Statement of Judge Ibáñez Carranza with respect to the joint declaration of the President of the Court and the President of the Appeals Division on the procedure on the election of presiding judges, in relation to her dissenting vote

1. As a result of the joint declaration issued on 22 January 2019 by the President of the Court and the President of the Appeals Division, I am compelled for reasons of law and ethics to issue this public statement in order to express some concerns as to the legal basis and the implications of such a declaration.

2. I would like to express my surprise that the joint declaration was signed by the President of the Court and the President of the Appeals Division in their official capacities which are of an administrative nature, in order to issue a declaration over a matter of a judicial nature such as the issuance of a dissenting vote. This could amount to a misuse of the administrative powers and functions in order to make a declaration over a matter that falls within the discretion of the Appeals Chamber, which is composed of five judges that are equal in status according to regulation 10 (1) of the Regulations of the Court.[1]

3. It must be highlighted that the issuance of the joint declaration finds no legal basis and is not supported by any reasons based on law, let alone the legal framework applicable before this Court. Indeed, the joint declaration makes no reference to any legal provision that would justify the issuance of this joint declaration which aims to disqualify my dissenting vote rendered in the exercise of my capacity as a judge of the Appeals Division, and as an expression of my Judicial Independence, in accordance with the legal framework of the Court.[2] It is also noted that the issuance of declarations challenging the content of dissenting opinions has not been the practice of this Court, and in this particular case the declaration does not invalidate my dissenting vote or the reasons in support thereof.

[1] Regulation 10 (1) of the Regulations of the Court reads as follows: 'In the exercise of their judicial functions, the judges, irrespective of age, date of election or length of service, are of equal status'.
[2] Pursuant to article 83 (4) of the Statute, a Judge of the Appeals Chamber may 'deliver a separate or dissenting opinion on a question of law'. Although this provision applies directly only to judgments of the Appeals Chamber, there have been separate or dissenting opinions also in respect of decisions and, occasionally, orders of the Appeals Chamber.

4. It must be stressed that a dissenting vote forms an integral part of any judicial decision issued by a bench of this court of law and, as such, must be respected even in circumstances in which there is disagreement with the reasoning or conclusions reached by the dissenting judge. My dissenting opinion sets out the legal and factual basis on which it was rendered. My esteemed colleagues seem to be in disagreement with some or all of the reasons; however, the issuance of joint declarations cannot and should not be the vehicle to express such disagreement insofar as this amounts to a lack of respect for a judicial dissenting vote or opinion and for the dissenting judge which, in turn, has a negative impact on the judicial guarantee of ensuring the proper administration of justice.

5. In terms of the content of the joint declaration, I would like to note some worrisome aspects thereof. In my humble view, the implication in the joint declaration that judges should be 'afforded the opportunity of previewing' dissenting opinions before they are issued[3] has no legal basis; on the contrary, this illegal imposition affects judicial independence. A dissenting judge must be free to express his or her opinions and only be guided in their decision making process by the rules of law. Demanding the setup of a procedure whereby dissenting judges must first afford the other judges an opportunity to review their dissent with a view to suggesting amendments or changes, as it seems to be implied in the joint declaration,[4] could amount to censorship which could, in turn, have the serious consequence of affecting the internal decision making process thereby impeding the free and independent exercise of the judicial functions entrusted to the Judges of this Court.

6. I appreciate the acknowledgment in the joint declaration as to the existence of a procedure in the Appeals Chamber Practice Manual to which I had not referred given that it is not a document publicly available.[5] I celebrate and am pleased that my dissenting opinion served the purpose of triggering the recognition of the existence of

[3] *See* 'Joint Declaration of Judge Eboe-Osuji and Judge Hofmański on the Procedure on the Election of Presiding Judges', ICC-02/11-01/15-1242-Anx2 [hereinafter: 'Joint Declaration'], para. 3.
[4] Joint declaration, para. 3: 'We regret, of course, that we were not afforded the opportunity of previewing the dissent before it was filed, as such a procedure might have made this joint declaration unnecessary.'
[5] 'Usually, the decision on the Presiding Judge is taken on a rotational basis, allowing, however, room for flexibility where appropriate (for example, to take account of other work load, specific expertise, or other pending appeals on a related subject assigned to a particular Presiding Judge).'

that said practice that indeed sets out both the criteria and the order to be followed for the designation of a Presiding Judge for each appeal.[6] It is fortunate that this question is now settled and unambiguous which will ensure the transparency and predictability in the designation of the presiding judge in the appeals that could arise before the Appeals Division.

7. With respect to the judicial guarantee of a pre-established judge, I note that the joint declaration alludes to this right of the parties as one that 'is concerned with the establishment –or at best the composition– of the court of law that is to consider a matter; rather than with the presiding judge of a particular Court or bench already composed'.[7] However, the *raison d'être* of the judicial safeguard, under the principle of due process, and right to have a natural or pre-established judge is concerned both with the pre-existence of a law that allows the exercise of a judicial mandate and with the manner in which such mandate is exercised.[8] This latter aspect is linked to the concept of the 'natural judge' which, forming part of the judicial guarantee of due process of law, requires that the judge that will decide a case is competent to do so. The powers of a Judge shall be derived not only from the law that established him as such, but also from the system (or criteria) which distributes among the judges their powers in the determination of a case.

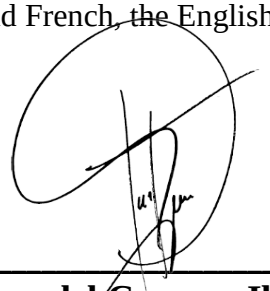
8. The joint declaration makes reference to the practice before the International Court of Justice (hereinafter: 'ICJ') concerning the President of that institution presiding 'over all meetings and cases of the Court'.[9] In this regard, one must recall the enormous

[6] Appeals Division Practice Manual, 15 May 2018, para. 7: 'Usually, the decision on the Presiding Judge is taken on a rotational basis, allowing, however, room for flexibility where appropriate (for example, to take account of other work load, specific expertise, or other pending appeals on a related subject assigned to a particular Presiding Judge)'. In this regard, it is noted that the example provided in the joint declaration as to those cases in which it may not be advisable to follow the 'rotation' rule established in paragraph 5 of the Appeals Division Practice Manual seems to be inapposite (Joint Declaration, para. 7). As it is of public knowledge, the issues raised on appeal by the Prosecutor are rather limited and the mandate of none of the Appeals Judges is close to coming to an end. It remains thus unclear to me the reasons justifying departure from the rotation rule agreed by the judges as reflected in the Practice Manual.
[7] Joint declaration, para. 9.
[8] *See in particular* article 8.1 of the American Convention on Human Rights: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'; and article 6.1 of the European Convention on Human Rights: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
[9] Joint declaration, para. 8.

differences between both Courts in terms of their jurisdiction, procedures and legal framework, *inter alia*, the following ones: (a) while the ICJ has jurisdiction to settle legal disputes between States and address the international responsibility of States, the International Criminal Court addresses individual criminal responsibility and is concerned with the restriction of the right to freedom and other fundamental rights of the individual; (b) while before the ICJ there is a single procedural stage that does not contemplate appeal proceedings, the Rome Statute contemplates at least three stages of proceedings (pre-trial, trial and appeal proceedings); (c) although it is true that the President of the ICJ presides over those cases in which he or she is involved,[10] it must be emphasised that this practice is explicitly precluded at this Court by the clear terms of the Rome State and regulation 13 (1) of the Regulations of the Court which states that '[t]he judges of the Appeals Chamber shall decide on a Presiding Judge for each appeal'. These striking differences preclude any possible comparison between the procedures applicable before the ICJ and the International Criminal Court.

9. My dissenting vote has been issued in accordance with the legal framework of this Court, was based on legal reasons and was rendered in the exercise of my judicial independence which, as explained above, forms part of the fundamental guarantee of due process of law, the proper administration of justice, and the highest democratic principles universally recognised in the exercise of judicial functions.[11] We, judges, are accountable before the international community as a whole and, as such, we should be promoting and serve as an example of the importance of observing democratic practices within our institution.

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



Judge Luz del Carmen Ibañez Carranza

Dated this 24th day of January 2019
At The Hague, The Netherlands

[10] Rule 18 (2) of the Rules of International Court of Justice.
[11] Basic Principles on the Independence of the Judiciary adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.