

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 8 March 2013

**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 the Defence Reply to the “Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber”**

**Source: Defence for Uhuru Muigai Kenyatta**

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

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## **REGISTRY**

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## I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta ("Defence") submits its reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber" ("Response").<sup>1</sup>
2. This filing is submitted confidentially, as it contains references to the evidence of protected witnesses. The Defence will submit a public redacted version in due course.

## II. PROCEDURAL HISTORY

3. The hearing on the confirmation of charges ("Confirmation Hearing") took place between 21 September and 5 October 2011. On 23 January 2012, the Pre-Trial Chamber ("PTC") issued the "Decision on the Confirmation of Charges" ("Confirmation Decision"), confirming the charges against Ambassador Muthaura and Mr Kenyatta, and refusing to confirm the charges against General Ali.<sup>2</sup>
4. On 5 February 2013, the Defence submitted its "Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration" ("Article 64(4) Application").<sup>3</sup>

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<sup>1</sup> ICC-01/09-02/11-664-Conf-Red.

<sup>2</sup> ICC-01/09-02/11-382-Conf.

<sup>3</sup> ICC-01/09-02/11-622.

5. On 7 February 2013, the Defence for Amb. Muthaura ("Muthaura Defence") submitted its "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)" ("Muthaura Article 64(4) Application").<sup>4</sup>
6. On 20 February 2013, the Muthaura Defence submitted an addendum to its Article 64(4) Application.<sup>5</sup>
7. On 25 February 2013, the Prosecution submitted the Response.
8. On 1 March 2013, both the Muthaura Defence and the Kenyatta Defence submitted applications for leave to reply to the Response.<sup>6</sup>
9. On 1 March 2013, the Prosecution submitted its "Response to the Muthaura Defence Application for Leave to Reply to the 'Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber'", in which it requested the Chamber to deny the Muthaura Leave Application.<sup>7</sup>
10. On the same day, at 18:39 by email, the Chamber granted the Muthaura and Kenyatta Leave Applications.

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<sup>4</sup> ICC-01/09-02/11-628-Conf.

<sup>5</sup> ICC-01/09-02/11-656-Conf.

<sup>6</sup> ICC-01/09-02/11-667 ("Muthaura Leave Application"); ICC-01/09-02/11-669 ("Kenyatta Leave Application").

<sup>7</sup> ICC-01/09-02/11-670.

### III. SUBMISSIONS

- (A) The Prosecution's submission that the Article 64(4) Application "has the potential to seriously affect the orderly conduct of all future and pending cases before the court"<sup>8</sup>
11. The Prosecution submits that if the Confirmation Decision is referred back to the Pre-Trial Chamber, it "has the potential to seriously affect the orderly conduct of proceedings in all pending and future cases before the Court."<sup>9</sup> The Prosecution argues further that reconsideration of the confirmation of charges "would merely serve to delay proceedings."<sup>10</sup>
  12. The Prosecution's floodgate policy argument fails to take into account the unique and exceptional circumstances of this case, namely the retraction of key evidence by a witness after the confirmation of charges and the Prosecution's failure to disclose key exculpatory evidence in its possession at the time of the confirmation hearing.
  13. The Defence submits that in the present case, it is illogical and inconsistent for the Prosecution to argue that policy considerations should prevent the remittance of the Confirmation Decision in respect of Mr Kenyatta, and at the same time concede that the case of his co-accused falls for redetermination under Article 64(4) of the Rome Statute ("Statute").

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<sup>8</sup> ICC-01/09-02/11-664-Conf-Red, para. 2.

<sup>9</sup> ICC-01/09-02/11-664-Conf-Red, para. 2.

<sup>10</sup> ICC-01/09-02/11-664-Conf-Red, subheading (d), page 21.

14. As the Prosecution notes, “[t]he confirmation hearing is ‘designed to protect the rights of the Defence against wrongful and wholly unfounded charges.’”<sup>11</sup> Wider floodgate policy issues concerned with the conduct of future cases must not be permitted to impact upon the necessary factual and legal determinations to be made in the present case nor upon Mr Kenyatta’s fundamental right to a fair trial. The need to ensure the orderly conduct of proceedings in the present case is paramount.

15. Furthermore, the Defence submits that reconsideration of the Confirmation Decision constitutes the most expeditious and fair course of action in the circumstances. Hypothetical policy concerns about the impact of the Chamber’s decision upon future cases must not be permitted to influence the proper and comprehensive assessment of the critical issues in this case.

(B) The Prosecution’s submission that the Article 64(4) Application seeks reconsideration of the Confirmation Decision “simply because the evidence has evolved since the confirmation of charges hearing”

16. The Prosecution argument that the issue before the Chamber is “simply because the evidence has evolved since the confirmation of charges hearing”<sup>12</sup> is misleading and incorrect. The Defence has previously addressed the impact of the changing nature of the Prosecution’s case since confirmation.<sup>13</sup> In addition to the impact of the substantially different case presented by the Prosecution since confirmation, the Article 64(4) Application is based upon the following substantial related issues, which the Prosecution fails to address in its Response:

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<sup>11</sup> ICC-01/09-02/11-664-Conf-Red, para 43; citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, para. 37; *Prosecutor v. Katanga & Ngudjolo*, ICC- 01/04-01/07-717, para. 63.

<sup>12</sup> ICC-01/09-02/11-664-Conf-Red, Submissions I, p. 6.

<sup>13</sup> ICC-01/09-02/11-622, paras 20-31.

- a. That the arguments advanced by the Prosecution at the Confirmation Hearing were based upon false evidence;<sup>14</sup>
  - b. That the case advanced by the Prosecution in its Submissions on the Confirmation Hearing was false;<sup>15</sup>
  - c. That the PTC was thereby caused to come to erroneous conclusions,<sup>16</sup> including rejecting wholly credible Defence evidence;<sup>17</sup> and
  - d. The Prosecution advanced arguments as to the credibility of its case and the consistency of its evidence, when in possession of contradictory evidence.<sup>18</sup>
17. By incorrectly limiting the remit of the Article 64(4) Application, the Prosecution has failed to grapple with the fundamental impact on the integrity of the Confirmation Hearing caused by the falsity of the testimony provided by

<sup>14</sup> In its oral submissions at the Confirmation Hearing, the Prosecution advanced arguments based upon false evidence in respect of (a) the alleged meeting at State House on 26 November 2007 (ICC-01/09-02/11-T-5-CONF-ENG, p. 22, lines 17-25; p. 23, lines 1-3; ICC-01/09-02/11-T-15-CONF-ENG, p. 10, lines 11-15; ICC-01/09-02/11-T-15-CONF-ENG, p. 14, lines 22-25; p. 15, lines 1-10); and (b) the alleged meeting at the Nairobi Members' Club on 3 January 2008 (ICC-01/09-02/11-T-4-ENG, p. 52 lines 13-25; p. 53, lines 1-25; ICC-01/09-02/11-T-5-CONF-ENG, p. 14, lines 20 – 25; p. 15, lines 1-25; p. 16, lines 1-23; p. 26, lines 23-25; p. 27, lines 1-6; p. 38, lines 2-6; p. 39, lines 8-17; p. 40, lines 13-25; ICC-01/09-02/11-T-6-ENG, p. 15, lines 22-25; p. 16, lines 1-18; p. 16, lines 24-25; p. 17, lines 1-17; p. 17, lines 18 – 25; p. 18, lines 1-13; p. 18, lines 14-25; p. 19, lines 1-3; p. 19, lines 4-25; p. 20, line 1; p. 20, lines 5-9; p. 22, lines 18-20; p. 45, lines 8-19).

<sup>15</sup> In its Submissions on the Confirmation Hearing, the Prosecution continued to assert that the evidence of OTP-4 supported its case, and that any challenge to the veracity of this evidence was "baseless and flawed", ICC-01/09-02/11-361, para.361. However, OTP-4 has issued retractions and exhibited a number of worrying inconsistencies in respect of key Prosecution allegations, including (a) admitting to lying to the Prosecution regarding his presence at an alleged meeting between politicians and Mungiki members at the Yaya Centre on 17 November 2007 (KEN-OTP-0067-0604\_R01, paras 7-9); (b) admitting to lying to the Prosecution and the Waki Commission regarding his presence at an alleged meeting between politicians and Mungiki members at State House on 26 November 2007 (KEN-OTP-0067-0604\_R01, paras 10-13); and (c) initially indicating that he was not present at the Nairobi Members' Club on 3 January 2008, but later stating that he did attend (KEN-OTP-0043-0083\_R01, para. 33; KEN-OTP-0043-0002\_R01, paras 188-208; KEN-OTP-0051-1045\_R01, paras 36, 50-54; KEN-OTP-0067-0604\_R01, paras 14-15).

<sup>16</sup> In particular : (a) the alleged meeting at State House on 26 November 2007, ICC-01/09-02/11-382-Conf, paras 310, 311, 325; and (b) the alleged meeting at the Nairobi Members' Club on 3 January 2008, CC-01/09-02/11-382-Conf, paras. 341, 342, 375, 376.

<sup>17</sup> In particular, the PTC rejected Defence evidence concerning: (a) the alleged meeting at State House on 26 November 2007, ICC-01/09-02/11-382-Conf, paras 316-331; and (b) the alleged meeting at the Nairobi Members' Club on 3 January 2008, CC-01/09-02/11-382-Conf, paras 346-359.

<sup>18</sup> ICC-01/09-02/11-T-5-CONF-ENG, p. 7, lines 24-25; p. 8 lines 1-6; ICC-01/09-02/11-T-15-CONF-ENG ET, p. 5, lines 18-23; p. 6, lines 2-3; ICC-01/09-02/11-T-15-CONF-ENG, p. 9, lines 22-25; p. 10, lines 1-25; p. 11, lines 1-12.

OTP-4, one of the three key witnesses relied upon by the Prosecution at the Confirmation Hearing, and the impact of the non-disclosure of exculpatory evidence which supported the submissions made by the Defence on the inconsistency of this witness's evidence.<sup>19</sup>

18. It is disingenuous of the Prosecution in its Response to seek merely to minimise the issues surrounding OTP-4.<sup>20</sup> The sobering reality remains that the Prosecution had in its possession prior to the Confirmation Hearing, exculpatory evidence, which completely undermined the credibility of one of its three core witnesses. In essence, the Prosecution has systematically failed in its approach to case investigation and the verification of evidence. The Prosecution's failure in respect of OTP-4 now casts doubt upon its approach to the disclosure of potentially exculpatory material in its possession at the time of the Confirmation Hearing in respect of the other two witnesses relied upon, namely Witnesses 11 and 12.
19. This fraud on the proceedings renders the Confirmation Decision necessarily unsound and affects the entirety of the proceedings before the Court. By seeking to continue to trial before this matter is resolved in accordance with the proper procedures of the Court, the Prosecution is seeking to subvert the purpose and aim of the confirmation process.

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<sup>19</sup> ICC-01/09-02/11-T-10-ENG, p. 21, lines 9-25; p.22-24; p. 25, lines 1-3; ICC-01/09-02/11-372 paras 26-32.

<sup>20</sup> ICC-01/09-02/11-664-Conf-Red, para. 15.



(C) The inconsistent position taken by the Prosecution over the effect of the withheld exculpatory evidence in the case of Amb. Muthaura as compared to that of Mr Kenyatta, and the Prosecution's submission that the remaining evidence cited in the Confirmation Decision provided "substantial grounds to believe" that Mr Kenyatta committed the crimes charged

20. Amb. Muthaura and Mr Kenyatta are charged as indirect co-perpetrators,<sup>21</sup> and the Prosecution has consistently framed its case as a common plan involving the two Accused.<sup>22</sup> The Prosecution alleges that Amb. Muthaura and Mr Kenyatta made "essential contributions" to a common plan which "resulted in the realisation of the objective elements of the crimes" at a meeting at the Nairobi Members' Club on 3 January 2008.<sup>23</sup> According to the Prosecution's analysis, Mr Kenyatta and Amb. Muthaura colluded to exercise a level of control over, respectively, the Mungiki and the police forces, such that the allegedly planned and coordinated post-electoral violence could take place. As alleged, the two roles are interdependent, and the realisation of the alleged common plan necessarily relies upon the contributions of both Accused. The alleged role, therefore, of Mr Kenyatta cannot be considered in abstraction, contrary to the position set out in the Response.

21. The Defence submits that it is illogical for the Prosecution to argue that the case against Amb. Muthaura may be remitted for reconsideration while the case against Mr Kenyatta must stand. Any decision regarding the liability of Mr Muthaura would necessarily, on the Prosecution's own analysis, impact upon

<sup>21</sup> ICC-01/09-02/11-591; ICC-01/09-02/11-591-Conf-AnxA.

<sup>22</sup> ICC-01/09-31-Red2, paras 5, 16, 18, 25, 26, 29; ICC-01/09-02/11-01, paras 35, 36, 37, 39, 44, 45, 56; ICC-01/09-02/11-280-AnxA, paras 19, 20, 21, 26, 35, 44, 45, 76, 77, 78, 80, 83, 89, 93; ICC-01/09-02/11-361, para. 38; ICC-01/09-02/11-T-6-ENG, p. 15, lines 22-25; p. 16, lines 1-18; p. 17, lines 18-25; p. 18, lines 1-13; p. 18, lines 14-25; p. 19, lines 1-3; p. 19, lines 4-25; p. 20, line 1.

<sup>23</sup> ICC-01/09-02/11-T-6-ENG, p. 15, lines 22-25; p. 16, lines 1-18; p. 17, lines 18-25; p. 18, lines 1-13; p. 18, lines 14-25; p. 19, lines 1-3; p. 19, lines 4-25; p. 20, line 1.

any determination of Mr Kenyatta's liability. In short, the mode of liability as confirmed cannot be maintained against Mr Kenyatta without Amb. Muthaura.

22. Furthermore, the Defence takes issue with the Prosecution's submission that even if the PTC would have discarded OTP-4's evidence in its entirety, the remaining evidence cited in the Confirmation Decision establishes "substantial grounds to believe" that Mr Kenyatta committed the crimes charged.<sup>24</sup>
  
23. In the absence of OTP-4's evidence, the Prosecution's allegations in respect of the meetings on 26 November 2007 at State House, Nairobi ("26 November meeting"), and 3 January 2008 at the Nairobi Members' Club ("3 January meeting"), are shown to be utterly unsubstantiated. The PTC supported its determination in respect of the 26 November and 3 January meetings almost exclusively with the evidence of OTP-4.<sup>25</sup> Any further evidence cited by the PTC in support of these allegations was sourced from anonymous hearsay or anonymous witness summaries,<sup>26</sup> which cannot alone confirm the specific facts and circumstances of a case.<sup>27</sup> The Defence submits that absent these two allegations, which formed two of the three central pillars of the Prosecution's case as regards Mr Kenyatta's individual criminal responsibility in the Confirmation Decision, no reasonable PTC could have found substantial grounds to believe that Mr Kenyatta committed the crimes charged.
  
24. At paragraph 23 of the Response, the Prosecution contends that absent the evidence of Witness OTP-4, the PTC would still have confirmed the case against

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<sup>24</sup> ICC-01/09-02/11-664-Conf-Red, paras 8, 9, 23, 24, 44, 45.

<sup>25</sup> ICC-01/09-02/11-382-Conf at paras. 310-17 and 341-48.

<sup>26</sup> In terms of the 26 November meeting, OTP-4 was the only 'direct' witness referred to by the PTC, with all other evidence provided by anonymous hearsay from Witnesses 11 and 12 and an anonymous hearsay summary from OTP-6, ICC-01/09-02/11-382-Conf, paras. 310-32. In respect of the 3 January meeting, the PTC refers only to the 'direct' evidence of OTP-4 and the anonymous hearsay of OTP-1 in support of the meeting itself (the Defence notes that Witnesses 11 and 12 were cited to once, but it pertained to their statements dealing with the closeness of the Kikuyu and Meru languages), ICC-01/09-02/11-382-Conf, para 344.

<sup>27</sup> ICC-01/04-01/07-717, paras 138-140 and ICC-01/04-01/06-803, paras. 99-106.

Mr Kenyatta, and that the Defence “ignores the totality of the evidence”.<sup>28</sup> In an attempt to support this submission, the Prosecution cites six examples almost exclusively from OTP-11 and OTP-12. The Defence submits that the evidence of OTP-11 and OTP-12 alone cannot support the charges against Mr Kenyatta. At the Confirmation Hearing, the Defence provided detailed submissions about the lack of credibility of OTP-11 and OTP-12.<sup>29</sup> It is illogical for the Prosecution to suggest that the removal of OTP-4 from confirmation process would not have caused OTP-11 and OTP-12’s credibility and their accounts generally to be placed under closer scrutiny. That OTP-4 provided such a detailed, ‘first-hand’ account of the key allegations was a factor that enabled the PTC to rely on the evidence of OTP-11 and OTP-12 to corroborate his allegations and to provide supplementary – not substantial – evidence in support of the Confirmation Decision. By submitting that the charges could have been confirmed on the basis of the evidence of OTP-11 and OTP-12, the Prosecution ignores the fact that the removal of OTP-4 fundamentally alters the complexion of the case before the PTC. For example, without OTP-4 the Prosecution case rests implausibly on two former Mungiki members, who are known to each other, who gave previous exculpatory statements to the Defence, who had time before seeing the Prosecution and after seeing the Defence to discuss their proposed testimony, and against whom the Defence has credible arguments with respect to their attempts to extort money in exchange for the intimidation of witnesses, and their defection to the Prosecution when their extortion demands were not met. Accordingly, the PTC’s analysis of OTP-11 and OTP-12 in a confirmation hearing without OTP-4 would demand that the evidence of the former be subjected to a level of scrutiny higher than that originally carried out in Confirmation Hearing.

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<sup>28</sup> ICC-01/09-02/11-664-Conf-Red, para. 23.

<sup>29</sup> ICC-01/09-02/11-T-10-ENG, p. 15, lines 11-25; p. 16-20; p.21, lines 1-8.

25. With respect to the evidence cited by the Prosecution at paragraph 23 of the Response as being capable, absent the evidence of OTP-4, of meeting the substantial grounds to believe threshold, the Defence submits that it is so fundamentally unreliable that no PTC could reasonably have relied upon it alone to confirm the charges against Mr Kenyatta. In order to exhibit the insufficiency of the Prosecution's evidence, the Defence makes the following observations:

- a. *The allegation regarding Mr Kenyatta's role at the meeting at Nairobi State House "on or about 30 December".*<sup>30</sup> The Defence notes that the PTC did not find that a meeting occurred at an ambiguous date as alleged by the Prosecution, rather it found that the meeting occurred "on 30 December 2007".<sup>31</sup> Further, it is clear from the evidence of OTP-11 that he was not present at the alleged meeting,<sup>32</sup> despite the fact his account is cited as the main evidence in support of this allegation over that of OTP-12, who OTP-11 alleges attended with OTP-152.<sup>33</sup> Remarkably, OTP-12 does not assert his presence at the alleged meeting, or provide as detailed an account as OTP-11, and, in addition to undermining the credibility of OTP-11's account, he fails to cite the source of his information.<sup>34</sup> The evidence of OTP-6 is an anonymous hearsay summary.<sup>35</sup>
- b. *The allegation regarding Mr Kenyatta's "payments to secure Maina Njenga's approval for Mungiki members to be used to carry out the retaliatory attacks."*<sup>36</sup> The hearsay evidence of OTP-11 suggests that he inferred Mr Kenyatta's alleged involvement from the fact that another individual had told him

<sup>30</sup> ICC-01/09-02/11-664-Conf-Red, p.12; ICC-01/09-02/11-382-Red, paras 333-336.

<sup>31</sup> ICC-01/09-02/11-382-Conf, para. 333.

<sup>32</sup> KEN-OTP-0052-1506 at 1514, line 308.

<sup>33</sup> KEN-OTP-0052-1506 at 1514, lines 301-303.

<sup>34</sup> KEN-OTP-0060-0405 at 0408, 0419.

<sup>35</sup> KEN-OTP-0053-0015 at 0019.

<sup>36</sup> ICC-01/09-02/11-664-Conf-Red, p.13; ICC-01/09-02/11-382-Red, paras 363-365.

that the money came from State House.<sup>37</sup> Similarly, with OTP-12, the source of his information is unknown.<sup>38</sup>

- c. *The allegation regarding Mr Kenyatta's "provision of cash to local coordinators in Nakuru and Naivasha".*<sup>39</sup> This allegation is necessarily weakened by the fact that the PTC relies on OTP-4's account of the 3 January meeting in support of its overall determination on this issue.<sup>40</sup> It is also the case that the evidence provided OTP-11 and OTP-12 in respect of these allegations is either hearsay, or it is impossible to discern whether the witness is speaking from personal recollection or not.<sup>41</sup>
- d. *The allegation regarding "Mr Kenyatta's payments to the Mungiki leader [REDACTED]."*<sup>42</sup> OTP-12's evidence, which states that Mr Kenyatta came to the Blue Post Hotel and personally handed over the money, is second-hand hearsay.<sup>43</sup> OTP-11's supposedly corroborative account does not specify which individual met [REDACTED],<sup>44</sup> failing even to state that Mr Kenyatta attended the Blue Post Hotel as alleged by OTP-12,<sup>45</sup> and is also based on second-hand evidence.<sup>46</sup>
- e. *The allegation regarding "Mr Kenyatta's instructions to [REDACTED] to recruit 'as many people as possible for the retaliatory attacks.'"*<sup>47</sup> It is impossible

<sup>37</sup> KEN-OTP - 0052 - 1292, at 1296.

<sup>38</sup> KEN-OTP - 0060 - 0272, at 0297.

<sup>39</sup> ICC-01/09-02/11-664-Conf-Red, p. 13; ICC-01/09-02/11-382-Red, paras 385-386, 389, 393.

<sup>40</sup> ICC-01/09-02/11-385-Red, para. 385; KEN-OTP - 0043 - 0002, at 0041.

<sup>41</sup> KEN-OTP-0052-1451 at 1463; KEN-OTP-0052-1469\_R01 at 1482; KEN-OTP-0060-0385 at 0389-0390; KEN-OTP-0060-0112 at 0126; KEN - OTP - 0052 - 1469, at 1485; KEN - OTP - 0052 - 1487, at 1494; KEN - OTP - 0060 - 0112, at 0118; KEN - OTP - 0052 - 1469, at 1483 - 1485; KEN - OTP - 0052 - 1487, at 1494; KEN - OTP - 0060 - 0365, at 0373, 0375 - 0378; KEN - OTP - 0060 - 0426, at 0448; EN - OTP - 0052 - 1305, at 1309; KEN - OTP - 0052 - 1487, at 1494; KEN - OTP - 0060 - 0365, at 0371, 0378; KEN - OTP - 0052 - 1305, at 1308 - 1312; KEN - OTP - 0052 - 1487, at 1490; KEN - OTP - 0060 - 0365, at 0371 - 0373; KEN - OTP - 0060 - 0112, at 0118 - 0119; KEN - OTP - 0060 - 0371, at 0376 - 0378; KEN - OTP - 0052 - 1469, at 1483; KEN - OTP - 0052 - 1469, at 1485; KEN - OTP - 0052 - 1487, at 1494; KEN - OTP - 0060 - 0365, at 0370, 0375.

<sup>42</sup> ICC-01/09-02/11-664-Conf-Red, p. 13; ICC-01/09-02/11-382-Red, para 395.

<sup>43</sup> KEN-OTP-0060-0405 at 0413, line 276.

<sup>44</sup> KEN-OTP-0052-1305 at 1308, lines 116-117.

<sup>45</sup> KEN-OTP-0052-1305 at 1308, lines 116-123

<sup>46</sup> KEN-OTP-0052-1305 at 1308, lines 116-117.

<sup>47</sup> ICC-01/09-02/11-664-Conf-Red, p. 13; ICC-01/09-02/11-382-Red, para. 396.

to discern whether the OTP-11 is speaking from personal recollection or not.<sup>48</sup> Contrary to the assertion of the Prosecution, OTP-12 does not provide any corroborative evidence in respect of this point, rather he comments on the alleged intensification of oath-taking ceremonies.<sup>49</sup>

26. In the Confirmation Hearing, the Defence also set out clearly the reasons as to why other evidence relied upon by the Prosecution was insufficient to confirm the charges.<sup>50</sup>

27. The Defence submits that it is inconceivable that the PTC would have confirmed the case against Mr Kenyatta on the basis of the evidence of OTP-11 and OTP-12 alone. However, this determination is ultimately reserved for the PTC upon a reassessment of the evidence presented for confirmation at that stage. Where a serious miscarriage of justice has occurred due to either active concealment or sheer incompetence, such issues must be revisited in order to ensure that the fair trial rights of the Accused are upheld.

(D) The Prosecution's failure to disclose an exculpatory statement by OTP-4 does not require Mr Kenyatta's case to be referred back to the Pre-Trial Chamber for reconsideration

28. The Defence takes issue with the Prosecution's submission that its failure to disclose an exculpatory statement by OTP-4 ("OTP-4 Statement")<sup>51</sup> does not require Mr Kenyatta's case to be referred back to the Pre-Trial Chamber for reconsideration.<sup>52</sup>

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<sup>48</sup> KEN-OTP-0052 - 1292, at 1304.

<sup>49</sup> KEN-OTP-0060 - 0365, at 0376; KEN - OTP - 0060 - 0405, at 0422.

<sup>50</sup> ICC-01/09-02/11-T-10-ENG, p. 11, lines 4-24, p. 12-52.

<sup>51</sup> KEN-OTP-0043-0083.

<sup>52</sup> ICC-01/09-02/11-664-Conf-Red, paras 40, 41.

29. The Defence submits that the Prosecution presents a misleading account in respect of the events that led to the unjustified non-disclosure of the OTP-4 Statement. The Prosecution seeks to apportion blame for the non-disclosure on two anonymous “reviewers”.<sup>53</sup> However, a closer inspection of the chain of custody of the document and the dates of subsequent Prosecution interviews with OTP-4 reveals a clear and systemic failure involving senior Prosecution lawyers with respect to the procedures applied during its investigations.
30. From a review of the Ringtail chain of custody information and the dates upon which OTP-4 was interviewed by the Prosecution, the following chronology can be established:
- a. Between [REDACTED] 2010, OTP-4 was interviewed by Prosecution Trial Lawyer Akinbolahan Adeniran, an anonymous investigator with the pseudonym OTP-INV-0017 (“Investigator 0017”) and another member of the Office’s staff named Balthazar Gardon;<sup>54</sup>
  - b. On 27 September 2010, OTP-4 gave the OTP-4 Statement to Mr Adeniran;<sup>55</sup>
  - c. On 28 September 2010, the chain of custody states that Mr Adeniran gave the OTP-4 Statement to Luis Guarnizo;
  - d. Between [REDACTED] 2011, OTP-4 was interviewed by Prosecution Senior Trial Lawyer Adesola Adeboyejo, Investigator 0017 and an anonymous investigator with the pseudonym OTP-INV-0004;<sup>56</sup>
  - e. Between [REDACTED] 2012, OTP-4 was interviewed by Prosecution Trial Lawyer Sam Lowery; and
  - f. On 19 October 2012, the Prosecution disclosed the OTP-4 Statement to the Defence.

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<sup>53</sup> ICC-01/09-02/11-664-Conf-Red, paras 7, 38, 41.

<sup>54</sup> KEN-OTP-0043-0002.

<sup>55</sup> KEN-OTP-0043-0083.

<sup>56</sup> KEN-OTP-0051-1045.

31. The Defence submits that, in accordance with good investigative practice and their duties under Article 54(1)(a) and 67(2) of the Statute, competent prosecutors and investigators would have reviewed the OTP-4 Statement immediately upon taking possession of the document, prior to re-interview, prior to making oral submissions in court, following defence submissions calling into question the credibility of the witness and prior to submitting final observations after the Confirmation Hearing. The Defence submits that Prosecution lawyers, in particular the Senior Trial Lawyer, bear the responsibility of ensuring that all investigations are carried out in accordance with the particular obligations imposed on the Office by the Statute.
  
32. The Defence submits further that the responsibilities of senior Prosecution lawyers necessarily entail a duty to ensure that all evidence is properly reviewed by a member of the Office; that all investigators are provided with clear instructions and the necessary materials with which to interview witnesses; and that the Court is not misled, willingly or by reason of incompetence, by any oral or written arguments or observations submitted on behalf of the Office.
  
33. In respect of Ms Adeboyejo, Mr Adeniran, Investigator 0017 and the Prosecution generally, the Defence submits the following particulars:
  - a. Mr Adeniran failed to review adequately the OTP-4 Statement between the date that he received it on 27 September 2010 and the beginning of the Confirmation Hearing on 21 September 2011;
  - b. Ms Adeboyejo failed, by neglecting to review the OTP-4 Statement, to prepare adequately for OTP-4's [REDACTED] 2011 interview, despite the fact that this interview had clearly concerned a re-examination of OTP-4<sup>57</sup> in respect of the allegation from his previous ICC statement concerning

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<sup>57</sup> KEN-OTP-0051-1045, paras 50-54.



the Nairobi Members' Club meeting of 3 January 2008 ("3 January meeting");<sup>58</sup>

- c. Investigator 0017, who was present in both of the key OTP-4 Prosecution interviews concerned with the 3 January meeting, failed, by neglecting to review the OTP-4 Statement, to prepare adequately for either interview;
- d. At the Confirmation Hearing, Ms Adeboyejo fundamentally misled the PTC as to the strength and credibility of the evidence of OTP-4 and the reliability of the Prosecution case as whole by:
  - Stating that "[t]he Prosecution has complete confidence in the credibility of all the witnesses we have put before this Court, and here we're not just talking about any witnesses but about all of our witnesses. If we didn't, we wouldn't present them."<sup>59</sup>
  - Stating that OTP-4 was an eye witness to the 3 January meeting,<sup>60</sup> and quoting extensively from his false account;<sup>61</sup>
  - Stating that "the evidence presented by the Prosecution is credible and compelling when viewed in totality. It is corroborated not only by 20 multiple and varied external sources but also by admissions in the evidence of the Defence. It reflects the reality of events and is largely consistent with the statements provided by victim participants in this case;"<sup>62</sup> and
  - Reiterating the Prosecution's "confidence in the credibility of the witnesses it has put before [the] Court";<sup>63</sup>
- e. At the Confirmation Hearing, Mr Adeniran fundamentally misled the PTC as to the strength of Prosecution case as a whole and in relation to the conduct of its investigations by:

<sup>58</sup> KEN-OTP-0043-0002, paras 188-208.

<sup>59</sup> ICC-01/09-02/11-T-5-CONF-ENG, p. 7, lines 24-25; p. 8 lines 1 – 6.

<sup>60</sup> ICC-01/09-02/11-T-5-CONF-ENG, p. 14, line 23.

<sup>61</sup> See for example ICC-01/09-02/11-T-5-CONF-ENG, p. 14, lines 20-25; p.15; p. 16 lines 1-13.

<sup>62</sup> CC-01/09-02/11-T-15-CONF-ENG ET, p. 5, lines 18-23.

<sup>63</sup> ICC-01/09-02/11-T-15-CONF-ENG ET, p. 6, lines 2-3.

- Stating that the Prosecution had diligently abided by its “obligations under Article 54” and had “investigated incriminating and exonerating circumstances, and in the material that has been disclosed to the Defence, they can attest to the fact that there is a substantial body of potentially exonerating material included therein”;<sup>64</sup> and
  - Stating that OTP-4 was a “direct witness”<sup>65</sup> to the 3 January meeting, and quoting extensively from his false account.<sup>66</sup>
- f. In the Prosecution’s Submissions on the Confirmation Hearing, Ms Adeboyejo, Mr Adeniran and the Office misled the PTC by stating, without justification, that Defence allegations that OTP-4 was a liar were “baseless and flawed”;<sup>67</sup> and
- g. Neither individual nor the Office acted to ensure that the system of evidence review employed by the Prosecution was adequate.
34. The Defence submits further that, in the Response, the Prosecution’s purported justifications regarding the non-disclosure of the OTP-4 statement expose fundamental deficiencies with respect to the manner in which it reviews evidence and its approach to investigation generally. Continuing, *arguendo*, on the assumption that the Prosecution did not willingly fail to recognise the inconsistency in the OTP-4 Statement, the Defence submits that the Prosecution’s admission that it did not discover “the potential significance of paragraph 33...until after the confirmation” is clear evidence that there exists a systemic and fundamental problem with its review process which has the capacity to extend beyond OTP-4.

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<sup>64</sup> ICC-01/09-02/11-T-4-ENG p. 24, lines 4-5.

<sup>65</sup> ICC-01/09-02/11-T-6-ENG, p. 16, line 5.

<sup>66</sup> See for example ICC-01/09-02/11-T-6-CONF-ENG, p. 14, lines 5-18; p. 17, lines 1-8, 21-25; p.18, lines 16-23; p.19 lines 6-16.

<sup>67</sup> ICC-01/09-02/11-361, para.361.

35. The Defence is concerned that further undiscovered errors are likely to have occurred to the detriment of the Accused, and it questions whether the Prosecution's duties under Articles 54(1)(a) and 67(2) are likely to be served by a review process that is reliant on individuals not familiar with the case. It is striking to note that the Prosecution, in an attempt to explain the reasons behind the non-disclosure of OTP-4 Statement states that "[one] must be familiar with OTP-4's statements that he attended the Nairobi Club meeting to spot the apparent inconsistency, and through an oversight, the inconsistency was not identified during the disclosure review."<sup>68</sup> The Defence submits that in order for any evidence review to be effective, and to enable the Prosecution to meet its investigation and disclosure obligations under the Statute, at the very least the individual conducting the review must be familiar with the allegations central to its case. By its own admission, the Prosecution employs a review process in which it is possible for the reviewers of statements to fail "to appreciate the impeachment value" of evidence.<sup>69</sup>
36. The Defence submits that the systemic failures within the Prosecution's review and investigation processes call into question the extent to which the Chamber can be sure that all Prosecution investigations have been conducted properly and in accordance with the Office's obligations under the Statute, particularly Articles 54(1)(a) and 67(2).

## **V. RELIEF**

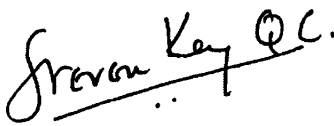

37. For the reasons set out above, the Defence respectfully requests that the Chamber grant the Article 64(4) Application.

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<sup>68</sup> ICC-01/09-02/11-664-Conf-Red, para. 38.

<sup>69</sup> ICC-01/09-02/11-664-Conf-Red, para. 7.

Respectfully submitted,

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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 8<sup>th</sup> day of March 2013

At London, England