

Annex to ICC-01/05-01/08-3557-Red

DECLARATION OF JUDGE EBOE-OSUJI

**RELATIVE TO THE APPEALS CHAMBER’S DISPOSAL OF THE
PROSECUTOR’S REQUEST DATED 6 DECEMBER 2017**

NOTING the “Prosecution’s request for a public version of confidential decision ICC-01/05-01/08-3557-Conf” dated 6 December 2017 (“Prosecutor’s Request”),¹ requesting the Appeals Chamber to authorise the filing of a public redacted version of the Appeals Chamber’s Decision of 29 August 2017;²

NOTING that the indicated reason for the Prosecutor’s Request (in paragraphs 1-2 and footnote 2 of that request) is to enable the Office of the Prosecutor to use certain pronouncements made in paragraph 17 of the Decision of 29 August 2017 as standing for the ‘current statement of the law’, for purposes of other litigation before the Court;

NOTING that the Appeals Chamber, by majority (Judge Eboe-Osuji dissenting) proceeded, on 15 December 2017, to authorise the filing of the public redacted version of the Decision of 29 August 2017, as the Prosecutor had requested, without announcing that authorisation in any decision formal or informal, and without inviting submissions from any of the parties opposed to the Prosecutor in this or any other litigation pending before this Court;³

NOW THEREFORE, I am constrained to declare as follows:

1. As a matter of procedure, there is no reason, in my view, that justifies the majority’s decision to not invite submissions from parties opposed to the Prosecutor in litigation pending before this Court – especially given the indicated reason for the Prosecutor’s Request;
2. Further as a matter of procedure, the requirements of transparency and proper records in judicial decision making requires the Appeals Chamber to announce in a formal way decisions or prompted actions it takes, pursuant to the formal requests of parties, especially when avoidance of such formal announcements of the Appeals Chamber’s decisions or prompted actions may have implications against the right of fair-hearing of

¹ ICC-01/05-01/08-3584-Conf (with confidential annex).

² ICC-01/05-01/08-3557-Conf.

³ “Public redacted version of ‘Decision on Mr Bemba’s request for disclosure concerning [REDACTED]’ of 29 August 2017 (ICC-01/05-01/08-3557-Conf)”, ICC-01/05-01/08-3557-Red.

parties opposed in interest to the party that made the request upon which the Appeals Chamber so acted;

3. As a matter of substance in the disposal of the Prosecutor's Request, my position is as follows:
 - i. It is fully accepted that the public redacted decision should be issued, in the ordinary course of the Court's business. But this is only to the effect that the decisions of the Court must be made public to the greatest extent possible. The Appeals Chamber's unannounced authorisation of the public redacted version of the Decision of 29 August 2017 is fully consistent with this position;
 - ii. It is not accepted that the Decision of 29 August 2017 stands for the 'current statement of the law' – as yet – to the extent of what was said in paragraph 17 of that decision, as quoted in footnote 2 of the Prosecutor's Request. Paragraph 17 of the Decision of 29 August 2017, as indicated is purely *obiter dictum* stated in a very conditional way. It is not yet the current law, fully considered and accepted as such by the Appeals Chamber. This position is not contradicted by the Appeals Chamber's unannounced authorisation of the filing of the public redacted version of the Decision of 29 August 2017, as the Prosecutor had requested.

Dated this 19th day of December 2017

At The Hague, The Netherlands



Chile Eboe-Osuji

Judge