

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 9 March 2012

**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 AND  
UHURU MUIGAI KENYATTA**

**PUBLIC**

**Second Decision with Respect to the Question of Invalidating the Appointment of  
Counsel to the Defence**

**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, Essa  
Faal, and Shyamala Alagendra

**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**

**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”) hereby renders the second decision with respect to the question of invalidating the appointment of counsel to the Defence. The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and a recurrently treated as confidential *ex parte*, Prosecutor and/or Defence. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Further, most of the information contained in this decision is already in the public domain because it has been referred to in previous documents and decisions. Finally, in the opinion of the Single Judge those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

## **I. Procedural History**

1. In June 2011, the Single Judge had noticed in a series of filings submitted by the Defence for Francis Kirimi Muthaura (“Mr. Muthaura”) that Essa Faal (“Mr. Faal”), a former Senior Trial Lawyer at the Office of the Prosecutor, signed on behalf of Mr. Muthaura together with other counsel.
2. On 28 June 2011, the Single Judge ordered the Prosecutor and the Registrar to submit their observations regarding a potential impediment to Mr. Faal’s representation as counsel in the Defence team for Mr. Muthaura.<sup>2</sup>
3. On 1 July 2011, the Single Judge received the observations by the Registrar<sup>3</sup> and the Prosecutor<sup>4</sup>, as ordered.

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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> 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.

<sup>3</sup> ICC-01/09-02/11-149-Conf-Exp and annex.

<sup>4</sup> ICC-01/09-02/11-150-Conf and 9 annexes (annexes A to H).

4. On 6 and 8 July 2011, the Defence for Mr. Muthaura responded to the observations of the Prosecutor.<sup>5</sup>

5. On 14 July 2011, the Prosecutor further submitted a reply to the Defence response.<sup>6</sup>

6. On 20 July 2011, the Single Judge issued the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" (the "20 July 2011 Decision") in which she rejected the Prosecutor's request to invalidate the appointment of Mr. Faal as counsel for Mr. Muthaura and decided that he may continue to represent Mr. Muthaura in the case against him.<sup>7</sup>

7. On 18 August 2011, the Single Judge granted the Prosecutor leave to appeal the 20 July 2011 Decision.<sup>8</sup>

8. On 21 September 2011, the hearing on the confirmation of charges in the present case commenced<sup>9</sup> and was concluded on 5 October 2011<sup>10</sup>.

9. On 10 November 2011, the Appeals Chamber reversed the 20 July 2011 Decision and directed the Chamber to decide anew on the question whether to invalidate the appointment of Mr. Faal as counsel in this case in light of the Appeals Chamber

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<sup>5</sup> ICC-01/09-02/11-158-Conf-Exp and annex; ICC-01/09-02/11-159-Conf-Exp and 8 annexes (annex A to H). The Single Judge ordered the Defence to re-submit the latter filing by 8 July 2011 in order to comply with the format requirements set out in the Regulations of the Court, see 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. The Defence for Mr. Muthaura duly complied with the Single Judge's order in ICC-01/09-02/11-163-Conf-Exp. The 8 annexes to the filing were retained in ICC-01/09-02/11-159-Conf-Exp-Anx.

<sup>6</sup> ICC-01/09-02/11-172-Conf-Exp and 6 annexes (annexes 1-6). Previously, the Single Judge had authorized the Prosecutor to reply in 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>7</sup> Pre-Trial Chamber II, ICC-01/09-02/11-185.

<sup>8</sup> Pre-Trial Chamber II, 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)'" , ICC-01/09-02/11-253.

<sup>9</sup> ICC-01/09-02/11-T-4-ENG ET WT.

<sup>10</sup> ICC-01/09-02/11-T-15-Red-ENG WT.

judgment.<sup>11</sup> To this end, it requested the Chamber to “first (...) clarify whether there was any confidential information of which Mr. Faal was aware. In case of an affirmative answer, [the Chamber] will need to determine whether it is nevertheless in the interests of justice that Mr. Faal should be part of the Defence”.<sup>12</sup>

10. On 15 November 2011, the Prosecutor requested leave pursuant to regulation 24(5) of the Regulations of the Court to file further written submissions in light of the Appeals Chamber judgment (the “Prosecutor’s Request”).<sup>13</sup>

11. On 16 November 2011, the Defence for Mr. Muthaura in response requested to summarily dismiss the Prosecutor’s Request.<sup>14</sup>

12. On 23 January 2012, the Chamber confirmed, by majority, the charges against Mr. Muthaura and Uhuru Muigai Kenyatta pursuant to article 61(7)(a) of the Rome Statute (the “Statute”).<sup>15</sup>

## II. The Applicable Law and its Interpretation

13. The Single Judge notes article 21(1)(a) of the Statute, rule 22(3) of the Rules of Procedure and Evidence, articles 1, 7(4), 12(1)(b), 16(1) and 24(1) of the Code of Professional Conduct for counsel (the “Code of Conduct”) and regulation 23*bis* of the Regulations of the Court (the “Regulations”).

14. Article 12(1)(b) of the Code of Conduct reads, in relevant part:

1. Counsel shall not represent a client in a case:

(...)

(b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel’s request, be ordered by the Court if deemed justified in the interests of justice. (...)

<sup>11</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, ICC-01/09-02/11-365.

<sup>12</sup> *Ibid.*, para. 72.

<sup>13</sup> ICC-01/09-02/11-368-Conf-Exp.

<sup>14</sup> ICC-01/09-02/11-371-Conf-Exp.

<sup>15</sup> Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

15. As clarified by the Appeals Chamber, article 12(1)(b), first sentence, of the Code of Conduct requires that counsel was privy to *any* confidential information relating to the case in which counsel seeks to appear. Counsel is considered to be “privy” to confidential information in case he or she “has knowledge of something secret or private that has been shared with him or her”.<sup>16</sup> The party challenging the assignment of counsel concerned must prove that counsel once had knowledge of confidential information relating to the case.<sup>17</sup>

16. In case counsel was privy to confidential information relating to the case, he or she may be permitted to represent the suspect or the accused if deemed justified in the interests of justice pursuant to article 12(1)(b), second sentence, of the Code of Conduct. Factors, such as the *de minimis* nature of confidential information, the rights of the accused, counsel’s position within the defence team and concerns about the overall fairness or the appearance of impropriety in relation to the proceedings arising, may be taken into consideration when determining what might be “in the interests of justice”.<sup>18</sup>

### III. The Single Judge’s Determination

#### 1. Preliminary Issues

##### *Prosecutor’s request to submit new observations*

17. The Single Judge notes the Prosecutor’s Request in which he argues it to be “fitting for the Chamber to entertain submissions in light of the Appeals Chamber’s clarification (...)”, including on the issue “whether the interests of justice would require Mr. Faal’s continuation in the case after having been privy to confidential

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<sup>16</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, ICC-01/09-02/11-365, para. 53.

<sup>17</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, ICC-01/09-02/11-365, para. 56.

<sup>18</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’, ICC-01/09-02/11-365, paras 69 and 70.

prosecution information”.<sup>19</sup> The Defence for Mr. Muthaura requests the dismissal of the request arguing that the Single Judge “has enough materials and all the necessary evidence to decide the question remitted to her”.<sup>20</sup>

18. The Single Judge notes that the Prosecutor does not purport to present further new facts to demonstrate prior knowledge of Mr. Faal. That said, the Single Judge does not deem it necessary to receive further arguments by the parties on the proper application of the law, as clarified by the Appeals Chamber.

*Re-classification of documents*

19. After a careful review of the content of the documents and decisions concerning the present subject-matter, the Single Judge is of the view that the filings ICC-01/09-02/11-371-Conf-Exp and ICC-01/09-02/11-368-Conf-Exp as well as the Chamber’s decision in ICC-01/09-02/11-170-Conf do not contain any sensitive information which could warrant the maintenance of their original classification as confidential and *ex parte*. For reasons of publicity of proceedings and consequently the maintenance of a public case record, to the extent possible, the Single Judge decides to re-classify the abovementioned documents as public pursuant to regulation 23bis (3), second sentence, of the Regulations.

2. Application of article 12(1)(b) of the Code of Conduct

20. Turning to the facts of the present case, the Single Judge will examine afresh the information provided to her by both parties as the findings in the first decision have been quashed by virtue of the reversal of the entire decision. To this end, the Single Judge will examine chronologically the submissions of the Prosecutor, to which the Defence responded, and the submissions of the Registry.

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<sup>19</sup> ICC-01/09-02/11-368-Conf-Exp, para. 2.

<sup>20</sup> ICC-01/09-02/11-371-Conf-Exp, para. 14.

*Information provided by the Prosecutor on 1 July 2011*

21. The Prosecutor appended to his observations made on 1 July 2011 nine annexes (annex A to Annx H) on the basis of which he argues that Mr. Faal was privy to confidential information relating to the present case.

22. **Annexes B**,<sup>21</sup> **D**,<sup>22</sup> **E**<sup>23</sup> and **G**<sup>24</sup> contain communications from the Chief of the Counsel Support Section, Lead Counsel in the Defence team of Mr. Muthaura and the resignation letter of Mr. Faal which do not provide any relevant information as to whether Mr. Faal was privy to any confidential information. The Single Judge therefore will not further contemplate said annexes and turns to the remaining annexes which could be of some relevance.

23. **Annex A** contains two declarations of staff members of the office of the Prosecutor.<sup>25</sup> The first is a declaration of a Trial Lawyer. In short, the Trial Lawyer indicates to have discussed with Mr. Faal as early as in September 2010 the ‘case hypothesis’ for the present case.<sup>26</sup> The Trial Lawyer further declares that discussions with Mr. Faal continued as the case progressed.<sup>27</sup> The Trial Lawyer finally explains that discussion involved “weaknesses of the case”, “the challenges in investigations” and the “ways to surmount these difficulties”.<sup>28</sup>

24. Mr. Faal submitted a sworn affidavit in which he responds to the abovementioned allegations made by the Trial Lawyer.<sup>29</sup> In brief, he accepts that a discussion on the ‘case hypothesis’ of the present case took place at the request of the Trial Lawyer concerned, albeit, according to him, at a time before September 2010.<sup>30</sup> He avers that he forwarded a ‘case hypothesis’ previously prepared in the context of

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<sup>21</sup> ICC-01/09-02/11-150-Conf-AnxB.

<sup>22</sup> ICC-01/09-02/11-150-Conf-AnxD.

<sup>23</sup> ICC-01/09-02/11-150-Conf-AnxE.

<sup>24</sup> ICC-01/09-02/11-150-Conf-AnxG.

<sup>25</sup> ICC-01/09-02/11-150-Conf-AnxA.

<sup>26</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 2, para. 4.

<sup>27</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 2, para. 5.

<sup>28</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 2, para. 6.

<sup>29</sup> ICC-01/09-02/11-163-Conf-Exp-AnxB, paras 12 *et seq.*

<sup>30</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 16.



the Darfur situation so as to assist the Trial Lawyer concerned in the preparation for a document in the context of the Kenya case.<sup>31</sup> He was subsequently presented with a draft initial 'case hypothesis' by the same Trial Lawyer with a view to providing his comments.<sup>32</sup> Mr. Faal acknowledges having read the document and "shared his opinion on how [he] thought [the Trial Lawyer] could improve it".<sup>33</sup> However, he asserts that this discussion was merely academic in nature.<sup>34</sup> The document had not contained any confidential information but was rather the Trial Lawyer's personal understanding of the violent events in 2007/2008 in the Republic of Kenya based on public information available on internet or other public sources.<sup>35</sup> Mr. Faal further maintains that he never met again the Trial Lawyer concerned to discuss issues pertaining to the Kenya situation or received any document related thereto.<sup>36</sup> In particular, Mr. Faal denies having discussed the strengths and weaknesses of the case or how to surmount difficulties in the Kenya investigations with the Trial Lawyer concerned.<sup>37</sup>

25. The Single Judge considers that the alleged discussion on the 'case hypothesis' could be of relevance here. While accepting the Defence argument that the 'case hypothesis' is a developing document subject to change, the Single Judge understands that this document is an internal preparatory paper which may contain confidential information pertaining to the Prosecutor's strategic position in the presentation of the case and/or the evidence used. The Single Judge notes, however, that the 'case hypothesis' was at its initial stage and does not appear to have contained any confidential information. Moreover, by the time Mr. Faal joined the Defence team of Mr. Muthaura (30 May 2011),<sup>38</sup> the 'case hypothesis' of the Prosecutor was already revealed in his request to summon the suspects of the case

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<sup>31</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, paras 16-18.

<sup>32</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 20.

<sup>33</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 20.

<sup>34</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 23.

<sup>35</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 23.

<sup>36</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 24.

<sup>37</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, paras 33-36.

<sup>38</sup> ICC-01/09-02/11-150-Conf-AnxB.

(15 December 2010)<sup>39</sup> and later decided upon by this Chamber (8 March 2011)<sup>40</sup>. Thus, it is difficult to argue that at the time Mr. Faal joined the Defence for Mr. Muthaura he had “knowledge of something secret or private that has been shared with him” that he acquired when being a staff member in the office of the Prosecutor.

26. As to the remaining information advanced by the Trial Lawyer in relation to discussions “as the case progressed”, the Single Judge notes the lack of any specificity as to the content, time or place of such discussions. Given the generality of the Trial Lawyer’s declaration and the categorical denial of Mr. Faal as to the taking place of such discussions, the information provided by the Prosecutor remains a mere allegation unsupported by concrete facts. Hence, the Single Judge cannot conclude from the Trial Lawyer’s declaration that Mr. Faal was privy to any confidential information related to this case.

27. The second declaration contained in Annex A is provided by the Kenya Investigation Team Leader. In short, the Investigation Team Leader alleges to have “shared his experiences related to this case” with Mr. Faal.<sup>41</sup> He further maintains that from the informal discussions held between him and Mr. Faal, the latter “would have been able to obtain a fairly good understanding about investigation strategy and the strengths and weaknesses of the case”.<sup>42</sup> The Investigation Team Leader also recalls an informal discussion with Mr. Faal during which he is “sure that [he] mentioned (...) some challenges which the Kenya investigation faced at this time”.<sup>43</sup>

28. Mr. Faal responds to the abovementioned allegations made by the Investigation Team Leader in two sworn affidavits.<sup>44</sup> He gives account of his difficult working relationship with the Investigation Team Leader concerned and emphatically denies

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<sup>39</sup> ICC-01/09-31-Red2.

<sup>40</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-01/09-02/11-1.

<sup>41</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 4, para. 5.

<sup>42</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 4, para. 5.

<sup>43</sup> ICC-01/09-02/11-150-Conf-AnxA, p. 4, para. 6.

<sup>44</sup> ICC-01/09-02/11-158-Conf-Exp-Anx; ICC-01/09-02/11-159-Conf-Exp-AnxB, paras 41 *et seq.*

having had any discussion related to the case or the Kenya investigation with the Investigation Team Leader.

29. The Single Judge notes the lack of any specificity as to the content, time or place of discussions as referred to by the Investigation Team Leader. Given the generality of the Investigation Team Leader's declaration and the categorical refutation of Mr. Faal as to the taking place of informal discussions about the Kenya investigation or case, the information provided by the Prosecutor remains a mere allegation unsupported by concrete facts. Hence, the Single Judge cannot conclude from the Investigation Team Leader's declaration that Mr. Faal was privy to any confidential information related to this case.

30. **Annex C** contains an internal memorandum of the Deputy Prosecutor to the Chief of the Counsel Support Section in which she indicates the Prosecutor's intention to object to the appointment of Mr. Faal in the Defence team of Mr Muthaura.<sup>45</sup> She makes reference to Mr. Faal's senior position in the office of the Prosecutor, his "detailed knowledge of highly confidential issues pertaining to investigative and prosecutorial policies, including confidential regulations in the operational manual".<sup>46</sup> She also mentions that Mr. Faal's attendance of Prosecution Division's senior management meetings during which "confidential issues pertaining to all cases before the Court", including the present case, "were discussed in detail".<sup>47</sup> Minutes of such a Division meeting dated 14 April 2010 was provided in **Annex H**.<sup>48</sup> The Deputy Prosecutor also refers to the confidential weekly reports summarizing court activities, including the present case, which were received by Mr. Faal.<sup>49</sup> Moreover, mention is made of the close relationship between Mr. Faal and members of the Kenya team within the Prosecution and Investigation Divisions, consultations with other senior trial lawyers and the proximity of offices within the

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<sup>45</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 2, first paragraph.

<sup>46</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 2, second paragraph.

<sup>47</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 2, second paragraph.

<sup>48</sup> ICC-0109-02/11-150-Conf-AnxH.

<sup>49</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 2, second paragraph.

office of the Prosecutor.<sup>50</sup> Consequently, it is argued at various instances in the memorandum that “[Mr. Faal] could have access to confidential information in the case”, that he “therefore is potentially privy” to confidential information and that Mr. Faal, being a lawyer with knowledge about how the office of the Prosecutor works, “creates a significant risk that confidential information may be used or disclosed or that there may be a perception of a conflict of interest”.<sup>51</sup>

31. Mr. Faal in his sworn affidavit denies having “seen, viewed or accessed any weekly report containing confidential information about the Kenya cases”.<sup>52</sup> He also denies having attended “a [Prosecution Division senior management meeting] in which confidential or substantive matters about the Kenya case has been discussed”.<sup>53</sup> As to the minutes of the Prosecution Division meeting dated 14 April 2010 contained in Annex H, Mr. Faal submits that he was not present at that meeting.<sup>54</sup> **Annex D1** also contains a letter of Mr. Faal in which he responds to the allegations made in the internal memorandum rejecting the allegations made by the Deputy Prosecutor.<sup>55</sup>

32. The Single Judge notes the lack of any specificity as to the content of confidential information that Mr. Faal is alleged to have been privy to when joining the Defence team of Mr. Muthaura. Most of the information reflected in the internal memorandum of the Deputy-Prosecutor is general or speculative in nature and simply draws primarily on Mr. Faal’s prior position and working methods in the office of the Prosecutor. Without more, this information constitutes a set of mere allegations unsupported by concrete facts. In addition, all allegations made are emphatically rejected by Mr. Faal.<sup>56</sup> Absent any reasons calling into question the integrity of Mr. Faal, the Single Judge is entitled to rely on Mr. Faal’s statement of

<sup>50</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 2, second paragraph; p. 3, fourth paragraph from top.

<sup>51</sup> ICC-01/09-02/11-150-Conf-AnxC, p. 3, fourth and sixth paragraph from top.

<sup>52</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 7.

<sup>53</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 8.

<sup>54</sup> *Ibid.*

<sup>55</sup> ICC-01/09-02/11-150-Conf-AnxD1.

<sup>56</sup> ICC-01/09-02/11-150-Conf-AnxD1.

facts. The speculative character of the allegations is further confirmed by the Deputy Prosecutor's language in arguing that Mr. Faal "could have access" or be "potentially privy" to confidential information (emphasis added). This does not satisfy the requirements of article 12(1)(b) of the Code of Conduct which requires that "counsel has to *have had* knowledge of confidential information relating to the case in which counsel seeks to appear" (emphasis added),<sup>57</sup> thus necessitating concrete proofs of such knowledge rather than plain assumptions. As the Appeals Chamber has confirmed, "prior association with the OTP does not, *per se*, disqualify a former OTP staff member from working for the defence".<sup>58</sup> Hence, the Single Judge cannot conclude from the internal memorandum submitted that Mr. Faal was privy to any confidential information related to this case.

33. This leaves the Single Judge with **Annex H** which contains the minutes of the 14 April 2010 Prosecution Division senior management meeting. The minutes summarize (i) a presentation and discussion on, *inter alia*, the Chamber's decision authorizing the commencement of the investigation<sup>59</sup> and (ii) a discussion in relation to the protection of witnesses<sup>60</sup>. Having analyzed the information contained in Annex H, the Single Judge is not persuaded that Mr. Faal became privy to something secret or private that has been shared with him while a member of the office of the Prosecutor. First, the minutes dating 14 April 2010 demonstrate that the discussion at the meeting was on the Chamber's decision authorizing the commencement of the Prosecutor's investigation into the situation in the Republic of Kenya.<sup>61</sup> Thus, no mention of any information relating to the present case is made in the minutes. Consequently, all issues discussed (in particular that of witness protection) were not

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<sup>57</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence', ICC-01/09-02/11-365, para. 64.

<sup>58</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence', ICC-01/09-02/11-365, para. 58.

<sup>59</sup> ICC-01/09-02/11-150-Conf-AnxH, p. 7.

<sup>60</sup> ICC-01/09-02/11-150-Conf-AnxH, pp. 9 and 10.

<sup>61</sup> Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr.

in any way related to the case of which the Chamber was seized only on 15 December 2010,<sup>62</sup> long before cases in the situation in the Republic of Kenya had crystallized. Therefore, the information discussed during the meeting, as demonstrated by the minutes, is general in nature and does not represent any confidential information relating to the present case. Lastly and most importantly, the minutes reveal, and Mr. Faal emphasizes as well,<sup>63</sup> that he was not present in that meeting. Furthermore, the Prosecutor's filings do not provide any information that Mr. Faal received the minutes concerned. Having said all of the above, the Single Judge cannot conclude from the minutes dated 14 April 2010 submitted that Mr. Faal was privy to any confidential information related to the present case.

34. **Annex F** contains several emails by way of which staff members of the office of the Prosecutor were informed that in the absence of the Deputy Prosecutor, *inter alia*, Mr. Faal would be in charge of the Prosecution Division.<sup>64</sup>

35. The Single Judge notes that according to these emails, Mr. Faal was in charge of the Prosecution Division *in lieu* of the Deputy Prosecutor in the time period 7-10 October 2008 and 1-5 November 2010. However, the mere fact that Mr. Faal was in charge of the Prosecution Division *as such* does not prove that Mr. Faal was privy to confidential information related to the present case. Article 12(1)(b) of the Code of Conduct requires *actual* knowledge of confidential information, and is not satisfied if the person could have had *potential* knowledge. Moreover, the Single Judge recalls that in 7-10 October 2008 the situation in the Republic of Kenya, let alone the present case, was not pending before the Court. Likewise, in the time period 1-5 November 2010, no case was pending before the Court. In conclusion, the Single Judge cannot conclude from the set of emails submitted that Mr. Faal was privy to confidential information related to this case.

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<sup>62</sup> See ICC-01/09-31-Red2.

<sup>63</sup> ICC-01/09-02/11-159-Conf-Exp-AnxB, para. 8.

<sup>64</sup> ICC-01/09-02/11-150-Conf-AnxF.

*Information provided by the Prosecutor on 14 July 2011*

36. The Prosecutor appended to his reply made on 14 July 2011 six annexes (annexes 1-6) on the basis of which he argues that Mr. Faal was privy to confidential information relating to the present case.

37. **Annexes 1,**<sup>65</sup> **2**<sup>66</sup> and **6**<sup>67</sup> contain declarations of an operation security officer, the Investigation Coordinator and Public Information Officer in the office of the Prosecutor which do not provide any relevant information as to whether Mr. Faal was privy to confidential information. The Single Judge therefore turns to the remaining annexes which could be of some relevance.

38. **Annex 3** contains a weekly report dated 2 March 2011 summarizing court activities from 21 to 25 February 2011.<sup>68</sup> The Prosecutor avers that Mr. Faal accessed this report which contains the summary of two confidential, *ex parte* filings in one of the Kenya cases.<sup>69</sup> In his view, this demonstrates that Mr. Faal “had access to confidential information in the Kenya case”.<sup>70</sup>

39. Having reviewed the annex concerned, the Single Judge observes that the summaries in question relate to two cover filings, excluding their annexes. The first filing was submitted by the Prosecutor confidentially at the time and relates to the Prosecutor’s submission of witness statements *prior* to the issuance of the summonses in the present case, i.e. the opening of the present case. The annexes, which remained confidential, were not summarized. Moreover, the Single Judge notes that by the time Mr. Faal joined the Defence team for Mr. Muthaura, the cover filing concerned had already been reclassified as public.<sup>71</sup> That said, the Single Judge

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<sup>65</sup> ICC-01/09-02/11-172-Conf-Exp-Anx1.

<sup>66</sup> ICC-01/09-02/11-172-Conf-Exp-Anx2.

<sup>67</sup> ICC-01/09-02/11-172-Conf-Exp-Anx6.

<sup>68</sup> ICC-01/09-02/11-172-Conf-Exp-Anx3.

<sup>69</sup> ICC-01/09-02/11-172-Conf-Exp, para. 4.

<sup>70</sup> ICC-01/09-02/11-172-Conf-Exp, para. 5.

<sup>71</sup> The Prosecutor’s filing was reclassified as public following the Chamber’s “Decision on Reclassification of Certain Documents”, ICC-01/09-02/11-30 dated 1 April 2011.

is not persuaded that Mr. Faal was privy to confidential information relating to the present case.

40. Turning to the second cover filing referred to by the Prosecutor, the Single Judge observes that it was submitted as a *public* document by the Victims Participation and Reparation Section (the “VPRS”). It contains the first periodic report on the activities of the VPRS in relation to victims’ applications received in the *situation* in the Republic of Kenya. Three annexes accompanied the filing, which were classified confidential *ex parte*, Registry only, and to which the Prosecutor does not have access.<sup>72</sup> Accordingly, the summary in the weekly report reflects only the content of the public filing. As the summary of a public filing cannot *per se* contain any confidential information, the Single Judge is not persuaded that Mr. Faal was privy to confidential information relating to the present case.

41. **Annex 4** contains a printout of a series of emails between an analyst of the Investigation Division in the office of the Prosecutor and Shyamala Alagendra (“Ms. Alagendra”) in which ideas are exchanged on the drafting of a police structure report at the early stages of the investigation.<sup>73</sup> The Prosecutor contends that this email exchange was forwarded to Mr. Faal and that he “expressed appreciation in an email to Ms. Alagendra for her assistance to the analyst”.<sup>74</sup> At the same time, the Prosecutor submits that the information contained in the email exchanges is “plainly not critical, particularly at this stage of the case”.<sup>75</sup> Despite the insignificance of the email’s content, the Prosecutor advances the argument that because of Mr. Faal’s position and his relationship with others “he was inevitably exposed to, and consulted on, confidential information in the Kenya case”.<sup>76</sup>

42. At the outset, the Single Judge wishes to make some general observations. The Single Judge observes that even though Mr. Faal is alleged to have been forwarded

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<sup>72</sup> In fact, the Prosecutor requested access to the confidential, *ex parte* annexes concerned, see ICC-01/09-51.

<sup>73</sup> ICC-01/09-02/11-172-Conf-Exp-Anx4.

<sup>74</sup> ICC-01/09-02/11-172-Conf-Exp, para. 6.

<sup>75</sup> ICC-01/09-02/11-172-Conf-Exp, para. 7.

<sup>76</sup> ICC-01/09-02/11-172-Conf-Exp, para. 7.



with the email exchanges concerned, the relevant email header, as reflected in the annex, does not contain the information *when* the email was sent to Mr. Faal (date and time).<sup>77</sup> Accordingly, the relevant line in the email header is blank. No explanation is provided as to why in a printout of email exchanges information of this kind could be missing in an otherwise standardized email header. In the same email header allegedly sent to Mr. Faal, the Single Judge also observes that, unlike in all other email headers reflected in the annex, the information is arranged in a disordered manner.<sup>78</sup> Again, the Single Judge is not provided with any explanation as to this irregularity. Leaving that second point aside, due to the incomplete information reflected in the annex concerning Mr. Faal, the Single Judge is left in doubt whether the email exchange between Ms. Alagendra and the analyst was indeed forwarded to Mr. Faal, as maintained by the Prosecutor. As a result, the Single Judge cannot rely on this part of annex 4.

43. Further, contrary to the Prosecutor's allegation, the email exchange in annex 4 also does not contain a reaction of Mr. Faal, expressing his appreciation to Ms. Alagendra for her assistance. In conclusion, as no other information is contained in annex 4 linking the entire email exchange with Mr. Faal, the Single Judge considers this annex to be of no relevance to the question whether or not Mr. Faal was privy to confidential information relating to the present case when joining the Defence team of Mr. Muthaura.

44. Apart from the above, it is the Prosecutor himself who acknowledges that the information is "plainly not critical, particularly at this stage of the case". The Single Judge agrees with this assessment and highlights that at the relevant time the investigation was at its early phase and no *case* was pending before the Court. Thus, the Single Judge does not agree with the Prosecutor's conclusion that Mr. Faal was privy to confidential information in the Kenya case. This assertion rests on a

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<sup>77</sup> All other email exchanges contain the relevant information in the email header.

<sup>78</sup> While the email headers of the emails between Ms. Alagendra and the analyst are organized "From – Sent – To – Subject", the email header introducing the alleged email to Mr. Faal is organized "To – Subject – Sent – From".

speculation rather than on actual proof of being aware of confidential information concerning the case against Mr. Muthaura.

45. **Annex 5** contains an email by Cynthia Tai (“Ms. Tai”), the Trial Lawyer in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, addressed to Mr. Faal.<sup>79</sup> With respect to Ms. Tai’s email, the Single Judge observes that the email merely refers to a question of a legal nature. But more so, the email concerned relates to the abovementioned companion case as opposed to the *present* case. It is recalled that article 12(1)(b) of the Code of Conduct requires that counsel was privy to confidential information relating to the *same* case in which counsel seeks to appear now. Furthermore, Mr. Faal has not responded to the said email, as acknowledged by the Prosecutor.<sup>80</sup> The Single Judge therefore cannot conclude from annex 5 that Mr. Faal was privy to confidential information related to the present case when he joined the Defence team of Mr. Muthaura.

*Further information provided*

46. The Single Judge, having examined the parties’ submissions, is of the view that the Prosecutor has failed to satisfy to the required standard of proof that Mr. Faal, in the words of the Appeals Chamber, “has knowledge of something secret or private that has been shared with him” while a member of the office of the Prosecutor. This conclusion is also supported by the Registry’s observations dated 1 July 2011 which show that, although Mr. Faal was on the notification list of confidential filings, he had never accessed a confidential or under seal document or evidence concerning the present case.<sup>81</sup> The same conclusion equally finds support in the unequivocal assertions of Mr. Faal in that he does not know or has no knowledge of any confidential investigative or prosecutorial policies pertaining to the present case as

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<sup>79</sup> ICC-01/09-02/11-172-Conf-Exp-Anx5.

<sup>80</sup> ICC-01/09-02/11-172-Conf-Exp, para. 8.

<sup>81</sup> ICC-01/09-02/11-149-Conf-Exp and its annex.

alleged by the Prosecutor.<sup>82</sup> In the absence of any reasons “doubting Mr. Faal’s integrity”, the Single Judge is entitled “to rely on his clear undertakings”.<sup>83</sup>

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

- a) rejects** the Prosecutor’s Request to file further written submissions in light of the Appeals Chamber judgment;
- b) rejects** the Prosecutor’s request to invalidate the appointment of Mr. Faal as member of the Defence team for Mr. Muthaura and thus Mr. Faal may continue to represent Mr. Muthaura in the present case;
- c) decides** to re-classify **ICC-01/09-02/11-170-Conf; ICC-01/09-02/11-368-Conf-Exp; and ICC-01/09-02/11-371-Conf-Exp** as public.

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Friday, 9 March 2012

At The Hague, The Netherlands

<sup>82</sup> ICC-01/09-02/11-150-Conf-AnxD1.

<sup>83</sup> Trial Chamber III, Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team’, ICC-01/05-01/08-769, para. 45; Trial Chamber IV, Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence, ICC-02/05-03/09-168, para. 22. This argument was also advanced by the Defence, ICC-01/09-02/11-163-Conf-Exp, para. 11