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**International  
Criminal  
Court**

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Date: 25 November 2020

**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**

**Paul Gicheru's Observations and Response to OPCD Submissions on the  
Inapplicability of Provisional Rule 165**

**Source: Counsel for Paul Gicheru**

**Document to be notified in accordance with regulation 31 of the *Regulations of the******Court to:*****The Office of the Prosecutor**Ms. Fatou Bensouda, Prosecutor  
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Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby submits his observations on the applicability of Provisional Rule 165 and responds to the Office of the Public Counsel for the Defence (“OPCD”) Submissions,<sup>1</sup> pursuant to Single Judge Alapini-Gansou’s Decision.<sup>2</sup> Contrary to the OPCD Submissions, Single Judge Alapini-Gansou has competence to exercise the powers and functions of the Pre-Trial Chamber in this case because Provisional Rule 165 is: a. in force and applicable,<sup>3</sup> b. not being applied retroactively to the detriment of Mr. Gicheru,<sup>4</sup> and c. consistent with the Rome Statute.<sup>5</sup> Commendable as its concerns may be regarding the Accused’s fair trial rights, the OPCD misunderstands the legal effect of the Assembly of States Parties’ (“ASP”) inaction on Provisional Rule 165, misapprehends the Appeals Chamber’s jurisprudence on retroactivity, and misconstrues the Statute and Rules, which differentiate between Article 70 offences and Article 5 crimes.

## I. PROCEDURAL HISTORY

1. On 10 February 2016, the Judges, acting in plenary and exercising their authority under Article 51(3), unanimously adopted Provisional Rule 165 to “simplif[y] and expedite[] article 70 proceedings.”<sup>6</sup> The provisional amendments reduce the number of judges sitting on the Pre-Trial Chamber, Trial Chamber, and Appeals Chamber, limits the right to interlocutory appeal, and eliminates an automatic right to separate sentencing proceedings for Article 70 cases.<sup>7</sup>

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<sup>1</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-47](#), OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020 (“OPCD Submissions”).

<sup>2</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-43](#), Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020, p. 5.

<sup>3</sup> [OPCD Submissions](#), paras. 13-30.

<sup>4</sup> [OPCD Submissions](#), paras. 31-34.

<sup>5</sup> [OPCD Submissions](#), paras. 35-49.

<sup>6</sup> 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”), Annex II, Report on the adoption by the judges of provisional amendments to rule 165 of the Rules of Procedure and Evidence, dated 29 February 2016 (“Judges’ Report on Provisional Rule 165”), paras. 1, 3; Report of the Working Group on Amendments, [ICC-ASP/15/24](#), 8 November 2016 (“Report of the Working Group on Amendments”), para. 35.

<sup>7</sup> [Judges’ Report on Provisional Rule 165](#), para 10.

2. The provisional amendments reflect Court-wide consultation, having been recommended by the Advisory Committee on Legal Texts (“ACLT”), which is composed of Judges and representatives from the Office of the Prosecutor, the Registry, and List Counsel.<sup>8</sup>
3. When Provisional Rule 165 was adopted, the Court was in the middle of trial hearings in *Bemba et al.* and had two more Article 70 cases on the docket – this case and the case against Walter Osapiri Basara<sup>9</sup> – as well an investigation into suspected Article 70 offences in *Ntaganda*.<sup>10</sup>
4. The Article 70 proceedings in *Bemba et al.* had proven to be lengthy and costly, and it became evident that the commitment of judicial resources to Article 70 proceedings was not commensurate to the gravity and nature of the offences.<sup>11</sup> Given the Court’s primary function in dealing with Article 5 “core” crimes, the Judges “felt the need to address the disproportionate resource drain” of “ancillary” Article 70 cases.<sup>12</sup> The Judges considered that the conditions warranting recourse to Article 51(3) were met – there was an urgent situation before the Court not contemplated by the Rules.<sup>13</sup>
5. Resource constraints resulting from the extensive drain on judicial resources from “peripheral” Article 70 proceedings when Court’s workload on Article 5 “core” crimes trials was increasing,<sup>14</sup> “rendered it urgent that the amendment to rule 165 be provisionally adopted.”<sup>15</sup> The Judges interpreted the term “urgent” “as applying

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<sup>8</sup> [Regulations of the Court](#), Regulation 4(1).

<sup>9</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-11](#), Order Unsealing the Warrant of Arrest and Other Documents, 10 September 2015; *Prosecutor v. Basara*, [ICC-01/09-01/13-1-Red2](#), Warrant of Arrest for Walter Osapiri Basara, 26 September 2013.

<sup>10</sup> *See Prosecutor v. Ntaganda*, [ICC-01/04-02/06-1883](#), Decision on Defence Request for a stay of proceedings with prejudice to the Prosecution, 28 April 2017, para. 4.

<sup>11</sup> [Report of the Working Group on Amendments](#), para. 31; [SGG Report](#), para. 11; [Judges’ Report on Provisional Rule 165](#), para. 8.

<sup>12</sup> [Report of the Working Group on Amendments](#), para. 31.

<sup>13</sup> [Judges’ Report on Provisional Rule 165](#), paras. 19-21.

<sup>14</sup> [SGG Report](#), para. 10.

<sup>15</sup> [Judges’ Report on Provisional Rule 165](#), para. 20.

not only to a situation requiring an immediate response, but also to one that is anticipated in light of current circumstances and has to be addressed in advance.”<sup>16</sup>

6. The Judges agreed that Article 70(2) provides the legal basis for the provisional amendments, as it “allow[s] for certain Rules amendments for article 70 proceedings which derogate from the procedures set out in the Statute.”<sup>17</sup> They also agreed that Rule 163(1) provides that some provisions of the Statute may be displaced by rules governing Article 70 offences, and that the Statute and Rules are consistent with the notion of legal functions being performed by a Single Judge.<sup>18</sup>
7. During consultations, the majority of States Parties who spoke expressed support for the provisional amendments, concurring with the Judges’ rationale for the amendments, and considering that they had met the conditions in Article 51(3) and were in conformity with the Statute.<sup>19</sup> Other States Parties questioned whether the conditions in Article 51(3) were met, raised concerns regarding Provisional Rule 165’s conformity with the Statute, or considered that the amendments were adopted *ultra vires*.<sup>20</sup>
8. Despite a large majority of States Parties supporting the adoption of Provisional Rule 165, it was not adopted, amended, or explicitly rejected at the ASP’s 15<sup>th</sup> session, as provided by Article 51(3).<sup>21</sup>
9. When it came to questions regarding the application of Provisional Rule 165 while it is still under consideration by the Working Group on Amendments, a “few delegations asked the Court to continue not to continue to apply the provisional rule.”<sup>22</sup> Yet a majority of delegations considered that Provisional Rule 165 remains

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<sup>16</sup> [Report of the Working Group on Amendments](#), para. 31.

<sup>17</sup> [Judges’ Report on Provisional Rule 165](#), para. 13.

<sup>18</sup> [Judges’ Report on Provisional Rule 165](#), paras. 11-12.

<sup>19</sup> [SGG Report](#), para. 7.

<sup>20</sup> [SGG Report](#), para. 8.

<sup>21</sup> [Report of the Working Group on Amendments](#), para. 37.

<sup>22</sup> Report of the Working Group on Amendments, [ICC-ASP/15/24/Add.1](#), 21 November 2016, Addendum III, Consideration of proposals to amend the Rules of Procedure and Evidence, para. 37 *bis*.

applicable pending a decision by the ASP to adopt, amend, or reject it, and that it would be for the Court, not the ASP, to decide its applicability.<sup>23</sup>

10. Kenya, which asked the Court “not to apply the provisional rule while the matter of rule 165 is still consideration,” expressed that it was “happy 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.”<sup>24</sup>

11. More than four years after the ASP’s 15<sup>th</sup> session, Single Judge Alapini-Gansou was appointed to exercise the powers and functions of the Pre-Trial Chamber in accordance with Provisional Rule 165.<sup>25</sup>

## II. PRELIMINARY MATTERS

12. The Defence agrees with the OPCD that Single Judge Alapini-Gansou is faithfully observing her duty to determine her competence by inviting submissions from the Parties and the OPCD on the legality of the establishment of Pre-Trial Chamber A.<sup>26</sup>

## III. LAW AND ARGUMENT

13. Pre-Trial Chamber A is lawfully established. Even though the ASP did not adopt, amend, or reject Provisional Rule 165 at its 15<sup>th</sup> session, it remains under consideration and is thus in force and applicable. Provisional Rule 165 is not being applied retroactively to the detriment of Mr. Gicheru. Nor is it inconsistent with the Statute since, in the context of Article 70 cases, a Single Judge performing the functions of a three-judge bench is consistent with the Statute and Rules,

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<sup>23</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 15<sup>th</sup> Session, 16-24 November, Official Records, Vol. 1, [ICC-ASP/15/20](#), Annex VI, Statement by Belgium concerning the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 3; Report of the Working Group on Amendments, [ICC-ASP/15/24/Add.1](#), 21 November 2016, Addendum III, Consideration of proposals to amend the Rules of Procedure and Evidence, para. 37*ter*.

<sup>24</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 15<sup>th</sup> Session, 16-24 November, Official Records, Vol. 1, [ICC-ASP/15/20](#), Annex V, Statement by Kenya concerning the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 3.

<sup>25</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-32](#), Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case, 2 November 2020.

<sup>26</sup> [OPCD Submissions](#), para. 29.

prohibiting discretionary interlocutory appeals does not deny the right of review, and the removal of an automatic right to a separate sentencing hearing – though imprudent – is likely to have a *de minimis* detrimental effect on the Accused’s fair trial rights.

**A. Pre-Trial Chamber A is lawfully established because Provisional Rule 165 is in force and applicable**

14. Provisional Rule 165 did not cease to be in force at the ASP’s 15<sup>th</sup> session and did not nullify the basis for creating Pre-Trial Chamber A on 2 November 2020. Article 51(3) unambiguously requires affirmative action by the ASP: to adopt, amend, or reject provisional amendments at its next session. The legal consequence of the ASP’s inaction on Provisional Rule 165 is that it continues to apply since it remains under consideration.
15. The OPCD claims that Pre-Trial Chamber A is not lawfully constituted because Provisional Rule 165 is not in force, and the legal consequence is that the case reverts to Pre-Trial Chamber II.<sup>27</sup> The OPCD argues that inaction by the ASP equates to tacit rejection or rejection by default,<sup>28</sup> the Court’s practice shows that it cannot act on new rules until they are officially adopted,<sup>29</sup> dissent by some States Parties casts doubt on the applicability of Provisional Rule 165,<sup>30</sup> and continued discussions on Provisional Rule 165 do not validate it.<sup>31</sup> The OPCD’s arguments are unconvincing.
16. The ASP’s inaction on Provisional Rule 165 does not equate to tacit rejection or rejection by default.<sup>32</sup> Article 51(3) requires affirmative action by the ASP: to adopt, amend, or reject the provisional rule. While it could be argued that the provisional

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<sup>27</sup> [OPCD Submissions](#), paras. 14, 30.

<sup>28</sup> [OPCD Submissions](#), paras. 15, 20, 23.

<sup>29</sup> [OPCD Submissions](#), para. 19.

<sup>30</sup> [OPCD Submissions](#), para. 21.

<sup>31</sup> [OPCD Submissions](#), para. 22.

<sup>32</sup> *Contra* [OPCD Submissions](#), paras. 15, 20, 23.

rule “lapsed” at the *next* session,<sup>33</sup> continued discussions took place at the 16<sup>th</sup> session, where a large majority of States Parties supported the adoption of the provisional rule.<sup>34</sup> Had the drafters of Article 51(3) intended that inaction on a provisional rule constitutes tacit rejection, they would have provided that the provisional rule lapses if no decision is taken by the ASP.

17. The Court’s practice does not show that it cannot act on new rules until they are officially adopted.<sup>35</sup> The OPCD’s example of amended Rule 76 is inapposite; the amendments to Rule 76 were not drawn up as a provisional rule under Article 51(3).<sup>36</sup> Suspending the application of a provisional rule until the ASP deliberates on whether to adopt, amend, or reject it would defeat the *raison d’être* of Article 51(3) – to provide the Judges urgent rule-making authority in circumstances not foreseen by the Rules. Leaving it to jurisprudence to develop rules in such scenarios “sits uneasily with both the relatively rigid conception of the principle of legality ... and the desire for the drafters of the Statute to leave final approval of the Rules to the States Parties.”<sup>37</sup>
18. Dissent by some States Parties does not cast doubt on the applicability of Provisional Rule 165.<sup>38</sup> A majority of States Parties considered that Provisional Rule 165 remains applicable pending a decision by the ASP to adopt, amend, or reject it and that it would be for the Court, not the ASP to decide its applicability.<sup>39</sup>

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<sup>33</sup> See Kritika Sharma, *The Curious Case of Rule 165 of the Rules of Procedure and Evidence: The Effect of Control Exercised by the Assembly of States Parties over the International Criminal Court*, 20 INT’L CRIM. L. REV. 285, 300 (2020).

<sup>34</sup> Report of the Working Group on Amendments, [ICC-ASP/16/22](#), 15 November 2017, para. 29.

<sup>35</sup> *Contra* [OPCD Submissions](#), para. 19.

<sup>36</sup> See Report of the Bureau on Study Group Governance, [ICC-ASP/13/28](#), 28 November 2014, Appendix III, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 76(3), rule 103, and rule 144(2)(b) of the Rules of Procedure and Evidence, paras. 1-5.

<sup>37</sup> Bruce Broomhall, *Article 51*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVER’S NOTES, ARTICLE BY ARTICLE 1043 (Otto Triffterer and Kai Ambos eds., 3d ed. 2016).

<sup>38</sup> *Contra* [OPCD Submissions](#), para. 21.

<sup>39</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 15<sup>th</sup> Session, 16-24 November, Official Records, Vol. 1, [ICC-ASP/15/20](#), Annex VI, Statement by Belgium concerning the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 3; Report of the Working Group on Amendments, 21 November 2016, 21 November 2016, [ICC-](#)



19. Continued discussions on Provisional Rule 165 demonstrate that it continues to apply pending a decision by the ASP.<sup>40</sup> States Parties' requests *not* to apply Provisional Rule 165 acknowledges that the Rule has not lapsed.<sup>41</sup>

**B. Provisional Rule 165 is not being applied retroactively to the detriment of Mr. Gicheru**

20. Provisional Rule 165 is not being applied retroactively. Provisional Rule 165 was adopted by the Judges in February 2016, four years before Mr. Gicheru surrendered himself to the Court on 2 November 2020.<sup>42</sup> When Pre-Trial Chamber A was composed according to Provisional Rule 165 on that day, there was a clear procedural regime with respect to the conduct of the Article 70 proceedings on which Mr. Gicheru could rely.<sup>43</sup> Even if Provisional Rule 165 is being applied retroactively, it is not to the detriment of Mr. Gicheru.

21. The OPCD claims that because the arrest warrant for Mr. Gicheru was issued before February 2016, the principle of non-retroactivity bars the application of Provisional Rule 165.<sup>44</sup> The OPCD also claims that application of Provisional Rule 165 would be to the detriment of the Accused: the case would only be heard by a Single Judge, the Accused would be denied the opportunity to interlocutory appeal, and would not have the benefit of separate sentencing hearings.<sup>45</sup> The OPCD misapprehends

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[ASP/15/24/Add.1](#), Addendum III, Consideration of proposals to amend the Rules of Procedure and Evidence, para. 37*ter*.

<sup>40</sup> *Contra* [OPCD Submissions](#), para. 22.

<sup>41</sup> See Assembly of States Parties to the Rome Statute of the International Criminal Court, 15<sup>th</sup> Session, 16-24 November, Official Records, Vol. 1, [ICC-ASP/15/20](#), Annex V, Statement by Kenya concerning the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, para. 3.

<sup>42</sup> *Prosecutor v. Gicheru and Bett*, [ICC-01/09-01/15-43](#), Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020, para. 2.

<sup>43</sup> See *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-2024](#), Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony," 12 February 2016, para. 80.

<sup>44</sup> [OPCD Submissions](#), paras. 31, 34.

<sup>45</sup> [OPCD Submissions](#), para. 33.

the Appeals Chamber's jurisprudence on non-retroactivity and the impact of Provisional Rule 165 on the Accused's fair trial rights.

22. Provisional Rule 165 is not being applied retroactively because it was adopted by the Judges before Mr. Gicheru's arrest warrant.<sup>46</sup> The Appeals Chamber held that in determining whether an amended rule is being applied retroactively, "it is necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties..."<sup>47</sup> The specific procedural regime governing these Article 70 proceedings became applicable to Mr. Gicheru once he surrendered to the Court, not upon issuance of the arrest warrant as the OPCD argues.<sup>48</sup> Provisional Rule 165 had no effect on the arrest warrant nor any procedural circumstance prior to his surrender to the Court on 2 November 2020.
23. Even if Provisional Rule 165 is being applied retroactively, it is not to the detriment of Mr. Gicheru simply because the case would be heard by a Single Judge, he would not have the right to interlocutory appeal, and he would not have an automatic right to a separate sentencing hearing.<sup>49</sup> These issues, and why they are not detrimental to Mr. Gicheru, are discussed below in Section C.

### **C. Provisional Rule 165 is consistent with the Rome Statute**

24. Properly adopted by the Judges under Article 51(3), Provisional Rule 165 does not eliminate any fundamental fair trial right under Article 67 of the Statute. In the context of Article 70 offences, a Single Judge performing the functions of a three-judge bench is consistent with the Statute and Rules, prohibiting discretionary interlocutory appeals does not deny the right of review, and any detrimental effect

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<sup>46</sup> *Contra* [OPCD Submissions](#), para 31.

<sup>47</sup> *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-2024](#), Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony," 12 February 2016, para. 79.

<sup>48</sup> [OPCD Submissions](#), para. 31.

<sup>49</sup> *Contra* [OPCD Submissions](#), para. 33.

on the Accused's fair trial rights resulting from the removal of an automatic right to a separate sentencing hearing is likely to be *de minimis*.

25. The OPCD's claims to the contrary are ill-conceived.<sup>50</sup> The OPCD misunderstands the Judges' discretion to adopt provisional rules under Article 51(3) and does not identify fundamental fair trial rights that would be denied by applying Provisional Rule 165.

**a. *The conditions in Article 51(3) were met***

26. A plain reading of the text of Article 51(3) supports the Judges' rationale in considering that there is an "urgent case[] where the Rules do not provide for a specific situation before the court" – i.e. "the situation of an extensive drain on judicial resources caused by the allocation of judicial resources to peripheral article 70 proceedings at the same time as the Court's workload on article 5 core crimes was continuing to increase."<sup>51</sup>

27. The OPCD claims that there was no *lacuna* in the Rules triggering Article 51(3) because Article 51(3) "appears to relate only to procedural gaps, not financial ones," and in any event, "there is no 'gap' to fill in" since the Statute already codifies the procedure for composing the tribunal, interlocutory appeals, and sentencing hearings.<sup>52</sup> The OPCD misreads Article 51(3).

28. Article 51(3) does not require a *lacuna* in the procedure. The OPCD misapprehends the so-called "authoritative" commentary it cites to support its claim.<sup>53</sup> In his *Commentary to the Rome Statute*, Professor William Schabas did not, as the OPCD suggests, comment that Article 51(3) "refers only to 'lacunae (...) in (...) areas of

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<sup>50</sup> [OPCD Submissions](#), paras. 37-49.

<sup>51</sup> [SGG Report](#), para. 10.

<sup>52</sup> [OPCD Submissions](#), paras. 37-38. *See also id.*, para. 39 (claiming that the reduction of sitting judge at each level of Article 70 proceedings is contrary to the Rome Statute on its face).

<sup>53</sup> [OPCD Submissions](#), para. 37, citing William A. Schabas, *Article 51. Rules of Procedure and Evidence*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 647 (William A. Schabas, ed., 2010). While Professor Schabas is a highly regarded Academic and scholar, his *Commentary on the Rome Statute*, while instructive, is neither beyond cavil nor "authoritative" in the sense that it is binding authority.

procedure.”<sup>54</sup> The OPCD relaxedly quotes out of context. Professor Schabas simply notes that “lacunae in the Rules have already been identified in important areas of procedure,” but as of the date of publication of his Commentary, the Judges chose not to proceed by adoption of provisional rules.<sup>55</sup>

29. Professor Schabas also notes the possibility that the Judges would adopt provisional rules under Article 51(3) to “adjust or amend a Rule adopted by the Assembly of States Parties ... in an ‘urgent case,’ where application of a Rule in a ‘specific situation’ may lead to an unworkable result or an absurdity.”<sup>56</sup> In such circumstances, Professor Schabas comments that the authority of two-thirds majority of Judges, coupled with the ASP’s consideration of the provisional rule in short order, “should be enough to reassure concerns about any possibility of abuse.”<sup>57</sup>

30. The Judges “[are] the ultimate arbiters of the Statute’s interpretation”<sup>58</sup> and have the discretion to determine whether the conditions are met for them to exercise their power to adopt provisional rules.<sup>59</sup> As Kritika Sharma points out, the ASP “was not established as an appellate or even a judicial or quasi-judicial body” with the power to review decisions of the Court under Article 51(3).<sup>60</sup> The ASP’s power to review decisions under Article 51(3) is to adopt the provisional amendment, amend it, or reject it in its entirety.

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<sup>54</sup> [OPCD Submissions](#), para. 37; William A. Schabas, *Article 51. Rules of Procedure and Evidence*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 647* (William A. Schabas, ed., 2010).

<sup>55</sup> William A. Schabas, *Article 51. Rules of Procedure and Evidence*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 647* (William A. Schabas, ed., 2010).

<sup>56</sup> William A. Schabas, *Article 51. Rules of Procedure and Evidence*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 647* (William A. Schabas, ed., 2010).

<sup>57</sup> William A. Schabas, *Article 51. Rules of Procedure and Evidence*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 647* (William A. Schabas, ed., 2010).

<sup>58</sup> [Report of the Working Group on Amendments](#), para. 35.

<sup>59</sup> Bruce Broomhall, *Article 51*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVER’S NOTES, ARTICLE BY ARTICLE 1043* (Otto Triffterer and Kai Ambos eds., 3d ed. 2016).

<sup>60</sup> Kritika Sharma, *The Curious Case of Rule 165 of the Rules of Procedure and Evidence: The Effect of Control Exercised by the Assembly of States Parties over the International Criminal Court*, 20 INT’L CRIM. L. REV. 285, 306-07 (2020).

***b. A Single Judge performing the functions of a three-judge bench is consistent with the Statute and Rules***

31. There is no inconsistency with the Statute in having a Pre-Trial Chamber and Trial Chamber composed of a Single Judge. Article 57(2)(b) allows for a Pre-Trial Chamber Judge to “exercise the functions provided for in this Statute....” Article 64(8)(b) provides that the Presiding Judge of the Trial Chamber may “give directions for the conduct of the proceedings....” And Rule 132*bis* provides for a Single Judge to assume functions for the preparation of the trial.
32. The OCPD argues that reductions of the number of Judges in the Pre-Trial, Trial Chamber, and Appeals Chamber is contrary to the Statute and departs from “high international standards.”<sup>61</sup> The OPCD overlooks that Article 70 creates a unique procedural regime for offences against the administration of justice, such that not all provisions of the Statute and Rules applicable to Article 5 crimes apply.<sup>62</sup>
33. During the drafting of Article 70, many delegations were concerned that “the various principles and procedures in the Statute were not appropriate for non-core crimes.”<sup>63</sup> But given the little time available in Rome to devise an appropriate procedure for prosecuting these offences, “the conference decided as a general matter to leave elaboration of more detailed standards to the Rules.”<sup>64</sup> The resulting language in Article 70(2) is “the general delegation of authority given to the drafters of the Rules” to devise procedures relating to Article 70 offences.<sup>65</sup>

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<sup>61</sup> [OPCD Submissions](#), paras. 39-43.

<sup>62</sup> See William A. Schabas, *Article 70*, in *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 856 (William A. Schabas, ed., 2010).

<sup>63</sup> Donald K. Piragoff, *Article 70*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER’S NOTES, ARTICLE BY ARTICLE 1751, 1755* (Otto Triffterer and Kai Ambos, eds., 3d ed., 2016).

<sup>64</sup> Donald K. Piragoff, *Article 70*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER’S NOTES, ARTICLE BY ARTICLE 1751, 1756* (Otto Triffterer and Kai Ambos, eds., 3d ed., 2016).

<sup>65</sup> Donald K. Piragoff, *Article 70*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER’S NOTES, ARTICLE BY ARTICLE 1751, 1755* (Otto Triffterer and Kai Ambos, eds., 3d ed., 2016).

34. Article 70(2) states that the “principles and procedures” governing the Court’s exercise of jurisdiction over Article 70 cases shall be those provided for in the Rules. Article 70(3), recognizing the difference in gravity between Article 70 offences and Article 5 core crimes, provides more limited sanctions for Article 70 offences. And Article 70(4) provides the Court the power to request that a State Party submit an Article 70 case to its national authorities, where no such transfer is permissible for Article 5 crimes.
35. The Rules themselves also provide that the rules applicable to Article 70 proceedings differ from those applicable to Article 5 core crimes. Chapter 9 of the Rules (offences and misconduct against the court), “excludes and/or varies the application of specific provisions of the Statute.”<sup>66</sup> Specifically, Rule 163(1) provides that the Statute and Rules apply *mutatis mutandis* “unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169.” Rule 162(2)-(3) provide that Chapters 2 (jurisdiction, admissibility, and applicable law) and 10 (enforcement) do not apply. Rule 164 provides a five-year time limit to initiate the investigation or prosecution of Article 70 offences and Rule 166 provides a specific sanction regime for Article 70 offences.
36. Rule 165, prior to its amendment, also departed substantially from the Statute. Rule 165(2) provided that Articles 53 (initiation of an investigation) and 59 (arrest proceedings in the custodial state) of the Statute do not apply. Rule 165(3) also provided that the confirmation of charges could be determined based on written submissions, departing from requirement in Article 61 of the Statute that a hearing be held.
37. That some delegations considered that having the Pre-Trial Chamber and Trial Chamber composed of a Single Judge and the Appeals Chamber of three judges was inconsistent with the Statute in drafting Article 70 does not render Proposed Rule 165 inconsistent with the Statute.<sup>67</sup> The OPCD’s example of the adoption of

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<sup>66</sup> [SGG Report](#), para. 13.

<sup>67</sup> *Contra* [OPCD Submissions](#), para. 40.

Rule 132*bis* and rejection of Proposed Rule 140*bis* is inapposite considering that these Rules were not proposed specifically contemplating Article 70 proceedings.<sup>68</sup>

38. There is also no indication that having the Pre-Trial Chamber and Trial Chamber composed of a Single Judge and an Appeals Chamber composed of three judges departs from “high international standards,” if such standard exists.<sup>69</sup> The OPCD refers solely to the composition of Chambers under the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>70</sup> Yet the Statutes and Rules of Procedure of the Special Tribunal for Sierra Leone,<sup>71</sup> Residual Special Court for Sierra Leone,<sup>72</sup> Special Tribunal for Lebanon,<sup>73</sup> International Residual Mechanism for Criminal Tribunals,<sup>74</sup> and the Kosovo Specialist Chambers,<sup>75</sup> all provide for offences against the administration of justice to be heard by a Single Judge.

39. Notably, States Parties considered the amendments regarding the number of judges composing the various Chambers to be consistent with national and international practice.<sup>76</sup> Of the States Parties that raised objections to the composition of the Chambers, France and Germany suggested to allow the Pre-Trial Chamber to be composed of a Single Judge, except as regards the confirmation of charges.<sup>77</sup>

*c. Prohibiting discretionary interlocutory appeals does not deny the right of review*

40. Even if interlocutory appeals under Article 82(1)(b) are prohibited, the right of review is still guaranteed by other provisions of the Statute. Article 81(1)(b) provides the right to appeal against a conviction decision on procedural errors,

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<sup>68</sup> *Contra* [OPCD Submissions](#), para. 41.

<sup>69</sup> *Contra* [OPCD Submissions](#), paras. 42-43.

<sup>70</sup> [OPCD Submissions](#), para. 42.

<sup>71</sup> [Special Court for Sierra Leone, Rules of Procedure and Evidence](#), Rule 77(D).

<sup>72</sup> [Statute of the Residual Special Court for Sierra Leone](#), Art. 12(1); [Residual Special Court for Sierra Leone, Rules of Procedure and Evidence](#), Rule 77(D)(i).

<sup>73</sup> [Special Tribunal for Lebanon, Rules of Procedure and Evidence](#), Rule 60*bis*(C).

<sup>74</sup> [Statute of the International Residual Mechanism for Criminal Tribunals](#), Art. 12(1)

<sup>75</sup> [Law on the Specialist Chambers and Specialist Prosecutor’s Office](#), Art. 25(2).

<sup>76</sup> [Report of the Working Group on Amendments](#), para. 34.

<sup>77</sup> [Report of the Working Group on Amendments](#), para. 36.

errors of law or fact, or “[a]ny other ground that affects the fairness and reliability of the proceedings or decision.” And Article 82(1)(a)-(c) provides the right to interlocutory appeal decisions on jurisdiction and admissibility, provisional release, and decisions of the Pre-Trial Chamber to act on its own initiative in relation to unique investigative opportunities under Article 56.

41. The OPCD argues that eliminating the right to immediately appeal decisions on issues that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” denies a fundamental right of review in clear contravention of the Statute.<sup>78</sup> The OPCD misreads Article 82(1)(d).
42. There is no guaranteed right to interlocutory appeal. The decision whether to accept such appeals is discretionary – “if, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”<sup>79</sup> The Pre-Trial Chamber’s or Trial Chamber’s decision to deny a motion for interlocutory appeal on the basis that the Appeals Chamber’s immediate resolution is not warranted “does not, in and of itself, indicate any error – even less does it substantiate a ‘fair trial violation.’”<sup>80</sup>
43. In fact, it has been practice at the ICC in Article 70 cases, as it is in some domestic jurisdictions, to deal with interlocutory appeals at the end of the process. At a lecture following the Trial Judgment in *Bemba et al.*, Judge Marc Perrin de Brichambaut commented on Trial Chamber VII’s approach to interlocutory appeals:

Third elements that the chamber has to rule on, because this is the common law tradition, there is a constant exchange of documents between the Prosecutor, the Defence and one of them is – and I hate it because we don’t have it in our system and in the civil law system – interlocutory appeal.... So, there are different approaches to this.

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<sup>78</sup> [OPCD Submissions](#), para. 46.

<sup>79</sup> [Rome Statute](#), Art. 82(1)(d).

<sup>80</sup> *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-2275-Red](#), Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute,” 8 March 2018, para. 659.



I sat in the *Bemba and others* Chamber. This is the picture you saw, presided by Judge [Bertam Schmitt]. Judge [Schmitt], serious German Judge, no nonsense: “Interlocutory appeals—I don’t have. None. Full-Stop.”

I agreed, actually, and [Judge Raul Pangalangan] also agreed. We all said, “We won’t accept any interlocutory appeal. If they have any questions to make, they will make it in the full appeal.” That allowed us to reach a decision from the beginning of the trial process in 400 days.<sup>81</sup>

44. The principles of legality and equal treatment are best served if the practice of disallowing interlocutory appeals is enshrined in a rule, rather than left to the whims of the Chamber in any given Article 70 case.

**d. Any detrimental effect on the Accused’s fair trial rights resulting from the removal of an automatic right to a separate sentencing hearing is likely to be de minimis**

45. Affording no separate sentencing hearings – which, in any event, may be afforded *proprio motu* – does not deprive an Accused any fair trial rights. While it is preferable to have a separate sentencing hearing, the Parties will be able to make written submissions in the sentencing phase even if the Trial Chamber decides not to hold one.<sup>82</sup>

46. The OPCD argues that the removal of a bifurcated sentencing structure, “could have a detrimental effect on fair trial rights, such as the right to remain silent, pursuant to Article 67(1)(g)” since the only way to introduce evidence in mitigation of sentence may be to renounce the right of silence and self-incrimination.<sup>83</sup> The OPCD neglects to consider that the Chamber could always decide *proprio motu* to hold separate sentencings, affording the Accused the right to present evidence in

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<sup>81</sup> Center for International Law Research and Policy, [Lecture by Judge Marc Perrin de Brichambaut on ICC Statute Article 68](#), Peking University Law School, Beijing, 17 May 2017, p. 9.

<sup>82</sup> *Contra* [OPCD Submissions](#), para. 47.

<sup>83</sup> [OPCD Submissions](#), para. 47.

mitigation of sentence through witness testimony and his own (should he waive his right to silence).<sup>84</sup>

47. Also, from a practical standpoint, while separate sentencing hearings may be necessary for Article 5 crimes given the severe sentences associated with those crimes, there is no obstacle presented to Defence Counsel in making sentencing remarks prior to the Trial Chamber's conviction decision in Article 70 cases. Less is at stake in Article 70 cases, the trials are (presumably) quicker, and the range of sentencing issues for the Trial Chamber to consider will invariably be more limited.

#### IV. CONCLUSION

48. While it would have been preferable for the ASP to have explicitly adopted, amended, or rejected Provisional Rule 165, it did not. The Single Judge, fulfilling her duty to determine whether the Chamber is lawfully constituted, is competent to determine the legal status and applicability of Provisional Rule 165. The Single Judge should find Pre-Trial Chamber A is lawfully constituted because Provisional Rule 165 is in force and applicable, is not barred by the principle of non-retroactivity, and is consistent with the Rome Statute.

**WHEREFORE**, for the above reasons, the Defence respectfully requests the Single Judge to find that Pre-Trial Chamber A is lawfully established because Provisional Rule 165 is in force and applicable.

Respectfully submitted, 25 November 2020,

In The Hague, the Netherlands.



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**Counsel for Mr. Paul Gicheru**

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<sup>84</sup> [Report of the Working Group on Amendments](#), para. 33.