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PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: **Judge Reine Adélaïde Sophie Alapini-Gansou**

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. PAUL GICHERU AND PHILIP KIPKOECH BETT

Public

Prosecution's Response to "OPCD's Submissions on the Inapplicability of Provisional Rule 165"

Source: **Office of the Prosecutor**

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INTRODUCTION

1. In 2016, the Judges of this Court proposed an amendment to rule 165 of the Rules of Procedure and Evidence. In particular, this would serve to reduce the number of judges sitting in the Pre-Trial Chamber, Trial Chamber, and Appeals Chamber for cases alleging violations of article 70 of the Statute.

2. Consistent with article 51(3), and on the basis of the Judges' view that this amendment was urgently required and its subject matter was not specifically addressed by an existing rule, the amended version of rule 165 was also promulgated as a provisional rule until such time as it was "adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties ["ASP"]." This was the first occasion on which the article 51(3) procedure was employed. However, at the next and following sessions of the ASP, States Parties failed to adopt, amend, or reject provisional rule 165.

3. The Office of Public Counsel for Defence ("OPCD") has now been granted leave to address this Pre-Trial Chamber – composed of a single judge, consistent with provisional rule 165(2) – on the validity of its constitution.[1] In OPCD's view, provisional rule 165(2) is no longer effective, and consequently the President of the Pre-Trial Division should have assigned the case to a Pre-Trial Chamber composed of three judges.[2] The President of the Pre-Trial Division has already dismissed *in limine* an earlier version of the Request, as it was addressed to the wrong forum.[3]

4. The OPCD submissions should be rejected. They misconceive the status of provisional rule 165, which is still under consideration by the ASP and remains in force. This Chamber, which is competent to rule on this matter, should accordingly find that it is indeed lawfully constituted. The OPCD's arguments regarding

[1] ICC-01/09-01/15-43 ("Decision Granting OPCD Leave to Appear"); ICC-01/09-01/15-40 ("Request for Leave to Appear"). *See also* ICC-01/09-01/15-47 ("OPCD Submissions"), para. 12 (noting that the request was granted by the Chamber on "the following day").
[2] *See* OPCD Submissions, paras. 4, 14, 27, 30.
[3] ICC-01/09-01/15-37. *See also* Request for Leave to Appear, para. 10.

retroactivity should likewise be rejected, since it misinterprets the Appeals Chamber jurisprudence on this issue, alternatively misapplies it to the facts of this case. In the present case, provisional rule 165 is not applied retroactively to the detriment of Mr Paul Gicheru[4] or for that matter Mr Philip Kipkoech Bett.[5] Nor is the provisional rule in conflict with the Statute,[6] which recognises a distinction between article 70 and article 5 offences. Applying a differing procedural regime in respect of article 70 offences is thus not inconsistent with the Statute. It is also consistent with practice in other international and domestic jurisdictions.

SUBMISSIONS

The Pre-Trial Chamber is competent to rule on this matter, for the purpose of this case

5. The Prosecution agrees that the Chamber is competent to rule on the legality of its own constitution.[7] This is consistent with the spirit underlying the principle known as *compétence de la compétence*[8]—even if the validity of provisional rule 165 is not a question of the jurisdiction of the Court, but rather the proper allocation of responsibilities between chambers and the applicable procedural law.[9] For the reasons explained below, now that it is seised of this question, the Chamber should affirm that it is validly constituted.

[4] "Gicheru".
[5] "Bett".
[6] *Contra* OPCD Submissions, paras. 5-6.
[7] *See* OPCD Submissions, paras. 25-26, 28-29.
[8] *See e.g.* ICC-RoC46(3)-01/18-37 ("*Bangladesh* Article 19(3) Decision"), para. 32 ("There is no question that this Court is equally endowed with the power to determine the limits of its own jurisdiction. Indeed, Chambers of this Court have consistently upheld the principle of *la compétence de la compétence*").
[9] *See e.g.* ICC-02/05-01/20-145 OA3 ("*Al Rahman* Appeal Admissibility Decision"), paras. 8-9 (a decision relating to a *chamber's* "sphere of competence" is not a "pronouncement with respect to any of the types of jurisdiction […] [n]or does it suggest that the *Court* is not competent to consider a matter", emphasis added); ICC-01/09-78 OA, para. 15 (referring, in the context of article 82(1)(d) to the "jurisdiction of the Court"). *See also* ICC-02/05-01/20-137 OA3, para. 6; ICC-02/17-T-001-ENG, pp. 17:20-18:2 (Prosecution submissions distinguishing the jurisdiction of the Court from matters concerning the competence of one organ of the Court *vis-à-vis* another organ of the Court). There is no doubt that the four facets of the Court's jurisdiction—subject matter, personal, territorial, and temporal—are established in the case against Mr Gicheru: *see e.g. Al Rahman* Appeal Admissibility Decision, para. 6; ICC-01/04-01/06-772 OA4, para. 21; ICC-01/04-01/07-3424 OA14, para. 32; ICC-01/04-02/06-1225 OA2, para. 39.

6. The corollary to this Chamber's power to rule on the matter raised by OPCD is that future chambers will *also* have this same power—which must be exercised in light of the concrete circumstances of those future cases, and the submissions made by the Parties to those cases.[10] Consequently, notwithstanding this Chamber's power to affirm the validity of its own constitution for the purpose of the case against Gicheru, it should not take into account considerations relating to any other persons, which would be impermissibly speculative.[11] The OPCD's intervention on behalf of Bett or any suspect arrested in the future is therefore both premature and unnecessary, given that such suspect could, upon their arrest and surrender, challenge the composition of any chamber constituted under rule 165, and such chamber could rule thereon. The Prosecution further recalls that both Parties in the case against Gicheru are amenable to severance from the case against Bett, who remains at large.[12] Thus, while OPCD has exceptionally been granted leave to make submissions to the Pre-Trial Chamber, it is not a Party to these proceedings, nor counsel for any person with an interest in these proceedings, and ordinarily would lack standing to make any representations in these proceedings. This means that any submissions from OPCD going beyond the narrow issue of the validity of rule 165 and its consequences for *this* Chamber in *this* case ought to be disregarded.

[10] This is also consistent with the principle of *res judicata*, which recognises that a final decision on a matter is binding on the Parties to that case. *See also* Statute, art. 21(2).
[11] *Cf.* OPCD Submissions, para. 13 (asserting that OPCD's submissions are made "on behalf of Mr Bett and all other unrepresented defendants who have no voice in their own proceedings yet are impacted by the viability of Provisional Rule 165", even though "such submissions are without consultation of any suspect and can only constitute representation of their general statutory rights until such time as they can make assertions before this Court of their own accord" and therefore "cannot constitute any specific defendant's admissibility or jurisdictional challenge"). *Compare also* Decision Granting OPCD Leave to Appear, para. 7 (recalling the basis of OPCD's claim of standing to represent Mr Bett "as an unrepresented suspect and party in this case", and "any potential suspects"), *with* para. 9 (granting OPCD leave to appear given "the importance of the issue under consideration for the conduct of the proceedings *in the present case*", emphasis added). In any event, the Prosecution does not understand the OPCD Submissions to constitute a challenge to the jurisdiction of the Court in any event: *see above* fn. 9.
[12] *See* ICC-01/09-01/15-46 ("Prosecution Submissions on Severance, and Other Matters"), paras. 18-19.

The ASP has not yet decided whether to adopt, amend, or reject provisional rule 165, and so it remains in force

7. While the failure of the ASP to make a prompt decision to adopt, amend, or reject provisional rule 165 is unfortunate,[13] it is not a "legal calamity",[14] nor is this situation unregulated by the Statute.

8. OPCD's concerns are premised on its claim that, "[i]f there was no action to adopt or amend Provisional Rule 165 at the 15th Assembly of States Parties [in 2016], it was tacitly rejected"[15] and that, "based on the plain text of the Rome Statute, inaction by the States equals rejection until, if and when, a provision is validly adopted."[16] In other words, in OPCD's view, "lack of any concrete decision by the ASP has caused the provisional amendments to expire in November 2016, leaving the original Rule 165 as applicable thereafter."[17] But this is inaccurate—and as a result OPCD's submissions relying on the operation of article 51(3) of the Statute must be dismissed.

9. Article 51(3) of the Statute gives effect to provisional rules "until" they are "*adopted, amended or rejected* at the next ordinary or special session of the Assembly of States Parties" (emphasis added). The wording of this clause – which implies a *decision* to adopt, amend, or reject the content of a provisional rule – demonstrates that OPCD is incorrect to assume that mere inaction by the ASP in a particular session can be equated with rejection.[18] If it was otherwise, article 51(3) would

[13] *Contra* OPCD Submissions, para. 2. *Compare* para. 9 ("the [ASP] considered Provisional Rule 165 [in 2016], but there was no final view on the matter").
[14] *Contra* OPCD Submissions, para. 1.
[15] OPCD Submissions, para. 2.
[16] OPCD Submissions, para. 15.
[17] OPCD Submissions, para. 23.
[18] As OPCD notes, one commentator suggests that "[r]ejection might be either by default (through inability to reach either consensus or the majority required to carry a vote) or by positive decision of the Assembly", but this commentator does not explain the basis for this view: OPCD Submissions, para. 20 (quoting B. Broomhall, 'Article 51', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 1342-1343 (mns. 29-30). It was apparently on the basis of Broomhall's view that Amnesty International likewise concluded in 2017 that provisional rule 165 is no longer in force: *see* OPCD Submissions, para. 23 (fn. 24). However, it is noteworthy that Amnesty International also accepts that the ASP "did not adopt, amend, *or reject* the provisional amendment", and that the ASP Working Group on Amendments "*continued* to consider" the provisional

merely stipulate that a provisional rule is effective until it is "considered" by the ASP. But it does not. Instead, a provisional rule remains in force until one of the three possible conditions for their termination is satisfied. This interpretation, which avoids the possibility of a provisional rule being terminated accidentally, promotes the effectiveness of article 51(3) since provisional rules may only be promulgated for matters which the Judges of the Court consider to be urgent and unregulated.[19]

10. Furthermore, on the facts, OPCD concedes that "the [ASP] considered Provisional Rule 165, but there was *no final view* on the matter",[20] and that it "did *none* of these *three* things" (adopting, amending, or – crucially – *rejecting* the provisional rule).[21] They also concede that States Parties at the ASP expressed "some approval" for the content of provisional rule 165[22]—which was, in fact, described as "strong support" by the ASP Working Group on Amendments[23]—but fail to recall that the majority of States Parties also foresaw the continued application of the rule until such time as the ASP made its final decision to adopt, amend, or reject it. This is confirmed by reference to the ASP's own records, which reflect that:

- On 21 September 2016, the ASP Study Group on Governance reported that it could reach "no final view" on provisional rule 165 and therefore "was not in a position to make a concrete recommendation" to the ASP Working Group on Amendments, to which it referred the matter.[24]

- On 8 November 2016, the ASP Working Group on Amendments reported that "there was no final view" among its members and therefore it was "not in a

amendment in 2017: Amnesty International, *International Criminal Court: Initial Recommendations to the 16th Session of the Assembly of States Parties (4 to 14 December 2017)*, p. 7 (emphasis added).
[19] *See* Statute, art. 51(3).
[20] OPCD Submissions, para. 9 (emphasis added).
[21] OPCD Submissions, para. 18 (emphasis added).
[22] OPCD Submissions, para. 19. *See also* para. 21.
[23] ICC ASP, *Report of the Working Group on Amendments*, ICC-ASP/15/24, 8 November 2016 ("WGA Report"), para. 34. *See also* para. 37; ICC ASP, *Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence*, ICC-ASP/15/7, 21 September 2016 ("SGG Report"), para. 17.
[24] SGG Report, para. 18.

position to make a concrete recommendation to the Assembly *at that time*" but would "*continue the discussion*" in the next session of the ASP.[25]

- On 16 November 2016, the ASP Bureau reported that the ASP Working Group on Amendments would "pursue the discussion with a view to making an appropriate recommendation to the Assembly."[26]

- On 22 November 2016, Kenya stated that "[i]n regards to [provisional] rule 165, we as an Assembly, are unable to pronounce ourselves on this matter" but expressed its satisfaction that "the Working Group on Amendments has agreed to remain seized of this matter and that it has been further agreed that negotiations will resume in New York, intersessionally".[27] Notwithstanding article 51(3), Kenya asked the Court "not to apply the provisional rule while the matter of rule 165 is still under consideration", in order to avoid "legal absurdities".[28] The last-mentioned request appears to implicitly recognise that the provisional rule was still valid and that it was in fact open to the Court to apply it.

- On 22 November 2016, Belgium stated that "the Assembly has not been able to take a decision as to the adoption, amendment or rejection of the provisional amendments to rule 165". In these circumstances, "a large majority of delegations, including […] Belgium," considered that "the provisional rule, as amended by the Court, remains applicable".[29] It was stressed that it is for the Court alone to determine this issue, if it became necessary.[30]

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[25] WGA Report, para. 37 (emphasis added). *See also* para. 41.
[26] ICC ASP, *Assembly of States Parties to the Rome Statute of the International Criminal Court*, Fifteenth Session, 16-24 November 2016, Official Records: Volume I, ICC-ASP-15-20 ("2016 ASP Proceedings"), Annex II (Oral Report on the Activities of the Bureau, 16 November 2016), paras. 21-22.
[27] 2016 ASP Proceedings, Annex V (Statement by Kenya), para. 3.
[28] 2016 ASP Proceedings, Annex V (Statement by Kenya), para. 5.
[29] 2016 ASP Proceedings, Annex VI (Statement by Belgium), para. 3.
[30] 2016 ASP Proceedings, Annex VI (Statement by Belgium), para. 3 ("it is for the Court, and the Court alone, to decide on the manner in which it should implement the provisions that concern it in the Rules […], and […] it is not up to the Assembly to dictate to the Court the way in which the latter should accomplish this task").

11. Likewise, four years later, the Independent Expert Report (IER) did indeed "reference[] Provisional Rule 165 as one that is 'in limbo'".[31] However, OPCD neglects to quote the IER's explanation that "[t]he ASP has neither adopted *nor rejected* the provisional amendment to Rule 165 adopted by the Court".[32]

12. OPCD seeks to circumvent the significance of the express condition in article 51(3) for terminating the effect of a provisional rule – adoption, amendment, or rejection by the ASP – by emphasising instead the reference to "the *next* ordinary or special session" (emphasis added) of the ASP,[33] which it considers to create a "time-sensitive gatekeeper function".[34] However, there is simply no reliable foundation for the view that a provisional rule lapses if it is not adopted at the next session of the ASP.[35] Indeed, this would significantly undermine the effectiveness of the procedure for adopting provisional rules – in contradiction to the urgent need which justifies their promulgation in the first place – and as such cannot be the correct interpretation of article 51(3). In particular, the current practices of the ASP Working Group on Amendments are such that it can be very time-consuming to gain the necessary consensus on each proposed amendment even when the vast majority of States Parties are in agreement. Interpreting article 51(3) to mean that provisional rules lapse if they are not immediately adopted at the ASP would largely make this capacity unworkable, and a dead letter.

13. Nor is OPCD assisted by reference to the ASP's practice in considering potential amendments to rule 76(3).[36] The crucial distinction is that draft amendments to rule 76(3) were not identified by the Judges of this Court as meeting the requirements for taking interim effect as a provisional rule. Consequently, article 51(3) of the Statute

[31] OPCD Submissions, para. 22.
[32] *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report*, 30 September 2020, para. 980 (fn. 759, emphasis added). Furthermore, the IER seems to suggest that at least some of the proposed amendments lying "in limbo" have "a two-thirds majority [of States Parties] in favour". From the context, it is not clear whether the IER considers provisional rule 165 to be such a rule.
[33] *See* OPCD Submissions, para. 18.
[34] OPCD Submissions, para. 22.
[35] *Contra* OPCD Submissions, para. 19. *See also above* fn. 18.
[36] *Contra* OPCD Submissions, para. 19.

does not apply, and therefore they can have no effect until "expressly adopted by the ASP", as OPCD notes. By contrast, where an amendment is given force as a provisional rule – like provisional rule 165 – the presumption is reversed: the provisional rule applies until expressly adopted, amended, or rejected by the ASP.

14. In these circumstances – where there is no real dispute that the ASP is yet to make a conclusive decision adopting, amending or rejecting provisional rule 165 – article 51(3) can only properly be interpreted as requiring the provisional rule to remain in force. For this reason, the first part of the OPCD Submissions must fail.

Provisional rule 165 is not applied retroactively in this case to the detriment of Gicheru

15. OPCD is incorrect to assert in the alternative that provisional rule 165 has been applied retroactively to this case, which in their view "was pending at the time it was passed", and that this is detrimental to the interests of Gicheru.[37] Article 51(4) of the Statute provides that:

> Amendments to the Rules […] as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

16. The Prosecution submits that provisional rule 165 has not been applied retroactively at all, and that in any event its application is not sufficiently detrimental so as to engage article 51(4). Accordingly, OPCD's submissions relying on article 51(4) of the Statute must be dismissed.

[37] *Contra* OPCD Submissions, para. 5.

Provisional rule 165 is not applied retroactively

17. OPCD fails to show that provisional rule 165 is applied retroactively – either to Gicheru or anyone else – but instead simply assumes this to be so.[38] This is incorrect, and inconsistent with the approach of the Appeals Chamber in *Ruto and Sang*.

18. In order to determine whether an amended rule or provisional rule has been applied retroactively, the Appeals Chamber stressed the necessity of determining "the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused."[39] Article 51(4) only serves to bar the application of any rule amended or provisional rule created *after* this point in time. Unlike the prohibition of the retroactive application of *substantive* law (for which the material point of time is always the time of the conduct allegedly committed by the suspect or accused), the prohibition of the retroactive application of *procedural* law depends on a judicial assessment of when the suspect or accused could reasonably assume that the proceedings against them would occur in a certain way.

19. The practice of the Appeals Chamber suggests that determining the relevant point in time is a mixed question of fact and law. In *Ruto and Sang*, "the date of the start of the trial" was held to be "the appropriate point at which to determine 'retroactivity'."[40] This was based on the content of the amended rule in question (relating to the admission of evidence), and the Appeals Chamber's view that, "at the commencement of the trial, there was a clear procedural regime with respect to the introduction of prior recorded testimony on which the accused could rely."[41]

20. In this case, in marked contrast, OPCD simply assumes that the "appropriate point" for the purpose of article 51(4) is not the commencement of the trial, as in *Ruto*

[38] *Contra* OPCD Submissions, para. 31.
[39] ICC-01/09-01/11-2024 OA10 ("*Ruto and Sang* Rule 68 Appeal Judgment"), para. 79.
[40] *Ruto and Sang* Rule 68 Appeal Judgment, para. 81.
[41] *Ruto and Sang* Rule 68 Appeal Judgment, para. 80.

and Sang, but the issue of a warrant of arrest.[42] In other words, the very inception of proceedings at the Court—more than four years before Gicheru accepted the Court's exercise of jurisdiction by his surrender, or otherwise sought to exercise any of his rights under the Statute. OPCD offers no justification at all for this position.

21. Provisional rule 165 differs from unamended rule 165 insofar as it disapplies from article 70 proceedings: articles 39(2)(b) (composition of chambers), 57(2) (powers of single judge of the Pre-Trial Chamber), 76(2) (power to convene a separate penalty hearing), and 82(1)(d) (interlocutory appeals with leave).[43] It reduces the number of judges sitting at each stage of proceedings,[44] as recalled above, and clarifies the rule on joining article 70 proceedings with the case in which the proceedings may have originated (inapplicable to this case).[45] Consequently, provisional rule 165 affects the regime applicable to litigation before the Court in pre-trial, trial, and appeal proceedings. It does not affect the circumstances in which an arrest warrant was issued for Gicheru (on 10 November 2015), which pre-dated the Judges' promulgation of provisional rule 165.

22. On this basis—and without prejudice to the recognition of an even later juncture as more appropriate—the *earliest* point in time which could possibly be considered material for the purpose of article 51(4) is the date when Gicheru (or any future suspect) surrendered to the jurisdiction of the Court (2 November 2020). This marked the point when, at least arguably, he may have relied upon the particularities of the litigation regime which would apply in the course of this Court's proceedings. At all previous times, far from relying on the applicable litigation regime at the Court, Gicheru entirely repudiated it—he remained a fugitive

[42] OPCD Submissions, para. 31 ("As the case of *Gicheru and Bett* had already been established by arrest warrants issued before February 2016, the principle of non-retroactivity […] prevents use of Provisional Rule 165 in this case").
[43] Provisional rule 165(2).
[44] Provisional rule 165(2).
[45] Provisional rule 165(4).

from the Court's jurisdiction, and did not comply with the arrest warrant. The same logic applies to Bett, who remains at large even now.

23. For these reasons, provisional rule 165 is not applied retroactively to Gicheru (or, indeed, to Bett) because it was promulgated by the Judges years before any possible reliance was made on the litigation regime of this Court.

Provisional rule 165 is not applied to the detriment of Gicheru or Bett

24. Further, even if provisional rule 165 were to be considered retroactive, it was not applied to the detriment of Gicheru.[46] The Appeals Chamber has held that "the term 'detriment' should be interpreted broadly" to the effect that:

> '[D]etriment' within the meaning of article 51(4) of the Statute is disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person. In that regard, the Appeals Chamber stipulates that it is not any disadvantage caused by the amendment of a rule that is sufficient for a finding of detriment under article 51(4) […] Detriment […] needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage.[47]

25. An assessment of 'detriment' will usually require analysis not only of the amended or provisional rule itself, but also the circumstances of its concrete application in the case.[48] A mere claim of detriment is insufficient.[49] In *Ruto and Sang*, the Appeals Chamber accepted that the application of the amended rule 68 "negatively affected the overall position" of the accused in their trial, based on the admission of evidence that could not previously have been admitted.[50]

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[46] *Contra* OPCD Submissions, para. 33.
[47] *Ruto and Sang* Rule 68 Appeal Judgment, para. 78. *See also* OPCD Submissions, para. 32.
[48] *Ruto and Sang* Rule 68 Appeal Judgment, para. 88.
[49] *Ruto and Sang* Rule 68 Appeal Judgment, para. 89.
[50] *Ruto and Sang* Rule 68 Appeal Judgment, para. 95.

26. OPCD fails to show that the overall position of Gicheru, or indeed Bett, is negatively affected by provisional rule 165. They note that pre-trial and trial proceedings will be heard by a single judge, and further claim that Gicheru will "be denied the opportunity to make interlocutory appeals even when an issue requires immediate resolution by the Appeals Chamber" and will "not benefit from having sentencing proceedings separate to the trial proceedings."[51] However, these concerns fail to meet the threshold required by article 51(4).

27. First, while it is true that provisional rule 165 has led to the constitution of this Pre-Trial Chamber with a single judge, this is not in fact detrimental to Gicheru, or indeed to any suspect. It should be noted that the Prosecution specifically raised this issue in Gicheru's presence at his initial appearance and invited him to make any submissions he had on the matter, or confirm that he was content for the case to continue before the Chamber as presently constituted.[52] Gicheru indicated that he had no objection and viewed it as a purely "administrative matter".[53] Thus, it appears that Gicheru himself does not share the OPCD's concerns as to possible prejudice.

28. Second, offences under article 70 of the Statute are subject to a limited penalty,[54] and may be tried not only by the Court but also by national jurisdictions.[55] Consequently, persons suspected of article 70 offences enjoy no right or legitimate expectation as to the particular composition of the judicial authority which will conduct pre-trial and trial proceedings against them, provided it confirms to internationally recognised standards. Depending on the law applicable in the national jurisdiction, this could be a judge sitting alone, a panel of judges, or even a jury. International acceptance that offences against the administration of justice may be properly tried before a single judge is further illustrated by the practice of other *ad*

[51] OPCD Submissions, para. 33.
[52] ICC-01/09-01/15-T-001-CONF-ENG ET 06-11-2020 15/23 SZ PT, p. 12, l. 18 to p. 13, l. 21.
[53] *Id*., p. 15, ll. 10-17.
[54] Statute, art. 70(3).
[55] Statute, art. 70(4)(a).

hoc tribunals hearing such cases before a single judge, such as the SCSL,[56] the RSCSL,[57] the STL,[58] the IRMCT,[59] and the KSC.[60] OPCD is therefore incorrect to suggest that, in this context, there is international consensus that "three heads are better than one".[61] Likewise, given this clear recent practice, previous international concern about this issue should be treated with caution.[62]

29. Third, the Prosecution notes that OPCD's concerns about potential appeal proceedings, or sentencing proceedings, are premature and fall short of demonstrating an actual – current – disadvantage, as required by the Appeals Chamber.[63] Nevertheless, the Prosecution observes that the restriction on the possibility of interlocutory appeal, with leave of a chamber, is not *per se* detrimental. Nor is the removal of the Parties' right to a separate sentencing hearing. In particular:

- As well established in the Court's jurisprudence – and illustrated by the plain terms of the provision itself – any limited right to appeal under article 82(1)(d) is highly qualified: it reflects a discretionary judicial power, which is to be applied restrictively.[64] The removal of this discretion by provisional rule 165 applies equally to all Parties to article 70 proceedings at the Court, and so confers no unfair advantage. Nor does it prevent the Parties from timely access to appellate review,[65] since the relatively brief duration of the pre-trial and trial stages means that the Parties' right of appeal at the conclusion of the trial serves this function.[66] Nor in any event does provisional rule 165 remove

[56] SCSL Rules of Procedure and Evidence, rule 77(D).
[57] RSCSL Statute, art. 12(1); RSCSL Rules of Procedure and Evidence, rule 77(D)(i).
[58] STL Rules of Procedure and Evidence, rule 60*bis*(C).
[59] IRMCT Statute, art. 12(1).
[60] KSC Law, art. 25(2).
[61] *Contra* OPCD Submissions, para. 42.
[62] *Contra* OPCD Submissions, para. 40 (citing H. Friman, 'Offences and Misconduct against the Court,' in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001), p. 614).
[63] *See* paras. 24-24 above.
[64] *See e.g.* ICC-01/13-73, paras. 22-23.
[65] *Contra* OPCD Submissions, para. 46.
[66] *Cf.* OPCD Submissions, paras. 44-45.

all forms of interlocutory appeal; the Parties may continue to avail themselves of the right to make interlocutory appeals under article 82(1)(a) to (c).

- OPCD is wrong to assume that provisional rule 165 precludes the possibility of "having sentencing proceedings separate to the trial proceedings".[67] Rather, provisional rule 165 disapplies the Trial Chamber's obligation to grant the Parties a separate sentencing *hearing*, on their request—but it would still appear to retain the discretion to grant such a hearing, if it appears necessary.[68] Moreover, the Parties will continue to make written submissions in a separate penalty phase, and potentially may also have the opportunity to adduce (suitably attested) evidence by this means.[69] Consequently, there is no obligation upon Gicheru – or any person accused of article 70 offences – to address matters which might be relevant to mitigating any sentence before his guilt has been determined beyond reasonable doubt.[70]

30. For these reasons, provisional rule 165 is not applied to the detriment of Gicheru (or, indeed, to Bett). While the procedural regime created by the rule is indeed somewhat different, Gicheru's overall position is not negatively, or unfairly, affected. To the contrary, he benefits from the streamlining of the Court's proceedings, so that the verdict in the case against him is rendered more expeditiously, in proportion to the limitations on the possible penalties that might be imposed.

Provisional rule 165 is compatible with the Statute

31. Finally, OPCD is wrong to argue that provisional rule 165 is incompatible with other provisions of the Statute, and that its application is therefore barred by article

[67] *Contra* OPCD Submissions, paras. 33, 47.
[68] *See e.g.* SGG Report, Annex II, para. 14 ("Even with these amendments, it was discussed that the Trial Chamber of one judge could still allow for a separate sentencing hearing under article 76 if circumstances warranted such a hearing"); WGA Report, para. 33.
[69] *Cf.* OPCD Submissions, para. 48.
[70] *Contra* OPCD Submissions, para. 47.

51(4) and (5).[71] This is primarily a question for the ASP, in deciding whether to adopt, amend, or reject a proposed amendment to the Rules.[72] Yet, in any event, rule 165(2) and (3) – in its unamended form – already illustrates the understanding of the drafters of the Statute that article 70 proceedings are recognised as an exception to the general provisions of the Statute.[73] Provisional rule 165 is no different in its effect,[74] and consequently any indications that some States Parties would not accept proposed amendments to the Rules concerning proceedings for article 5 crimes are immaterial.[75]

32. For the reasons already expressed,[76] provisional rule 165 occasions no unfairness, and is not inconsistent with internationally recognised human rights as guaranteed by provisions such as article 21(3) and article 67(1).[77] To the contrary, it accords with the widely held view that judicial procedures may be appropriately abbreviated for those crimes punished with lesser penalties.

33. OPCD further argues that the Judges of the Court erred in considering that the requirements of article 51(3) were met for the proposed amendment to rule 165 to be promulgated as a provisional rule.[78] In particular, article 51(3) requires that provisional rules must be approved by a two-thirds majority of the Judges of the Court, and may be promulgated only "in urgent cases where the Rules do not provide for a specific situation before the Court". While OPCD seems to accept the urgency of the need for provisional rule 165, they argue that there was no lacuna in

[71] *Contra* OPCD Submissions, paras. 35-36.
[72] *See also* WGA Report, para. 35 (recalling "strong support for the view that the criteria in article 51, paragraph 3, of the Statute had been met").
[73] *See* (unamended) rule 165(2)-(3) (disapplying articles 53 and 59 of the Statute for article 70 proceedings, and modifying the effect of article 61). *See also* SGG Report, Annex II, para. 8.
[74] *Contra* OPCD Submissions, para. 39 (asserting that the effect of provisional rule 165 "is contrary to the Rome Statute on its face"). *See also* para. 49.
[75] *Contra* OPCD Submissions, para. 41.
[76] *See above* paras. 27, 29. *See also* OPCD Submissions, paras. 33, 36 (noting that the arguments raised concerning the alleged incompatibility of provisional rule 165 with the Statute are the same as those which are alleged to show 'detriment' for the purpose of article 51(4)).
[77] *Contra* OPCD Submissions, para. 43.
[78] OPCD Submissions, paras. 37-38.

the Rules on the matters addressed by provisional rule 165.[79] This is simply incorrect: the Rules make relatively limited provision specific to the conduct of article 70 proceedings – which, in their nature, differ from article 5 proceedings – and it was open to the Judges to fill this gap with a provisional rule.

Conclusion

34. For all the reasons above, the OPCD Submissions should be dismissed, and the Pre-Trial Chamber should affirm the validity of its constitution under provisional rule 165.

Fatou Bensouda, Prosecutor

Dated this 20th day of November 2020
At The Hague, The Netherlands

[79] OPCD Submissions, paras. 37-38.