PARTY DISSENTING OPINION OF JUDGE EBOE-OSUJI AND JUDGE BOSSA

1. This Court was created in order to ensure that victims and parties must receive justice according to law. It was not created merely so that judges can exercise power as they deem fit or appropriate, even with the best of intentions. That being the case, judges of the Court—even in plenary—have a duty to ensure that their functions are discharged with due fidelity to the law that must guide those functions. Thus, the law cannot be overtaken by actions of judges—even in plenary—and such actions may indeed invoke questions of consistency—contemplated by article 51(4) of the Rome Statute—between the Statute and Rules of Procedure adopted by the Plenary of Judges.

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2. We respectfully regret our inability to concur in the decision of the majority of the Appeals Chamber to uphold the decision of the Pre-Trial Chamber, on either the matter of applicability of the provisional rule or the question of compatibility between the draft amended rule and the Rome Statute.

3. It is a matter of regret that the Assembly of States Parties has not resolved this matter for five years now. That, however, need not result in an interpretation which, in spite of the wordings of article 51(1) and 51(3), foists upon the system a new rule or an amendment that judges adopted, which the ASP has not adopted, rejected or amended, between the time of its adoption by judges and the next session of the ASP.

4. We may then have a look at article 51(1) and article 51(3). They provide as follows:

> 1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
>
> …
>
> 3. After the adoption of the Rules of Procedure and Evidence, *in urgent cases where the Rules do not provide for a specific situation before the Court*, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties. [Emphasis added.]

PART I: APPLICABILITY OF PROVISIONAL RULE

5. Purely as a temporal matter, and assuming the provisional rule was validly adopted, we are not persuaded that there is continuing application of provisional rules beyond the 'next ordinary or special session' of the ASP following the date that the judges adopted the provisional rule. In that regard, were are generally persuaded by the submissions of the Office of Public Counsel for the Defence and counsel for Mr Gicheru.

6. More fundamentally, we are not persuaded that the provisional regime laid down in article 51(3) applies, in the first place, to the circumstances of this case. This is because the pith and substance of that provision lie in the following contingency contemplated in that very provision: 'in urgent cases where the Rules do not provide for a specific situation before the Court.' That contingency requires a combination of two things. First is the existence of an urgency. But, more importantly, is the accentuation of that urgency because the situation is one 'where the Rules do not provide for a specific situation before the Court.' It is that combination of circumstances that presses upon the judges the need to adopt a provisional rule, which would enable the judicial process to be conducted, while awaiting action of the ASP to adopt, amend or reject the rule applied under the provisional regime. Those circumstances are not implicated in the matter now before the Chamber. There are preexisting rules under which the proceedings at hand could have been conducted. The case of *Bemba No 2* also known as *Bemba et al*, a case similar to the present, was conducted under the preexisting applicable rules. That is to say, Mr Gicheru's case can very comfortably be conducted on the basis of the same rules that governed the trial and appeal in *Bemba No 2*. It is true that the new rules are sensibly intended to enhance the efficiency of process and the economy of human resources. But that is a different question than to say that an urgent situation has arisen with no rules to guide the necessary process.

PART II: THE QUESTION OF CONSISTENCY

7. The Office of Public Counsel for the Defence and counsel for Mr Gicheru complain that the new amendment is inconsistent with the Rome Statute. We are satisfied that it is so, but for different reasons than those largely canvassed by the parties.

8. We are not persuaded that the denial of the right to interlocutory appeal—under the new rule—is a violation of the rights of the defendant. In many national jurisdictions, parties have no right to launch interlocutory appeals in the middle of trials. Parties may preserve their appellate issues in the course of trials and litigate them, if need be, following the pronouncement of the judgment on the merits of the case. Principles of human rights law do not contradict that approach. Secondly, there is no *right*, as such, of interlocutory appeal at the ICC. Interlocutory appeal is merely a procedural indulgence that rests principally upon 'the opinion' of the Pre-Trial or Trial Chamber that there is a thorny procedural issue on which 'an immediate resolution by the Appeals Chamber may materially advance the proceedings.'[1] Indeed, this is an innovation introduced by the ad hoc tribunals after they had commenced operation, which innovation was not even contemplated in the original instruments of the *ad hoc* tribunals.[2] The innovation was wholly sensible in the context of an *ad hoc* tribunal, whose

[1] See article 82(1)(d) of the Rome Statute.
[2] Notably, the original provisions of the Rules of Procedure and Evidence common to the ICTY and the ICTR permitted preliminary motions to be made only within 60 days following initial appearance, except for appeals

life span might not be guaranteed long enough to permit the full range of outcomes (such as retrial before the same Chamber) that may lie at the end of an appeal in which all the issues in the case might be litigated had those issues not been litigated in an interlocutory appeal. And to some extent, the same consideration is engaged at the ICC because of the non-renewable judicial tenure of nine years. But that consideration has little to do with the 'right' of the parties.

9. We also do not accept that the rights of the defendant are violated because the new rules have reduced the composition of judicial panels to one judge (for pre-trial and trial) and three judges (for appeal), instead of the traditional composition of three judges for pre-trial and trial and five for appeal. For one thing, the new regime applies equally for all parties and participants—prosecution, victims and the defence. Furthermore, there's nothing in the norms of international human rights law—as reflected in article 67 of the Rome Statute or at large—which suggests that the minimum standards of fair trial require a panel of three judges to conduct proceedings at first instance and five to hear the appeal. And, finally, in a large part of the world, it is quite normal to conduct judicial proceedings by a bench of one judge at first instance and three in the ensuing appeal.

10. For the foregoing reasons, we are not persuaded that the new rules are inconsistent with the Statute because they violate the rights of the defendant.

11. We are, however, satisfied that the amendment is essentially inconsistent with the Rome Statute. It is the provision of article 39(2) that raises that obstacle.

12. Article 39(2)(a) provides that '[t]he judicial functions of the Court *shall* be carried out in each division by Chambers.' [Emphasis added.] And, article 39(2)(b) mandates the composition of Chambers as follows: (i) 'The Appeals Chamber *shall* be composed of all the judges of the

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against jurisdiction which might be made after that deadline. But the rules made no allowance for interlocutory appeals of the resulting decision. See rules 72 and 73 generally of the 1st edition of the ICTY RPE adopted on 11 February 1994. Indeed, as part of the 3rd revision to the ICTY RPE on 30 January 1995, it was specified that the Trial Chamber shall dispose of preliminary motions in *limine litis* and '*without interlocutory appeal*, save in the case of dismissal of an objection based on lack of jurisdiction.' See rule 72(b), emphasis added. By the 9th revision made on the 25 June 1996 and 5 July 1996, the exception to the general rule against interlocutory appeals was recognised 'in other cases where leave is granted by a bench of three judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.' It was not until the 12th revision, made on 12 November 1997, that it was recognised that parties may at any time bring 'Other Motions' besides preliminary motions. But, even so, the decisions on such motions were '*without interlocutory* appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave: (i) if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgement appeal; (ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.' See rule 73(b) of the 12th edition of the ICTY RPE, emphasis added. And, it was only by the 24th revision on 5 August 2002, that the ICTY RPE began to have an intertextual resonance with article 82(1)(d) of the Rome Statute, in the following terms: 'Decisions *on <u>all motions</u> are without interlocutory appeal save* with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.' See rule 73(b) of the 24th edition of the ICTY RPE, emphases added.

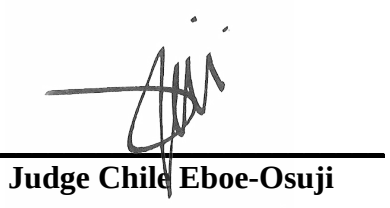
Appeals Division'; (ii) 'The functions of the Trial Chamber *shall* be carried out by three judges of the Trial Division'; (iii) 'The functions of the Pre-Trial Chamber *shall* be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.' [Emphasis added.]

13. Since the composition of the Chambers who *shall* carry out the judicial functions of the Court are stated in such imperative terms, it must, in our view, take more than rules amendment to change the composition. It is for that reason that the amendment is incompatible with the Rome Statute.

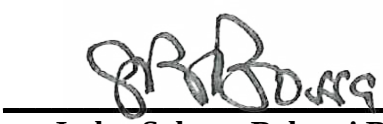
14. We are not persuaded that article 70(2) is a safe route around the foregoing difficulty. In the relevant part, article 70(2) provides as follows: 'The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. …' The 'principles and procedures' address the matter of *how* something is to be done. First to be established is the *structural framework* within which the thing is to be done. After that comes *how* the thing is to be done within the structural framework as established. At the ICC, the structural framework for the performance of the judicial functions of the Court is established in the Statute adopted in Rome in 1998, in article 39(2). Following that, the States Parties set up another process for the adoption of the Rules of *Procedure* and Evidence. The States Parties did not employ the Rules of Procedure and Evidence to lay down the composition of Chambers for the performance of the judicial functions in relation to article 5 crimes. For a parity of reasoning, we are not persuaded that it is safe to use the Rules of Procedure and Evidence to compose the Chambers for purposes of article 70 offences, merely because article 70(2) entails a licence to enunciate principles and procedures that may govern the Court's exercise of jurisdiction over those offences.

15. In conclusion, we are persuaded that the merits of the matter require the decision of the Pre-Trial Chamber to be overturned, for the reasons explained above.

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



Judge Chile Eboe-Osuji



Judge Solomy Balungi Bossa

Dated this 8th day of March 2021

At The Hague, The Netherlands