

**Joint Declaration of Judge Eboe-Osuji and Judge Hofmański
on the Procedure on the Election of Presiding Judges**

1. It may be noted that in addition to their functions as judges in this appeal, Judge Eboe-Osuji also serves as the President of the Court and Judge Hofmański also serves as the President of the Appeals Division. This declaration is issued with the approval of Judge Morrison and Judge Bossa for purposes of ensuring a proper understanding of the relevant practice in the work of the Appeals Division.

2. The Presiding Judge in the appeal was elected by all judges of the Appeals Chamber exercising their functions independently. Four out of the five judges of the Appeals Chamber voted in favour of the outcome, and one voted against.¹

3. As the judge who voted against, our esteemed colleague, Judge Ibañez Carranza, has issued a dissenting opinion to explain her opposing vote.² In it, she stressed that her dissent was not intended as a personal adversative. None is taken. 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.

4. This declaration is compelled, then, by the suggestion of our esteemed colleague to the effect either that there is no procedure that guides the selection of a presiding judge in the Appeals Division, or that such procedure as exists was not followed.

5. But, it is with the greatest respect that we recall the current procedure for the decision on a presiding judge as described in paragraph 5 of the ‘Appeals Division Practice Manual’ (last updated on 15 May 2018 and circulated during the tenure of the current Appeals Division). It states as follows:

¹ ‘Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the oral decision of Trial Chamber I taken pursuant to article 81(3)(c)(i) of the Statute’, 18 January 2019, ICC-02/11-01/15-1242.

² ‘Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza’, 18 January 2019, ICC-02/11-01/15-1242-Anx1.

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).

6. While it is neither necessary nor appropriate to engage the discussions among judges, such as resulted in the outcome of the election,³ it suffices to stress that the election of the Presiding Judge in this case followed both the letter and the spirit of paragraph 5 of the procedure described in the Appeals Division Practice Manual. And nothing alleged as a fact in our esteemed colleague's dissenting opinion suggests otherwise.

7. On the normative front, it is important to emphasise that the selection of the Presiding Judge in an appeal before the Appeals Chamber cannot - and should not - be done strictly on the basis of automatic rotation alone. For, that will quickly result in too many difficulties (foreseen and unforeseen) for the Court. One only needs to consider the difficulties that may result if a judge is automatically rotated in to preside over a large and complex appeal lodged towards the end of that judge's tenure at the Court.

8. Nor can one accept the implication alluded to in the dissenting opinion that it is somehow improper for the President of the Court to preside over an appeal in addition to his or her duties undertaken in the capacity of President with respect to the administration of the Court.⁴ It does not follow that this necessarily negatively impacts upon the fair and expeditious conduct of the proceedings.⁵ The practice in many courts is that the President of the court presides over every appeal. We note that as a matter of practice and procedure at the International Court of Justice, the President presides over all meetings and cases of the court.⁶

³ See rule 5 of the Rules of Procedure and Evidence, and article 6 of the Code of Conduct for Judges.

⁴ 'Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza', 18 January 2019, ICC-02/11-01/15-1242-Anx1, para. 9.

⁵ 'Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza', 18 January 2019, ICC-02/11-01/15-1242-Anx1, para. 9.

⁶ See, for example, Statute of the International Court of Justice, articles 45, 55, 58; International Court of Justice, Rules of Court, articles 12, 13(2), 18(2), 32(2), 61(3), 61(4), 65; International Court of Justice, Resolution Concerning the Internal Judicial Practice of the Court, article 6(ii), and more generally articles 3, 5, 6(iii), 8.

9. We also take note of our esteemed colleague's argument that the procedure for election of the Presiding Judge must respect 'the right of the parties to have a pre-established judge in proceedings before the Appeals Chamber, and more generally, before the Court'.⁷ However, we would observe that such right 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. The contemplated mischief is clearly not in issue here.

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



Judge Chile Eboe-Osuji



Judge Piotr Hofmański

Dated this 22nd day of January 2019

At The Hague, The Netherlands

⁷ 'Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza', 18 January 2019, ICC-02/11-01/15-1242-Anx1, para. 9.