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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 REPUBLIC OF KENYA

**IN THE CASE OF *THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA & MOHAMMED HUSSEIN ALI***

**Public Document
With Public Annexures A, B and C**

**Defence Response to 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)"**

Sources: Defence Team of 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. On 20 July 2011, the Single Judge found that there is no impediment to Mr. Essa Faal acting as Defence Counsel for Ambassador Muthaura as the Office of the Prosecutor (“OTP”) had failed to prove “that Mr. Faal 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”.¹
2. Defence Counsel for Ambassador Muthaura (the “Defence”) respectfully submit that the OTP’s appeal against the Single Judge’s decision set out in the *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)”*² should be dismissed in its entirety as the Single Judge committed no errors of law in reaching the Impugned Decision.
3. Rather, the Single Judge, acting *proprio motu* “to preserve the integrity of the proceedings” and to ensure “that they are conducted in a fair and transparent manner”,³ applied the correct legal test, laid down in Article 12(1)(b) of the Code of Professional Conduct for Counsel (“Code”) and related jurisprudence, which is whether Mr. Faal was “privy to confidential information”.⁴ The Single Judge properly did not apply the OTP’s proposed self-serving, “objective” test as it finds no basis either in the governing legal instruments of this Court or the applicable international jurisprudence.⁵ Equally, the Single Judge was correct in rejecting tests based on speculation, possibilities and presumptions of conflict of interest based solely on prior association with the OTP,⁶ a submission which has

¹ Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, ICC-01/09-02/11-185 (“Impugned Decision”), para. 17, page 8.

² 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)”, 29 August 2011, ICC-01/09-02/11-Conf-Exp (“Appeal”). 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. 12.

³ Impugned Decision, para. 11.

⁴ *Ibid*, para. 16.

⁵ See fuller discussion on this point at paras 10 to 21 below.

⁶ Impugned Decision, para. 23.

the potential to remove judicial discretion to ignore insignificant factors.⁷

4. The Defence note the Appeal's obvious overlap with the OTP appeal currently before this Appeals Chamber in the *Banda & Jerbo* case.⁸ The OTP's appeal arguments are practically identical in both cases. Therefore, as the arguments in response are also similar, the Defence adopt the submissions made by the defence in the *Banda & Jerbo* case in response to the *Banda & Jerbo* Appeal.⁹ Specifically, the Defence underline the very real concern that the OTP is attempting to transform the Appeals Chamber from a judicial body to a legislator by effectively seeking a wholesale rule change in conflict of interest matters rather than seeking remedies to alleged errors of law.¹⁰
5. As argued more fully below, the applicable and correct legal standard, carefully applied by the Single Judge in this case, provides more than adequate protection to the integrity and fairness of proceedings and also to the parties and counsel involved. There is nothing unreasonable, impossible¹¹ or erroneous in requiring a moving party to discharge its burden of proof through the leading of credible and reliable evidence and it is remarkable that the Prosecuting organ of this Court would consider otherwise.

II. GROUNDS & SUBMISSIONS IN RESPONSE TO THE APPEAL

A. The Single Judge erred by failing to disqualify Mr. Faal based on an objective, not subjective, standard under Article 12 of the Code of Conduct and her obligations under Article 64 of the Statute

6. The OTP's opening gambit under its first ground of appeal is to rebuke the Single Judge for failing to discharge her obligations under Article 64(2) of the Rome

⁷ *Ibid*, para. 17.

⁸ 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 ("*Banda & Jerbo* Appeal").

⁹ 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", 5 August 2011, ICC-02/05-03/09-184 ("*Banda & Jerbo* Appeal Response").

¹⁰ *Banda & Jerbo* Appeal Reponse, para. 3.

¹¹ Appeal, paras 19, 30 & 36.

Statute ("Statute") to take steps to preserve the fairness of the trial.¹² This is remarkable as it categorically ignores the obvious fact that it was the Single Judge acting *proprio motu* who triggered the enquiry into whether there was any possible impediment to Mr. Faal acting as Defence Counsel in this case in the first place.¹³ As noted in the Defence Response, the OTP "sat tight on their hands [from] 22 April 2011 and were only woken from [their] slumber by the Single Judge's order of 28 June 2011."¹⁴ Further, as noted in paragraph 3 above, the Single Judge expressly stated that the Order was "to preserve the integrity of the proceedings" and to ensure "that they are conducted in a fair and transparent manner".¹⁵

7. In addition, glaringly absent from the OTP's submissions on fairness, and indeed anywhere in the Appeal, is any acknowledgement of the important safeguard imposed by the Single Judge – that the Chamber would keep the matter under continuing review and would disqualify Mr. Faal in the future should any new information, not available at the time the Impugned Decision was rendered, come to light.¹⁶ The Single Judge's decision in this regard constitutes a vigilant and proper measure clearly designed to ensure the ongoing fairness of these proceedings.
8. Thus, in light of the steps taken by the Single Judge, claims that the learned judge erred by failing to analyse "the issue as one involving the fairness of the trial"¹⁷

¹² Submissions on this point are made by the OTP in their preliminary remarks under this ground at paragraphs 16 to 17 of the Appeal and again at paragraphs 26 to 30 of the Appeal.

¹³ Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation, 28 June 2011, ICC-01/09-02/11-138-Conf.

¹⁴ Defence Response, para. 37. Indeed, the OTP could be criticised for failing to exercise due diligence in asserting its right. See the Appeals Chamber's comments in *Katanga & Ngudjolo* that "[a] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in "a timely manner" (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings, 19 July 2010, ICC-01/04-01/07-2259, para. 54).

¹⁵ Impugned Decision, para. 11.

¹⁶ *Ibid*, para. 30.

¹⁷ Appeal, para. 17.

and to exercise her Article 64(2) responsibility are unfounded and should be dismissed. Indeed, eschewing the application of a test which has no basis in law is one of the clearest demonstrations of fairness and adherence to internationally recognised human rights standards.¹⁸

9. The Single Judge is also criticised for following the plain language of the *lex specialis* in this case – Article 12(1)(b) – and the related jurisprudence.¹⁹ The OTP argue that the Single Judge should have applied a test which automatically deems a former OTP lawyer “privy to confidential information” in a case if that case was open while s/he was employed by the OTP.²⁰
10. The OTP’s arguments are without merit. The Single Judge did not err in law by failing to apply a standard that finds no basis in either the governing legal instruments of this Court or the applicable international jurisprudence. It is these sources which must provide the tangible legal basis for the correct standard.
11. The Statute establishes a clear hierarchy of applicable law that is ignored in the Prosecutor’s 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 for Counsel (the “Code”) directly derives from Rule 8 of the Rules. In resolving the present issue, the Court must apply the Code before turning to any supplementary means of interpretation
12. 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

¹⁸ The OTP would clearly have the Single Judge do otherwise (see Appeal, para. 28).

¹⁹ Appeal, para. 16.

²⁰ *Ibid*, paras 17-18.

apply, where appropriate, principles and rules of international law".²¹ Thus, the relevant jurisprudence of other international courts and tribunals, which operate in a similar context to the ICC, is of persuasive authority.

13. 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).
14. 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."²²
15. Operating within this framework, the Single Judge properly identified Article 12(1)(b) of the Code as the applicable provision.²³ Specifically, the learned judge correctly identified that the issue was whether "Mr. Faal was 'privy to confidential information as a staff member of the Court relating to the case' of Mr. Muthaura".²⁴ The Single Judge also determined that satisfaction of this standard requires proof that the person concerned "was aware of confidential information of some significance to the case *sub judice*".²⁵ The Single Judge'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 derives its authority from the Rules, the Chamber was obliged by Article 21(1)(a) to apply the Code "in the first place".

²¹ 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.

²² 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 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 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).

²³ Impugned Decision, paras 15-16.

²⁴ *Ibid*, para. 16.

²⁵ *Ibid*, para. 17.

16. The Single Judge's application of the article to the facts before her was also correct. 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 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 either "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 was "privy" to it, i.e. aware.
17. Thus, the Single Judge was also correct that she 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 [...]."²⁶
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

²⁶ 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"), para. 42.

from becoming a defence counsel”,²⁷ applied a “real possibility test”²⁸ 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.”²⁹ Further, in the ICTR *Karemera* case, the issue of the appointment of a former defence legal assistant to the Prosecution was considered.³⁰ 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 OTP and so rejected the defence’s allegations.³¹

20. Plainly, in this legal framework and context, the approach taken to Article 12(1)(b) by the Single Judge was correct in law. Further, to argue that the decisions issued by Trial Chamber III in *Bemba*, the ICTY Pre-Trial Chamber in *Hadžihasanović* and the ICTR Trial Chamber III in *Karemera*, which all required the moving party to substantiate its concerns, were wrongly decided³² is contrary to the plain language of the provision.

21. In contrast to the Single Judge’s clear analysis in the Impugned Decision, the arguments relied upon by the OTP in support of its proposed standard have no basis in law.

(i) *The characteristics and working methods of the OTP*³³

22. A preliminary criticism of the Prosecution’s Document in Support of Appeal is that it strays into factual issues not certified for appeal by the Single Judge.³⁴ As

²⁷ *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.

²⁸ *Ibid*, paras 46 & 49.

²⁹ *Ibid*, para. 53. (emphasis added)

³⁰ *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.

³¹ *Ibid*, paras 7, 8 & 9.

³² Appeal, para. 19.

³³ *Ibid*, paras 21-23

³⁴ See for instance, paras 24-25 of Appeal

such, the factual matters pleaded by the Prosecution are not appropriately before the Appeals Chamber. The Defence notes that the Appeals Chamber has in the past taken a strict approach to matters not properly before it.³⁵ The Defence submit that the same approach should be adopted in the present case and the non-certified arguments presented by the Prosecution in its appeal brief should be disregarded. Notwithstanding this, should the Appeals Chamber consider the OTP's factual averments, the Defence provides the following submissions in response to the issues raised in the Appeal Brief.

23. Nothing in the Court's governing documents or the applicable international jurisprudence mandates that extraneous factors such as the characteristics and working methods of the OTP be taken into account when interpreting an ICC provision. Nevertheless, the test mandated by Article 12(1)(b) and applied in the Impugned Decision does not prevent the proper functioning of the OTP by preventing its lawyers from consulting freely amongst themselves on factual, legal and policy issues connected to their cases.³⁶ The legal standard applied in this Court 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.
24. Contrary to the OTP's submissions, this is neither an impossible nor an unreasonable standard.³⁷ Allegations may be substantiated through a variety of means which can more than adequately deal with the sometimes informal ways in which confidential information is said to be transmitted.³⁸ This was effectively demonstrated in the present case where the Single Judge had before her information provided by the Court Management Section and in a variety of other forms contained in more than 9 annexes submitted by the OTP.³⁹ The fact that

³⁵ ICC-01/04-01/06 OA, para. 45.

³⁶ *Ibid*, para. 3. See related concerns at paras 18 & 21-23.

³⁷ *Ibid*, paras 19, 23, 30 & 36.

³⁸ For example, sworn affidavits can attest to informal discussions whether conducted in corridors or otherwise.

³⁹ Impugned Decision, paras 4 & 9 and footnote 15.

the OTP's "evidence" was rejected does not mean that an impossible legal standard was applied by the learned judge. It simply means that the correct legal standard was applied but the OTP did not, in this instance, discharge its burden of proof. Put another way, it means that Mr. Faal is not aware of any confidential information relevant to this case such as to warrant his disqualification.

25. Throughout the Appeal and in support of the various arguments contained therein, the OTP attempts to argue that possession of general information and knowledge of OTP strategy amounts to confidential information.⁴⁰ No elucidation is provided in either the underlying Prosecution's Request⁴¹ or the Appeal, as to exactly what secret OTP practices and strategies the Prosecutor fears will be revealed or how knowledge of those practices by defence counsel would in any way constitute an unfair advantage to the defence or be detrimental to the fairness of these proceedings. Indeed, the extensive disclosure obligations placed on the OTP vis-à-vis the Defence, especially in relation to its investigations and information in its possession and control, means that transparency and openness in prosecutions is, in most instances, a primary consideration. In any event, the argument is simply irrelevant to the issues on Appeal as it has nothing to do with: (i) the first ground and its focus on OTP lawyers being automatically deemed in possession of confidential information regardless of the underlying factual situation; or (ii) the second ground and its focus on the correct interpretation of Article 12(1)(b).

26. Further, it has never been the Defence's position that former OTP lawyers can join ICC defence teams without restriction. If there is a good faith concern regarding conflicts of interest, appointments can be challenged and judicially scrutinised according to the correct standard as has occurred in this case. There is no need to construct artificial tests which find no basis in the applicable law.

⁴⁰ Appeal, paras 19, 20, 23, 31, 32 & 37.

⁴¹ This term is defined at Appeal, para. 12.

27. As observed in the Defence Response,⁴² the OTP's submissions on this point are, in any event, specious and contrary to its own previously stated position. They conflict with the OTP's previous averments of having independently functioning OTP teams and staff members as contended in the *Lubanga* case.⁴³ The OTP cannot selectively argue the existence or non-existence of these concepts dependent upon the instant cause it is seeking to promote.

(ii) *Mr. Faal's exposure to confidential information regarding the Kenya cases*⁴⁴

28. The Defence is perplexed as to the relevance of the OTP's submissions under this head which have no relevance to the matters properly certified for appeal in this case, ie: the argument that OTP lawyers should automatically be presumed privy to confidential information regardless of the factual reality pertaining to the challenged counsel as well as the applicable legal standard and should be disregarded. Critically, each of the specific examples referred to by the OTP concern information which was categorically determined by the Single Judge not to amount to confidential information or to which Mr. Faal was not found privy either through non-attendance at the relevant meeting or non-access to the filings.⁴⁵ Clearly, therefore, the OTP's request that these examples must lead the Chamber to adopt a presumption of knowledge of more than *de minimis* confidential information is bizarre and completely illogical.⁴⁶

(iii) *The Chamber's duty to ensure the fairness of the proceedings*⁴⁷

29. The Defence refer to paragraphs 6 to 8 above which address the OTP's submissions under this head.

⁴² Defence Response, para. 23.

⁴³ ICC-01/04-01/06-T-350-ENG RT 14-04-2011 T, p.14, lines 12 to 15 and p. 17, lines 11 to 16.

⁴⁴ Appeal, paras 24-25.

⁴⁵ Impugned Decision, paras 20, 22, 23, 24 & 29.

⁴⁶ Appeal, para. 25.

⁴⁷ *Ibid*, paras 26-30.

(iv) *The need to protect against the appearance of impropriety*⁴⁸

30. Equally irrelevant to the applicable legal standard in conflict of interest matters is the need to protect against the appearance of impropriety. As was properly observed by the Single Judge, a plain reading of Article 12(1)(b) does not require that such a factor be taken into account.⁴⁹ Even if it were a factor, there is no appearance of impropriety where there is no evidence that defence counsel was privy to any confidential information on this case.

31. It is a sign of desperation that the OTP invites the Court to rely on internet blogs or newspaper articles as reliable *indicia* of how the Court is perceived.⁵⁰ A court of law must be directed by evidence and principle,⁵¹ and be ever vigilant at eschewing unsupported speculation, innuendo and gossip of the type sometimes found in the public domain. This is especially so when the content is not fairly and accurately cited by the OTP.⁵² The appropriateness of relying on such sources 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.⁵³ The Defence

⁴⁸ *Ibid*, paras 31-33.

⁴⁹ Impugned Decision, para. 16.

⁵⁰ Appeal, para. 32 & footnote 42.

⁵¹ See in the *Situation of Uganda*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06", 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para. 36 ("[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base the decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law").

⁵² See the cite at footnote 42 of the Appeal to a clip from YouTube concerning Mr. Faal (<http://www.youtube.com/watch?v=jtggmj0MQ>). 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".

⁵³ 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 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

do not associate themselves with these criticisms or appraisals of the OTP by independent commentators and journalists but assume that the OTP would not wish these newspaper article, reports or blogs to be taken as representative of world opinion or determinative on any issue.

32. The OTP practice of selectively citing material it seeks to rely upon in support of its submissions is continued in its invocation of the *Hadžihasanović* Decision.⁵⁴ 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’,⁵⁵ 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.⁵⁶
33. Finally, in support of its submissions concerning the need to protect against impropriety, the OTP rely on one national jurisdiction – the United States.⁵⁷ 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.⁵⁸ The one case⁵⁹ cited by the OTP that actually involves a former

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>.

⁵⁴ Appeal, para. 33.

⁵⁵ 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).

⁵⁶ 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 Borovčanin*, IT-02-64, Decision of the Registrar, 28 May 2008.

⁵⁷ Appeal, paras 31-33.

⁵⁸ E.g., *Heringer v. Haskell*, cited at Appeal, footnote 45, 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 45, 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 48 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)).

⁵⁹ *United States v. Miller*, 624 F.2d 1198 (3rd Cir. 1980).

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 Single Judge's finding that the great variance of national practice does not allow for guidance to be drawn from said practices.⁶⁰ The Defence do not take issue with the OTP's summary of this U.S. federal appellate court case.⁶¹ The Defence note, however, that another federal appellate court severely criticised and declined to follow this case.⁶² Even with respect to this 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.

34. In reality, in many national jurisdictions (including the U.S. and Canada)⁶³ movement between prosecution and defence is commonplace and uncontroversial. This is certainly the position in The Gambia, as is evidenced by the attached affidavit of the Solicitor General of The Gambia.⁶⁴ Indeed, the

⁶⁰ Impugned Decision, para. 27.

⁶¹ Appeal, para. 33.

⁶² *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.").

⁶³ 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: 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.

⁶⁴ See Affidavit of Pa Harry Jammeh, Solicitor General of The Gambia, dated 14 June 2011 ("Annexure B" hereto).

Deputy Prosecutor of the ICC 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.⁶⁵

B. The Single Judge 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

35. The OTP's arguments under this ground are illogical, contradictory and lack an appreciation of the practical application of the law. Further, they seek to denude ICC Trial Chambers and Judges of their judicial fact finding function, all in favour of a test which would entrench the OTP's preferred policy position in conflict of interest matters. Such policy interests of the OTP cannot trump the Rome Statute, the Rules of Procedure and Evidence or the ICC the Code of Conduct - all of which seek to safeguard the rights of all parties and participants that appear before the Court.
36. The OTP first criticise the Single Judge under this ground of appeal for requiring the challenged counsel to be "subjectively aware of being in possession of the [confidential] information",⁶⁶ arguing instead that a mere possibility of being in possession should be enough.⁶⁷
37. Again, and contrary to the OTP's approach to the provision,⁶⁸ 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 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 "a possibility" that an individual had access to confidential information is wrong. Article 12(1)(b)

⁶⁵ 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.

⁶⁶ Appeal, para. 35.

⁶⁷ *Ibid*, paras 39 & 41.

⁶⁸ *Ibid*, para. 36.

says nothing about possibilities. Since “privy to” is not defined, it must bear its ordinary meaning: “sharing in the secret of”.⁶⁹ Thus, the test is only satisfied if the OTP can prove that Mr. Faal shared in the secret of some identified confidential information, and not by suggesting that it is possible that he so shared.

38. Further, the OTP’s reliance on the *Hadžihasnović* Decision is misplaced.⁷⁰ As noted above, the “real possibility” test applied in that case still required the moving party to properly substantiate its concern.⁷¹
39. Finally, the OTP’s submissions on “possibility” are contradictory. In paragraph 39 of the Appeal, the OTP acknowledge the reality of the situation which is that “the Single Judge concluded that there was no proof that Mr. Faal was aware of confidential information pertaining to the case”. However, in the very next paragraph of the Appeal, the OTP state that “the Single Judge recognised that the Prosecution established that Mr. Faal had received confidential information but concluded that the information was insignificant.”⁷² A review of the Impugned Decision clearly establishes that the OTP deliberately misstate the Single Judge’s findings in paragraph 40 of the Appeal.⁷³
40. The OTP then proceed to criticise the Single Judge, Trial Chamber IV, and Trial Chamber III for requiring something more than “*de minimis* confidential information”.⁷⁴ Properly understood, adopting the phrase “*de minimis*” does not import an illegitimately high threshold or amount to a legislative act.⁷⁵ As the Single Judge stated, the phrase simply refers to something “so insignificant that a court may overlook it in deciding an issue”.⁷⁶ This reflects the reality that in all areas of law, there are some factors that are so insignificant that any court ought

⁶⁹Oxford English Reference Dictionary, Second Edition, Revised, p. 1151.

⁷⁰ Appeal, para. 38.

⁷¹ See paragraph 19 above.

⁷² Appeal, para. 40.

⁷³ See also related submissions at paragraph 28 above.

⁷⁴ Appeal, para. 34.

⁷⁵ *Ibid*, paras 34 & 36.

⁷⁶ Impugned Decision, para. 17 citing Bryan A. Garner (ed.), *Black's Law Dictionary*, 7th ed., (1999), p. 443.

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.

41. 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,⁷⁷ the entire *Bemba* defence team, and the *Banda & Jerbo* defence team.⁷⁸ 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 choosing⁷⁹ 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 Single Judge, 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.
42. In any event, the use of the “*de minimis*” standard had no effect on the outcome of the Impugned Decision and, 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.⁸⁰ This is because the Single Judge made no

⁷⁷ See the *Bemba* Decision.

⁷⁸ Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence” (ICC-02/05-03/09-168), 6 July 2011, ICC-02/05-03/09-173, para. 23.

⁷⁹ Article 67(1)(d) of the Statute.

⁸⁰ 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.”

finding of fact that Mr. Faal was in possession of any confidential information, let alone *de minimis* information.⁸¹

III. CONCOMITANT EFFECT: UNILATERAL, DETRIMENTAL, RETROSPECTIVE AMENDMENT OF EMPLOYMENT CONTRACT

43. As stated above,⁸² the Defence adopt the submissions made in the *Banda & Jerbo* Appeal Response, including those made on the employment law issues the Appeal raises.⁸³ In short, 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 for the Appeals Chamber to do so, least of all retrospectively.

IV. LIFTING OF ANY IMPEDIMENT

44. In the event that 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. Faal’s appointment.⁸⁴

45. The Defence inform the Chamber that Ambassador Muthaura is willing to waive any deemed conflict of interest. Further, as Mr. Faal is not privy to any confidential information concerning this case which he acquired during his employment with the OTP, he does not face any situation in which he would be

⁸¹ Impugned Decision, para. 17, page 8.

⁸² Paragraph 4 above.

⁸³ *Banda & Jerbo* Appeal Response, paras 41-46.

⁸⁴ In particular, the Defence note that Mr. Faal has an integral role in the Defence team and that his disqualification at this stage - twelve days before the start of the confirmation of charges hearing - would greatly prejudice the Defence.

required to resolve divided loyalties and, thus, does not need any waiver from the OTP.⁸⁵

V. CONCLUSION

46. The Impugned Decision correctly applies the law governing conflict of interest matters. Motivated by a concern that this case proceeds in a “fair and transparent manner”, the Single Judge performed a careful and considered analysis of the facts presented to her, rendering a decision which cannot be challenged on the basis of an error of law.
47. Accordingly, 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,



Mr. Karim A. A. Khan QC
Lead Counsel for Francis Kirimi Muthaura

Dated this 9th Day of September 2011

At The Hague, The Netherlands

⁸⁵ See OTP submissions at Appeal, para. 20 & footnote 23.