Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza

1. For the reasons that follow, I respectfully disagree with the procedure adopted by my colleagues for the purposes of issuing the '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'. My dissenting opinion is based on two main reasons: (1) the lack of clear and transparent procedures in the Appeals Chamber to designate a Presiding Judge for each appeal, which impinges upon the fundamental right of the parties to have a pre-established judge thereby negatively affecting the fairness, predictability and transparency of proceedings before the Appeals Chamber; and (2) the absence of a fair and equal distribution of workload in the Appeals Chamber which is detrimental to the efficient conduct of proceedings and the right to be tried without undue delay.

2. With respect to my first reason, I am of the firm view that there should be clear and transparent procedures in place in the Appeals Chamber for the designation of a Presiding Judge for each appeal. Those procedures, once in place, must be respected and followed in order to ensure the fairness, predictability, and transparency of proceedings and, fundamentally, the right of the parties to have a pre-established judge in proceedings before the Appeals Chamber, and more generally, before the Court.

3. The right/judicial guarantee to have a pre-established judge forms part of the judicial guarantees of fair trial and due process in criminal proceedings as established in numerous human rights instruments (article 9.3 of the International Covenant on Civil and Political Rights ("ICCPR");[1] article 8.1 of the American Convention on Human Rights ("ACHR")[2]) which, by virtue of article 21(3) of the Statute, must be considered.

4. With respect to the right to have a pre-established judge, the Inter-American Court of Human Rights ("IACtHR") has held as follows: '[t]he Court considers that, by creating *temporary* public law chambers and courts and **appointing judges to them** at the time that

[1] "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."
[2] "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."

the facts of the case *sub judice* occurred, the State did not guarantee […] the right to be heard by judges or courts "previously established by law", as stipulated in Article 8(1) of the American Convention.'[3] In analysing the content of article 8.1 of the ACHR, the IACtHR has also stated that

> Article 8(1) sets forth the characteristics of the Judge (in the material sense, not only in the formal sense) summoned to decide an adversarial case and before whom the proceedings subjected to the guarantees system specified in the same provision must be developed:
>
> a) **legally established**, that is, his powers shall derive from the law which creates him or, in any case, from a law preventing them, considering the genuine scope of the expression "law", a topic which has also been addressed by the Inter-American Court jurisprudence;
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> b) **preexistent to the facts** on which it is to pass judgment, an *ex ante* characteristic which often constitutes a precious guarantee of legal certainty: it is set in the axis of criminal repression itself, regarding the principle of *nullum crimen nulla poena sine lege praevia*: substantive, organic and procedural, and it excludes ad hoc courts and the trials by commission.[4]

5. In another important case, the Inter-American Commission on Human Rights argued that 'the very concept of a tribunal previously established by law "means that judicial competence can be neither derogated nor removed; in other words, absolute adherence to the law is required and judicial competence may not be arbitrarily altered."'[5] It further contended that 'for a tribunal established by law to exist it is not sufficient that it be provided for by law; such a tribunal must also fulfil all the other requirements stipulated in Article 8 of the American Convention and elsewhere in international law.'[6] On this basis, the IACtHR found as follows:

> When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.[7]

[3] IACtHR, *Ivcher-Bronstein v. Peru*, Series C. No. 52, Judgment of 6 February 2001, para. 114 (emphasis added).
[4] IACtHR, *Palamara-Iribarne v. Chile*, Series C. No. 135, Judgment of 22 November 2005, concurring opinion of judge Sergio García Ramírez , para 9.
[5] IACtHR, *Castillo Petruzzi et al v. Peru*, Series C. No. 52, Judgment of 30 May 1999, para. 125 (f).
[6] IACtHR, *Castillo Petruzzi y otros v. Peru*, Series C. No. 52, Judgment of 30 May 1999, para. 125 (f).
[7] IACtHR, *Castillo Petruzzi y otros v. Peru*, Series C. No. 52, Judgment of 30 May 1999, para. 128.

6. Turning to the circumstances of the present case, upon my arrival at the Appeals Chamber, I was informed by the President of the Appeals Division that, according to the practice of the Appeals Division, the internal procedure to designate a Presiding Judge for each appeal was based on (a) rotation and (b) seniority. However, this procedure was not followed in the present case. Rather, the decision on the Presiding Judge was adopted on the basis of the alleged expertise of one of the judges on 'no case to answer' matters and further to his own proposal. In this regard, it is my humble view that all the Judges in the Appeals Division have the required expertise to preside over any appeal. The foregoing shows that there seems to be no clear and transparent internal procedure in place for the designation of a Presiding Judge for each appeal. The absence of such an internal procedure detrimentally affects the fundamental right of the parties to have a pre-established judge thereby impinging upon the fairness, predictability and transparency of proceedings before the Appeals Chamber.

7. Turning to the second reason of my dissent, I must recall that proceedings before this Court, including proceedings before the Appeals Chamber, must be conducted in a fair and expeditious manner. An imbalanced distribution of the workload of a Court of law has the result of negatively impacting upon the fair and expeditious conduct of judicial proceedings and negatively affecting the right of the accused to be tried without undue delay, a right which also forms part of the judicial guarantee of due process of law. In this regard, it is important to highlight that the right of the accused to be tried without undue delay (article 67(1)(c) of the Rome Statute;[8] article 14(3)(c) of the ICCPR;[9] article 8(1) of the ACHR[10]) is also applicable at the appeal stage and the Appeals Chamber must ensure the observance of this right which forms part of the judicial guarantee of due process of law.

8. With respect to the right to be tried without undue delay, the IACtHR has stated that the behaviour of the judicial authorities is one of the three points that 'must be taken into

[8] "The accused shall be entitled […] to the following minimum guarantees, in full equality: […] (c) To be tried without undue delay."
[9] "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] (c) to be tried without undue delay."
[10] "Every person has the right to a hearing, with due guarantees and within a reasonable time."

account in determining a reasonable time within which the trial must be conducted'.[11] The IACtHR has further held that

> the deficit of courts, the complexity of outdated procedural systems, and the overwhelming workload are relevant factors, even as regards courts that make a real effort to be productive. It is necessary to be aware of these factors; nevertheless, none of them should impair the rights of the individual and prejudice him. An excessive workload cannot justify the failure to respect reasonable time, which is not a balance between volume of domestic litigations and number of courts, but rather an individual reference for a specific case.[12]

9. Turning to the particular circumstances of the present case, I note that three of the Judges in the Appeals Chamber are already presiding over important pending appeals: in addition to his duties and responsibilities in his capacity of President of the Court, Judge Eboe-Osuji is presiding over the appeal filed by Jordan in the case of the *Prosecutor v. Omar Al-Bashir*; Judge Morrison is presiding over the appeal filed by Mr Bemba in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo et al.*; and Judge Hofmanski is presiding over the appeal filed by Mr Lubanga and victims in the case of the *Prosecutor v. Thomas Lubanga Dyilo*. However, there are two judges of the Appeals Chamber who have joined the Division as of March 2018 and who are currently not presiding over any pending appeal, despite the uncontroversial fact that all the Judges in the Appeals Division have the required expertise to preside over any appeal. The foregoing demonstrates that the designation of the Presiding Judge in the present case results in an imbalanced distribution of workload thereby negatively impacting upon the fair and expeditious conduct of the proceedings. The uneven distribution of the workload also has a negative impact on the right of the accused to be tried without undue delay which the Appeals Chamber is under an obligation to ensure.

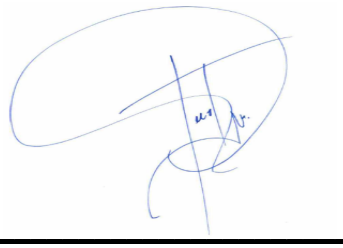
10. I must clarify that my dissent is not based on personal reasons. I file this dissent with my highest sense of appreciation for my colleagues and in the spirit of collegiality and have no doubts that the designated Judge is extremely qualified and experienced to preside over any appeal, in the same way as all the judges of the Appeals Chamber equally meet the requirements to be judges of this Court and preside over any appeal. This dissenting opinion

[11] IACtHR, *Genie Lacayo v Nicaragua*, Judgment of 29 January 1997, para. 77; ECtHR, *Ruiz-Mateos case v. Spain*, Judgment of 23 June 1993, Series A no. 262, para. 30; ECtHR, *Motta* Judgment of 19 February 1991, Series A no. 195-A, para. 30.

[12] IACtHR, *Valle Jaramillo et al.v. v. Colombia*, Judgment of 27 November 2008, concurring opinion of judge Sergio García Ramírez, para. 7.

is simply based on the need to have in place fair, predictable and transparent internal procedures in the Appeals Division, including for the designation of a Presiding Judge for each appeal. This will ensure the fair and expeditious conduct of the proceedings before the Appeals Chamber and the strict observance of the rights of the parties to have a pre-established judge and of the accused to be tried without undue delay.

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



Judge Luz del Carmen Ibañez Carranza

Dated this 18th day of January 2019

At The Hague, The Netherlands