

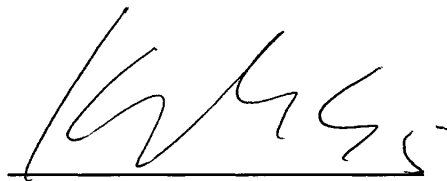
## Separate Opinion of Judge Ozaki

1. I fully concur with the final outcome of the Chamber's Decision on the Defence requests. I write separately solely to express my views on the question of the Defence request for referral to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute, especially with regard to the analysis in paragraphs 84 to 86 and 100 to 104 of the Decision.
2. In the Decision, my colleagues accepted that the Defence's challenge to the validity of the Confirmation Decision (Issue 2) could amount to a "preliminary issue" within the meaning of Article 64(4) of the Statute but held that it was not necessary for the "fair and effective functioning" of the Chamber to refer this matter to the Pre-Trial Chamber. In reaching this conclusion, the majority undertook a preliminary assessment of the merits of the defence challenge and determined that it was not self-evident that no reasonable Pre-Trial Chamber would have confirmed the charges had all relevant materials relating to Witnesses 4 and 11 been disclosed to it. The same test is applied in determining that the matter did not give rise to grounds for a termination or stay of the proceedings. In my view, these different forms of relief should have been separately analysed.
3. Furthermore, in my view, it would never be proper for the Chamber to refer the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute for the purpose of reviewing the validity of the charges. As discussed in my partially dissenting opinion to the "Decision on the withdrawal of the charges against Mr Muthaura", it is the role of the Prosecution to frame the charges upon which the accused is brought to trial.<sup>1</sup> The Chamber does not have the competence to refer back to the Pre-

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<sup>1</sup> ICC-01/09-02/11-698, 19 March 2013, para. 3 (referring to Article 61 of the Statute; Order regarding the content of the charges, Order regarding the content of the charges, 20 November 2012, ICC-01/09-

Trial Chamber an issue over which it has no competence to begin with. Therefore, in the case of a finding by the Chamber that there were serious substantive deficiencies in the Confirmation Decision which may render the charges flawed or invalid, the appropriate course would be for the Prosecution to be invited to withdraw or seek amendment of the charges pursuant to Article 61(9) of the Statute. If the Prosecution were to refuse to do so, the trial will continue, or, if the Chamber finds that the continuation of the trial on the basis of such charges violates the fundamental rights of the accused so that a fair trial becomes impossible, it will rely on its general power and obligation as set out in Article 64(2) of the Statute, and terminate or stay the proceedings.



**Judge Kuniko Ozaki, Presiding Judge**

Dated 26 April 2013

At The Hague, the Netherlands

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02/11-536, para. 7; Decision on the content of the updated document containing the charges, 21 December 2012, ICC-01/09-02/11-584, para.19).