attorney appearing as Defence counsel in a matter that was under investigation by the prosecution office during the attorney's employment there merely underlines the Trial Chamber's finding that the great variance of national practice does not allow for guidance to be drawn from said practices.³⁷ The Defence do not take issue with the OTP's summary of this U.S. federal appellate court case.³⁸ The Defence note, however, that another federal appellate court severely criticised and declined to follow this case.³⁹ Even with respect to the one national jurisdiction to which the OTP cite, the existence of a coherent position on the issue of appearance of impropriety is by no means clear.

26. In reality in many national jurisdictions (including the U.S. and Canada)⁴⁰ movement between prosecution and defence is commonplace and

³⁵ E.g., *Heringer v. Haskell*, cited at Appeal, footnote 34, involved a three-person law firm switching sides in the middle of a civil dispute (536 N.W.2d 362, 367 (N.D. 1995)). *State v. Tate*, also cited at Appeal, footnote 34, concerned the unique situation of the head of a county's prosecution office who formerly presided over the case in question as a trial court judge (925 S.W.2d 548 (Tenn. Crim. App. 1995)). The court in *Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc.*, relied upon at footnote 37 of the Appeal, described the case as a "rare" situation involving a mass tort action involving the "health care of millions" – not a "simple one-client case" – where the law firm in question was simultaneously representing both the plaintiff and defendant, though in different matters (53 F. Supp. 2d 338, 340, 346 (E.D. N.Y. 1999)).

³⁶ *United States v. Miller*, 624 F.2d 1198 (3rd Cir. 1980).

³⁷ Impugned Decision, para. 8.

³⁸ Appeal, para. 29.

³⁹ *United States v. Washington*, 797 F.2d 1461, 1446 (9th Cir. 1986) ("We cannot accept the Third Circuit's reliance upon such a restrictive reading of the ABA disciplinary rule as a basis for denying a criminal defendant his Sixth Amendment right to counsel of his choice. We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. It is quite a different matter to demonstrate that public confidence will in fact be undermined if criminal defendants are permitted to retain lawyers who worked for the government in the field of law implicated by an indictment.").

⁴⁰ See, for example, the following reports from the US and Canadian context: (i) Julie Bykowicz, "A top prosecutor is switching sides", *Baltimore Sun*, 12 August 2004, available at:

uncontroversial. This is certainly the position in The Gambia, as is evidenced by the attached affidavit of the Solicitor General of The Gambia.⁴¹ Indeed, the Deputy Prosecutor appears to have availed herself of this freedom and immediately embarked upon Defence private practice upon leaving her position as Attorney General of The Gambia.⁴²

27. Separate comment is warranted on the appropriateness of the OTP's invitation to the Court to rely on internet blogs or newspaper articles as reliable *indicia* of how the Court is perceived.⁴³ A court of law must be directed by evidence and principle, and be ever vigilant at eschewing unsupported speculation, innuendo and gossip of the type sometimes found in the public domain.⁴⁴ This is perhaps best illustrated by a review of some of the same types of reports which make serious, salacious and unsavoury allegations against the OTP.⁴⁵ The Defence do

http://articles.baltimoresun.com/2004-08-12/news/0408120186_1_bair-bennett-death-penalty; (ii) "Longtime prosecutor Dixon moving to the defense table", *Savannah Morning News*, available at: <http://savannahnow.com/stories/042401/LOCdixon.shtml>; (iii) Marianne Funk, "Prominent Defence Attorney says Changing sides to Prosecution isn't a big leap: She's still Advocate", *Desert News*, 21 March 1995, available at: <http://www.deseretnews.com/article/410811/PROMINENT-DEFENSE-ATTORNEY-SAYS-CHANGING-SIDES-TO-PROSECUTION-ISNT-A-BIG-LEAP-SHES-STILL-ADVOCATE.html>; (iv) Blair Anthony Robertson, "Ex-prosecutor finds changing sides trying", *Sacramento Bee*, 30 January 2007, available at: <http://www.patrickhanlylaw.com/CM/Custom/PatHanlyArticle13007.pdf>; (v) Pat Milhizer, "Prosecutors make successful switch from offense to defense", *Chicago Daily Law Bulletin*, 25 April 2009, available at: <http://www2.gtlaw.com/pub/media/2009/Rubinstein09a.pdf>; (vi) "Former D.C. Federal Prosecutor Joins Squire Sanders' White-Collar Defense Team", *The Blog of LegalTimes*, 2 June 2011, available 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", Ed Geary's Legal Blog, available at: <http://edmondgeary.wordpress.com/2007/11/23/prosecution-and-defense-switching-roles/>; (viii) Donald O'Connor, "Law switch makes partners in crime", *lfpres.com*, 29 April 2011, available at: <http://www.lfpres.com/news/london/2011/04/29/18085811.html>; & (ix) Sheldon Gordon, "Crossing the Street", *Legal Transitions*, National Magazine's Legal Careers Supplement, July/August 2006, available at: <http://www.legaltransitions.dgtlpub.com/data/issuePDF/LT/8500000513-LT.pdf>. A selection of these articles is provided in "Annexure A" hereto.

⁴¹ See Affidavit of Pa Harry Jammeh, Solicitor General of The Gambia, dated 14 June 2011 ("Annexure B" hereto).

⁴² See Deputy Prosecutor's CV at p. 6 of the document included as "Annexure C" hereto, also available at: http://212.159.242.181/iccdocs/asp_docs/library/asp/ICC-ASP-3-8.pdf.

⁴³ Appeal, para. 30 & footnote 39.

⁴⁴ This is especially so when the content is not cited to fairly, fully and accurately by the OTP. See for example the cite at footnote 39 of the Appeal to a clip from YouTube concerning former OTP lawyer Mr. Faal (http://www.youtube.com/watch?v=jtggmjm_0MQ). This report does not support the claim that public perception of the Court will be damaged if former OTP lawyers move to defence teams. In fact the clip includes the report that "[...] experts in international law don't blame the move ... it will in no way affect the ICC prosecution's case. ICC expert [...] argued that lawyer Faal has not been working on the Kenyan case. Therefore, there will not be a conflict of interest. He, however, says this could be a big blow to Ocampo's team as Faal was one of the more experienced persons on the prosecution team".

⁴⁵ E.g. (i) Julie Flint and Alex de Waal, "Case Closed: A Prosecutor Without Borders", *World Affairs*, Spring 2009, available at: <http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html>; (ii) Joshua

not associate themselves with any of these criticisms but assume that the OTP would not wish these blogs to be taken as representative of world opinion.

28. The OTP also cite to *Hadžihasanović*, discussed at paragraphs 19 and 20 above – in support of its ‘impropriety’ submissions.⁴⁶ But, the OTP fail to mention that the ICTY Pre-Trial Chamber declined to bar a former OTP attorney from appearing for the Defence on the basis of ‘impropriety’,⁴⁷ or for any other reason. In fact, the OTP are unable to cite to a *single* instance in which an attorney or legal assistant formerly employed by the OTP of an international court was barred from appearing as Defence counsel before that court on the basis of impropriety.⁴⁸
29. Finally, a consideration of the practices of only four national jurisdictions⁴⁹ has no role to play.⁵⁰ According to Article 21, in relation to an issue on which there is ICC legislation and international jurisprudence, there is no need to turn to general principles of national laws. This is particularly so when, as the OTP concede “such practices vary in operation”⁵¹ and, thus, no general principle of law can be derived as is required by Article 21(1)(c). The Trial Chamber,

Rozenberg, “Why the world's most powerful prosecutor should resign: Part 4”, The Telegraph, 14 September 2008, available at: <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2700448/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-4.html>; (iii) Matthew Russell Lee, “At UN, Sudan Ridicules Ocampo, Competence and Bosco Left Unanswered, Farrow in Council”, Inner City Press, available at: <http://www.innercitypress.com/icc7ocampo060509.html>; (iv) David Pallister, “Human rights: Growing clamour to remove the Hague prosecutor who wants Sudanese president arrested”, Guardian, 18 August 2008, available at: <http://www.guardian.co.uk/world/2008/aug/18/humanrights.sudan/print>; (v) Tony Ryals, “UN Susan Rice, Viagra Rape Libya?: IMF Strauss-Kahn, ICC Luis Moreno-Ocampo both rape black women!”, Austin Indymedia, available at: <http://austin.indymedia.org/article/2011/06/12/un-susan-riceviagra-rape-libya-imf-strauss-kahnicc-luis-moreno-ocampo-both-rape-b>; (vi) “Circus in the court room”, Article42-3.org, available at: <http://comment.article42-3.org/#home>.

⁴⁶ Appeal, para. 28.

⁴⁷ The ICTY Pre-Trial Chamber stated that “it is of the opinion that the appearance of a just procedure is as important as a just result for a fair trial. That is not to say that any challenge to the integrity of the proceedings, however artificial or theoretical, should form the basis of a reaction from the Chamber. Only when that challenge is *real*, some reaction is required.” See *Hadžihasanović* Decision, para. 46 (emphasis added).

⁴⁸ See, e.g., *Prosecutor v. Cermak*, IT-06-90-PT, Public Decision of the Registrar, 12 Nov 2007, p 4; *Prosecutor v. Ante Gotovina et al.*, IT-06-90-PT, Decision on Ivan Cermak’s and Mladen Markac’s Joint Motion to resolve Conflict of Interest regarding attorney Gregory Kehoe, 29 November 2007, p. 9-10; *Prosecutor v.; Prosecutor v Borovčanić*, IT-02-64, Decision of the Registrar, 28 May 2008.

⁴⁹ In this section the OTP refer to the practices in France, Italy, China and Germany (see Appeal, para. 32). The Defence note that the Prosecution’s Request originally referred also to the American Bar Association Model Code of Professional Responsibility and practices in Canada (see Prosecution’s Request, paras. 19 & 20). However, perhaps due the fact that these were misstated and did not in actual fact support the OTP’s position, they are not referred to in the Appeal. See ICC-02/05-03/09-163, paras 19-22.

⁵⁰ See paras 10-13 above regarding the hierarchy of laws. See also the Single Judge’s comments in the *Muthaura* Decision at paras 26 & 27 regarding the competency and adequacy of a survey of national laws.

⁵¹ Appeal, para. 31.

therefore, properly did not have regard to the OTP's submissions regarding domestic practices. This approach finds support in the *Hadžihasnović* Decision where a similar argument made by the Prosecution was dismissed as the ICTY Pre-Trial Chamber concluded that "national practices differ so much [...] it can derive no guidance from [them]".⁵²

30. Most importantly in this regard, the OTP omits to inform the Appeals Chamber that the time bars imposed in the national jurisdictions referred to are expressly codified, which is not the case with this Court. This distinction is fundamental because when faced with similar situations, courts in those national jurisdictions referred to by the OTP are expressly guided by such written codes, 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.

31. Notwithstanding the above, and for the sake of completeness, the Defence refer the Appeals Chamber to the criticisms which the Defence made of the OTP's reliance on the national practices of France, China and Germany in the Defence Response.⁵³ In essence, these examples cannot be relied upon 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 value.

Second Ground: the Trial Chamber erred when it required that Mr. Yillah be effectively in possession of "more than de minimis" confidential information

32. The OTP criticise the Impugned Decision for "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".⁵⁴

33. Again, the clear words of Article 12(1)(b) defeat this argument. Under this Article counsel is only disqualified in two circumstances, first if he was "involved" in

⁵² *Hadžihasnović* Decision, para. 42.

⁵³ See Defence Response, paras 19 & 23-29.

⁵⁴ Appeal, p. 16.

the same case, and second if he “was privy to confidential information”. The suggestion that the second limb of the test is satisfied by suggesting there is “an objective possibility” that an individual had access to confidential information is wrong. Article 12(1)(b) says nothing about possibilities. Since “privy to” is not defined, it must bear its ordinary meaning: “sharing in the secret of”.⁵⁵ Thus, the test is only satisfied if the OTP can prove that Mr. Yillah shared in the secret of some identified confidential information, and not by suggesting that it is possible that he so shared.

34. Accordingly, there is no inconsistency in the Trial Chamber finding that Mr. Yillah’s prior employment “might have provided him with knowledge pertaining to ongoing investigations” (emphasis added), and going on to dismiss the Request because the OTP failed to prove that Mr. Yillah was in fact “privy to confidential material”. In fact, this was the correct finding since, as set out above, the OTP failed to identify a single piece of confidential information that Mr. Yillah was privy to.
35. It is a sign of desperation that the OTP go on to criticise Trial Chamber IV, Trial Chamber III and Pre-Trial Chamber II for requiring something more than “*de minimis* confidential information”.⁵⁶ Properly understood, adopting the phrase “*de minimis*” does not import an illegitimately high threshold. The phrase simply refers to something “so insignificant that a court may overlook it in deciding an issue”.⁵⁷ This reflects the reality that in all areas of law, there are some factors that are so insignificant that any court ought not to consider them. There is nothing improper in the Chambers confirming that in reaching their decision, they had not taken into account information which was “so insignificant” that it could properly be overlooked.

⁵⁵ Oxford English Reference Dictionary, Second Edition, Revised, p. 1151.

⁵⁶ Appeal, para. 34.

⁵⁷ Black’s Law Dictionary, 9th ed. (Thomas Reuters 2009), p. 496.

36. If the OTP's view is accepted, the Court might have to disqualify counsel in any case where the OTP can show that the individual had access to a single piece of inconsequential confidential information, including Mr. Nicholas Kaufmann,⁵⁸ the entire *Bemba* defence team, and *Muthaura* defence team.⁵⁹ Such an approach would not advance the aims and objectives of the Rome Statute and would be unjust. The Defence submit that the purpose of Article 12(1)(b) is to balance the accused's right to be represented by counsel of their choosing⁶⁰ against the risk that the OTP would be disadvantaged by the Defence having access to confidential information. That there is a balancing exercise is illustrated by the second sentence of Article 12(1)(b) which allows the Court to "lift the impediment" to representation if it is in the "interests of justice" to do so. The Chambers, correctly, struck this balance by deciding that the accused should not be deprived of his right to his chosen representative, unless the OTP can point to "more than *de minimis* confidential information". It is submitted that this is the correct approach.
37. In any event, the use of the "*de minimis*" test had no effect on the outcome of the Impugned Decision as the OTP failed to prove that Mr. Yillah was privy to a single piece of confidential information, *de minimis* or otherwise. In effect, the OTP is inviting the Appeals Chamber to render an advisory opinion on hypothetical questions of law, which have no material impact on the alleged prejudice that the requested appellate intervention is intended to cure because the Trial Chamber made no finding of fact that Mr. Yillah was in possession of any confidential information, let alone *de minimis* information.⁶¹

⁵⁸ See the *Bemba* Decision.

⁵⁹ *Prosecutor v. Muthaura, Kenyatta & Ali*, 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), 26 July 2011, para. 25.

⁶⁰ Article 67(1)(d) of the Statute.

⁶¹ 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."

38. Similarly, there is no basis to the criticism that the Impugned Decision required “subjective ‘effective’ possession of information”.⁶² The Trial Chamber identified the correct test: “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”.⁶³ When the Trial Chamber applied the test to the facts, it said that “the combination of lack of any proof that Mr. Yillah is effectively in possession of confidential material and his unequivocal assertions that he is unaware of any relevant confidential material settles this matter.”⁶⁴
39. The Defence submit that the Trial Chamber committed no error of law. It simply used the phrase “effectively in possession of” as a natural substitute for “privy to”. This is unobjectionable. “In possession of” means the same as “privy to”. The word “effectively” merely emphasises that it was for the OTP to prove that Mr. Yillah was in fact in possession of confidential material, and not that it was merely possible that he was in possession of confidential material.
40. In any event, the Prosecution’s Request would have been rejected on either test, since, as set out above, it failed to identify a single piece of confidential information that Mr. Yillah was either in possession of or privy to.

Concomitant Effect: unilateral, detrimental, retrospective amendment of employment contract

41. The concomitant effect of the OTP’s proposed legal standard, if accepted, would be the imposition of a unilateral, detrimental and, in the case of Mr. Yillah, retrospective, change to OTP lawyers’ contracts of employment, so as to impose a “restraint of trade” provision.⁶⁵ No such restriction was included in Mr. Yillah’s employment contract with the OTP. Nor was any separate undertaking required of him by the OTP at any time during the course of his employment.

⁶² Appeal, para. 35.

⁶³ Impugned Decision, para. 16.

⁶⁴ *Ibid.*, para. 22.

⁶⁵ Originally in the Prosecution’s Request, the OTP referred to a period of one year. In the Appeal, the OTP now prefer to refer to a “period of time” without specifying how long this period of time should be. The Defence submit that the absence of any reason to prefer one period of time over another is a further example of the arbitrary nature of the rule that the OTP seek to impose.

Accordingly, the Appeal must fail because the OTP's approach is contrary to general principles of employment law.

42. When considering restraint of trade provisions, the starting point is that they must be treated with caution because they breach an individual's right to free choice of employment. This right is an internationally recognised human right,⁶⁶ and, therefore, according to Article 21(3) of the Statute, the Code of Conduct must be applied and interpreted in a manner consistent with this right.
43. In November 2010, *Ius Laboris* published a report detailing the national laws on restraints of trade in 28 jurisdictions, including jurisdictions in Europe, North America, South America and Asia.⁶⁷ The general principle, which can be deduced from these national jurisdictions is that:

*[...] an enforceable clause [...] must be in writing and acknowledged by both parties. [...] 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.*⁶⁸

44. Further, of the 28 national jurisdictions, none obliged an employee not to compete with a former employer in the absence of a specific clause in the contract to that effect, unless the employer could prove wrongful behaviour on the part of the employee. It goes without saying that there can be no suggestion that Mr. Yillah has acted wrongfully.
45. Furthermore, the case law of the Administrative Tribunal of the International Labour Organisation also recognises that individual terms and conditions of employment may not be changed unilaterally to the detriment of an employee

⁶⁶ This right is recognised in Article 23(1) of the Universal Declaration on Human Rights and Article 6(1) of the International Convention Covenant on Economic, Social and Cultural Rights. It also finds a place in national law, "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraint of trade of themselves, if there is nothing more, are contrary to the public policy, and are therefore void. That is the general rule." *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

⁶⁷ *Ius Laboris*, Non-Compete Clauses: An International Guide available at <http://www.iuslaboris.com/Files/non-compete-clauses-an-international-guide.pdf>.

⁶⁸ *Ius Laboris*, *ibid* at p 19.

particularly when the change infringes “the essential terms in consideration of which the official accepted appointment”.⁶⁹ This is relevant because the Administrative Tribunal has jurisdiction over employment disputes arising from the OTP.⁷⁰ In this regard, the relief sought by the OTP is unlawful because it is an attempt to impose a restraint of trade on a former employee.

46. If this matter was of such concern to the OTP, it should have addressed it in the drafting of its employment contracts or by seeking a change in the Rules. The OTP have been on notice of this issue since the Statute entered into force in July 2002, and more importantly since a former OTP staff member joined a defence team in 2009,⁷¹ but apparently in the last nine years has seen no need for change.⁷² The OTP cannot now remedy this omission via this Appeal, at least in respect of former employees. The Appeals Chamber is not a legislative body. It cannot change provisions in the Code of Conduct or re-draft OTP employment contracts. In effect, the OTP want 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.⁷³

IV. LIFTING OF ANY IMPEDIMENT

47. *Esto* the Appeals Chamber finds that the Trial Chamber did err in law, the Defence advise that it reserves the right to request that the discretion provided for in Article 12(1)(b) of the Code of Conduct be exercised in the interests of justice to lift any impediment to Mr. Yillah’s appointment.

⁶⁹ Judgement No. 61, para. 12

(http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=61&p_language_code=EN).

⁷⁰ The jurisdiction of the Administrative Tribunal has been recognised by the ICC (see <http://www.ilo.org/public/english/tribunal/membership/index.htm>).

⁷¹ Mr. Nicholas Kaufman joined the *Bemba* Defence team in 2009. The OTP did not seek leave to appeal the *Bemba* Decision, nor did it seek to impose a time bar in that case. This position is inconsistent with its exaggerated fears of the impact of such move on the organization of its Prosecution Division.

⁷² The Defence also note that the *Hadžihasnović* Decision dates from March 2002 and the *Bemba* Decision from May 2010.

⁷³ *Hadžihasnović* Decision, para. 52. See also *Muthaura* Decision, para. 28.

V. CONCLUSION

48. For all the reasons detailed in the paragraphs above, the Defence request the Appeals Chamber to: dismiss the Appeal on all grounds; and confirm the Impugned Decision.

Respectfully Submitted,



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Lead Counsel



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Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 5th Day of August 2011

At Nairobi, Kenya

Dated this 5th Day of August 2011

At Phnom Penh, Cambodia