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Date: **1 September 2011**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

PUBLIC REDACTED Version

Prosecution's Appeal against the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)"

Source: **Office of the Prosecutor**

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Introduction

1. Before he resigned, effective 31 March 2011, Mr. Essa Faal was a Senior Trial Lawyer in the Office of the Prosecutor ("OTP"). He headed the OTP teams in the cases arising in the Situation in Darfur, Sudan. Three weeks after he left the office, on 22 April, he telephoned the Deputy Prosecutor from Kenya to inform her that he had joined the *Muthaura* Defence Team. On 20 August 2011 the Single Judge of Pre-Trial Chamber II ("Single Judge") denied the Prosecution's request to invalidate his appointment to the *Muthaura* Defence Team[1] finding no basis to disqualify him since he was not aware of more than *de minimis* confidential information relevant to the case.

2. The Prosecution submits that the Single Judge committed two errors: First, she erred when she refused to apply an objective standard under Article 12(1)(b) of the Code of Professional Conduct of Counsel ("Code") to determine whether counsel is "privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear". Second, she erred by requiring that access to confidential information is not enough, and that (a) counsel must be shown to be subjectively aware of the confidential information, which (b) in addition to being confidential also must be sufficiently "important".

3. The nature of the Court's mandate, the particular context in which the Court operates and the Statutory requirements of fairness warrant the adoption of standards that 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 tests that are wrong in law and offer inadequate protection. The tests adopted in the Decision are particularly inadequate in view of the practice within the OTP and the function exercised by a P5 Senior Trial Lawyer. Because of the essential need to

[1] ICC-01/09-02/11-185.

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 ("PD") will be unrestricted and therefore confidential.

4. The Prosecution accordingly requests the Appeals Chamber to reverse the impugned Decision, provide the correct legal standards, and either invalidate Mr. Faal's appointment or remand the matter to the Single Judge with directions.[2]

Statement of Facts

5. Because of the newness of this Tribunal and the paucity of established precedent, the experiences of lawyers in national and international tribunals are particularly solicited and valued. Within the Prosecution Division ("PD"), lawyers frequently seek strategic and legal advice from each other, exploring how issues are analyzed and resolved in other courts in order to formulate the best approach in their cases. These consultations are so frequent as to be unremarkable. They are also mostly informal, brief, and undocumented. Because of the need for open discussions, the employment contracts require that the person accept that everything that occurs within the OTP is deemed confidential

6. Mr. Faal joined the OTP on 17 January 2006 to work on matters arising in the Situation in the Darfur, becoming the Senior Trial Lawyer in charge of the Darfur cases on 1 November 2007. In one of the Darfur cases, three suspects (now two, since charges were not confirmed against the third) were represented by Mr. Karim Khan, who also represents Mr. Muthaura in the instant case.

[2] Pursuant to Regulation 23*bis*, the Prosecution files this document confidential, *ex parte* available only to the Prosecution, Registry and Defence of Muthaura, since it refers to the content of documents that have the same classification, in particular the Defence Response. A public redacted version of this brief will be filed as soon as possible.

7. Mr. Faal brought to the OTP a prosecutorial background before the Special Panel for Serious Crimes in East Timor and before his national courts. His experience was valuable not simply for the Darfur cases. Junior and senior colleagues consulted him readily, formally and informally, on investigative and prosecutorial strategies and policies arising in all cases. In addition to these informal contacts, as one of four P5 Senior Trial Lawyers he participated in PD senior staff meetings during which legal and factual issues arising in all cases were freely discussed. He received internal weekly reports synthesizing all filings, decisions, and other relevant developments, confidential and public, in all cases in the OTP. He received all confidential and *ex-parte* filings in all cases and situations pending before the Court. On several occasions he acted as Officer in Charge of PD in the absence of the Deputy Prosecutor.[3]

8. On 23 February 2011, Mr. Faal announced his resignation. He invoked unidentified personal reasons to ask the Office to shorten the two-month notice period and allow his resignation to become effective 31 March 2011.[4]

9. On 22 April, the last day of the original two months notice period and three weeks after he left the OTP, Mr. Faal, calling from Kenya, informed the Deputy Prosecutor that he had joined the Defence Team of Mr. Muthaura. The Deputy Prosecutor raised concerns of conflict of interest and told him that the OTP would most likely oppose his appointment.[5]

[3] See Prosecution Request and its annexes and Prosecution Reply and its annexes.
[4] "Due to certain important issues that I need to sort out at my native home, I crave upon your indulgence to allow me to give one month notice", Prosecution Request, Annex G.
[5] Prosecution Request, Annex A.

10. On 30 May 2011, the CSS notified the OTP of the proposed appointment of Mr. Faal as Co-Counsel on the Defence team representing Mr. Muthaura.[6] On 13 June 2011, the OTP formally objected.[7] REDACTED.[8]

11. On 28 June 2011, the Single Judge *proprio motu* requested observations regarding his appointment to "preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved".[9]

12. On 1 July 2011, the Prosecution requested the Single Judge to invalidate the appointment ("Prosecution's Request").[10] On 8 July, Mr. Muthaura's defence filed a response ("Defence Response").[11] REDACTED.[12] With leave of the Chamber the Prosecution filed a reply on 14 July, which included, *inter alia*, records indicating that he had opened one specific weekly report containing confidential information on the Kenya case.[13]

13. On 20 July 2011 the Single Judge issued the Decision denying the Prosecution's Request.[14] Relying exclusively on the Code and two prior decisions by ICC Trial Chambers, the Single Judge found that "the core issue *sub judice* [is] whether Mr. Faal was 'privy to confidential information as a staff member of the Court relating to the case' of Mr. Muthaura".[15] The Single Judge required the Prosecution to prove that Mr. Faal "was aware of confidential information of some significance to the case *sub*

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[6] Prosecution Request, Annex B.
[7] Prosecution Request, Annex C.
[8] Prosecution Request, Annex D.
[9]ICC-01/09-02/11-138-Conf, para. 11
[10] ICC-01/09-02/11-150-Conf and Annexes.
[11] ICC-01/09-02/11-163-Conf-Exp.
[12] Defence Response, paras.7,9,13.
[13] ICC-01/09-02/11-172-Conf-Exp and Annexes.
[14] ICC-01/09-02/11-185.
[15] Decision, para.16

judice, which prompts the Chamber to invalidate the [his] continuous involvement with the [Defence]".[16]

14. Finding no proof that Mr. Faal was aware of such information, and taking into account "the unequivocal assertion of Mr. Faal […] that he does not know or has no knowledge of any confidential investigative or prosecutorial policies pertaining to the present case"[17] the Single Judge ruled that Mr. Faal may continue to represent Mr. Muthaura.[18]

15. On 18 August the Single Judge granted leave to appeal:[19]

- "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 the person] should be deemed as being privy to confidential information related to the case under Article 12(1)(b) of the Code of Professional Conduct"; and

- "Whether the correct test to determine that a person is 'privy to confidential information' under Article 12(1)(b) is whether that person has become aware of more than *de minimis* confidential information related to the relevant case".

Prosecution's Submissions

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

[16] Decision, para.17.
[17] Decision, para.29.
[18] Decision, p.13.
[19] ICC-01/09-02/11-253, para.11.

16. In considering whether Mr. Faal should be disqualified, the Single Judge exclusively relied on the Code and two prior decisions of Trial Chambers of the Court that are also solely based on the Code.[20] She erred in failing to consider her authority under Article 64(2) of the Statute to take steps to preserve the fairness of the trial. She also erred in construing Article 12(1)(b) of the Code to require the Prosecution seeking to disqualify a former prosecutor to prove that the former prosecutor subjectively had actual knowledge of significant confidential information.[21] Consequently, the Chamber will approve the appearance as defence counsel of a person who was "privy to" confidential information if the Prosecution cannot prove that he recalls it (i.e., that he has "actual knowledge") or that the confidential information was "significant".

17. Had the Single Judge correctly analyzed the issue as one involving the fairness of the trial, and not simply the oversight of attorney ethics, or had she applied an objective standard to disqualify a former Senior Trial Attorney from immediately appearing against his former office in a case that was open when he/she worked for the Prosecution and about which he/she was privy to confidential information, she necessarily would have invalidated Mr. Faal's appointment.

18. The Prosecution submits that due to the characteristics and working methods of the OTP, a PD lawyer in the ordinary course of events will have access (thus, be privy) to confidential information with respect to cases that were open when he or she worked at the OTP. Most of that confidential information is shared informally and without any mechanism to track or record the conversations. And that is the only way it can operate: lawyers need to be able to consult with each other quickly, to find persons when they are available, to stop them in the hallway or walk into offices and ask questions, all without taking minutes or convening formal meetings.

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[20] Decision, paras.14-17. The Chamber relied on ICC-01/05-01/08-769, para.42 and ICC-02/05-03/09-168, para.16.
[21] Decision, para.29.

19. REDACTED.[22] But those decisions were wrongly decided. This Court should clarify that possession of insider knowledge and information about a case – including, and indeed most particularly when the knowledge relates to strategy or ongoing investigations or internal assessments of weaknesses or strengths -- are precisely what disables the former prosecutor from assisting the Defence. The test applied by the Single Judge puts an impossible burden on the Prosecution to establish what precisely a former member of the Office learned while in the Office and now remembers, and it provides inadequate protection for the fairness of the proceedings and the perception of fairness by the parties and the public.

20. Therefore the Decision prejudices the OTP's interests and the public perception of the integrity of this Court. A lawyer cannot leave the OTP and immediately sign on to the Defence without using, knowingly or unconsciously, information about the OTP's anticipated strategies, strengths and weaknesses, and litigative concerns. The issue is not simply the ethical obligation that Mr Faal has to Mr Muthaura, his current client REDACTED but his ethical obligation of loyalty to the OTP, his former client, which obligation the OTP cannot waive.[23]

(i) The characteristics and working methods of the OTP

21. The OTP is a single office, not an association of separate trial teams. Its Prosecution Division includes approximately 40 lawyers, a few of whom are not trial attorneys. The trial teams include very junior, mid-level, and senior attorneys. The legal staff is assigned to over 11 cases (3 Darfur, 3 DRC, 1 CAR, 2 Kenya, 1 Uganda, 1 Libya) that are either active or awaiting the arrest of indicted persons. The teams are not insular; people are reassigned temporarily or permanently to other teams as office priorities

[22] Defence Response, para. 26
[23] It will also require the former Senior Trial Lawyer 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 requires Mr. Faal to share his assessment with his client, to the prejudice of the Prosecution, or withhold it, to the prejudice of the Defence.

require. Lawyers are also encouraged to consult with each other, within and outside the teams to which they are formally assigned. Moreover, PD lawyers come from multiple countries and legal systems. That is a deliberate and desirable choice to enable the OTP to share ideas from a variety of perspectives. [24]

22. These working methods maximize the efficient use of the limited resources of the OTP.[25] They also are essential to enable the OTP's adoption of coherent, informed and consistent positions in the litigation before different Chambers and to cite applicable decisions in their submissions.[26] Prosecution lawyers need to know not only the decisions of other Chambers – confidential as well as public -- but also the facts and the reasons underlying OTP's arguments and the Chambers' decisions. Confidential decisions are not widely notified, so lawyers have to ask since it may not be enough to search online. This contributes to the atmosphere of open sharing of confidential information within the OTP.

23. Because it is impossible to isolate confidential facts from public information or pure legal discussions from policy and strategy, it is presumed that everyone has access to confidential information beyond the case to which they are assigned. New OTP staff members are first required to sign an undertaking of confidentiality pursuant to Rule 101.4 of the Staff Rules,[27] which also expressly provide that the confidentiality continues after separation from service.[28]

(ii) Mr. Faal's exposure to confidential information regarding the Kenya cases

[24] Lawyers also maintain friendships with persons on other teams, and their conversations invariably turn to work-related matters and involve, confidential matters.
[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.
[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] Rule 101.4(c) of the Staff rules also provides that "staff members shall keep confidential any information regarding the Court's operations, including but not limited to evidence and information relating to victims and witnesses […].
[28] Rule 101.4(d).

24. The Prosecution was able to document specific instances in which Mr. Faal was exposed to confidential consultations and information. For her part, the Single Judge accepted specifically that Mr. Faal had discussed the 'case hypothesis' and its weaknesses (para. 20); that the situation of the Republic of Kenya was discussed in a PD meeting in April 2010 (para. 20); that emails had been sent from two members of the OTP requesting Mr. Faal's advice (one email was directly addressed to Mr. Faal by Ms Cynthia Tai, while the other was forwarded to him . by Ms Shyamala Alagendra) (para. 21); that Mr. Faal had access to weekly reports including a summary of two confidential ex parte filings related to one of the Kenya cases (para. 24); and that Mr. Faal was on the notification list of confidential filings (para. 29).[29]

25. Having accepted these facts, the Single Judge then failed to properly consider them when interpreting and applying Article 12(1)(b) of the Code. The Prosecution submits that proper consideration of these facts must lead a Chamber to adopt a presumption that a Senior Trial Lawyer has knowledge of more than *de minimis* confidential information in cases open at the time when the he or she served at the OTP.[30]

(iii) The Chamber's duty to ensure the fairness of the proceedings

26. Contrary to the finding of the Single Judge, this case did not require her to "act as a legislative body".[31] She concluded that she lacked the power to, in effect, legislate by imposing a requirement that is not present in the Code, the Statute, or the Rules. However, she then imposed requirements that are themselves not present in those instruments, through her interpretation of the Code.

[29] REDACTED
[30] For instance, 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).
[31] Decision, para.28.

27. The Code is a secondary normative instrument, subject to the Statute, the Rules and the Regulations of the Court.[32] It regulates ethical behavior of lawyers, but is not a guide to fairness at trial. The Chamber has an independent duty to exercise its judicial powers to preserve the fairness of the proceedings. Reliance on the Code as the sole source of its authority, rather than considering its foremost duty to "regulate the proceedings to ensure that the trial is fair […] under article 64(2)",[33] was error.

28. The Appeals Chamber has ruled that "the law applicable under the Statute [which includes the Code] must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, […] the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".[34]

29. The Single Judge correctly noted that there is no express provision in the Court's basic legal documents to "prohibit a staff member from the Office of the Prosecutor to join the Defence"[35] and found that, due to the variety of approaches within national systems, no general principle of law to that effect could be extracted.[36] Having concluded that no statute, rule, or other regulation applied and that there is no universal consensus, that was the end of her inquiry. In so doing, the Single Judge failed under Article 64(2) to exercise her "ultimate responsibility for securing justice and ensuring fairness".[37] The Court must therefore interpret and apply the relevant provision – if necessary also on its own initiative – in a manner that ensures the fairness of the proceedings.

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[32] In this context see the Appeals Chamber's findings in relation to the Regulations of the Court (ICC-01/04-01/07-776 OA7, para. 81). The Prosecution submits that these findings by analogy also to the Code of Conduct.
[33] ICC-01/04-01/07-2259 OA10, para.77; see also ICC-01/04-01/07-2297 OA10, Dissenting Opinion of Judges Kourula and Trendafilova, para.42.
[34] ICC–01/04–01/06-772 OA4, para. 37; see also ICC-01/04-01/07-573 OA6, para. 15.
[35] Decision, para.27.
[36] Decision, para.27.
[37] ICC-01/04-01/06-2582 OA18, para. 47; ICC-01/04-01/06-1401, para. 88; ICC-01/04-01/06-568 OA3, para. 76.

30. Even if reliance on the Code were appropriate, the Single Judge did not properly interpret it. She found that the core issue *sub judice* is whether Mr. Faal "was privy to confidential information as a staff member of the Court relating to the case".[38] But, as set forth in more detail below, she then imposed a test that is not required by the Code and is almost impossible to meet.

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

31. Further, when interpreting and applying this standard, the Single Judge did not take into account the need to protect the proceedings against the appearance of impropriety. The appearance of fairness and integrity is essential to foster and preserve the public trust and confidence in the Court. Allowing a lawyer who held a senior position in PD and accordingly had in-depth knowledge of its strategy and regular access to confidential information to immediately join the Defence team can only erode the public confidence in the Court's proceedings.[39]

32. The Prosecution submits that proper consideration of these factors, and bearing in mind the working methods of the office, require a Chamber to presume that an OTP – particularly, but not necessarily, a Senior Trial Lawyer -- is privy to more than *de minimis* confidential information in cases that are open at the time when he or she is serving at the OTP. Situations such as Mr. Faal's necessarily give rise to appearance of "impediments to representation"[40] and damage the public perception of this Court:[41] In fact, in this case, media reports and public blogs describe the Court as

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[38] Decision, para.16.
[39] 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).
[40] Code of Conduct, Article 12.
[41] *United States v Miller* (1980, CA3 NJ) 624 F2d 1198.

corrupt and ineffective because Mr. Faal joined the defence team of Mr. Muthaura immediately after leaving the Prosecution.[42]

33. 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".[43] The Chamber must always consider its duty to ensure public confidence in the fairness and integrity of the proceedings.[44] 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.[45] These jurisdictions highlight the need for an objective standard to promote public confidence in the legal system.[46] 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 previously been a prosecutor, and the former prosecutor had had no proven 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".[47] In another case where a law firm was disqualified

[42] 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 ICC Prosecution 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 Confirmation of Charges developments, p.2.
[43] *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").
[44] Article 64(2).
[45] 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.
[46] 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.
[47] United States v Miller (1980, CA3 NJ) 624 F2d 1198 (emphasis added)

due to a prior representation, the court noted that the "appearance of impropriety was enhanced by the high profile of the case".[48]

II. The Trial Chamber erred by failing to find that Mr. Faal's 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 counsel 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.[49] However, to date three Chambers, including the Pre-Trial Chamber in the instant case, represented by the Single Judge, conclude that being privy to confidential information requires exposure to more than "*de minimis* confidential information relevant to the case."[50] This additional requirement is not found in the statutory language – to that extent, then, the Chambers engaged in the very act of legislating that the Single Judge abjured in rejecting the Prosecution's argument. The Single Judge explained that information is deemed *de minimis* "if it is 'so insignificant that a court may overlook it in deciding an issue'".[51] Consequently, the burden on the party seeking disqualification is to establish that the person "was aware of confidential information of some significance to the case *sub judice*, which prompts the Chamber to invalidate the person's continued involvement with the opposing party

[48] 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).
[49] Decision,para.17.
[50] Decision, para.17, ICC-02/05-03/09-168, para.16; ICC-01/05-01/08-769, para.42.
[51] Decision, para.17.

(Defence)".[52] The Decision leaves it entirely to the relevant Chamber to decide what constitutes information "of some significance".

35. This aspect of the Decision involves two errors: First, the Single Judge erred by adding to the requirement that counsel be "privy to confidential information" a condition not found in the Code, that he or she be subjectively aware of being in possession of the information. Article 12(1)(b) of the Code requires a showing of objective access to confidential information, not a counsel's subjective impression that he knows something confidential. Second, the Single Judge erred by requiring that the confidential information be sufficiently "important".[53] Article 12(1)(b) expressly *excludes* importance as a factor, in contrast to the requirement in Article 12(1)(a) and 12(3) that the information be substantial. It also significantly differs from Article 14(c) of the ICTY Code of Professional Conduct, which requires disqualification when counsel "participated personally and substantially".[54] These errors are independent of the one raised in the First ground of Appeal.

36. The Code does not require that the attorney "became aware" and remains aware of confidential information in his possession, and it does not require that the confidential information reach some undefined level of importance. Such a requirement of importance also places an unrealistic evidentiary burden on the Prosecution that, in all but the most blatant cases, will be impossible to meet.

37. As noted above, the harm to the integrity of the proceedings arising from an erroneous assignment may be too great to redress after the fact. 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

[52] Ibid.
[53] A similar problem is posed by Trial Chamber IV's recently adopted standard requiring "effective possession" (ICC-02/05-03/09-168, para.21.
[54] Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 Rev. 3, Article 14(c).

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 notes that, notwithstanding the different rules in the ICTY, a Chamber in that Tribunal 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".[55] The Chamber explained that "in judicial proceedings a misstep in procedure with "possibly" adverse consequences will equally affect the integrity of the proceedings […]".[56] 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.[57]

39. The facts of this case, indeed, illustrate the flaws of the test embraced by the Single Judge, and its inadequacy for the purposes of protecting the fairness and integrity of the Court's proceedings. The Prosecution argued primarily that by virtue of the characteristics and working methods of the OTP and his position as a Senior Trial Lawyer, Mr. Faal in fact was exposed to confidential information pertaining to the

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[55] *Hadzihasanovic Decision,* para.45.
[56] Ibid.
[57] See *United States v. Miller,* cited in fn.41 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 can disqualify a lawyer when, for example, 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 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 a client 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).

Muthaura, Kenyatta and Ali case.[58] Yet, in the face of these facts, the Single Judge concluded that there was no proof that Mr. Faal was aware of confidential information pertaining to the instant case, "let alone *de minimis* information".[59] Had the Single Judge applied the "possibility" test, her only reasonable conclusion on the basis of the record would have been that, due to the accessibility of relevant confidential information to Mr. Faal, he "was in position where he *could have* received" sensitive or privileged prosecution information, or "was likely to have come across" such information.

40. Alternatively, based on the record the Single Judge recognized that the Prosecution established that Mr. Faal had received confidential information but concluded that the information was insignificant.[60] By so doing, the Single Judge imported a requirement that, as shown above, not only is nowhere to be found in the governing provisions of the Code of Conduct, but is also antithetical to the goal of preserving the integrity – and appearance of integrity – of the proceedings. The added requirement of "significance" of the confidential information involves the danger of Chambers of the Court "second guessing" on the basis of partial or incomplete information the importance of the confidential material in question.[61] This cannot be an adequate method to prevent that situations of serious conflict of interests capable of irreparably damage the integrity of the proceedings arise.

41. The Prosecution accordingly submits that when faced with a situation of possible conflict of interests stemming from the prospective counsel's prior service in the OTP, Chambers of the Court should err on the side of caution and adopt the test that offers the highest degree of protection to the proceedings. This means that the

[58] See paras.5 and 18 above; see also Prosecution Request, paras.15-22.
[59] Decision, para.17.
[60] Decision, paras.20, 22, 23 and 24.
[61] For instance, the Single Judge dismissed the importance of Mr. Faal's discussion of the "case hypothesis" with the Trial Lawyer, without knowing the OTP practices or understanding that a case hypothesis discussion will necessarily evaluate known facts (and thus, by inference, unknown facts), gaps, strategies, strengths and weaknesses.

relevant Chamber should ask itself the following question: was the person in a position where he or she could access confidential information pertaining to the case, i.e. did he or she have the possibility to become aware of the relevant confidential information? If the answer to this question is an affirmative one, the person must be banned from acting as counsel in the same case. No further showing is required, neither in terms of effective possession or knowledge, nor in terms of significance or importance of the information. The approach followed by the Single Judge in this case is legally unsupported, and simply fails to offer the necessary degree of protection.

Conclusion

42. For all the aforementioned reasons, the Prosecution requests the Appeals Chamber to overturn the Decision and to find as a matter of law that Mr. Faal is disqualified from appearing for the Defence, or alternatively refer the matter to the Pre-Trial Chamber and direct the Chamber to apply the correct test.

Luis Moreno-Ocampo,
Prosecutor

Dated this 1st day of September 2011

At The Hague, The Netherlands