Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **26 April 2013**

TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Decision on defence application pursuant to Article 64(4) and related requests

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

The Office of the Prosecutor Ms Fatou Bensouda Mr James Stewart Ms Adesola Adeboyejo	**Counsel for the Defence** Mr Steven Kay Ms Gillian Higgins
Legal Representatives of Victims Mr Fergal Gaynor	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims Ms Paolina Massidda	**The Office of Public Counsel for the Defence**
States Representatives	***Amicus Curiae***

REGISTRY

Registrar Mr Herman von Hebel	**Deputy Registrar**
Victims and Witnesses Unit Ms Maria Luisa Martinod-Jacome	**Detention Section**
Victims Participation and Reparations Section	**Others**

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta,* having regard to Articles 54(1), 61(9), 61(11), 64(2), 64(4), 64(6)(f) and 67 of the Rome Statute ("Statute") and Rules 77 and 134(1) of the Rules of Procedure and Evidence ("Rules"), issues the following Decision on defence application pursuant to Article 64(4) and related requests ("Decision").

I. Procedural history

1. On 23 January 2012, after a hearing on the confirmation of charges ("Confirmation Hearing") held between 21 September and 5 October 2011, Pre-Trial Chamber II confirmed charges of crimes against humanity against Mr Kenyatta and his then co-accused Mr Muthaura ("Confirmation Decision").[1] On 29 March 2012, the Presidency referred the case against Mr Muthaura and Mr Kenyatta to the Chamber for the conduct of the subsequent proceedings.[2] On 9 July 2012, the Chamber scheduled the commencement date for trial as 11 April 2013.[3]

2. On 5 February 2013, the defence for Mr Kenyatta ("Defence") filed an application requesting that the "preliminary issue of the validity of the Confirmation Decision be referred to the Pre-Trial Chamber for reconsideration pursuant to Article 64(4), and that the trial date be vacated ("Article 64(4) Application").[4] The Article 64(4) Application alleged that the Confirmation Decision was rendered invalid as a

[1] 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.
[2] Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, ICC-01/09-02/11-414.
[3] Decision on the schedule leading up to trial, ICC-01/09-02/11-451, page 10.
[4] Defence 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, ICC-01/09-02/11-622, para. 42.

result of the Prosecution's failure to disclose a potentially exculpatory affidavit ("Affidavit") made by Witness 4, a witness who allegedly provided key evidence relied upon by the Prosecution during the Confirmation Hearing.

3. On 14 February 2013, a status conference was held, during which the pending Article 64(4) Application was briefly discussed. Also during this status conference, the Defence addressed the impact of the manner in which the Office of the Prosecutor ("Prosecution") had carried out its investigations and disclosed materials to the Defence. Due to time restraints, the Chamber directed the Defence to file additional observations on these issues by 20 February 2013.[5] The Prosecution was instructed to respond to the Article 64(4) Application, as well as to the additional observations by 25 February 2013.[6]

4. On 20 February 2013, the Defence filed its "Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial" ("First Additional Defence Observations"), in which it requested that the trial date of 11 April 2013 be vacated.[7] On 25 February 2013, the Prosecution filed its response to the First Additional Defence

[5] Transcript, ICC-01/09-02/11-T-22-ENG ET WT, page 32, lines 10-12; and email from Trial Chamber V Legal Officer, 15 February 2013 at 19:44.
[6] Transcript, ICC-01/09-02/11-T-22-ENG ET WT, page 32, lines 14-15; and email from Trial Chamber V Legal Officer, 15 February 2013 at 19:44.
[7] Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B, and Public Annex A1, ICC-01/09-02/11-655, para. 38.

Observations[8] and to the Article 64(4) Application ("Article 64(4) Response").[9]

5. The Defence requested leave to reply to the Article 64(4) Response on 1 March 2013.[10] Later that day, the Chamber notified the parties by email that it granted leave to reply and ordered that the reply be filed by noon on 8 March 2013, indicating that a reasoned decision would follow.[11] The decision granting the Defence leave to reply was filed on 7 March 2013.[12]

6. On 5 March 2013, the Chamber issued an order convening a status conference for 11 March 2013 in order to receive additional information and clarification on certain issues arising out of the aforementioned filings ("Order").[13] In the Order the Chamber also requested the parties to file written submissions on these issues by 8 March 2013.

7. On 7 March 2013, noting that the Article 64(4) Application and First Additional Defence Observations raised serious issues to be resolved before trial, the Chamber vacated the trial commencement date of 11 April 2013 and provisionally set the new date for start of trial for 9 July 2013.[14]

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[8] Prosecution Response to Defence submissions on the 11 April 2013 trial date, ICC-01/09-02/11-663.
[9] Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber, ICC-01/09-02/11-664-Conf-Exp. A confidential redacted version, ICC-01/09-02/11-664-Conf-Red and public version, ICC-01/09-02/11-664-Red2, were filed on the same day.
[10] Defence Request for Leave to 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", ICC-01/09-02/11-669.
[11] Email from Trial Chamber V Legal Officer to the parties, 1 March 2013 at 18:39.
[12] Decision on Defence requests for leave to reply, ICC-01/09-02/11-679.
[13] Order scheduling a status conference and agenda, ICC-01/09-02/11-673.
[14] Order concerning the start date of trial, ICC-01/09-02/11-677.

8. On 8 March 2013, the Defence's filed its reply to the Article 64(4) Response[15] and its written submissions in response to the Order.[16] The Prosecution also filed its written submissions in response to the Order.[17]

9. On 11 March 2013, during the status conference, the Prosecution announced its decision to withdraw the charges against Mr Muthaura.[18] The "Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura" was filed later that day.[19] The Chamber instructed the Prosecution to provide written submissions, no later than 13 March 2013, on the "impact of the withdrawal on the charges against Mr Kenyatta, given that the accused are charged as indirect co-perpetrators".[20] The "Prosecution observations on the impact of the withdrawal of the charges against Mr Muthaura on Mr Kenyatta" were filed on 13 March 2013.[21]

10. On 14 March 2013, the Chamber scheduled another status conference to be held on 18 March 2013 to discuss the Article 64(4) Application and the consequences of the withdrawal of the charges against Mr Muthaura for the case against Mr Kenyatta.[22]

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[15] 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", ICC-01/09-02/11-681-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-681-Red.

[16] Corrigendum of "Defence Observations on Article 64(4) and 61(11) of the Rome Statute in Accordance with the Trial Chamber's Order scheduling a status conference and agenda, dated 5 March 2013, ICC-01/09-02/11-684-Corr.

[17] Additional Prosecution observations on the Defence's Article 64 applications, filed in accordance with order number ICC-01/09-02-11-67, 8 March 2013, ICC-01/09-02/11-683-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-683-Red.

[18] Transcript, ICC-01/09-02/11-T-23ENG ET, page 3, line 9 to page 5, line 24.

[19] ICC-01/09-02/11-687.

[20] Transcript, ICC-01/09-02/11-T-23-ENG ET, page 6, line 21 to page 7, line 24; page 24, lines 4-7.

[21] ICC-01/09-02/11-692-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-692-Red.

[22] Order scheduling a status conference, ICC-01/09-02/11-695.

11. On 18 March 2013, the Chamber by Majority, Judge Ozaki partially dissenting, granted the Prosecution permission to withdraw the charges against Mr Muthaura and terminated the case against him.[23]

12. During the 18 March 2013 status conference, the Defence made oral submissions regarding the evidence supporting the charges as confirmed. In the interests of time, the Chamber directed the Defence to submit any further submissions on this issue in writing. In addition, the parties and the Legal Representative of Victims ("Legal Representative") were asked to file observations on a number of questions on factual and legal issues arising from the Article 64(4) Application and related written submissions by the parties.[24] The Prosecution was directed to include in its observations any responses to allegations of misconduct made against it by the Defence.[25]

13. On 28 March 2013, the Defence filed its "Written Submissions Following 18 March Status Conference" ("Third Additional Defence Observations")[26] and the "Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the 'Order requesting written submissions following 18 March status conference'" ("Fourth Additional Defence Observations").[27] In both filings the Defence requests as relief "that the Chamber i) Terminate the proceedings, ii)

[23] Decision on the withdrawal of charges against Mr Muthaura, ICC-01/09-02/11-696 and Partial dissenting opinion of Judge Ozaki and concurring separate opinion of Judge Eboe-Osuji ICC-01/09-02/11-698.
[24] Transcript, ICC-01/09-02/11-T-24-ENG ET, page 38, lines 5-12; and Order requesting written submissions following 18 March 2013 status conference, 20 March 2013, ICC-01/09-02/11-699.
[25] Transcript, ICC-01/09-02/11-T-24-ENG ET, page 38, lines 5-12; and Order requesting written submissions following 18 March 2013 status conference, 20 March 2013, ICC-01/09-02/11-699.
[26] ICC-01/09-02/11-706.
[27] Corrigendum of "Defence Observations Regarding the impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the 'Order requesting written submissions following 18 March status conference'", 3 April 2013, ICC-01/09-02/11-707-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-707-Corr-Red.

Stay the proceedings, or iii) Remit the case back to the Pre-Trial-Chamber pursuant to Article 64(4) of the Statute for reconsideration".[28] The Prosecution[29] and Legal Representative[30] filed their observations on the same day.

14. On 9 April 2013, the Prosecution filed a combined response to the Third and Fourth Additional Defence Observations.[31]

15. On 15 April 2013, the Defence filed a request for leave to reply to the Prosecution's combined response of 9 April 2013.[32] The Defence informed the Chamber that additional materials related to the Prosecution's initial contact with Witness 4 in May and June 2010 were disclosed to it on 11 April 2013. The Chamber denied the request for leave to reply, but, exceptionally, granted the Defence permission to file written submissions on the newly disclosed materials.[33]

16. On 18 April 2013, the Defence filed its submissions on the newly disclosed materials relating to Witness 4 ("Fifth Additional Defence Observations").[34] The Defence requests as relief that the Chamber

[28] ICC-01/09-02/11-706, para. 43; ICC-01/09-02/11-707-Conf-Corr, para. 52.
[29] Additional Prosecution observations on Mr Kenyatta's Article 64 application, filed in accordance with order number ICC-01/09-02-11-699, ICC-01/09-02/11-708-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-708-Red.
[30] Victims' observations relating to the "Order requesting written submissions following 18 March 2013 status conference", ICC-01/09-02/11-709.
[31] Prosecution's omnibus response to Defence submissions ICC-01/09-02/11-706 and ICC-01/09-02/11-707, ICC-01/09-02/11-714-Conf. A public redacted version was filed on the same day. ICC-01/09-02/11-714-Red.
[32] URGENT Request for Leave to Reply to the "Prosecution's omnibus response to Defence Submissions ICC-01/09-02-11-706 and ICC-01/09-02-11-707", ICC-01/09-02/11-717-Conf. A public redacted version was filed on 23 April 2013, ICC-01/09-02/11-717-Red.
[33] Email from Trial Chamber V Legal Officer to the parties, 15 April 2013 at 18:38.
[34] Submissions Regarding the Prosecution's 11 April 2013 Disclosure of Material Relation to its Initial Contact with OTP-4 with Confidential Annexes A-E, ICC-01/09-02/11-719-Conf. A public redacted version was filed on 23 April 2013, ICC-01/09-02/11-719-Red.

"determine that a fair trial has been rendered impossible" and terminate the proceedings.[35]

17. Also on 18 April 2013, the Defence filed a request to file submissions concerning new materials disclosed to it on 17 April 2013 relating to the Prosecution's initial contact with Witness 11 in 2011, another witness relied upon by the Pre-Trial Chamber in the Confirmation Decision.[36] The Chamber exceptionally granted the Defence request.[37]

18. On 19 April 2013, the Prosecution filed its response to the Fifth Additional Defence Observations.[38]

19. On 23 April 2013, the Defence filed its submissions on the newly disclosed materials relating to Witness 11 ("Sixth Additional Defence Observations").[39] The Defence requests as relief that "the Chamber grant the relief requested in the 28 March Submissions", namely "a. Terminate the proceedings; or b. Stay the proceedings; or c. Remit the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute for Reconsideration".[40]

20. On 24 April 2013, the Prosecution filed its response to the Sixth Additional Defence Observations.[41]

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[35] ICC-01/09-02/11-719-Red, para. 29.
[36] Request for Permission to Provide Submissions on the Prosecution's 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11, ICC-01/09-02/11-721-Conf. A public redacted version was filed on 23 April 2013, ICC-01/09-02/11-721-Red.
[37] Email from Trial Chamber V Legal Officer to the parties, 19 April 2013 at 17:27.
[38] Prosecution's response to the Defence "Submissions Regarding the Prosecution's 11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4", ICC-01/09-02/11-722-Conf.
[39] Submissions Regarding the Prosecution's 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11, with Confidential Annex A, ICC-01/09-02/11-723-Conf. A public redacted version was filed on the same day, ICC-01/09-02/11-723-Red.
[40] ICC-01/09-02/11-723-Red, para. 21.
[41] Prosecution response to the Defence "Submissions Regarding the Prosecution's 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11", with confidential Annex A, ICC-01/09-02/11-726-Conf.

II. Submissions

21. The issues arising from the Article 64(4) Application and related filings (namely the First to Sixth Additional Defence Observations) can be grouped into four separate, but interrelated categories:

    1) the Prosecution's conduct with respect to the non-disclosure, prior to the Confirmation Hearing, of Witness 4's Affidavit and other materials (Issue 1);

    2) the validity of the Confirmation Decision as a result of "deficiencies"[42] in the Prosecution's evidence, including the alleged lack of credibility of witnesses (Issue 2);

    3) alleged "new and radically altered allegations"[43] against the accused as a result of the Prosecution's removal of Witness 4 from its witness list and its reliance on a substantial body of new evidence collected after the Confirmation Hearing (Issue 3); and

    4) the impact of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta (Issue 4).

22. The parties' submissions, and where relevant those of the Legal Representative, on these four issues are set out below.

23. Due to the evolving nature of the requests for relief sought by the Defence and the fact that they pertain to overlapping issues, the submissions in relation to relief are set out separately in Section III below.

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[42] ICC-01/09-02/11-706, paras 21-22; ICC-01/09-02/11-707-Conf-Corr, paras 23d, 23e-h, 27, 28h, 36, and 38-39.
[43] ICC-01/09-02/11-655-Corr, para. 11.

A. Submissions on non-disclosure of Witness 4's Affidavit and other materials (Issue 1)

24. This issue relates primarily to Witness 4's Affidavit, which was received by the Prosecution on 27 September 2010, [44] but not disclosed to the Defence until after the Confirmation Decision, on 19 October 2012. It is uncontested between the parties that the Affidavit contains information which may have affected the credibility of the Prosecution's evidence and, as such, should have been disclosed in full or in part before the Confirmation Hearing.[45]

25. Also at issue is the recent disclosure of materials relating to the Prosecution's initial contact with Witness 4 in May and June 2010 and with Witness 11 in 2011. These materials were not disclosed to the Defence until 11 April 2013 and 17 April 2013, respectively. Again it is uncontested between the parties that the majority of the additional materials related to Witness 4 should have been disclosed to the Defence prior to the Confirmation Hearing pursuant to Article 67(2) of the Statute.[46]

(i) Defence

26. The Defence submits that the Prosecution's explanation of the failure to disclose the Affidavit as an "oversight" by two reviewers, is "a misleading account" of the events that led to the non-disclosure, which – in the view of the Defence – was "a clear and systematic

[44] ICC-01/09-02/11-664-Red, para. 34.
[45] ICC-01/09-02/11-622, para. 10; ICC-01/09-02/11-664-Red, para. 31.
[46] ICC-01/09-02/11-719-Conf, para. 9; ICC-01/09-02/11-722-Conf, paras 7 – 12.

failure" of the investigatory procedure, which involved senior Prosecution lawyers.[47]

27. The Defence alleges that in his Affidavit, sworn in May 2009 and received by the Prosecution on 27 September 2010 but not disclosed to the Defence until 19 October 2012, Witness 4 "admitted that he was not present at the 3 January 2008 meeting".[48] The significance of this meeting is addressed in paragraph 30 below. The Defence notes that Witness 4's Affidavit was signed for by a Prosecution member who took part in the confirmation proceedings.[49]

28. The Defence considers that, in accordance with good investigative practice and the Prosecution's duties pursuant to Articles 54(1)(a) and 67(2) of the Statute, competent prosecutors and investigators should have reviewed the Affidavit at various moments prior to and after the Confirmation Hearing. It further submits that the justifications given by the Prosecution for the non-disclosure of the Affidavit "expose fundamental deficiencies with respect to the manner in which its reviews evidence and its approach to investigation generally", and that "a systemic and fundamental problem" exists in the Prosecution's review process.[50] The Defence submits that the foregoing calls into question to what extent the Chamber can be sure that the Prosecution's investigations have been carried out properly and in accordance with Articles 54(1) and 67(2).[51]

29. The Defence argues that the Prosecution "misled" the Pre-Trial Chamber when it applied for non-disclosure of Witness 4's Affidavit

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[47] ICC-01/09-02/11-681-Red, para. 29.
[48] ICC-01/09-02/11-622, para. 28.
[49] ICC-01/09-02/11-622, para. 28.
[50] ICC-01/09-02/11-681-Red, para. 34.
[51] ICC-01/09-02/11-681-Red, paras 35-36.

to the Defence on 15 August 2011 by failing to mention that the Affidavit "spoke directly to the 3 January meeting, and contained potentially exculpatory information relating thereto".[52] The failure to properly indicate the importance of the Affidavit "must be seen as an act of bad faith", which "constitutes an abuse of the protective measures regime" and "was used as a litigation strategy to increase artificially the strength of the case".[53]

30. As to the effects of the Prosecution's conduct on the Confirmation Decision, the Defence argues that the Prosecution's "fraud" renders the Confirmation Decision "necessarily unsound and affects the entirety of the proceedings before the Court".[54] The Defence observes that the Pre-Trial Chamber relied heavily on Witness 4's evidence in the Confirmation Decision. In particular, in establishing Mr Kenyatta individual criminal responsibility, the Pre-Trial Chamber relied upon Witness 4's evidence as to Mr Kenyatta's alleged attendance at a meeting at the Nairobi Members' Club on 3 January 2008.

31. The Defence contends that the Prosecution "advanced arguments as to the credibility of its case and the consistency of its evidence, when in possession of contradictory evidence".[55] As such, the Defence submits that the "false evidence" presented by the Prosecution at the Confirmation Hearing caused the Pre-Trial Chamber to come to "erroneous conclusions" and renders the case against the accused "false".[56]

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[52] ICC-01/09-02/11-622, paras 32-34; and ICC-01/09-02/11-681-Red, para. 33d.
[53] ICC-01/09-02/11-622, para. 36.
[54] ICC-01/09-02/11-681-Red, para. 19.
[55] ICC-01/09-02/11-681-Red, para. 16d.
[56] ICC-01/09-02/11-681-Red, paras 16a-c.

32. Moreover, the Defence contends that the Prosecution's failure to disclose the Affidavit "casts doubt upon its approach to disclosure of potentially exculpatory material in its possession" relating to Witnesses 11 and 12, two other "key witnesses" that the Pre-Trial Chamber relied on when confirming the charges.[57]

33. With respect to the materials relating to the Prosecution's initial contact with Witnesses 4, which were only disclosed on 11 April 2013, the Defence submits that they "reveal further fundamental contradictions" to Witness 4's evidence relating to material facts set out in the Confirmation Decision.[58] It concludes that the "failure to disclosure further important evidence exhibits incontrovertible proof of a clear and systematic problem within the [Prosecution], whether intentional or as a result of negligence, which continues to have far-reaching and negative effects on the fairness of the proceedings and the credibility of the Court as an institution."[59]

(ii) Prosecution

34. The Prosecution acknowledges and regrets that it "erred in not disclosing the affidavit at the pre-trial stage", and in not having alerted the Single Judge to the potentially exonerating component.[60]

35. Based on its electronic database (Ringtail) records, the Prosecution argues that the Affidavit was reviewed by two Prosecution staff members prior to the Confirmation Hearing. It submits that "[o]ne must be familiar with Witness 4's statements that he attended the Nairobi [Member's] Club meeting to spot the apparent

[57] ICC-01/09-02/11-681-Red, para. 18.
[58] ICC-01/09-02/11-719-Red, para. 9.
[59] ICC-01/09-02/11-719-Red, para. 26.
[60] ICC-01/09-02/11-664-Red2, para. 37.

inconsistency".[61] However, the significance of the sentence where the Witness states that someone told him about the said meeting was not recognised "through an oversight".[62]

36. As a result, the Prosecution submits, the inconsistency between the statements made by Witness 4 until that time and the Affidavit was not highlighted before the Single Judge in the applications to withhold the Affidavit.[63]

37. As to Witness 11, the Prosecution submits that no disclosure violation has taken place. It challenges the Defence's submission that it would have been under an obligation to disclose the screening notes for Witness 11 as all the relevant information contained in this screening note is also "captured" in Witness 11's formal statements.[64]

B. Submissions on the validity of the Confirmation Decision (Issue 2)

(i) Defence

38. The Defence submits that based on "the evidence underlying each of the headings in Section VII of the Confirmation Decision dealing with individual criminal responsibility" there is a need for the case against Mr Kenyatta to be terminated, stayed or referred back to the Pre-Trial Chamber for reconsideration as a result of "deficiencies" in the confirmation process.[65]

39. In particular, the Defence submits that Witness 4's evidence "can no longer be sustained."[66] It points to the inconsistency revealed in the

[61] ICC-01/09-02/11-664-Red2, para. 38.
[62] ICC-01/09-02/11-664-Red2, para. 38.
[63] ICC-01/09-02/11-664-Red2, para. 39.
[64] ICC-01/09-02/11-726-Conf, paras 7-12.
[65] ICC-01/09-02/11-707-Corr-Red, para. 17.
[66] See, for example, ICC-01/09-02/11-707-Corr-Red, paras 20-23a-c.

Affidavit as to his attendance at the alleged 3 January 2008 meeting[67] (discussed above) and to the fact that in a statement given to the Prosecution after the Confirmation Hearing, on 25 May 2012, Witness 4 recanted his evidence relating to a meeting at the Nairobi State House on 26 November 2007.[68] This meeting, allegedly attended by Mr Kenyatta and Mungiki representatives, was central to the Pre-Trial Chamber's findings on individual criminal responsibility.[69] Furthermore, the defence states that in his May 2012 statement Witness 4 "also admitted lying about another meeting at which he alleged he was present with Mr Kenyatta and Mungiki personnel on 17 November 2007".[70]

40. The Defence concludes that if the Pre-Trial Chamber had been aware of the true nature of Witness 4's evidence at the time of its deliberations, it would not have confirmed the case against the accused for trial.[71]

41. The Defence submits that an analysis of the remaining evidence, once Witness 4 is discounted, for the 26 November 2007 meeting "reveals that it is clearly insufficient to meet the confirmation threshold of 'substantial grounds to believe'", demonstrates "a failure to assess properly the evidence in this case" and amounts to "a deficiency in this confirmation process".[72] Similarly, in relation to the 3 January 2008 meeting, the Defence states that the evidence "cannot substantiate the required threshold" once Witness 4 is discounted as the only other evidence relied upon by the Prosecution in respect of

[67] ICC-01/09-02/11-707-Corr-Red, para 32.
[68] ICC-01/09-02/11-707-Corr-Red, para. 21.
[69] ICC-01/09-02/11-707-Corr-Red, para. 21.
[70] ICC-01/09-02/11-622, paras 23-24.
[71] ICC-01/09-02/11-622, para. 31; ICC-01/09-02/11-681-Red, para. 23.
[72] ICC-01/09-02/11-707-Corr-Red, paras 23d-h.

the meeting was an anonymous witness summary from Witness 1, who will not be called at trial.[73]

42. With respect to Mr Kenyatta's alleged attendance at a meeting on 30 December 2007, which was confirmed on the basis of accounts from Witnesses 11 and 12, the Defence states that the evidence is "wholly insufficient to attach individual criminal responsibility to Mr Kenyatta", and that it is "not capable of supporting the alleged common plan, because it does not disclose a plan with the Mungiki to commit post-election violence through an organisational policy".[74] It submitted that the Pre-Trial Chamber "failed to assess properly the evidence [of this meeting]" and that it "reveals further fundamental deficiencies in this confirmation process".[75]

43. Finally, the Defence contests a number of other specific determinations made by the Pre-Trial Chamber,[76] and calls for a reassessment of the Defence witnesses' evidence and the evidential value of video footage and newspaper articles on Mr Kenyatta's whereabouts on 26 November 2007.[77] It puts forward arguments that, in its view, militate against the credibility of Witness 12, one of the witnesses relied on by the Pre-Trial Chamber in relation to key findings.[78]

(ii) Prosecution

44. Primarily, the Prosecution submits that the Defence's allegations of flaws in the Pre-Trial Chamber's assessment of evidence and the claims about resulting deficiencies in the confirmation process "are

[73] ICC-01/09-02/11-707-Corr-Red, paras 29 and 35. See also, ICC-01/09-02/11-681-Red, para. 23.
[74] ICC-01/09-02/11-707-Corr-Red, para. 25.
[75] ICC-01/09-02/11-707-Corr-Red, paras 27 and 28h.
[76] ICC-01/09-02/11-707-Corr-Red, para. 23g.
[77] ICC-01/09-02/11-707-Corr-Red, paras 23j and 23m.
[78] ICC-01/09-02/11-707-Corr-Red, paras 38-39.

nothing more than an impermissible attempt to bring a *de facto* appeal against the confirmation decision".[79] It recalls that the Defence's arguments about the evidence supporting the confirmation have been rejected by the Pre-Trial Chamber: in the Confirmation Decision and when it denied leave to appeal this decision. The Prosecution holds that "[t]he Defence's analysis of the alleged 'deficiencies' is thus nothing more than a third attempt to introduce an evidentiary analysis", and in essence is asking the Chamber "to sit as an appellate court".[80] The Prosecution considers that to be outside the Chamber' "statutory remit".[81]

45. Furthermore, the Prosecution submits that whilst not disclosing Witness 4's Affidavit in time was an error, this error does not undermine the Confirmation Decision.[82]

46. The Prosecution argues that although disclosure of the Affidavit might have led the Pre-Trial Chamber to evaluate Witness 4's evidence differently or even to reject all of Witness 4's evidence, this possibility would not be sufficient to "undo" the Confirmation Decision.[83] It submits that a reasonable Pre-Trial Chamber could have confirmed the charges against Mr Kenyatta, without relying on the findings based on Witness 4's evidence.[84] In its view, the Pre-Trial Chamber would have done so, even if it had discarded Witness 4's evidence in its entirety,[85] because "substantial grounds to believe" that Mr Kenyatta committed the charged crimes still exist as the Pre-

[79] ICC-01/09-02/11-714-Red, para. 2.
[80] ICC-01/09-02/11-714-Red, para. 2.
[81] ICC-01/09-02/11-714-Red, para. 2.
[82] ICC-01/09-02/11-664-Red2, paras 31-37.
[83] ICC-01/09-02/11-664-Red2, para. 40.
[84] ICC-01/09-02/11-708-Red, paras 3-4; ICC-01/09-02/11-714-Red, paras 3-4.
[85] ICC-01/09-02/11-664-Red2, para. 22-30; ICC-01/09-02/11-683-Red, para. 3; and ICC-01/09-02/11-714-Red, para 4 and 26.

Trial Chamber's findings on other events (e.g., Mr Kenyatta's presence at the 30 December 2007 Nairobi State House meeting), which go to his role in the common plan, did not at all rely on Witness 4's evidence.[86] Furthermore, the Prosecution disputes the Defence's reading of the evidence provided by Witnesses 11 and 12, the two main witnesses on which the Pre-Trial Chamber's findings on the 30 December 2007 meeting were based.[87]

(iii) Legal Representative

47. The Legal Representative notes that the Pre-Trial Chamber already considered, in the Confirmation Decision and in rejecting leave to appeal that decision, detailed challenges by the Defence to the credibility of Witnesses 11 and 12. He argues that the Defence submissions amount "to little more than a third round of litigation about the credibility of OTP-11 and OTP-12."[88]

C. Submissions on alleged new and altered allegations (Issue 3)

(i) Defence

48. The Defence submits that the Prosecution's "ongoing and protracted" investigation, as well as the manner in which it has disclosed the evidence to the Defence (e.g. in various versions of redactions, "hindered by technical difficulties and logistical problems") and the "inclusion of new or radically altered post confirmation allegations" has led to an "ever-shifting case" which has put pressure on the Defence and required it to "expend considerable investigative

[86] ICC-01/09-02/11-664-Red2, para. 23-24; ICC-01/09-02/11-708-Red, paras 16-20; ICC-01/09-02/11-714-Red, paras 15-21.
[87] ICC-01/09-02/11-714-Red, paras 21-26.
[88] ICC-01/09-02/11-709, para. 8c.

resources".[89] As such, the Defence "has not been afforded adequate time to prepare for trial".[90]

49. It submits that the Pre-Trial Brief shows that the Prosecution's case has substantially changed since the Confirmation Hearing, in a manner detrimental to the accused. For example, it notes that the Pre-Trial Chamber established the charges, *inter alia*, based on Witness 4's evidence as to a meeting that allegedly took place at the Nairobi Members' Club on 3 January 2008 but that the Prosecution's Pre-Trial Brief "no longer contains th[is] allegation" referring instead to meetings in early January.[91] It submits that this reference is vague and consequently renders effective Defence investigation "extremely difficult".[92] It contends that there are a "significant number of new allegations", which have not been subjected to a confirmation procedure.[93]

50. In addition, the Defence submits that the new evidence would have been available at the confirmation stage had the Prosecution exercised "reasonable diligence", and that its failure to do so undermines the confirmation process.[94] It submits that the Prosecution has attempted to fill the evidential gaps left by the withdrawal of Witness 4 with newly-collected evidence. The Prosecution's conduct, in the view of the Defence, violates the

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[89] ICC-01/09-02/11-655-Corr, paras 11, 35, and 37.
[90] ICC-01/09-02/11-655-Corr, paras 20 and 28.
[91] ICC-01/09-02/11-622, paras 26-27.
[92] ICC-01/09-02/11-655-Corr, para. 17; and further at paras 12, 15-16.
[93] ICC-01/09-02/11-655-Corr, para. 12.
[94] ICC-01/09-02/11-655-Corr, para. 18.

Defence's rights under Article 67(2) of the Statute and fails to comply with the Appeals Chamber's jurisprudence in *Lubanga*.[95]

51. The Defence further argues that the change in the substantive evidence becomes clear when looking at the proposed witnesses: the Prosecution no longer intends to call seven out of 12 witnesses it relied on for confirmation, but has added 26 witnesses that were first interviewed after the confirmation stage.[96] Moreover, the Defence submits that all of the witnesses that the Prosecution intends to call at trial were available prior to the Confirmation Hearing, and that the Prosecution's argument that prospective witnesses may not want to cooperate until charges are confirmed does not justify the Prosecution's failure to carry out "proper, expeditious and effective" investigations.[97]

52. The Defence complains that the identities of ten of the most significant witnesses still had not been disclosed by 20 February 2013, and that the evidence disclosed is much more voluminous than the Prosecution estimated in June 2012. According to the Defence, this demonstrates the Prosecution's inappropriate approach to investigation and its failure to respect "the rights of the Defence, in particular the right to adequate time to prepare for trial".

(ii) Prosecution

53. The Prosecution submits that there is no shift in the case since the confirmation and that the facts alleged in the Pre-Trial Brief are all

[95] ICC-01/09-02/11-655-Corr, para. 12, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paras 54-55.
[96] ICC-01/09-02/11-655-Corr, para. 22.
[97] ICC-01/09-02/11-655-Corr, para. 19.

within the scope of the charges as confirmed by the Pre-Trial Chamber and are contained in the Updated Document Containing the Charges ("Updated DCC").[98]

54. The Prosecution further submits that it is "self-evident" that it would offer more evidence at trial than at the confirmation stage as, pursuant to Article 61(5) of the Statute, it then only needed to surpass the "substantial grounds" threshold and could rely on "summary evidence". [99] It submits that no criteria, pre-conditions or proportionality requirement is imposed on the Prosecution with respect to conducting post-confirmation investigations[100] as nothing in the statutory framework of the Court limits the Prosecution's ability to conduct post-confirmation investigations, and that in fact the relevant provisions "suggest the opposite".[101] The Prosecution further submits that the jurisprudence of the Appeals Chamber does not impose such a limitation.[102] In its view, it also "should be presumed that the Prosecution's investigations are aimed at uncovering the truth, absent a contrary showing".[103]

55. According to the Prosecution it is not always possible to draw clear distinctions between materials obtained pre- and post-confirmation as investigative steps undertaken before the confirmation sometimes only led to results post-confirmation.[104] The Prosecution submits that it only expanded its investigations on the ground in Kenya after confirmation due to risks to witnesses, and the security situation on

[98] ICC-01/09-02/11-663, para. 8.
[99] ICC-01/09-02/11-663, para. 7.
[100] ICC-01/09-02/11-708-Red, paras 35 and 38.
[101] ICC-01/09-02/11-708-Red, para. 36.
[102] ICC-01/09-02/11-708-Red, para. 36.
[103] ICC-01/09-02/11-708-Red, para. 38.
[104] ICC-01/09-02/11-683-Red, paras 22-23.

the ground.[105] It doing so, it "balanced its Article 68(1) obligations to safeguard witnesses with the need to avoid overburdening the Court's protection system with demands for long-term protection of dozens of witnesses (and their families) before it was absolutely necessary to do so".[106] It contends that it was "amply justified in tailoring its investigations to the unique challenges of the Kenya cases".[107]

56. Furthermore, the Prosecution submits that the Defence cannot claim to be surprised by the addition of evidence, because the Prosecution intends to call 33 witnesses and provided timely notice of this to the Defence when it explained in June 2012 that it intended to call "between 25 and 35 witnesses".[108] The Prosecution explains that it will rely at trial on 31 fact-witnesses and two expert witnesses. Twenty-six of the fact witnesses and the expert witnesses were not relied on for confirmation.[109] The Prosecution's list of evidence contains 948 items of which 649 were registered after the confirmation hearing, although some of these items resulted from investigative steps taken prior to confirmation. The Prosecution submits that in reality, the number of items that can be considered as "new" is 380, as the remainder includes documents produced by the Defence and statements/transcripts of witnesses.[110]

57. As to the removal of Witness 4 from its witness list, the Prosecution contends that it has to prosecute the same charges at trial that were confirmed by the Pre-Trial Chamber, but that the Prosecution is not

[105] ICC-01/09-02/11-683-Red, paras 24-25.
[106] ICC-01/09-02/11-708-Red, para. 38.
[107] ICC-01/09-02/11-708-Red, para. 38.
[108] ICC-01/09-02/11-663, para. 7.
[109] ICC-01/09-02/11-683-Red, para. 28.
[110] ICC-01/09-02/11-683-Red, paras 29-30.

obligated to present the same evidence at trial as it did for purposes of confirmation. Its decision not to rely on Witness 4's evidence at trial, because it considers that his credibility is undermined by a post-confirmation interview and the fact that he revealed that he "had been offered, and accepted, money from the individuals holding themselves out as representatives of the Accused to withdraw his testimony", does not affect the Confirmation Decision, nor does it render the confirmation fundamentally unfair.[111]

(iii) Legal Representative

58. According to the Legal Representative, the Prosecution does not need to meet any criteria or pre-conditions for it to investigate post-confirmation as "its duty to uncover exculpatory evidence and to uncover the truth is ongoing".[112] He submits that the Appeals Chamber jurisprudence grants the Prosecution flexibility with respect to the investigation and it does not need to seek permission from the Pre-Trial Chamber to continue its investigation.[113] He considers the ability to investigate post-confirmation important because the Chamber should receive the best evidence at trial, which will most clearly and efficiently reveal the truth.[114]

59. The Legal Representative submits that any problems the Defence raises regarding the evidence, can be dealt with at trial rather than in a (new) confirmation hearing, as the former is the principal forum in

[111] ICC-01/09-02/11-664-Red2, paras 16-17.
[112] ICC-01/09-02/11-709, para. 15, pointing to ICC-01/09-02/11-700-Corr, paras 36-39, and 41-42.
[113] ICC-01/09-02/11-709, para. 15, pointing at ICC-01/04-01/06-568, para. 52-53.
[114] ICC-01/09-02/11-709, para. 17.

which the sufficiency and credibility of the Prosecution's evidence is tested by the Defence.[115]

D. Submissions on withdrawal of the charges against Mr Muthaura (Issue 4)

(i) Defence

60. The Defence submits that the Prosecution's decision not to rely on Witness 4 and the withdrawal of charges against Mr Muthaura destroys "the factual and legal matrix of the common plan" as it was confirmed by the Pre-Trial Chamber.[116] It argues that this follows from the fact that "[t]he Prosecution had alleged that Mr Kenyatta and Mr Muthaura were the sole principal perpetrators who devised the common plan, which they then took to Maina Njenga who 'eventually agreed' with it in return for concessions".[117] The Defence submits that now that the Prosecution concedes that there is insufficient evidence to support the charges against Mr Muthaura, "there is no longer sufficient evidence to provide grounds to believe that Mr Kenyatta was a co-perpetrator in a common plan to commit crimes", because the alleged plan "was dependent upon the alleged initial agreement between two individuals".[118]

61. The Defence highlights that the Pre-Trial Chamber found that "the most important contribution" to the crimes made by Mr Kenyatta and Mr Muthaura was the precise instruction given during the 3 January 2008 meeting.[119] It submits that the said meeting "is now wholly unsupported" as a result of the withdrawal of Witness 4 and

[115] ICC-01/09-02/11-709, para. 5.
[116] ICC-01/09-02/11-707-Corr-Red, para. 16.
[117] ICC-01/09-02/11-707-Corr-Red, para. 16.
[118] ICC-01/09-02/11-707-Corr-Red, para. 16.
[119] ICC-01/09-02/11-707-Corr-Red, para. 41, referring to ICC-01/09-02/11-382-Conf, para. 375.

that only what has been referred to by the Pre-Trial Chamber as "additional contributions" remain.[120] The Defence argues that "[t]hese piecemeal contributions, supported largely by hearsay, are inadequate for the purpose of the common plan and do not amount to substantial grounds to believe that Mr Kenyatta exercised control over the crimes".[121]

(ii) Prosecution

62. The Prosecution submits that "the withdrawal of charges against one alleged indirect co-perpetrator [...] has no legal consequence with respect to a co-accused, who is also charged as an indirect co-perpetrator and against whom charges remain in place".[122] It bases its argument on i) the plain reading of Article 25(3)(a), [123] ii) its submission that a Trial Chamber need not reach the same verdict as regards persons who are charged under the same mode of liability ,[124] and iii) the Court's practice in other cases, where trials have proceeded even though alleged co-perpetrators were either at large or not charged,[125] or where charges were not confirmed against an alleged indirect co-perpetrator.[126]

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[120] ICC-01/09-02/11-707-Corr-Red, para. 41.
[121] ICC-01/09-02/11-707-Corr-Red, para 41; and similarly at paras 45-50.
[122] ICC-01/09-02/11-692-Red, para. 4.
[123] ICC-01/09-02/11-692-Red, paras 5-6.
[124] ICC-01/09-02/11-692-Red, para. 7.
[125] ICC-01/09-02/11-692-Conf, paras 8-9, specifically referring to *Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Amended Document Containing the Charges, Article 61(3)(a), 23 December 2008, ICC-01/04-01/06-1573-Anx1, para 20; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para 410; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, paras 1351-1352; *Prosecutor v. Omar Hassan Ahmad Al Bashhir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, paras 214, 216 and 223.
[126] ICC-01/09-02/11-692-Red, para. 9, pointing at the fact that the charges against Mr Sang were confirmed, whilst he was charged as an indirect co-perpetrator together with Mr Kosgey, against whom the charges were not confirmed.

63. The Prosecution acknowledges that the current case law of the Court requires the Prosecution to prove at trial that a common plan existed between two or more persons, one of whom was the accused. However, it asserts that a large number of persons were members of the common plan, and that the Defence itself considers Mr Njenga to be an (indirect) co-perpetrator.[127]

64. According to the Prosecution, even if the Chamber were to decide that the withdrawal of charges against Mr Muthaura affects the mode of liability of Mr Kenyatta as an indirect co-perpetrator, the case could still proceed on alternative modes of liability as Regulation 55 of the Regulations of the Court ("Regulations") permits the Chamber to consider different modes of liability without an amendment to the charges.[128] The Prosecution refers in this regard to its pending application for notice to be given to the accused pursuant to Regulation 52(2) of the Regulations,[129] but also considers that the Chamber could act *proprio motu*.[130]

65. Further, the Prosecution argues that the withdrawal has no factual impact on the case against Mr Kenyatta, which "remains unaltered" as Mr Kenyatta and Mr Muthaura are alleged to have assumed different roles in the common plan.[131]

(iii) Legal Representative

[127] ICC-01/09-02/11-692-Conf, para. 10.
[128] ICC-01/09-02/11-692-Red, para. 11; and ICC-01/09-02/11-708-Red, paras 25-26.
[129] ICC-01/09-02/11-692-Red, para. 11; and ICC-01/09-02/11-708-Red, para. 27; both referring to Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility, 3 July 2012, ICC-01/09-02/11-444.
[130] ICC-01/09-02/11-708-Red, para. 27.
[131] ICC-01/09-02/11-692-Red, paras 12-13.

66. The Legal Representative submits that there is "no legal impediment to the Prosecution proceeding against Mr Kenyatta having dropped the charges against Mr Muthaura".[132] He stresses that in cases involving participants in a common plan, the evidence related to each participant should be assessed individually, focusing on the participation of the concerning participant in the common plan. He submits that it is inevitable that the quantity of evidence will be different for the various participants, but that the fact that there is not sufficient evidence to sustain a reasonable prospect of conviction against one co-perpetrator does not exclude the possibility that there is sufficient evidence to sustain a reasonable prospect of conviction against another co-perpetrator.[133]

III. Relief requested

67. In its initial Article 64(4) Application the Defence sought only a referral of the Confirmation Decision to the Pre-Trial Chamber for reconsideration.[134] However, in later filings it broadened its requested relief. Specifically, in the Third Additional Defence Observations, the Defence submits that "[w]hile the matter remains capable of being referred back to the Pre-Trial Chamber"[,] the preferable course of action is for the Trial Chamber to determine this matter under Rule 134 [and Article 64(6)(f)]".[135] The primary relief it now seeks (as set out in the Third Additional Defence Observations, Fourth Additional Defence Observations, and Sixth Additional Defence Observations) is for the Chamber to terminate the proceedings against Mr Kenyatta.[136]

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[132] ICC-01/09-02/11-T-24-ENG ET WT, page 14, lines 8-10.
[133] ICC-01/09-02/11-T-24-ENG ET WT, pages 13, line 25 and page 14, lines 1-8.
[134] ICC-01/09-02/11-622, para. 42.
[135] ICC-01/09-02/11-706, para. 3.
[136] ICC-01/09-02/11-706, para. 43; ICC-01/09-02/11-707-Corr-Red, para. 52; ICC-01/09-02/11-719-Red, para. 29; ICC-01/09-02/11-723-Red, para. 21.

As an alternative, it requests the Chamber to order a stay of the proceedings.[137] As a final alternative it seeks the referral of the Confirmation Decision back to the Pre-Trial Chamber for reconsideration.[138] The Chamber notes that, in deciding on the complex matters before it, it has not been assisted by the Defence's approach to requesting relief. It emphasises that, as a general matter, it is incumbent upon the party seeking judicial relief to articulate the legal basis for and precise nature of that relief, indicating certainty and focus in relation to the relief. While parties may change the relief requested, they should do so in a manner that is clear and readily understable, which includes mentioning that the relief requested has changed and specifying whether or not the previously requested relief is retained or withdrawn.

68. Additionally, in the 64(4) Application, the Defence requested that the Prosecution be reprimanded in respect of the non-disclosure of Witness 4's Affidavit.[139] The Defence made this request in the body of the application and did not include it in its formal request for relief in that filing, or later filings. Despite this deficiency, however, the Chamber is prepared to rule on this issue given the seriousness of the allegations against the Prosecution.

69. In the following paragraphs the Chamber sets out, in respect of each requested form of relief, a summary of the submissions by the parties

[137] ICC-01/09-02/11-706, para. 43; ICC-01/09-02/11-707-Corr-Red, para. 52; ICC-01/09-02/11-723-Red, para. 21.
[138] ICC-01/09-02/11-706, para. 43; ICC-01/09-02/11-707-Corr-Red, para. 52; ICC-01/09-02/11-723-Red, para. 21. The Chamber notes that the Defence, in its Fifth Additional Defence Observations requested as relief that the Chamber "[d]etermine that a fair trial has been rendered impossible; and, accordingly […] [t]erminate the proceedings against Mr Kenyatta" (ICC-01/09-02/11-719-Red, para. 29). Given that the Defence in its last filing returned to the relief requested before, the Chamber understands the Defence request to be to also consider the alternative forms of relief.
[139] ICC-01/09-02/11-622, para. 41.

and the Legal Representative followed by an analysis of the governing legal framework.

A. Termination or stay of proceedings

(i) Submissions

70. The Defence requests the Chamber to "terminate" or unconditionally[140] "stay" the proceedings. The Defence does not distinguish between a termination and an unconditional stay of proceedings, either in terms of the legal or factual basis relied upon or their procedural consequences. In the view of the Chamber, these remedies are essentially interchangeable as they would have the effect of permanently halting the proceedings without prospect of recommencement. Accordingly, the Chamber will analyse the availability and applicability of these remedies together as a single form of requested relief.

71. The Defence relies on the Appeals Chamber's jurisprudence in the *Lubanga* case (discussed below) to argue that a fair trial is "impossible" now or at any stage in the future.[141] The Defence does not identify with any specificity the precise grounds upon which it submits a termination or stay of proceedings is warranted. In the Chamber's understanding of the Defence submissions, the request appears to be based primarily on a lack of substantive evidence

[140] The Defence submits that "the present case cannot be considered suitable for a conditional stay of proceedings, as a fair trial cannot at any stage become possible on the factual and legal matrix upon which the case is brought." ICC-01/09-02/11-706, para. 18. The Chamber understands this submission as a request for an unconditional stay of proceedings.
[141] ICC-01/09-02/11-706, paras 18 and 21.

against the accused (a combination of Issues 2 to 4)[142] rather than the alleged misconduct on the part of the Prosecution.

72. The Prosecution submits that whereas the Chamber has the authority to stay or terminate the proceedings in certain circumstances, it "would be an error to grant such relief here"[143] and that the case "does not come close to meeting the 'high threshold' required for a stay."[144] It submits that the "the Defence advances no cogent reasons why a stay of proceedings – conditional or permanent – should be imposed in the case". In particular, it submits that the Defence "does not explain how its own assessment of the evidence at confirmation stage supports the notion of unfairness of the proceedings."[145] It concludes that the Defence request "appears to be little more than an afterthought, supported by argument".[146]

73. The Legal Representative acknowledges that the power to stay or terminate proceedings has been recognised by the Appeals Chamber.[147] However, he also submits, that "where a disciplinary measure might bring about the same result as that sought by a stay of proceedings, a disciplinary measure should be used".[148]

(ii) Discussion

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[142] ICC-01/09-02/11-706, paras 18 and 19; ICC-01/09-02/11-707-Corr-Red, paras 2 and 16.
[143] ICC-01/09-02/11-708-Red, para. 30.
[144] ICC-01/09-02/11-708-Red, para. 31.
[145] ICC-01/09-02/11-714-Red, para. 28.
[146] ICC-01/09-02/11-714-Red, para. 28.
[147] ICC-01/09-02/11-709, para.14.
[148] ICC-01/09-02/11-709, para.14, citing *Prosecutor v.Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36 and *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paras 59-60.

74. The Chamber observes that the Statute does not expressly provide for either a termination or stay of proceedings. However, the jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where violations of the rights of the accused make it impossible for a fair trial to take place. In addition, Article 85(3) of the Statute, which governs compensation to detained or convicted persons, refers to a termination of proceedings for a "grave and manifest miscarriage of justice" thereby implying availability of termination in cases of serious violations of fair trial rights.

75. The Appeals Chamber first considered the availability of a stay of proceedings in a December 2006 decision in the *Lubanga* case. Having concluded that a stay was not available under the Statute for an abuse of process as such, it determined that the jurisdiction of the Court could only be exercised and its statutory provisions interpreted in accordance with internationally recognised human rights norms. It held that where breaches of an accused's fundamental rights make a fair trial impossible, "it would be a contradiction in terms to put the person on trial"and "the process must be stopped." [149]

76. The Appeals Chamber decision was applied by Trial Chamber I in *Lubanga* when it ordered a stay of proceeding in June 2008[150] for non-disclosure of potentially exculpatory material to the defence, which it

[149] *Prosecutor v. Thomas Lubanga Dyilo,* Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA4), paras 37 and 39.

[150] *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401.

defined as a fundamental aspect of the accused's right to a fair trial.[151] Significantly, the Trial Chamber held that in imposing a stay, it was not necessary to find that the prosecution acted in bad faith. It is sufficient, it held, to show that the rights of the accused have been violated to such an extent that the "essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process".[152] In subsequently upholding the stay, which it characterised as a conditional stay, the Appeals Chamber reconfirmed and expanded on its earlier jurisprudence. It held that a conditional stay of proceedings is an available and appropriate remedy in circumstances where a fair trial is not presently possible but may become so at a later stage of proceedings due to a change of circumstance.[153]

77. It is clear from the more recent jurisprudence of the Court that not every violation of fair trial rights will justify the imposition of a stay (conditional or unconditional) of the proceedings and that this is an exceptional remedy to be applied as a last resort. Of particular note is the Appeals Chamber decision of October 2010 reversing Trial Chamber I's imposition of a second stay of proceedings in the *Lubanga* case for failure by the prosecution to follow orders of the Court.[154] Referring to a stay as a "drastic" remedy which "potentially

[151] ICC-01/04-01/06-1401, paras 77 and 92.
[152] ICC-01/04-01/06-1401, para. 91.
[153] *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 80 ("If the unfairness to the accused person is of such nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceeding may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of the proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person").
[154] ICC-01/04-01/06-2582.

frustrate[es] the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute"[155] the Appeals Chamber held that the Trial Chamber should first have had recourse to sanctions against the Prosecution prior to imposing a stay.[156] Trial Chamber I in the *Lubanga* proceedings subsequently dismissed a further defence request for a permanent stay on the grounds of prosecutorial misconduct finding that a stay of proceedings should only be ordered if it "would be 'repugnant' or 'odious' to the administration of justice to allow the case to continue."[157]:

78. Trial Chamber IV and Pre-Trial Chamber I have also emphasised the exceptional nature of the remedy. In *Banda and Jerbo,* Trial Chamber IV rejected a defence request for a stay of proceedings on the grounds that restrictions on conducting investigations in the Republic of Sudan made an effective defence "impossible".[158] It held that to "conceive of a stay of proceedings" as an appropriate remedy for any difficulties encountered in accessing information or facilities during trial preparation "would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process".[159] In *Mbarushimana,* Pre-Trial Chamber I rejected a defence request for a permanent stay on the grounds that the Prosecution had, at the time of seeking an arrest warrant, mischaracterised certain procedural aspects of an investigation in Germany against the suspect. It held that not every breach of a suspect's or accused's rights justifies

[155] ICC-01/04-01/06-2582, para. 55.
[156] ICC-01/04-01/06-2582, para. 60.
[157] *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 8 March 2011, ICC-01/04-01/06-2690-Red2, para. 195.
[158] ICC-02/05-03/09-410.
[159] ICC-02/05-03/09-410, para. 79. In his separate concurring opinion, Judge Eboe-Osuji elaborates on the exceptional nature of the remedy. ICC-02/05-03/09-410, paras 14–83.

halting a trial and concluded that, in the circumstances, the alleged conduct did not reach the required gravity threshold to trigger a stay of proceedings.[160]

79. It follows from the above that the Defence has to meet a high threshold in satisfying the Chamber that Issues 1 to 4 (either alone or combined) establish grounds for a termination or stay of proceedings.

B. Referral to the Pre-Trial Chamber

(i) Submissions

80. The Defence retains, as an alternative relief, its request for the Confirmation Decision to be referred to the Pre-Trial Chamber for "reconsideration" pursuant to Article 64(4) of the Statute.[161] In support, it submits that because of the non-disclosure of Witness 4's Affidavit and the post-confirmation withdrawal of his evidence, the Confirmation Decision is "based on an inherently flawed analysis of the evidence".[162] The Defence concedes that the proposed application of Article 64(4) of the Statute to refer a Confirmation Decision back to the Pre-Trial Chamber was "not contemplated expressly at its conception". However it submits that a "textual and purposive reading" of the provision would necessarily "include questions or problems related to the [...] confirmation stage."[163]

81. The Prosecution submits that Article 64(4) was not intended to be "a vehicle for sending confirmed cases to the Pre-Trial Chamber for

[160] *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the "Defence request for a permanent stay of proceedings", ICC-01/04-01/10-264, 1 July 2011, pages 4-6.
[161] ICC-01/09-02/11-622, para. 42.; ICC-01/09-02/11-706, para. 43; ICC-01/09-02/11-707-Corr-Red, para. 52; ICC-01/09-02/11-723-Red, para. 21.
[162] ICC-01/09-02/11-622, para. 31.
[163] ICC-01/09-02/11-682, para. 10.

reconsideration".[164] It submits that such a remedy should only be granted in "the most exceptional circumstances".[165] Specifically, it submits, that it should only be granted if the Chamber were to conclude that the Confirmation Decision is "necessarily unsound" with respect to the accused and not merely because of changes to the Prosecution's evidence occurring post-confirmation.[166] According to the Prosecution there is "no merit" to the Defence's argument that the case would not have been confirmed if the Pre-Trial Chamber had known that there were inconsistencies in Witness 4's Affidavit as to his attendance at the 3 January 2008 meeting.[167]

82. In the view of the Legal Representative, referring a case back to the Pre-Trial Chamber is not an appropriate sanction for a violation of disclosure obligations.[168] Referring the case back to the Pre-Trial Chamber as a form of sanctioning the Prosecution, even if the Defence had established misconduct by the Prosecution, would be an inappropriate remedy as "it would be unfair to the thousands of victims in this case, who have waited over five years for this trial to begin".[169] Likewise, the Legal Representative argues that a case "cannot and should not" be referred back to the Pre-Trial Chamber based on Defence challenges to the sufficiency of the Prosecution's evidence and the "speculative argument that the Pre-Trial Chamber might change its mind".[170] To do so, he argues, would risk turning

[164] ICC-01/09-02/11-664-Red2, para 11.
[165] ICC-01/09-02/11-664-Red2, paras 2, 11-15.
[166] ICC-01/09-02/11-664-Red2, paras 3-4, 11-15.
[167] ICC-01/09-02/11-664-Red2, paras 3-4, 22.
[168] ICC-01/09-02/11-709, para. 2.
[169] ICC-01/09-02/11-709, para. 8.
[170] ICC-01/09-02/11-709, para. 6.

the confirmation hearing "into a forum in which endless re-litigation could take place".[171]

(ii) Discussion

83. Article 64(4) of the Statute provides the Chamber with discretionary power to refer "preliminary issues" to the Pre-Trial Chamber or another available judge of the Pre-Trial Division where it is necessary for its "effective and fair functioning". In order to exercise this power, therefore, the Chamber must satisfy itself that the matter amounts to a "preliminary issue" and that a referral is "necessary" for the "effective and fair functioning" of the Chamber.

84. In the present case, there is broad agreement amongst the parties that the question of the validity of the Confirmation Decision amounts to a "preliminary issue" in the relevant sense.[172] For the purposes of this Decision, the Majority of the Chamber is prepared to accept this characterisation without further inquiry or analysis.[173]

85. The more significant question, for the Chamber, is whether referral of the Confirmation Decision for reconsideration is "necessary for its effective and fair functioning". In determining this question, in the circumstances of the present application, the Chamber inevitability has to consider the merits of the challenge presented by the Defence. However, in doing so, it should not go beyond a *prima facie* analysis. The Chamber is mindful that it should not place itself in the position of the Pre-Trial Chamber when it comes to the consideration of the credibility of witnesses and assessment of the evidence presented at

[171] ICC-01/09-02/11-709, para. 6.
[172] See in particular ICC-01/09-02/11-682, para. 10; ICC-01/09-02/11-683-Red, para. 11 and 16.
[173] Judge Ozaki does not join in the analysis (paras 84-86) of the Chamber's powers under Article 64(4) of the Statute. Her views are set out in her separate opinion.

the Confirmation Hearing. It should not determine that the Confirmation Decision is invalid merely on the basis that it would have assessed the evidence differently. In the same vein, the Chamber should not conclusively determine how the Pre-Trial Chamber would have weighed the totality of Witness 4's evidence had the Affidavit been timely disclosed or in what way a different determination of Witness 4's credibility would have affected the weighing of the rest of the evidence, at the time of the confirmation.

86. It is only if it is self-evident that no reasonable Pre-Trial Chamber could have come to the same conclusion, had it been adverted to the Affidavit, that the Chamber could consider it necessary for its "effective and fair functioning" to refer the Confirmation Decision back to the Pre-Trial Chamber for reconsideration.

C. Reprimand

(i) Submissions

87. In the main body of its initial Article 64(4) Application, the Defence requests the Chamber "to reprimand the Prosecution for acting in bad faith (in respect of the non-disclosure of Witness 4's Affidavit), and take into account the Prosecution's conduct in the determination of any future requests for redactions in the proceedings".[174] The Defence does not make submissions as to the legal basis for this request.

88. Neither the Prosecution nor the Legal Representative address the issue of a reprimand directly in their submissions although, as noted above, the Legal Representative does refer in general terms to the

[174] ICC-01/09-02/11-622, para. 41.

imposition of disciplinary measures or sanctions for disclosure violations.[175]

(ii) Discussion

89. In the view of the Chamber, the authority to issue a reprimand and warning for failure to identify and disclosure of materials which may affect the credibility of Prosecution evidence, whilst not expressly provided for in the statutory framework of the Court,[176] falls squarely within the Chamber's broad discretionary powers set out in Articles 64(2) and 64(6)(f). These provisions, respectively, oblige the Chamber to ensure a fair trial and uphold the interests of justice and authorise it to rule on any other relevant matters. The Chamber recalls the finding of Trial Chamber I in *Lubanga* that "disclosure of exculpatory material in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial".[177]

90. As such, the Chamber considers it to be appropriate for a reprimand to be issued, as a form of sanction against the Prosecution, in cases of clear violations of this right. Moreover, in appropriate circumstances, a reprimand could be coupled with additional, more stringent sanctions or remedies for the Defence (for instance, the exclusion of evidence or imposition of fines).

IV. Analysis and conclusions

91. In this section, the Chamber analyses and makes findings on the appropriate relief to be granted in relation to each of the four issues arising from the Article 64(4) Application and related requests. It then

[175] See paras 81-82 above.
[176] The Chamber does not consider Article 71 of the Statute, which refers to misconduct committed by "persons present before" the Court, to be applicable to the present circumstances.
[177] ICC-01/04-01/06-1401, para. 92.

addresses the discrete issue of the propriety of the Prosecution's continued post-confirmation investigations.

A. Non-disclosure of Witness 4's Affidavit (Issue 1)

92. With respect to the Prosecution's conduct in failing to disclose Witness 4's Affidavit, the Chamber considers it appropriate to have regard to Articles 54(1), 64(2), and 67(2) of the Statute. Article 54(1) provides that the Prosecution has to "investigate incriminating and exonerating circumstances equally" and that it has to "[t]ake appropriate measures to ensure [...] effective investigation". Furthermore, the Prosecution is under an obligation to disclose potentially exonerating evidence in its possession to the Defence as soon as practicable. Such potentially exonerating evidence includes information that "may affect the credibility of prosecution evidence".[178]

93. The Defence has submitted that the Prosecution acted in bad faith. However, the Chamber considers that there is no conclusive information before it, on the basis of which the Chamber could conclude that members of the Prosecution purposely tried to withhold the Affidavit from the Defence until after the Confirmation Decision. Nevertheless, it is clear from the parties' submissions that the Prosecution made a grave mistake when it wrongly classified the Affidavit. The mistake occurred as a result of a deficient review system in place (at the time) within the Prosecution, where – apparently – persons without knowledge of the overall state of the evidence against the accused, or at a minimum the overall evidence

[178] Article 67(2) of the Statute.

provided by the witness concerned, performed a review of the Affidavit.

94. Further deficiencies in the Prosecution's internal structure are demonstrated by the fact that even though members of the Prosecution, *inter alia,* conducted further interviews with Witness 4, requested authorisation from the Single Judge to withhold the Affidavit from the Defence, and reviewed the overall evidence provided by Witness 4 when preparing submissions for the Confirmation Hearing, no member of the Prosecution appears to have adequately re-reviewed the Affidavit and noticed the mistake. Moreover, the Prosecution's error appears to have remained unnoticed until the Defence requested the Prosecution to provide information about the Affidavit. Similarly, the system in place allowed for other documents related to Witness 4 to not be disclosed to the Defence until 11 April 2013.

95. Recalling Trial Chamber I's finding in *Lubanga* that disclosure of potentially exculpatory material is a "fundamental aspect of the accused's right to a fair trial,"[179] the Chamber finds the Prosecution's conduct in failing to disclose the Affidavit and other documents related to Witness 4 to be a cause for serious concern, both in terms of the integrity of the proceedings and the rights of Mr Kenyatta.[180]

96. In terms of relief, the Chamber notes that unlike in *Lubanga,* where the Prosecution was refusing to disclose the materials concerned at the time the stay was ordered, the situation in the present case is very different. Although too late, the Affidavit and other materials related to Witness 4 have already been disclosed. Moreover, the prejudice the

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[179] ICC-01/04-01/06-1401, paras. 77 and 92. See the discussion in para. 76 above.
[180] Judge Eboe-Osuji explains his views on this matter in his separate opinion.

non-disclosure caused can be rectified at trial as the Prosecution no longer intends to call Witness 4 and the Defence will have the opportunity to challenge the credibility of other evidence relied upon by the Prosecution at confirmation in corroboration of Witness 4's evidence. Finally, the Chamber is mindful of its earlier finding that there is no conclusive information of bad faith on the part of the Prosecution in failing to disclose the document.

97. In these circumstances, the Chamber considers that it would be disproportionate to terminate or stay the proceedings as a result of the non-disclosure. Nor is it necessary to refer this issue to the Pre-Trial Chamber pursuant to Article 64(4) given that the issue came to light during the period when the Chamber was responsible for the conduct of the proceedings and is fully competent to resolve it. Rather, the appropriate remedy is for the Chamber to reprimand the Prosecution for its conduct and to require it to conduct a complete review of its case file and certify before this Chamber that it has done so in order to ensure that no other materials in its possession that ought to have been disclosed to the Defence, are left undisclosed. In addition, the Chamber stresses that given that the failure to disclose the Affidavit appears to have resulted from a deficient internal review procedure, the Prosecution can reasonably be expected, if it has not already done so, to make appropriate changes to its internal procedures.

B. Validity of the Confirmation Decision (Issue 2)

98. The Defence argues that the evidence that remains, now that the Prosecution no longer seeks to rely on Witness 4, does not meet the required threshold to establish that Mr Kenyatta has committed the

crimes as charged. The most detailed submissions on this issue appear in the Fourth Additional Defence Observations which purports to relate to "the impact of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta"[181] but in fact focuses on the evidence relied upon by the Pre-Trial Chamber in confirming the charges against the accused. The Defence challenges the findings by the Pre-Trial Chamber based on this evidence, and considers those findings to be "failure[s] to assess properly the evidence".[182] It argues that, "[c]ontrary to the determination of the [Pre-Trial Chamber]", certain evidence does not support the findings made by the Pre-Trial Chamber.[183]

99. The Chamber considers that these Defence submissions constitute an impermissible attempt to have the Chamber effectively entertain an appeal of the Confirmation Decision. In addition to the Defence's complaint that the Pre-Trial Chamber "did not permit the Defence to appeal the Confirmation Decision",[184] the Defence now challenges and calls for a reconsideration of all the evidence relied on in the Confirmation Decision, and not only that related to Witness 4.

100. The Statute is clear on the separation of powers between the various Chambers in this regard: only the Pre-Trial Chamber can entertain a request for leave to appeal the Confirmation Decision, and it is only the Appeals Chamber that can hear an appeal of the Confirmation Decision.[185] The Defence exhausted these remedies in 2012 when it did not agree with the outcome of the Confirmation Decision and

[181] ICC-01/09-02/11-707-Corr-Red.
[182] See, for example, ICC-01/09-02/11-707-Corr-Red, paras 23, 27 and 28h.
[183] See, for example, ICC-01/09-02/11-707-Corr-Red, paras 8, 23g, 23j, 23m, and 38-39.
[184] ICC-01/09-02/11-707-Corr-Red, para. 27, referring to ICC-01/09-02/11-384 and ICC-01/09-02/11-406.
[185] Article 82 of the Statute; Rules 155-156 of the Rules.

filed motions with the Pre-Trial Chamber and the Appeals Chamber.[186] The Chamber has no appellate jurisdiction over decisions of the Pre-Trial Chamber.[187] The fact that the Prosecution no longer seeks to rely on a witness or that the charges against a co-accused have been withdrawn does not change the statutory framework of the Court. Similarly, the Chamber is not the proper body to decide on a reconsideration of the evidence and credibility assessments as performed by the Pre-Trial Chamber. As noted above, any review by the Chamber of the validity of the Confirmation Decision as a result of the non-disclosure of Witness 4's Affidavit, or other materials disclosed after the Confirmation Hearing, and its implications for the Pre-Trial Chamber's assessment of the totality of the evidence against the accused, cannot go beyond a *prima facie* analysis given the responsibilities as set out in the Statute.

101. In any event, the Chamber is not persuaded that the non-disclosure of the Affidavit materially impacted the confirmation process. The Chamber agrees with the Prosecution and the Legal Representative that the factual arguments on the Affidavit and screening notes of Witness 4 and Witness 11 and their credibility relied on by the Defence, rather than focusing on the potential impact of the Affidavit, for the most part amount to an impermissible challenge to the evidentiary findings and methods of assessment of the Pre-Trial Chamber as a whole.[188]

[186] ICC-01/09-02/11-384 and ICC-01/09-02/11-383.
[187] *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the Status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 43.
[188] ICC-01/09-02/11-714-Red, para.7; ICC-01/09-02/11-709, para. 8c.

102. In this regard the Chamber notes that Witness 4 only recanted part of his statements to the Prosecution *after* the Confirmation Decision and that any effect on the confirmation process would thus only have resulted from the impact of the Affidavit. As to the content of the Affidavit, the Chamber considers that the Defence might have overstated the content (and thus possible effect) of the Affidavit when it states that in it Witness 4 "admitted that he was not present at the 3 January 2008 meeting",[189] and that he "clearly states that he did not attend the alleged meeting at Nairobi Members' Club on 3 January 2008".[190] Although, the Witness's remarks in the Affidavit raise questions as to his later statements to the Prosecution, the Chamber considers that these questions or the information contained in the screening notes for Witness 4 would not self-evidently have resulted in a reasonable Pre-Trial Chamber coming to a different conclusion as to Witness 4's credibility.[191]

103. As to Witness 11's screening notes, the Chamber considers that the information contained in the screening notes is not contradictory to or substantially different from the information contained in Witness 11's statements that were disclosed to the Defence prior to the Confirmation Hearing. The Defence's ability to challenge Witness 11, or the decision as it would have been taken by a reasonable Pre-Trial Chamber, would thus not materially have been affected.

104. Accordingly, the Chamber is not convinced that this issue provides a basis to terminate or stay the proceedings. Nor is it, in the view of the Majority, [192] necessary for the Chamber's "fair and effective

[189] ICC-01/09-02/11-622, para. 28.
[190] ICC-01/09-02/11-622, fn 76.
[191] See the discussion in para. 86 above.
[192] Judge Ozaki does not join in this part of the reasoning as explained in her separate opinion.

functioning" to refer this issue back to the Pre-Trial Chamber for reconsideration. To do so for this issue would effectively mean that the Chamber acts as an appellate body, which as considered above, is not permitted by the Statute.

C. Alleged new and altered allegations (Issue 3)

105. At the outset, the Chamber observes that the Prosecution is not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation of charges stage. There may be good reasons for the Prosecution to substitute, at trial, the evidence it used during the Confirmation Hearing to establish the charges (to the substantial grounds to believe standard) with other evidence, as long as this other evidence pertains to the same charges.

106. The Defence submits that it has to answer a wholly different case than the one confirmed by the Pre-Trial Chamber. It argues that there are new allegations,[193] but it is not clear whether the Defence is referring to new facts and circumstances, or merely to new evidence in support of the facts and circumstances underlying the charges as outlined in the Updated DCC. In this regard, the Chamber notes that the Defence mainly refers to information contained in the Pre-Trial Brief.

107. The Chamber stresses that it is the charges as confirmed by the Pre-Trial Chamber and subsequently set out in the Updated DCC, and *not* the information contained in the Pre-Trial Brief that serves as the basis for trial. The role of the Pre-Trial Chamber is to confirm or decline to confirm the charges as originally formulated by the Prosecution. In conducting the trial and rendering its final decision,

[193] ICC-01/09-02/11-655-Corr, para. 11.

the Chamber, whilst it cannot exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber and framed in the Updated DCC, is not bound by the Pre-Trial Chamber's evidentiary assessments or its interpretation of the relevant provisions of the Statute. The Chamber will not permit the Prosecution, at trial, to presume to rely on facts and circumstances going beyond the confirmed charges. If the Prosecution intends to introduce any such new facts and circumstances, the appropriate course would be to seek an amendment of the charges, prior to the commencement of trial, in accordance with Article 61(9).

108. As to the Defence's submission that the Prosecution has substituted key events, such as the 3 January 2008 meeting, with other events, the Chamber takes note of the Prosecution's submission that the meeting referred to in the Pre-Trial Brief as occurring "in early January 2008",[194] in fact refers to the 3 January 2008 meeting that was confirmed by the Pre-Trial Chamber.[195] Having considered the Prosecution's submissions, the Chamber accepts, at this stage, that this fact as alleged in the Pre-Trial Brief is consistent with the corresponding charge confirmed by the Pre-Trial Chamber.

109. As to the alleged addition of other meetings in January 2008, the Chamber has already found that the language used by the Prosecution in the Updated DCC, which refers to "multiple meetings [...] in early, mid and late January 2008",[196] does not go beyond the

[194] Confidential Redacted version Prosecution Pre-Trial Brief, 10 January 2013, ICC-01/09-02/11-596-Conf-AnxD-Red, paras 31 and 115.
[195] ICC-01/09-02/11-664-Red2, para. 27.
[196] Public Redacted Version of the Prosecution's Final Updated Document Containing the Charges, 7 January 2013, ICC-01/09-02/11-591-AnxB, page 34.

charges as confirmed by the Pre-Trial Chamber.[197] Regarding the language used by the Prosecution in its Pre-Trial Brief, the Chamber stresses again that the Updated DCC is the controlling document for trial.

110. The Chamber therefore finds that none of the allegations to which the Defence points exceed the facts and circumstances described in the confirmed charges and reflected in the Updated DCC. Moreover, the Chamber is not satisfied that the developments in the case post-confirmation discussed under this heading (Issue 3), either alone or combined with the other issues raised by the Defence, "[destroy] the factual and legal matrix" of the case as confirmed by the Pre-Trial Chamber and thereby invalidate the Confirmation Decision and render a fair trial impossible.[198] In so ruling, the Chamber does not discount the merits of the evidentiary challenges raised by the Defence. Rather, it simply does not consider that they cast sufficient doubt on the integrity of the proceedings or amount to such a gross violation of the accused's rights that it is impossible for a fair trial to take place. The Defence will have adequate opportunity, during the trial, to challenge the credibility of Prosecution witnesses and the strength of its case as a whole. As such, the deficiencies complained of do not meet the requirements for a termination or stay of proceedings as they can and will be resolved during trial.

111. The Chamber also fails to see how those post-confirmation developments could justify a referral of the case back to the Pre-Trial Chamber for reconsideration. These developments occurred during the period when the Chamber had responsibility for the conduct of

[197] Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, paras 44-45.
[198] ICC-01/09-02/11-706, para. 21 and ICC-01/09-02/11-707-Corr-Red, para. 16.

the proceedings. It is more efficient, expeditious and appropriate for the Chamber to address these issues and evaluate the impact on the Prosecution's case during the course of the trial rather than refer the case to the Pre-Trial Chamber for what would amount to a "fresh" confirmation. Again, the Chamber agrees with the Prosecution and Legal Representative that changes in the evidence (as opposed to the charges)[199] between the confirmation of charges and the trial stages cannot be a basis for seeking a new confirmation process.[200] As mentioned earlier, the proper forum for the Defence to raise its challenges as to the sufficiency of the evidence against the accused is before the Chamber, at the end of the Prosecution's case, or in closing arguments.

112. The Chamber does, however, have concerns as to the substantial volume of new evidence that was gathered by the Prosecution and only recently disclosed to the Defence. The propriety of the Prosecution's conduct and, what remedies or sanctions, if any, should apply, is analysed in sub-section E below.

D. Withdrawal of the charges against Mr Muthaura (Issue 4)

113. The Defence was given ample opportunity to make legal submissions, but – as opposed to the Prosecution and the Legal Representative[201] – it did not make any substantial submissions on the legal consequences of the withdrawal during the status conference or in its subsequent filings. Rather, the Defence's submissions are limited to the (alleged) lack of evidence "to provide

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[199] As discussed above, the Chamber is satisfied that the charges against the accused have not changed as a result of these developments and that it is a matter for the Chamber to determine, at trial, whether evidence to be adduced falls within the scope of the Updated DCC.

[200] ICC-01/09-02/11-714-Red, paras 9-11; ICC-01/09-02/11-709, paras 5-6.

[201] See, respectively, ICC-01/09-02/11-692-Red, paras 4-9; and ICC-01/09-02/11-T-24-ENG ET WT, pages 13-14.

substantial grounds to believe that Mr Kenyatta was a co-perpetrator in a common plan to commit crimes".[202] The Defence's 40-page filing on "the impact of the withdrawal of the charges against Mr Muthaura against Mr Kenyatta"[203] does not actually address the impact of the withdrawal beyond one introductory paragraph,[204] and it only addresses what it considers to be evidentiary problems at the confirmation stage.

114. The Chamber considers that at this stage it need not pronounce on the legal question as to the level of contribution necessary from co-perpetrators and the evidentiary standard for the evidence related to co-perpetrators who are not charged. Whether the Prosecution can prove its case against Mr Kenyatta and whether the evidence supports the alleged mode of liability of Mr Kenyatta as an indirect co-perpetrator are matters for trial. The Chamber deems it sufficient, at this stage, to observe that it is not bound by the interpretation of Article 25(3)(a) as applied by the Pre-Trial Chamber in the Confirmation Decision.

115. The Chamber notes the Prosecution's submission that if the Chamber has concerns as to the applicability of Article 25(3)(a) of the Statute, it could give notice pursuant to Regulation 55 of the Regulations that the other modes of liability contained in Article 25(3) of the Statute may be considered with respect to the accused.[205] An application by the Prosecution concerning notice pursuant to Regulation 55(2) of the

[202] ICC-01/09-02/11-707-Corr-Red, para. 16.
[203] ICC-01/09-02/11-707-Corr-Red.
[204] ICC-01/09-02/11-707-Corr-Red, para. 16.
[205] ICC-01/09-02/11-692-Red, para. 11; and ICC-01/09-02/11-708-Red, paras 25-26.

Regulations is pending before this Chamber and will be considered in due course.[206]

116. At this stage, the Chamber considers it necessary that the Prosecution provide an updated version of the document containing the charges, which reflects the withdrawal of the charges against Mr Muthaura. In addition, the Prosecution should include the necessary changes that follow from the Pre-Trial Chamber's Decision of 21 March 2013 granting the Prosecution's request to insert the allegation that gunshots were the cause of some of the alleged killings in Naivasha.[207] Further, the Chamber invites the Prosecution to update its Pre-Trial Brief to reflect these changes.

E. Post-confirmation investigations

117. The Chamber now turns to the Defence's concerns as to the quantity of evidence that was collected by the Prosecution post-confirmation. As concluded above, the Chamber considers that these matters have not altered the charges against the accused, or undermined the integrity of the proceedings to such an extent that a fair trial is no longer possible. The Chamber also recalls that it has already ruled on the scope of the confirmed charges against the accused[208] and emphasises that its final decision on the guilt of the accused cannot exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber and reflected in the Updated DCC.

[206] ICC-01/09-02/11-444.
[207] Corrigendum to Decision on the Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 21 March 2013, ICC-01/09-02/11-700-Corr.
[208] Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584 and accompanying annex.

118. The Chamber is concerned by the considerable volume of evidence collected by the Prosecution post-confirmation and the delays in disclosing all relevant evidence to the Defence. Whilst the Chamber does not consider that the Statute prohibits the Prosecution from conducting post-confirmation investigations, it is mindful of the Appeals Chamber's recent statement in *Mbarushimana* that the investigation should be "largely completed"[209] by the Confirmation Hearing.

119. Although there may be no formal preconditions for the Prosecutor to continue investigating the same facts and circumstances after they have been confirmed,[210] this is not an unlimited prerogative. In particular, the Majority of this Chamber (Judge Eboe-Osuji not joining in the reasoning) is of the view that under the procedural framework of the Statute, the Prosecution is expected to have largely completed its investigation prior to the confirmation hearing.[211] Article 54(1)(a) of the Statute requires the Prosecutor to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." As the Appeals Chamber has pointed out, this obligation is specifically linked to the Prosecutor's responsibility to establish the truth.[212] The Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the

[209] *Prosecutor v. Mbarushimana,* Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 44.
[210] ICC-01/04-01/06-568, paras 51-52.
[211] Judge Eboe-Osuji does not join in the line of reasoning as set out in paras 119-124, though he agrees that the relief as discussed in para. 125 is the appropriate relief to the prejudice complained of.
[212] ICC-01/04-01/06-568, para. 52.

confirmation hearing.[213] The Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.

120. This is not to say that the Prosecution is prohibited from conducting further investigations after the confirmation stage. Post-confirmation investigation may be appropriate when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation. It may also be appropriate when certain evidence that was available prior to confirmation, unexpectedly and through no fault of the Prosecution, becomes unavailable for use at trial (e.g. a witness dies or otherwise becomes unavailable). Furthermore, if the Prosecution can establish that (a) it could not have taken a particular investigative step prior to confirmation without unduly endangering the security of particular individuals or (b) that it had justifiable reasons for believing that this situation would significantly change after confirmation, it may be appropriate for the Prosecution to postpone such an investigative step until after confirmation.

121. However, the Majority is of the view that the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation. If a Trial Chamber finds that this has occurred, it would need to determine the appropriate remedy based on the circumstances of the case. This could include the exclusion of all or part of the evidence so obtained as a remedy for the

[213] This point is not affected by the fact that article 61(5) of the Statute allows the Prosecutor to present evidence in written or summary *form* at the confirmation hearing. Indeed, although the form of the evidence may be different, the substance should be largely the same.

Prosecution's conduct as well as to allay any potential prejudice caused to the accused.

122. In this case, as far as the Chamber has been able to ascertain, at least 24 of the Prosecution's 31 fact witnesses were interviewed for the first time after the Confirmation Hearing. In addition, a large quantity of documentary evidence appears to have been collected post-confirmation and to have been disclosed at a late stage.[214]

123. Under these circumstances, the Majority is of the view that the Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) of the Statute. In addition, the timing, manner and volume of disclosure of new evidence, failed to fully respect the accused's rights under Articles 54(1)(c) and 67(1)(a),(b) and (c) as well as Article 67(2) of the Statute.[215]

124. Notwithstanding the above, the Majority accepts that the Prosecution may have been guided by the Appeals Chamber's decision of 13 October 2006[216] without the benefit of its subsequent elaboration in *Mbarushimana,* [217] which intervened only after the confirmation hearing in the present case. Although the Prosecution's explanations[218] for its post-confirmation investigations focus on the

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[214] ICC-01/09-02/11-683-Red, paras 29 to 30.

[215] The Chamber notes that during the status conference held on 12 June 2012, the Prosecution stated in response to a question from the Presiding Judge that apart from disclosure issues, redactions and issues related to witness security it was otherwise ready to go to trial. Transcript, 12 June 2012, ICC-01/09-02/11-T-18-ENG-CT-WT, page 10, line 22 – page 11, line 1. In addition, the Chamber notes that it was clear from its decisions on the schedule for trial and the redaction protocol that the 9 January 2013 deadline for disclosure was a final deadline and that disclosure was expected to take place on a rolling basis prior to that date. Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para. 19; Annex A to Decision on the protocol establishing a redaction regime, ICC-01/09-02/11-495-AnxA, 27 September 2012, para. 2.

[216] ICC-01/04-01/06-568.

[217] ICC-01/04-01/10-514.

[218] As submitted in ICC-01/09-02/11-683-Red.

general security situation in Kenya and thus lack the degree of specificity which would have been expected, the Chamber accepts that the circumstances under which the Prosecution was operating were difficult and may have affected its ability to conduct a fuller investigation prior to confirmation.

125. Consequently, the Chamber considers that in the circumstances of the present case the most appropriate remedy for the prejudice caused to the accused consists of providing the Defence with further time to conduct its investigations and to fully prepare for trial in light of the new evidence.[219]

126. The Prosecution points to the fact that the initial trial date was vacated on 7 March 2013, which gave the Defence more time to prepare its case. However, when vacating the initial trial date, the Chamber explained that the reason for doing so was the time needed to address and decide the pending applications before it.[220]

127. As previously decided, the Chamber considers that three months after the date of full disclosure provides adequate time to prepare and should thus be taken as guidance as to the time needed.[221] However, in light of the Chamber's above findings, the Chamber will seek the Defence's views on time needed for preparation. For that reason, the Chamber invites the Defence to submit its observations as to the estimated time needed to adequately prepare for trial.

[219] Judge Van den Wyngaert appends a separate concurring opinion with additional views on post-confirmation investigations.
[220] ICC-01/09-02/11-677.
[221] ICC-01/09-02/11-451, para. 12.

128. Until the Chamber has decided on the amount of additional time that the Defence will be given, the current date for trial of 9 July 2013 will be retained.

For the foregoing reasons, the Chamber hereby:

REPRIMANDS the Prosecution for its failure to timely disclose the Affidavit to the Defence;

DIRECTS the Prosecution to conduct a review of its case file, as discussed in paragraph 97, and certify by 21 May 2013 that it has reviewed all materials in its possession;

RESERVES its decision as to the granting of additional time to the Defence to prepare for trial; and **INVITES** the Defence to submit observations on this issue by 13 May 2013;

ORDERS the Prosecution to submit an updated version of the Updated DCC by 6 May 2013; and **INVITES** the Prosecution to submit an updated Pre-Trial Brief by 6 May 2013;

DENIES the Article 64(4) Application and related requests in all other respects.

Judge Ozaki, Judge Van den Wyngaert and Judge Eboe-Osuji append separate opinions.

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

Judge Kuniko Ozaki, Presiding

Judge Christine Van den Wyngaert **Judge Chile Eboe-Osuji**

Dated 26 April 2013

At The Hague, The Netherlands