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No.: ICC-01/09-02/11

Date: 18 August 2011

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

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

**Public**

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

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

**The Office of the Prosecutor**  
Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for Francis Kirimi Muthaura**  
Karim A. Khan, Kennedy Ogetto and  
Essa Faal

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar & Deputy Registrar**  
Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other  
Appeals Chamber**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)<sup>1</sup> of the International Criminal Court (the “Court”), issues this decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’” (the “Prosecutor’s Application” or “Application”).<sup>2</sup>

## **I. Procedural History**

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (collectively the “Suspects”) to appear before the Court.<sup>3</sup>
2. On 8 April 2011, the Suspects voluntarily appeared before the Court at the initial appearance hearing during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 21 September 2011.<sup>4</sup>
3. On 28 June 2011, the Single Judge, *proprio motu*, ordered the Prosecutor and the Registrar to submit observations on a possible impediment to Essa Faal’s (“Mr. Faal”) representation as Counsel for the Defence in the proceedings with which the Chamber is currently seized, by no later than 1 July 2011.<sup>5</sup> She also ordered that, should Mr. Muthaura’s Defence wish to respond, it must do so, by no later than 6 July 2011.<sup>6</sup>
4. On 1 July 2011, the Prosecutor filed his observations together with 9 annexes appended thereto, in which he provided the Chamber with information that tended to prove the existence of a conflict of interest, as far as Mr. Faal continues to represent

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

<sup>2</sup> ICC-01/09-02/11-195.

<sup>3</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

<sup>4</sup> ICC-01/09-01/11-T-1-ENG page 17, lines 12 to 25.

<sup>5</sup> Pre-Trial Chamber II, “Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation”, ICC-01/09-02/11-138-Conf, p. 4.

<sup>6</sup> Pre-Trial Chamber II, “Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation”, ICC-01/09-02/11-138-Conf.

Mr. Muthaura and his appointment is maintained (the “Prosecutor’s Observations” or “Observations”).<sup>7</sup> On the same date, the Chamber received a report prepared by the Division of Court Services within the Registry revealing all actions performed on documents stored in the document storage system TRIM. In particular, the Court Management Section checked whether: a) Mr. Faal received notification emails sent in the Kenya situation and the cases related thereto; b) he viewed confidential and documents under seal concerning the Kenya situation and the cases related thereto; and c) whether he had real time access to the transcripts of “closed proceedings”.<sup>8</sup>

5. On 4 July 2011, Mr. Muthaura’s Defence requested an extension of page limit to respond to the Prosecutor’s Observations.<sup>9</sup> The request was rejected on the same date.<sup>10</sup>

6. On 6 July 2011, Mr. Muthaura’s Defence responded to the Prosecutor’s Observations employing an incorrect type face of the document,<sup>11</sup> and on 7 July 2011, the Single Judge ordered Mr. Muthaura’s Defence to “re-submit its response [...] no later than [...] 8 July 2011”.<sup>12</sup>

7. On 8 July 2011, Mr. Muthaura’s Defence re-submitted its response, in which it requested that the Single Judge “dismiss the objections” contained in the Prosecutor’s Observations as a matter of priority ( the “Defence’s Resubmitted Response”).<sup>13</sup>

8. On 12 July 2011, the Prosecutor requested leave to reply to the Defence’s Resubmitted Response, of which the Chamber was notified on 13 July 2011 (the “Prosecutor’s Request for Leave to Reply” or the “Reply”).<sup>14</sup> On the same date, the

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<sup>7</sup> ICC-01/09-02/11-150-Conf and its annexes.

<sup>8</sup> ICC-01/09-02/11-149-Conf-Exp and its annex.

<sup>9</sup> ICC-01/09-02/11-154-Conf.

<sup>10</sup> Pre-Trial Chamber II, “Decision on the ‘Defence Request for extension of page limit pursuant to Regulation 37(2) of the Regulations of the Court’”, ICC-01/09-02/11-155-Conf.

<sup>11</sup> ICC-01/09-02/11-159-Conf-Exp and its annexes.

<sup>12</sup> Pre-Trial Chamber II, “Order to the Defence of Francis Kirimi Muthaura on the Re-submission of the Defence Response to the ‘Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence Team’”, ICC-01/09-02/11-161-Conf-Exp.

<sup>13</sup> ICC-01/09-02/11-163-Conf-Exp.

<sup>14</sup> ICC-01/09-02/11-169-Conf-Exp.

Single Judge granted the Prosecutor's Request for Leave to Reply to the extent that the Chamber receives his reply, by no later than 14 July 2011.<sup>15</sup>

9. On 14 July 2011, the Chamber received the Prosecutor's Reply, in which he requested that the Chamber invalidate Mr. Faal's contested appointment.<sup>16</sup>

10. On 20 July 2011, the Single Judge issued her decision on the subject matter whereby she, *inter alia*, rejected the Prosecutor's request to invalidate the appointment of Mr. Faal and decided that he may continue to represent Mr. Muthaura in the case against him (the "20 July 2011 Decision").<sup>17</sup>

11. On 26 July 2011, the Prosecutor filed the Application in which he sought leave to appeal the 20 July 2011 Decision on the following points:

a) Whether as a matter of law, a prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution Prosecution [sic] lawyer who, shortly after leaving the OTP, joins a defence team in a case that was open at the time when the person worked for the Prosecution should be deemed as being privy to confidential information related to the case under Article 12(1)(1)(b) of the Code of Professional Conduct[the "First Issue"]; and

b) Whether the correct test to determine that a person is 'privy to confidential information' under Article 12(1)(b) [of the Code of Professional Conduct] is whether that person has become aware of more than *de minimis* confidential information related to the relevant case [the "Second Issue"].<sup>18</sup>

12. On 1 August 2011, Mr. Muthaura's Defence responded to the Prosecutor's Application and requested its dismissal (the "Defence's Response" or the "Response").<sup>19</sup>

13. On 3 August 2011, the Prosecutor requested leave to reply to the Defence's Response,<sup>20</sup> which the Chamber rejected on 4 August 2011.<sup>21</sup>

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<sup>15</sup> Pre-Trial Chamber II, "Decision on the 'Prosecutor's Request for leave to Reply to the 'Defence Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence team'", ICC-01/09-02/11-170-Conf.

<sup>16</sup> ICC-01/09-02/11-172-Conf-Exp and its annexes.

<sup>17</sup> Pre-Trial Chamber II, "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", ICC-01/09-02/11-185.

<sup>18</sup> ICC-01/09-02/11-195, paras 2, 12.

<sup>19</sup> ICC-01/09-02/11-207.

## **II. Applicable Law**

14. The Single Judge notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the “Statute”).

## **III. The Single Judge’s Determination**

15. According to article 82(1)(d) of the Statute, “[e]ither party may appeal [...]:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. In this regard, the Single Judge recalls the first decision on interlocutory appeals dated 19 August 2005, in which this Chamber, albeit with different composition, held that when addressing an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfillment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.<sup>22</sup> Moreover, the Single Judge also recalls the Appeals Chamber’s judgment of 13 July 2006 (the “13 July 2006 Judgment”), which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.<sup>23</sup> The Single Judge shall therefore examine the Prosecutor’s Application in view of these principles.

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<sup>20</sup> ICC-01/09-02/11-209.

<sup>21</sup> ICC-01/09-02/11-212.

<sup>22</sup> Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, ICC-02/04-112, para. 16.

<sup>23</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 19.

17. Having laid down the main principles underlying interlocutory appeals, the Single Judge turns to the requirements regulating the granting or rejecting of an application for leave to appeal, which are as follows:

a) The decision must involve an “issue” that would significantly affect *both* (i) the “fair” and “expeditious” conduct of the proceedings (ii) or the outcome of the trial; and

b) In the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

18. It follows that in order to grant the request outlined in the Application, the Prosecutor must demonstrate the existence of an “appealable issue” amounting from the 20 July 2011 Decision, which in turn, meets the requirements as specified in paragraphs (a) and (b).<sup>24</sup>

### ***Determination on the Two Issues***

19. In the 13 July 2006 Judgment, the Appeals Chamber defined an appealable issue as:

[A]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one<sup>25</sup>

20. In the Application, the Prosecutor argues that both “issues” put forward before the Chamber are appealable within the meaning of article 82(1)(d) of the Statute, since they “constitute ‘identifiable subject[s] or topic[s] requiring a decision for [their]

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<sup>24</sup> Pre-Trial Chamber II, “Decision on the Prosecutor's Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-532, paras 14-16.

<sup>25</sup> Appeals Chamber, “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 9.

resolution’”.<sup>26</sup> According to the Prosecutor, the resolution of these issues by the Appeals Chamber is “essential for the determination of matters arising under the judicial cause under examination”, as they concern the “applicable legal standard for a determination of an ‘impediment to Representation’” of a former lawyer of the Office of the Prosecutor.<sup>27</sup>

21. By contrast, in the Response, Mr. Muthaura’s Defence argues that the issues presented by the Prosecutor “constitute a misrepresentation of the Single Judge’s Decision, as well as a disagreement with [...] [her] assessment of the value of the evidentiary material put forth by the Prosecution in its original Requests”.<sup>28</sup> According to the Defence, an “appealable issue” must arise out of the Single Judge’s decision and not “merely represent an abstract question or a hypothetical concern”.<sup>29</sup> In the Defence’s opinion, these reasons mainly render the issues identified by the Prosecutor unappealable within the meaning of article 82(1)(d) of the Statute.

22. The Single Judge concurs with the Prosecutor that the First and Second Issues presented are identifiable subjects or topics. However, whether the resolution of said subjects or topics is “essential for the determination of matters arising in the judicial cause under examination”, requires further elaboration.

23. With respect to the First Issue, the Single Judge understands that what the Prosecutor argues is, in principle, whether the mere joining of a lawyer from the Prosecutor’s office to a Defence team during the ongoing proceedings of any case including the one *sub judice* means that that person is automatically deemed “privy to confidential information”. The issue as framed appears on its face as not directly arising from the decision, since it is presented as an argument of principle, regardless of whether it concerns the case *sub judice* or any other case ( regardless of its facts). However, the fact that if this was correct, a conflict of interest would have certainly

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<sup>26</sup> ICC-01/09-02/11-195, pp. 8-9.

<sup>27</sup> ICC-01/09-02/11-195, p. 9.

<sup>28</sup> ICC-01/09-02/11-207, paras 2, 14, 16.

<sup>29</sup> ICC-01/09-02/11-207, paras 6-8.



arisen, makes it clear that the First Issue presented by the Prosecutor is one which arises directly from the decision and a resolution of which “is essential for the determination of matters arising in the judicial cause under examination” as per the Appeals Chamber’s definition.

24. As to the Second Issue, the Single Judge considers that its resolution is equally “essential for the determination of matters arising in the judicial cause under examination”. The Prosecutor’s core argument goes to the standard applied by the Single Judge and on the basis of which she reached her conclusion on the facts. Had the Single Judge applied a different standard than the awareness of more than the *de minimis* confidential information, the outcome of the decision might have been different. In a scenario as such, the person would be deemed as “privy to confidential information” within the meaning of article 12 of the Code of Conduct, which would definitely trigger the problem of conflict of interest, by the continuous involvement of Mr. Faal to represent Mr. Muthaura. It follows that what the Prosecutor presents are “appealable issues” within the meaning of article 82(1)(d) of the Statute.

***Determination on Whether the Two Issues Significantly Affect the Fairness of the Proceedings***

25. Turning to the remaining requirements that must be satisfied for the purpose of granting the Application, the Prosecutor claims that “[p]rovisions on conflict of interest and their application are by definition intended to safeguard the fairness of the proceedings”.<sup>30</sup> Citing a recent decision issued by Trial Chamber IV in a similar case, the Prosecutor states that the Chamber found that the same issues “affect the fairness of the proceedings”.<sup>31</sup> Moreover, according to the Prosecutor, if a member of the Defence team of Mr. Muthaura possessed confidential information concerning the “investigation and prosecution, [...] including but not limited information on its case hypothesis and its prosecutorial strategy, [...] this will necessarily affect the

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<sup>30</sup> ICC-01/09-02/11-195, para. 22.

<sup>31</sup> ICC-01/09-02/11-195, para. 21.

fairness of the proceedings”.<sup>32</sup> This is because it will provide the Defence with “insight into the Prosecutor’s strategy and its perception of the strengths and weaknesses of the case”, thus, providing the Defence with “an undue and unfair advantage over the Prosecution”.<sup>33</sup>

26. The Defence, on the other hand, considers that the Prosecutor fails to prove how the First and Second Issues alleged by the Prosecutor significantly affect the fairness of the proceedings.<sup>34</sup> According to the Defence, the Application sought relies on Trial Chamber IV’s decision on the basis of selectivity and the lack of a specific reason as to “why that Chamber certified a similar issue for appeal”.<sup>35</sup> In the Defence’s opinion, granting the Application “on this basis would amount to requesting the Single Judge to abdicate her judicial functions in favour of another Chamber of complimentary jurisdiction without engaging in any reasoned or considered analysis”.<sup>36</sup>

27. The Defence further argues that the Prosecutor “mischaracterises the nature of the Single Judge’s decision”, as the latter “constitutes a vigilant and proper measure designed to ensure the fairness of the proceedings”.<sup>37</sup> In addition, the Defence asserts that Mr. Faal’s mere knowledge of general information “does not in any way affect the fairness of the proceedings”, as the Single Judge ruled that such information was already available, whether by way of disclosure to the Defence or in the public domain.<sup>38</sup> Nor does the possession of “general information” regarding the Prosecutor Office’s strategy and the way it functions affect the fairness of the proceedings, the Defence adds.<sup>39</sup>

28. The Single Judge agrees with the Defence that the possession of information of a general nature certainly cannot affect the fairness of the proceedings. She also

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<sup>32</sup> ICC-01/09-02/11-195, para. 23.

<sup>33</sup> ICC-01/09-02/11-195, para. 23.

<sup>34</sup> ICC-01/09-02/11-207, paras 18-25.

<sup>35</sup> ICC-01/09-02/11-207, para. 20.

<sup>36</sup> ICC-01/09-02/11-207, para. 20.

<sup>37</sup> ICC-01/09-02/11-207, para. 21.

<sup>38</sup> ICC-01/09-02/11-207, para. 22.

<sup>39</sup> ICC-01/09-02/11-207, para. 23.

supports the view that her decision is mainly aimed at ensuring, first and foremost, the fairness of the proceedings. However, the crux of the problem in the present case lies somewhere else. Examining the Prosecutor's Application through the scope of article 82(1)(d) of the Statute dictates a different line of reasoning. It is not the role of the Single Judge to justify or defend the correctness of her own decision. Rather, her role in deciding on an interlocutory appeal is to determine whether the First and Second Issues presented by the Prosecutor significantly affect the fairness of the proceedings.

29. In this respect, the Single Judge's answer is in the affirmative, given the fact that the logic underlying the First and Second Issues if, as argued above, was followed by the Single Judge in her ruling in the 20 July 2011 Decision, the conclusion could have been that the Mr. Faal was privy to confidential information. Accordingly, the said finding would have revealed that a conflict of interest existed, which, in turn, would have barred him from continuing to join the Defence team of Mr. Muthaura.<sup>40</sup> This conclusion is sufficient in itself to demonstrate that the First and Second Issues outlined in the Prosecutor's Application have a significant impact on the fairness of the proceedings.

***Determination on Whether the Two Issues Significantly Affect the Expeditionness of the Proceedings***

30. The Prosecutor also submits that the First and Second Issues affect the expeditious conduct of the proceedings.<sup>41</sup> Similar to the argument presented under the criterion of fairness, the Prosecutor avers that, "in an almost identical case", Trial Chamber IV found that "a former OTP lawyer [who] had access to sensitive information has a 'real potential for delay to the trial' as the Prosecution may be forced to adjust its strategy [...] and selection of evidence in order to neutralize or

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<sup>40</sup> Trial Chamber IV has reached a similar conclusion in a similar case. See, Trial Chamber IV, "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'", ICC-02/05-03/09-179, para. 17.

<sup>41</sup> ICC-01/09-02/11-195, paras 24-26.

mitigate the prejudice to its case”.<sup>42</sup> In the opinion of the Prosecutor, if it turned out that Mr. Faal had access to confidential information, “this could derail the trial and [lead to the] disqualification of the Defence team in its entirety” and the commencement of the proceedings anew with new counsel.<sup>43</sup> Should the Single Judge not allow the First and Second Issues to be currently resolved, this “could [cause] a reversal of the result of the trial in a final appeal and a possible re-trial, the Prosecutor argues.<sup>44</sup> This will result in an unavoidable delay and will compromise the “efficient conduct of the proceedings”.<sup>45</sup>

31. The Defence, however, argues that the Prosecutor’s allegations that the First and Second Issues affect the expeditiousness of the proceedings are unfounded.<sup>46</sup> For the Defence, the Prosecutor “erroneously” relies on the decision of Trial Chamber IV “without distinction”, and accordingly, speculates “on the potential for delay in the trial because it would lead to a possible disqualification of the entire defence team as well as a possible re-trial”, without “concretely explain[ing] how each of these scenarios would arise”.<sup>47</sup>

32. According to the Defence, a presumed conflict of interest, which has not been properly explained by the Prosecutor, cannot affect the expeditiousness of the proceedings. Also, a determination of a “legal standard” which “is not based on a finding that Mr. Faal had access to *de minimis* confidential information, but rather that he did not actually access confidential information”, cannot support an argument that the expeditiousness of the proceedings is negatively affected.<sup>48</sup> For the Defence, if the Application were to be granted, and the Appeals Chamber concurred with the Prosecutor’s position, this would have far-reaching consequences such as,

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<sup>42</sup> ICC-01/09-02/11-195, para. 24.

<sup>43</sup> ICC-01/09-02/11-195, para. 25.

<sup>44</sup> ICC-01/09-02/11-195, para. 26.

<sup>45</sup> ICC-01/09-02/11-195, para. 26.

<sup>46</sup> ICC-01/09-02/11-207, paras 26-30.

<sup>47</sup> ICC-01/09-02/11-207, para. 26.

<sup>48</sup> ICC-01/09-02/11-207, para. 27.

the disqualification of other Defence counsels, with similar circumstances, and who are currently involved in other cases before the Court.<sup>49</sup>

33. The Single Judge disagrees with the Defence's claims, as the Prosecutor has reasonably developed his arguments to the level of convincing the Single Judge that the First and Second Issues framed in the Application also significantly affect the expeditiousness of the proceedings. The Single Judge's finding that the First and Second Issues significantly affect the expeditiousness of the proceedings is also based on the same fundamental reasons elaborated under the criterion of fairness referred to above. Thus, a different ruling by the Single Judge in the 20 July 2011 Decision that Mr. Faal was automatically privy to confidential information by the mere fact that he used to work for the Office of the Prosecutor, and/or the application of a different standard to the facts than the one applied in the said decision, would have resolved the Prosecutor's concerns and likely facilitated the smooth running of the proceedings in this regard. By contrast, the fact that the Prosecutor is placed in a position whereby he may need to adjust his "strategy [...] and selection of evidence in order to neutralize or mitigate the [alleged] prejudice to [his] case", will in fact affect the expeditious conduct of the proceedings. The same holds true if it turned out that Mr. Faal was privy to confidential information "this could derail the trial [and result in the] disqualification of the Defence team in its entirety, and accordingly, a delay in the proceedings is likely to occur."<sup>50</sup>

34. Having said the above, the Single Judge therefore cannot agree with the Defence that the Application should be rejected because, *inter alia*, granting leave to appeal of the First and Second Issues *sub judice* might have far-reaching consequences. In the Single Judge's opinion, this is a policy driven argument that goes beyond the scope of article 82(1)(d) of the Statute. In any event, should the Prosecutor's Application be

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<sup>49</sup> ICC-01/09-02/11-207, para. 28.

<sup>50</sup> See also Trial Chamber IV's similar finding, "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'", ICC-02/05-03/09-179, para. 19.

finally granted, this is a matter for the Appeals Chamber to decide and not for the Pre-Trial Chamber.

***Determination of Whether an Immediate Resolution of the Two Issues Materially Advance the Proceedings***

35. The Prosecutor, citing the 13 July 2006 Judgment, argues that if the Application is denied, this “will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process”.<sup>51</sup> According to the Prosecutor, Mr. Faal’s appointment, “if tainted by a conflict of interest, could invalidate the entire proceedings”, and thus, [t]imely intervention by the Appeals Chamber [...] will materially advance the proceedings [...] [as] it will prevent taint [...]” its entirety from his appointment.<sup>52</sup>

36. The Defence, however, avers that the Prosecutor fails to prove that the First and Second Issues would materially advance the proceedings.<sup>53</sup> In the Defence’s view, “any suggestion that the identified issues would have an impact on the outcome of the proceedings is abstract, speculative and without foundation”.<sup>54</sup> On the contrary, the Prosecutor’s position “at this stage would interrupt the process leading to the confirmation hearing”, the Defence argues.<sup>55</sup> According to the Defence, the Prosecutor also fails to reveal how the disqualification of the Defence team or the Appeals Chamber’s intervention with respect to the First and Second Issues would materially advance the proceedings.<sup>56</sup> Moreover, the Defence also argues that, contrary to the Prosecutor’s assertion, only the First Issue is pending before the Appeals Chamber, and thus, the Single Judge should disregard the inaccurate information provided by the Prosecutor.<sup>57</sup>

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<sup>51</sup> ICC-01/09-02/11-195, para. 27.

<sup>52</sup> ICC-01/09-02/11-195, para. 28. See also, paras 29-31.

<sup>53</sup> ICC-01/09-02/11-207, paras 31-33.

<sup>54</sup> ICC-01/09-02/11-207, para. 31.

<sup>55</sup> ICC-01/09-02/11-207, para. 32.

<sup>56</sup> ICC-01/09-02/11-207, para. 33.

<sup>57</sup> ICC-01/09-02/11-207, para. 35.

37. The Single Judge concurs with the Defence that only the First Issue outlined in the Prosecutor's Application is under the Appeals Chamber's examination. However, this does not deny the fact that the Prosecutor managed to persuade the Single Judge that the Second Issue, like the First Issue, warrants an immediate resolution by the Appeals Chamber. In this regard, the Single Judge recalls the 13 July 2006 Judgment, in which, the Appeals Chamber made clear that for the purpose of satisfying this criterion, the relevant Chamber must rule that an "authoritative determination" on appeal will "move forward" the proceedings and "remove doubts about the correctness of [the] decision or map[...] a course of action along the right lines."<sup>58</sup> By applying the Appeals Chamber's definition to the case *sub judice*, the Single Judge considers that an immediate resolution on appeal is necessary, as it will remove doubts about the finding of the Single Judge in the 20 July 2011 Decision and ensures that the proceedings follow the right "course of action".

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**grants** the Prosecutor's Application.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova  
Single Judge

Dated this Thursday, 18 August 2011

At The Hague, The Netherlands

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<sup>58</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, paras 14-15; also, Trial Chamber IV, "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'", ICC-02/05-03/09-179, para. 22.