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**International
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Court**

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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

Public

Public Redacted Version of "Defence Reply to Confidential redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber", submitted on 7 March 2013

Sources: Defence for 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. The Defence for Ambassador Muthaura ("Defence") submits this Reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber" ("Response"),¹ pursuant to the Leave granted by the Honourable Trial Chamber on 1 March 2013.²
2. Whilst the Defence welcomes the Office of the Prosecutor's ("OTP") submission that it does not oppose the Defence's Article 64(4) Application and indeed accepts that *"Mr Muthaura presents the extremely rare case where it is appropriate to contemplate sending the case back to the Pre-Trial Chamber for reconsideration on the basis of the withheld Affidavit"*,³ the Defence nonetheless deems it necessary to file this reply in order that the Trial Chamber can properly assess the OTP's conduct in this case and its implications on the Defence's Article 64(4) Application.⁴
3. A review of the record demonstrates that the OTP failed to disclose to the Chamber the true facts concerning the non-disclosure of the exculpatory Affidavit of Witness 4 and has instead provided an explanation that is incorrect, incomplete and/or untruthful. The Defence submits that the non-disclosure was not an innocent "oversight" or "error" of a junior "reviewer", as the OTP indicates. The truth of the matter is that the former Prosecutor, Mr. Luis Moreno Ocampo, the Senior Trial Lawyer Ms. Adesola Adeboyejo and Trial Lawyer Mr. Adeniran Akingbolahan were all fully aware of the existence and presumably the content of the document even before the issuance of the Summons, and at every stage of the proceedings up to this point. The Defence submits that these

¹ ICC-01/09-02/11-664-Conf-Red.

² Email from Trial Chamber V to the parties of 1 March 2013 at 18h39.

³ Response, para. 44.

⁴ Public Redacted Version of "Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution's Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)", 7 February 2013, ICC-01/09-02/11-628-Red (hereinafter "Article 64(4) Application").

individuals were directly involved in withholding the exculpatory Affidavit. This is a grave act by the most senior members of the OTP, to the prejudice of Ambassador Muthaura and the fairness of proceedings against him, which, as the OTP concedes, requires the case against him to be reassessed.

4. The Defence submits that the true facts concerning the non-disclosure of the exculpatory Affidavit will substantiate its contention that “the OTP deliberately concealed the true nature of the [affidavit] from the Single Judge” and thereby willfully misled the Court regarding the reliability of Witness 4 when these same OTP Lawyers sought to hold him out to be a witness of truth.⁵ This is not merely an issue of non-disclosure of a single piece of evidence, but, the Defence submits, an issue that reveals a wider malaise, namely a “win at all costs” attitude that has permeated the OTP to a worrying and unacceptable degree.
5. There are several instances where the OTP has knowingly misled the Chamber and/or the parties on critical issues concerning the state of its evidence in this case, but the Defence will refer to only a few select examples which will give the Chamber a flavor of the overall attitude of the OTP, which has been charged with the responsibility of investigating the PEV that occurred in Kenya in 2007 and 2008. A responsibility which Mr. Ocampo took upon himself, *proprio motu*.
6. The Defence submits that these are matters which the Chamber must consider when deciding whether to grant the request of the Defence for the case against Ambassador Muthaura to be remitted to the PTC pursuant to Article 64(4).⁶

II. Information concerning the non-disclosure of the exculpatory Affidavit of Prosecution Witness 4

⁵ Article 64(4) Application, para. 18.

⁶ The Defence notes the Order scheduling a status conference and agenda (ICC-01/09-02/11-673) which requires the parties to make submissions on the scope of the Trial Chamber’s powers under Article 61(11). The Defence will address this issue in a separate filing as that issue is beyond the scope of the Leave granted by the Chamber to submit this Reply.

7. The OTP was fully aware of the nature and content of the Affidavit [REDACTED], well before filing its Article 58 Application⁷ for the issuance of a summons to appear against Ambassador Muthaura on 15 December 2010.
8. The records reveal that OTP Lawyer Mr. Adeniran Akingbolahan directly received the Affidavit from Witness 4 [REDACTED].⁸ Mr. Akingbolahan led the interview sessions with Witness 4 over a course of five days [REDACTED].
9. During this interview, Witness 4 provided an extremely detailed description of a meeting which allegedly took place at the Nairobi Club to the point of even describing the colour of the table cloth and the cutlery on the table in the room that day.⁹ His description of the meeting spanned over 15 paragraphs.¹⁰
10. During this interview, Mr. Akingbolahan went to great lengths to discuss details of the content of the exculpatory Affidavit. The details concerning this Affidavit are contained in 8 paragraphs of the statement.¹¹ The witness stated that he had verified and confirmed that the content of the Affidavit was true. The witness states that the only information which is not contained in the affidavit is [REDACTED]. The relevant paragraph of the statement reads:

[REDACTED]
11. Mr. Akingbolahan took possession of the Affidavit and questioned Witness 4 about it. Witness 4 attests at paragraph 33 of the Affidavit that he was not at the alleged Nairobi Club meeting. This was a completely opposite account of that he had just provided to the OTP during that same interview. Mr. Akingbolahan did

⁷ Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-31-Red2.

⁸ KEN-OTP-0043-0002-R05, ICC Witness Statement of Witness 4 [REDACTED]; the Defence attaches, as **Annex A**, a chart detailing the precise chain of custody of material obtained by OTP from Witness 4.

⁹ KEN-OTP-0043-0002-R05, para. 191

¹⁰ KEN-OTP-0043-0002-R05, paras. 188-202.

¹¹ KEN-OTP-0043-0002-R05, paras. 311-318.

not question the witness about this glaring contradiction – a blatant breach of Article 54(1)(a) and his responsibilities as prosecuting counsel in this case.

12. After taking possession of the exculpatory Affidavit [REDACTED], Mr. Akingbolahan had the document in his possession for a full day, until [REDACTED], when he handed the document to [REDACTED].
13. Witness 4 was interviewed again, 8 months later, [REDACTED], over a period of four days. During this interview, OTP investigators questioned him on details of the Nairobi Club meeting and gave him the opportunity to clarify his previous OTP statement (which referred to the Affidavit). In this interview, Witness 4 again falsely states he was present at Nairobi Club and attended the alleged meeting.¹² The OTP did not question him about his sworn statement that he was not present at the Nairobi Club – again, a blatant breach of Article 54(1)(a).
14. Witness 4 was interviewed a third time, [REDACTED], over a period of three days. OTP Lawyer Mr. Sam Lowery was participated in this interview. Witness 4 was again questioned about his presence at the Nairobi Club and given an opportunity to review his previous statements including his first statement where reference is made to the Affidavit; he again lied, asserting that he was present at the meeting. Mr. Lowery did not question him about the content of the exculpatory Affidavit in breach of the OTP's obligations under Article 54(1)(a).
15. On 3 June 2011, the OTP filed its "First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Other Materials to Be Relied Upon at the Confirmation Hearing" ("First Redaction Application"),¹³ wherein it sought to withhold the Affidavit of Witness 4 from the Defence. Reference to the Affidavit and the basis for requesting its non-disclosure is contained in that filing and accompanying Annex E. Mr. Luis Moreno Ocampo

¹² KEN-OTP-0051-1045, paras. 50-52.

¹³ ICC-01/09-02/11-101-Red and Annexes A to M.

signed this filing and presumably knew the implications of the document he was signing. As Senior Trial Lawyer with carriage of the case, Ms. Adesola Adeboyejo would have personally handled this filing. Despite this, the OTP sought orders allowing it to withhold the contents of the affidavit from the Defence – even to the extent of misleading the learned Single Judge as to the content, relevance and critical importance of the Affidavit. Mr. Ocampo and his Senior Trial Lawyer Ms. Adeboyejo did not disclose in Annex E to its filing, that the information the OTP sought to withhold from the Defence included the sworn statement of Witness 4 (as contained in that Affidavit) that he was not present at the Nairobi Club meeting, which amounted to potentially exonerating evidence (PEXO).

16. The OTP had yet another opportunity to review its position *vis-à-vis* Witness 4's Affidavit when it was confronted with requests from the Defence of Uhuru Kenyatta¹⁴ and Defence of General Hussein Ali, both on 8 June 2011,¹⁵ in which the defence teams requested additional information concerning the material the OTP sought to withhold from them via its First Redaction application, and requesting to be privy to the factual and legal basis of the redactions sought. Of importance, is the submission by the Defence of General Ali in this instance, that its request was crucial to *"ensure that the Defence is not unfairly disadvantaged in the preparation of its case and to avoid re-litigation of issues"*. This is exactly where we find ourselves today – re-litigating the disclosure of the exculpatory Affidavit of Witness 4 – a matter which could have brought proceedings against Ambassador Muthaura to an end in June 2011, had the OTP paid due regard to the requests from the defence pertaining to the OTP's disclosure obligations. The OTP opposed both defence requests, and again Mr. Moreno Ocampo signed off on

¹⁴ Defence Request for Additional Information Concerning the 'Prosecution's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing', and for Immediate Disclosure of Redacted Materials", ICC-01/09-02/11-109.

¹⁵ Defence Request for an Order Compelling the Prosecutor to Supply Additional Information to the Defence with regard to the "Prosecutor's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witness and Other Materials to be Relied Upon at the Confirmation Hearing", ICC-01/09-02/11-110.

this refusal of the OTP to reconsider its position on matters including the non-disclosure of the information contained in the Affidavit of Witness 4.¹⁶

17. In her decision granting the requested redactions in the First Redaction Application,¹⁷ the Single clarified [REDACTED].¹⁸ The Judge reminded [REDACTED].¹⁹ The Prosecutor, Mr. Moreno Ocampo and his OTP Senior Trial Lawyer, Ms. Adeboyejo, had the overriding obligation to be meticulous in the information they provided to the Single Judge. Instead, they chose to conceal the fact that the document they sought to withhold contained exculpatory information which contradicted the central allegation in this case against Ambassador Muthaura – the Nairobi Club meeting. This led the Majority of the Chamber to hold in the Confirmation Decision that *“The occurrence of this meeting is established, to the requisite threshold, by the testimony of Witness OTP 4, who was present therein as a Mungiki representative and who provides a detailed account thereof.”*²⁰
18. The OTP eventually disclosed the Affidavit of Witness 4 [REDACTED] – about 2 years after it received the document and more than one year after the start of the confirmation hearing. Interestingly, the Affidavit was disclosed as “incriminating” evidence and buried in a list of 133 items of evidence, as if it was routine disclosure. The Defence regrets that it has no choice but to conclude that this was done to cover-up the value of the Affidavit *vis-à-vis* the allegations against Ambassador Muthaura. The List of Material disclosed in this package – INCRIM Disclosure Package 18 – was signed by Ms. Adeboyejo.²¹ Ms. Adeboyejo

¹⁶ Prosecution’s Consolidated Response to the Defence Requests for Additional Information Concerning the Prosecution’s First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing and for Immediate Disclosure of Redacted Materials (ICC-01/09-02/11-109 and ICC-01/09-02/11-110), 30 June 2011, ICC-01/09-02/11-142.

¹⁷ 12 July 2011, ICC-01/09-02/11-165-Conf-Red.

¹⁸ *Ibid.*, para. 35.

¹⁹ *Ibid.*

²⁰ ICC-01/09-02/11-382-Conf, para 342.

²¹ See attached **Annex B**, containing the List of Material for INCRIM Disclosure Package 18.

could, at least at this juncture, have taken the step to disclose the Affidavit categorized properly as “PEXO”. If the Affidavit did not deserve to be classified as PEXO, nothing does. Additionally, the OTP could have taken the initiative to reconsider the validity of the case it was putting forward against Ambassador Muthaura, pinned to the Nairobi Club meeting. Regrettably, this did not take place. Another opportunity was cast aside, and the OTP marched on.

19. On 26 October 2012, the Muthaura Defence and the Defence for Uhuru Kenyatta communicated with Ms. Adeboyejo requesting information relevant to the non-disclosure of the exculpatory Affidavit, and for the OTP to *urgently* seek necessary authorisations from the PTC to provide the Defence with the underlying documents concerning this non-disclosure. Ms. Adeboyejo did not respond, and remained silent despite reminders from the Defence requesting the OTP to take the necessary steps to ensure full disclosure of what had transpired in relation to the non-disclosure of this critical piece of exculpatory evidence. Mr. Manoj Sachdeva, OTP Trial Lawyer, responded on 6 December 2012, more than a month later, stating, *inter alia*, that “No application for reclassification has yet been filed with the PTC”.²² Even at this point, however late in the day, the OTP could have raised their hands, in the name of integrity and transparency of proceedings and taken the right course to reassess its case against Ambassador Muthaura and at the very least to correct its misstatements at the pre-trial stage and bring the true position to the attention of the relevant Chamber of the ICC.²³ It did not. It ploughed on regardless – indifferent to the truth.

20. The Defence refers to its submissions in paragraphs 22 to 24 of its Article 64(4) Application. There would have been no case against Ambassador Muthaura if

²² See **Annex C**, containing the referenced letters from the Kenyatta Defence and emails from the Muthaura Defence.

²³ See Joint Defence Application for an Order to the Prosecutor for the provision of a list containing the bar memberships and good standing status of Prosecution trial lawyers expected to make submissions at trial and Request that the Trial Chamber promulgate a protocol of professional ethics applicable to Prosecution lawyers, 17 January 2013, ICC-01/09-02/11-603, para. 19.

not for the alleged Nairobi Club meeting and the testimony of Witness 4 – as the OTP itself concedes. The OTP went out of its way to ensure that this meeting remained on the table “at all costs”, including by deliberately not disclosing to the Defence that [REDACTED] contradicted their star-witness, Witness 4 – information they had in their possession six whole months before the confirmation hearing. This non-disclosure, the Defence is compelled to say, was deliberate. [REDACTED]. A blatant breach, say the Defence, of the OTP’s Article 54(1)(a) statutory obligations. Ms. Adeboyejo participated in this interview [REDACTED]. No evidence controverting the evidence of Witness 4 was going to be pursued by the OTP. Nor was it.

21. On [REDACTED] 2012, the OTP interviewed [REDACTED]. The evidence of this witness was disclosed to the Defence for the first time eight months later. Witness 4’s evidence concerning the Nairobi Club meeting was that [REDACTED]. In his interview to the OTP in [REDACTED] 2012, when asked if he ever went to Nairobi Club he responded [REDACTED] *no [...]*”. The Defence submits that the OTP contacted this witness [REDACTED] in order to secure evidence it believed could keep the Nairobi Club meeting as alleged by Witness 4, a live issue in this trial, [REDACTED]. Ms. Adeboyejo likewise was present and participated in this interview.
22. On 7 February 2013, the Defence filed its Article 64(4) Application. On 14 February 2013, the parties were summoned to a status conference wherein the same issues concerning the non-disclosure of the exculpatory evidence of Witness 4 were discussed. The OTP team, led by Ms. Adeboyejo and comprising Mr. Manoj Sachdeva and Mr. Sam Lowery, who all had the opportunity to turn their mind to the exculpatory Affidavit of Witness 4 – were present. These OTP lawyers could, even at that point, have indicated to the Chamber that they accepted that they had wrongly withheld the evidence pointing to Ambassador

Muthaura's innocence. Instead, Ms. Adeboyejo and her team sat tight on their hands and did not even concede that an April 2013 trial date was not viable if the rights of the Defence were to be respected. Nor did she highlight to the Chamber the exceptional situation of Ambassador Muthaura's case – and that it should be reviewed by the PTC. Nor, of course, was there any attempt to correct the many misstatements made by the OTP vouching for the credibility and veracity of Witness 4's account as presented at the confirmation hearing.

23. The Defence submits that despite having full, direct knowledge of the existence and content of the exculpatory Affidavit of Witness 4 as described in paragraphs 7-12 above, Mr. Moreno Ocampo, Ms. Adeboyejo and Mr. Akingbolahan individually made both oral and written submissions to the Judges of the PTC concerning the credibility and consistency of Witness 4's evidence, knowing it to be false.²⁴ The Defence refers to the following submissions of Ms. Adeboyejo to the Pre Trial Chamber during the confirmation hearing as an example :

*24 To be clear, the Prosecution has complete confidence in the
25 credibility of all the witnesses we have put before this Court, and here
1 we're not just talking about any witnesses but about all of our
2 witnesses. If we didn't, we wouldn't present them. It's that simple.
3 The Prosecution takes any and all allegations made against its witnesses
4 very seriously, including any allegations that might come from the
5 Defence. The Prosecution in exercise of its obligation investigates such
6 allegations diligently and carefully.*²⁵

24. It is noteworthy, with respect to Ms. Adeboyejo, that she has previously been reprimanded by an ICTR Chamber and cautioned *"to refrain from making*

²⁴ 21 September 2011 Transcript, ICC-01/09-02/11-T-4-ENG ET, p. 51-54; 22 September 2011 Transcript, ICC-01/09-02/11-T-5-CONF-ENG ET, p. 14, line 20 to p.16, line 13 and p. 40, lines 30-20; 23 September 2011 Transcript, ICC-01/09-02/11-T-6-ENG ET, p. 17, line 18 to p.18, line 4 and p. 45, lines 8-13; 5 October 2011 Transcript, ICC-01/09-02/11-T-15-CONF-ENG ET, p. 7, lines 2-5 and p. 14, lines 9-21; Prosecution's Written Submissions Following the Hearing on the Confirmation of Charges, 28 October 2011, ICC-01/09-02/11-361, paras. 63, 66–67; Prosecution's Consolidated Response to Uhuru Kenyatta and Francis Muthaura Applications for Leave to Appeal the Decision on the Confirmation of Charges (ICC-01/09-02/11-384-Red and ICC-01/09-02/11-385), 3 February 2012, ICC-01/09-02/11-396, para. 26.

²⁵ 22 Sept 2011 Confirmation of Charges Hearing Transcript, ICC-01/09-02/11-T-5-CONF-ENG, pp. 7–8.

erroneous and potentially misleading submissions". In that case,²⁶ the ICTR Chamber found that the erroneous submissions of Ms. Adeboyejo could have occasioned a miscarriage of justice and held that the criteria for reconsideration had therefore been satisfied on the issue of the admissibility of certain evidence. The Defence complaint in this instance, is not dissimilar. The ICTR Chamber held:

15. It is now the Chamber's belief that its Oral Decision admitting the documents contained in Exhibit P. 33 was based on the mistaken assumption that these were the statement and confession of Witness YAQ who has previously testified for the Prosecution in this case and whose demeanour and credibility the Chamber has had the opportunity to assess. In particular, the Chamber notes the following exchange between the Presiding Judge and the Prosecution Counsel:

MR. PRESIDENT:

Madam Prosecutor, could you kindly tell us -- one of these witnesses gave testimony in this court?

MS. ADEBOYEJO:

Yes, Your Honour. Yes, directly gave evidence before this Trial Chamber, Witness YAQ, Your Honours.¹⁷

16. Having carefully examined the English and French versions of the documents contained in Exhibit P. 33,¹⁸ the Chamber notes that the declarant in both the witness statement and

the confession is not Witness YAQ. Rather, the declarant in both documents is YAQ's brother, who has not testified in the instant case.

17. In the Chamber's view, by pointing out that the declarant in the documents contained in Exhibit P. 33 was someone other than a witness who has previously testified in this case, the Defence has successfully demonstrated the existence of new information which was unknown to the Chamber at the time it rendered its Oral Decision. The Defence has also shown that the decision to admit the documents contained in Exhibit P. 33 could occasion a miscarriage of justice. The criteria for reconsideration have therefore been satisfied.

18. Finally, the Chamber has considered the Prosecution's request for sanctions and is not of the opinion that the Defence Motion is frivolous. Furthermore, the Chamber cautions the Prosecution to refrain from making erroneous and potentially misleading submissions.¹⁹

25. The Defence submits that the OTP's attempt to explain away the non-disclosure of the exculpatory Affidavit as an "error" and/or an innocent "oversight" is both duplicitous and unfair. The OTP has a duty not to make false representations to this Court. The state of affairs, as described by the Defence above, makes it abundantly clear that at all relevant times the most senior representatives of the OTP (Mr. Moreno Ocampo, Ms. Adesola Adeboyejo, Mr. Adeniran Akingbolahan) had

²⁶ *Prosecutor v Tharcisse Muvunyi*, 13 June 2006, ICTR-2000-55A-T, Decision on Muvunyi's Motion to Exclude Prosecution Exhibit 33 (attached as Annex D to this filing).

knowledge of the nature and content of the exonerating evidence of Witness 4 prior to, during and after the confirmation of charges hearing.

26. Further, Mr. Lowery, OTP Trial Lawyer, had occasion to discuss the content of the exonerating Affidavit with Witness 4 when he interviewed him [REDACTED].
27. All of these OTP Trial Lawyers wilfully took part at various points in reviewing the nature and content of the exonerating Affidavit of Witness 4. To pass off what took place as an “error” and mere “oversight” attributable only to a junior “reviewer” is to excuse the inexcusable.

III. Further Submission to demonstrate that the non-disclosure of the exculpatory evidence was not a simple oversight

28. The Defence are cognisant of the fact that it is making a serious allegation of impropriety against the OTP. It does not do this lightly. However, it is compelled to make the submissions contained in this filing. Mistakes can happen, but there has been a catalogue of impropriety and errors on the part of the OTP in this case that point in one direction. Not to mere incompetence, but to a deliberate attempt to “win at all costs” and a stubborn refusal to pause and re-evaluate not only a weak case, but an absolutely false one. A few select examples of such conduct are detailed below to provide the Chamber with a reference point that may shed light on how and why the Affidavit was not disclosed and, crucially, how it came that the OTP, having possession of that Affidavit, made various averments regarding the consistency and credibility of Witness 4 that were known to be false at the time those averments were made to the Defence and the Court.²⁷

²⁷ The Defence underscores that it is revealing to note that even when the exculpatory statement was disclosed to the Defence, the OTP remained inactive and did not consider it had any ethical obligations to remedy the issue by bringing it to the attention of the Pre-Trial or Trial Chamber. Nor did the OTP suggest an Article 64(4) referral or other remedy that it ought to have done as the entity charged by the Assembly of State Parties to fairly investigate and prosecute. It has been entirely reactive to Defence submissions and indeed characterised the

(a) Misrepresentations in Prosecution filings and communications

29. [REDACTED].²⁸ The Defence contends that the allegations of bribery can only be considered a smoke screen when considering why Witness 4 has been dropped. It is pertinent to note that the statement of the witness in his Affidavit predated any allegations of attempted bribery by third-parties. Additionally, the Defence cannot underscore sufficiently that this witness's account was contradicted by all OTP witnesses in the most critical respects. Put in simplest terms this is evidenced by the fact that all OTP witnesses that Witness 4 says he attended the State House and Nairobi Club meeting with, state he did not. As far as the Nairobi Club meeting is concerned, not only OTP witnesses state that Witness 4 did not attend with them, they state they did not attend either. The account was false from start to finish. Four months after the Confirmation Decision Witness 4 finally confessed that he lied about the State House meeting. All the while [REDACTED] the OTP knew fully well he was lying about the Nairobi Club meeting. Regardless, the OTP persisted in clutching to the credibility of a witness it knew was in tatters.

30. Ms. Adeboyejo has continued to put forward the false allegations made by Witness 4, in a manner which supports the Defence submissions that Ms. Adeboyejo was party to the campaign to conceal Witness 4's Affidavit. In the course of normal *inter partes* communications, on 17 February 2013, the Defence requested the translations of a number of audio recordings that the OTP had disclosed. On 21 February 2013, Ms. Adeboyejo not only responded with an indication that the Defence will not be receiving these recordings for another 15 to 16 weeks, [REDACTED].²⁹

exculpatory statement as incriminatory. Simply put, it should not require the Defence to expose the Prosecution for the Prosecution to do the right thing.

²⁸ [REDACTED].

²⁹ Statement of OTP Witness 4, KEN-OTP-0043-0002-R05, paras. 191, 194-199.

31. [REDACTED].³⁰ [REDACTED]. In order to justify its request, the OTP alleged that the witnesses have been tampered with by persons linked to the Accused. At page 7 the OTP make the following submissions:

[REDACTED]

32. [REDACTED]³¹ [REDACTED].

33. [REDACTED].

34. [REDACTED]. What the Defence does presume, is that the OTP would, at a bare minimum, have sought to verify [REDACTED]. The OTP did no such thing.

35. A review [REDACTED] reveals, the Defence contends, a very dangerous style of investigation by the OTP that is prejudicial to the rights of the Accused and contrary to the truth finding process upon which the proper administration of justice depends.³² [REDACTED].

36. [REDACTED].

37. [REDACTED].

38. [REDACTED]. The huge focus on “consciousness of guilt” is, the Defence submits, a distraction from the real issue of the sufficiency of evidence in this case. Concern over the paucity of reliable evidence on the central issue of the responsibility for the PEV in Kenya in Nakuru and Naivasha has, the Defence submits, led the OTP to not disclose the Affidavit of Witness 4 and to knowingly and repeatedly make false submissions regarding the credibility of its witness. The OTP had to cling on to the account of Witness 4 at confirmation because without it there would be no case against Ambassador Muthaura. The “win at all

³⁰ ICC-01/09-02/11-636-Conf-Red.

³¹ ICC-01/09-02/11-636-Conf-Red, footnote 19.

³² [REDACTED].

costs” attitude prevailing in the OTP would not allow the OTP to stand back and reconsider its case and to withdraw the case against the Ambassador. While the OTP does not object to the case against Ambassador Muthaura being remitted back to the PTC. A confident OTP that takes its statutory responsibilities seriously would, the Defence submits, have no hesitation in seeking to withdraw the case. The concession by the OTP that the case against Ambassador Muthaura necessitates reconsideration by the PTC cannot be viewed as a vindication of prosecutorial good faith. The Defence submits that it ought not to have taken the Article 64(4) Application to obtain this concession by the OTP.

(b) OTP’s failure to disclose matters concerning Witness 152 to Kenyatta Defence

39. On 1 March 2013, the Defence wrote to the OTP requesting the disclosure [REDACTED] OTP Witness 152. The OTP replied on 4 March that the following items disclosed under Rule 77 relate “*exclusively*” to Witness 152: KEN-OTP-0064-0360, KEN-OTP-0082-0290 KEN-OTP-0082-0697 and KEN-OTP-0082-0687.³³ No more is said by the OTP. Upon reviewing the disclosure notes in which these items are included,³⁴ the Defence discovered that the OTP had disclosed two of these items to the Defence (KEN-OTP-0064-0360 and KEN-OTP-0082-0290) on 11 February 2013 stating expressly that they relate to [REDACTED] Ms. Adeboyejo’s signature appears at the end of the list.

40. The Defence brought this issue to the OTP’s attention on the same day, 4 March, explaining that the evidence of Witness 152 had been wrongly linked to [REDACTED] and that this “*has misled the defence significantly in our investigations and trial preparations*”.³⁵ Up to the date of this filing, the OTP has **not** notified the Kenyatta Defence of this misinformation, so as to ensure that the fair

³³ The referenced email is attached as **Annex H** to this filing.

³⁴ Attached as **Annex G** to this filing.

³⁵ See **Annex H**.

trial rights of Mr. Kenyatta are respected.³⁶ It is not for the Defence of a co-Accused to convey information that should properly be conveyed by the prosecuting authority. What could, perhaps, be described as a casual or negligent approach to such matters when considered individually takes on a still more worrying hue when considered cumulatively. A pattern emerges that appears, to the Defence, to be evidence of either massive systemic failures at the heart of the OTP's internal processes or deliberate decisions of keeping PEXO evidence or evidence unfavourable to the OTP away from the defence at all costs. This is precisely what happened in the non-disclosure and false statements made at the confirmation hearing and in written submissions by the OTP, regarding what it contended was the "consistent" and credible account of Witness 4.

41. The Defence submits that the matters stated above are relevant to the issues raised in the Article 64(4) Application to demonstrate that the non-disclosure of exculpatory evidence was not an oversight, and in fact was part of a deliberate pattern of violations on the part of the OTP that has severely prejudiced the fair trial rights of Ambassador Muthaura and which necessitate the relief sought in the Defence Article 64(4) Application.³⁷

Respectfully Submitted,



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Lead Counsel, Muthaura Defence
Dated this 8th Day of March 2013, At The Hague, the Netherlands

³⁶ See **Annex I**, containing a copy of the email communication between the two defence teams on this matter.

³⁷ At the SCSL, the Prosecution relied on a pattern of violations alleged to demonstrate that Mr. Courtenay Griffiths, Lead Counsel for Mr. Charles Taylor at the Trial stage, had deliberately disclosed the identities of Prosecution witnesses. Although the Chamber eventually found that the disclosure by Mr. Griffiths was inadvertent and that the alleged "pattern of conduct" had not been made out to substantiate the intent to knowingly and willfully interfere with the administration, the fact remains that "pattern of conduct" was a matter which the court did consider. (Judgment in Contempt Proceedings, In the Matter of Contempt Proceedings Arising from the case of The Prosecutor v Charles Ghankay Taylor, SCSL-12-01-T (466-491), 19 October 2012, paras. 16 and 44).