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**No. ICC-01/09-01/15
Date: 10 December 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

Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart

Counsel for the Defence

Mr Michael Karnavas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

Mr Xavier-Jean Keïta
Ms Marie O’Leary

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER A (ARTICLE 70) of the International Criminal Court (the ‘Court’) issues this Decision on the Applicability of Rule 165 of the Rules of Procedure and Evidence (the ‘Rules’) to the present case.

I. PROCEDURAL HISTORY

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Paul Gicheru (‘Mr Gicheru’) and Philipp Kipkoech Bett (‘Mr Bett’) for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).¹
2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).
3. On the same day, the President of the Pre-Trial Division constituted the present Chamber pursuant to rule 165(2) of the Rules, as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (‘Provisional Rule 165’), and regulation 66*bis*(1) of the Regulations of the Court (the ‘Regulations’), which was adopted and entered into force on the same day.²
4. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.
5. On 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,³ Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules.⁴
6. On 11 November 2020, the Chamber received the ‘OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165’ on behalf of the Office of the Public Counsel for the Defence (the ‘OPCD’).⁵ The OPCD sought standing to make

¹ Decision on the ‘Prosecution’s Application under Article 58(1) of the Rome Statute’, ICC-01/09-01/15-1-Conf-Exp; a public redacted version was notified on the same day, *see* [ICC-01/09-01/15-1-Red](#).

² [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](#), ICC-01/09-01/15-32.

³ [Order Setting the Date for the Initial Appearance of Mr Gicheru](#), ICC-01/09-01/15-34.

⁴ ICC-01/09-01/15-T-001-CONF-ENG.

⁵ [ICC-01/09-01/15-40](#).

submissions on the competence of the present Chamber to exercise the powers and functions of the Pre-Trial Chamber under provisional rule 165 of the Rules and regulation 66*bis*(1) of the Regulations ‘in line with its mandate to represent and protect the rights of Mr Philip Kipkoech Bett, an unrepresented suspect and party in this case, and any potential suspects who are, or would be, subject to charges of Article 70’ (the ‘OPCD Request’).⁶

7. On 12 November 2020, the Chamber issued the ‘Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence’.⁷ The Chamber granted leave to the OPCD to submit the observations set out in the OPCD Request by no later than 17 November 2020, and further ordered Mr Gicheru and the Prosecutor to submit a response to the OPCD’s observations and any additional observations that are considered to be relevant to this issue by no later than 20 November 2020 if they so wish.⁸

8. On 17 November 2020, the Chamber received the ‘OPCD Submissions on the Inapplicability of Provisional Rule 165’ (the ‘OPCD’s Submissions’).⁹

9. On 18 November 2020, the Chamber received the ‘Notification of the Appointment of Mr Michael G. Karnavas as Counsel for Mr Paul Gicheru’.¹⁰

10. On 20 November 2020, the Chamber received from the newly appointed counsel for Mr Gicheru the ‘Request for Extension of Time to Respond to ‘OPCD Submissions on the Inapplicability of Provisional Rule 165’ (ICC-01/09-01/15-47)’ (the ‘Defence Request’).¹¹ The Defence requested a one-week extension of time to respond to the OPCD’s Submissions.¹²

11. On 20 November 2020, the Chamber issued the ‘Decision on Request for Extension of Time and Varying Other Time Limits’.¹³ The Chamber *inter alia* granted the Defence Request, thereby finding that the Defence shall submit a response to the

⁶ [ICC-01/09-01/15-40](#), para. 1.

⁷ [ICC-01/09-01/15-43](#).

⁸ [ICC-01/09-01/15-43](#), para. 9.

⁹ [ICC-01/09-01/15-47](#).

¹⁰ [ICC-01/09-01/15-48](#), together with [public annex I](#).

¹¹ [ICC-01/09-01/15-50](#), together with [public annex A](#).

¹² [ICC-01/09-01/15-50](#), p. 6.

¹³ ICC-01/09-01/15-51-Conf; a public redacted version was notified on the same day, *see* [ICC-01/09-01/15-51-Red](#).

OPCD's Submissions and any additional observations that are considered to be relevant to this issue by no later than 27 November 2020 at 16:00 hours.¹⁴

12. On 20 November 2020, the Chamber received the 'Prosecution's Response to "OPCD's Submissions on the Inapplicability of Provisional Rule 165"' (the 'Prosecutor's Response').¹⁵

13. On 25 November 2020, the Chamber received 'Paul Gicheru's Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165' (the 'Defence's Response').¹⁶

II. SUBMISSIONS RECEIVED BY THE CHAMBER

A. The OPCD's Submissions

14. The OPCD submits that the Chamber does not have the competence to exercise the powers and functions of the Pre-Trial Chamber under Provisional Rule 165 and regulation 66*bis*(1) of the Regulations in this case because 'these provisions [...] were not in force, and it was therefore not lawfully established'.¹⁷ It is the position of the OPCD that, in light of the words 'until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties' in article 51(3) of the Statute, the lack of a decision by the States at the 15th Assembly of States Parties (the 'ASP') entails that 'the provisional amendments [to Provisional Rule 165] expired and the original text is in force until further action by the States or Plenary'.¹⁸ The OPCD adds that 'it can further be argued that the States have rejected Provisional Rule 165 by default' or 'tacitly'.¹⁹ In this regard, the OPCD avers that '[r]ejection by non-adoption is explained in the [Triffterer & Ambos] Commentary to the Rome Statute as including failure to affirm'.²⁰ The OPCD adds that, 'while there were some States generally in approval of Provisional Rule 165, [...] a fair amount of undecidedness or dissent also emerged'.²¹

¹⁴ [ICC-01/09-01/15-51-Red](#), para. 18.

¹⁵ [ICC-01/09-01/15-52](#).

¹⁶ [ICC-01/09-01/15-53](#).

¹⁷ [OPCD's Submissions](#), para. 14.

¹⁸ [OPCD's Submissions](#), para. 19 ; *see also* paras 15, 19, 23.

¹⁹ [OPCD's Submissions](#), paras 2, 20.

²⁰ [OPCD's Submissions](#), para. 20.

²¹ [OPCD's Submissions](#), para. 21.

According to the OPCD, the result is that the Chamber is ‘not established by law’ as required by international human rights law.²² The OPCD also asserts that the Chamber ‘has a duty to ensure for itself that it is validly established by law’.²³

15. In the alternative, and referring to article 51(4) of the Statute, the OPCD argues that, ‘[a]s the case of *Gicheru & Bett* had already been established by arrest warrants issued before February 2016, the principle of non-retroactivity of new legislation prevents use of Provisional Rule 165 in this case’.²⁴ The OPCD is also of the view that ‘the application of this rule causes “detriment” to the defendants in this case by denying certain provisions of the Rome Statute afforded to other defendants before the Court’, namely that they ‘would have their case heard by one judge instead of three, they would be denied the opportunity to make interlocutory appeals [...] and they would not benefit from having sentencing proceedings separate to the trial proceedings’.²⁵

16. As a further alternative, the OPCD asserts that article 51(4) of the Statute stipulates that ‘any provisional Rule shall be consistent with [the] Statute’ but that provisional rule 165 of the Rules ‘is clearly not’ as it reduces the number of sitting judges for each judicial stage of article 70 proceedings, and is inconsistent with other rights enshrined in articles 76(2) and 82(1)(d) of the Statute.²⁶ The OPCD additionally contends that there was no lacunae in the Rules triggering the applicability of article 51(3) of the Statute and that ‘the decision to amend Rule 165 [...] appears to be [the result of] the ICC’s “financial constraints”’ even though the procedure in article 51(3) of the Statute ‘appears to relate only to procedural gaps, not financial ones’.²⁷

17. As a result, the OPCD requests the Chamber to find that: (i) Provisional Rule 165 is no longer in effect; (ii) the constitution of PTC A has no legal basis; (iii) the case of *Gicheru and Bett* is reverted back to PTC II; and (iv) ‘each future defendant may

²² [OPCD’s Submissions](#), para. 27; *see also* paras 25-26, 28-29.

²³ [OPCD’s Submissions](#), para. 28.

²⁴ [OPCD’s Submissions](#), para. 31; *see also* para. 5.

²⁵ [OPCD’s Submissions](#), para. 33; *see also* para. 32 referring to the *Prosecutor v. Ruto et Sang*, [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, ICC-01/09-01/11-2024 (the ‘Appeal Judgment of 12 February 2016’), paras 74, 78; *see further* paras 39-49.

²⁶ [OPCD’s Submissions](#), para. 36; *see also* paras 39-49.

²⁷ [OPCD’s Submissions](#), para. 37.

possess a reservation of right to make jurisdictional/admissibility challenges on this or related matters in their own cases when they come before the Court²⁸.

B. The Prosecutor's Response

18. The Prosecutor 'agrees that the Chamber is competent to rule on the legality of its own constitution' as '[t]his is consistent with the spirit underlying the principle known as *compétence de la compétence* — 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'.²⁹ However, in the view of the Prosecutor, '[t]he OPCD's intervention on behalf of Bett or any suspect arrested in the future is [...] 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' and, as a result, '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'.³⁰

19. The Prosecutor avers that article 51(3) of the Statute gives effect to provisional rules 'until' they are 'adopted, amended or rejected' by the ASP³¹ and that '[t]he wording of [article 51(3) of the Statute] – 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'.³² Otherwise, article 51(3) of the Statute would 'merely stipulate that a provisional rule is effective until it is "considered" by the ASP. But it does not'.³³ Thus, in her view, 'a provisional rule remains in force until one of the three possible conditions for their termination is satisfied'.³⁴ According to the Prosecutor, interpreting article 51(3) of the Statute otherwise would 'significantly undermine the effectiveness of the procedure' under this article, 'largely make [its] capacity unworkable, and a dead letter', and 'as such cannot be the correct interpretation' since 'it can be very time-consuming to gain the necessary consensus on each proposed amendment even when the vast majority of

²⁸ [OPCD's Submissions](#), para. 50.

²⁹ [Prosecutor's Response](#), para. 5.

³⁰ [Prosecutor's Response](#), para. 6 (emphasis in original).

³¹ [Prosecutor's Response](#), para. 9.

³² [Prosecutor's Response](#), para. 9 (emphasis in original).

³³ [Prosecutor's Response](#), para. 9.

³⁴ [Prosecutor's Response](#), para. 9.

States Parties are in agreement’.³⁵ The Prosecutor further argues that the OPCD fails ‘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’.³⁶

20. The Prosecutor adds that ‘provisional rule 165 has not been applied retroactively’.³⁷ According to the Prosecutor, ‘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)’ as, at that point, ‘he may have relied upon the particularities of the litigation regime which would apply in the course of this Court’s proceedings’.³⁸

21. In addition, it is the position of the Prosecutor that provisional rule 165 of the Rules ‘was not applied to the detriment of Gicheru’.³⁹ The Prosecutor contends that the constitution of a Pre-Trial Chamber composed of a single Judge is not detrimental as ‘Gicheru indicated [at his initial appearance] that he had no objection and viewed it as a purely “administrative matter”’.⁴⁰ In addition, the Prosecutor submits that ‘offences under article 70 of the Statute are subject to a limited penalty’ and, ‘[c]onsequently, 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’.⁴¹ The Prosecutor is also of the view that the ‘OPCD’s concerns about potential appeal proceedings, or sentencing proceedings, are premature and fall short of demonstrating an actual – current – disadvantage’.⁴² In any event, the Prosecutor asserts that ‘any limited right to appeal under article 82(1)(d) is highly qualified’, ‘[t]he removal of this discretion by provisional rule 165 applies equally to all Parties’, and does not ‘prevent the Parties from timely access to appellate review’ after the conclusion of the trial.⁴³ The Prosecutor additionally submits that a Trial

³⁵ [Prosecutor’s Response](#), para. 12.

³⁶ [Prosecutor’s Response](#), para. 10.

³⁷ [Prosecutor’s Response](#), para. 16.

³⁸ [Prosecutor’s Response](#), para. 22 (emphasis in original).

³⁹ [Prosecutor’s Response](#), para. 24.

⁴⁰ [Prosecutor’s Response](#), para. 27.

⁴¹ [Prosecutor’s Response](#), para. 28.

⁴² [Prosecutor’s Response](#), para. 29.

⁴³ [Prosecutor’s Response](#), para. 29.

Chamber ‘would still appear to retain the discretion to grant’ a separate sentencing hearing.⁴⁴

22. Lastly, the Prosecutor believes that the ‘OPCD is wrong to argue that provisional rule 165 is incompatible with other provisions of the Statute’ as ‘[t]his is primarily a question for the ASP’ and, ‘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’.⁴⁵ The Prosecutor concludes by professing that ‘the Rules make relatively limited provision specific to the conduct of article 70 proceedings [...] and it was open to the Judges to fill this gap with a provisional rule’.⁴⁶

C. The Defence’s Response

23. The Defence submits that ‘Provisional Rule 165 did not cease to be in force at the ASP’s 15th session’.⁴⁷ It is of the view that ‘[a]rticle 51(3) unambiguously requires affirmative action by the ASP: to adopt, amend, or reject provisional amendments at its next session’ and ‘[t]he legal consequence of the ASP’s inaction on Provisional Rule 165 is that it continues to apply since it remains under consideration’.⁴⁸ The Defence adds that ‘[t]he Court’s practice does not show that it cannot act on new rules until they are officially adopted’.⁴⁹ The Defence further asserts that ‘[d]issent by some States Parties does not cast doubt on the applicability of Provisional Rule 165’ and that ‘[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’.⁵⁰

24. Moreover, according to the Defence, ‘Provisional Rule 165 is not being applied retroactively’.⁵¹ It argues that provisional rule 165 of the Rules was adopted ‘four years before Mr. Gicheru surrendered himself to the Court on 2 November 2020’ and ‘[w]hen Pre-Trial Chamber A was composed according to Provisional Rule 165 on that day,

⁴⁴ [Prosecutor’s Response](#), para. 29.

⁴⁵ [Prosecutor’s Response](#), para. 31.

⁴⁶ [Prosecutor’s Response](#), para. 33.

⁴⁷ [Defence’s Response](#), para. 14.

⁴⁸ [Defence’s Response](#), para. 14.

⁴⁹ [Defence’s Response](#), para. 17.

⁵⁰ [Defence’s Response](#), para. 18.

⁵¹ [Defence’s Response](#), para. 20.

there was a clear procedural regime with respect to the conduct of the Article 70 proceedings on which Mr. Gicheru could rely'.⁵² The Defence further avers that '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'.⁵³ The Defence also contends that, '[e]ven if Provisional Rule 165 is being applied retroactively, it is not to the detriment of Mr. Gicheru' for the same reasons identified below.⁵⁴

25. Lastly, the Defence takes the view that provisional rule 165 of the Rules 'is consistent with the Rome Statute'.⁵⁵ First, it submits that '[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".⁵⁶ In this regard, the Defence disagrees with the OPCD argument that this article requires a lacuna as '[t]he OPCD misapprehends the so-called "authoritative" commentary it cites to support its claim'.⁵⁷ Second, the Defence maintains that '[t]here is no inconsistency with the Statute in having a Pre-Trial Chamber and Trial Chamber composed of a Single Judge'.⁵⁸ It adds that '[t]he 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'.⁵⁹ Third, the Defence claims that, '[e]ven if interlocutory appeals under Article 82(1)(b) [sic] are prohibited, the right of review is still guaranteed by other provisions of the Statute'.⁶⁰ According to the Defence, '[t]he OPCD misreads Article 82(1)(d)' as '[t]here is no guaranteed right to interlocutory appeal'.⁶¹ Fourth, the Defence avers that '[a]ffording no separate sentencing hearings – which, in any event, may be afforded *proprio motu* – does not deprive an Accused any fair trial rights'.⁶²

⁵² [Defence's Response](#), para. 20.

⁵³ [Defence's Response](#), para. 22.

⁵⁴ [Defence's Response](#), para. 23. *See below* para. 25.

⁵⁵ [Defence's Response](#), para. 48.

⁵⁶ [Defence's Response](#), para. 26.

⁵⁷ [Defence's Response](#), para. 28.

⁵⁸ [Defence's Response](#), para. 31.

⁵⁹ [Defence's Response](#), para. 32.

⁶⁰ [Defence's Response](#), para. 40.

⁶¹ [Defence's Response](#), paras 41-42.

⁶² [Defence's Response](#), para. 45.

III. APPLICABLE LAW AND BACKGROUND

26. The Chamber notes that article 51(3) of the Statute provides that, ‘[a]fter 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’. The fourth paragraph of this article stipulates that ‘[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence 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’.

27. The Chamber recalls that rule 165 of the Rules originally read as follows:

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.
2. Articles 53 and 59, and any rules thereunder, shall not apply.
3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.
4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.

28. On 10 February 2016, the Judges of the Court, acting in plenary, adopted provisional rule 165 of the Rules,⁶³ which reads as follows:

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.
2. Articles 39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d), and any rules thereunder, shall not apply. A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application

⁶³ ICC, [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#), Annex II to ASP 15th Session - 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, 29 February 2016, ICC-ASP/15/7, para. 1 (the ‘Rule 165 Report’).

under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.

3. For purposes of article 61, the Pre-Trial Chamber, as constituted under sub-rule 2, may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.
4. The Trial Chamber seized of the case from which the article 70 proceedings originate may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.

29. These amendments stemmed ‘from the recognition that the nature and gravity of offences under article 70 differ markedly from those under article 5 and that the procedure governing article 70 proceedings should reflect that difference’.⁶⁴ The legal basis for the amendment was rooted in article 70(2) of the Statute, which ‘indicates that a distinct procedural regime for article 70 offences may be provided for in the Rules’.⁶⁵ This reading was considered to be buttressed by the drafting history of article 70(2) of the Statute,⁶⁶ which ‘indicates that “many delegations” were concerned “that various principles and procedures in the Statute were not appropriate for non-core crimes”’. However, “the conference decided as a general matter to leave elaboration of more detailed standards to the Rules”.⁶⁷ The Judges also took the view that ‘the concept of a judge taking certain decisions alone is not new to the legal framework of the Court’ having regard to articles 57(2)(b) and 64(8)(b) of the Statute and rule 132*bis* of the Rules.⁶⁸ They additionally considered that ‘removing the separate sentencing hearing procedure under article 76 and leave to appeal procedures [...] would further expedite article 70 proceedings’ but that ‘the Trial Chamber of one judge could still allow for a separate sentencing hearing under article 76 if circumstances warranted such a

⁶⁴ [Rule 165 Report](#), para. 8.

⁶⁵ [Rule 165 Report](#), para. 9.

⁶⁶ [Rule 165 Report](#), para. 9.

⁶⁷ [Rule 165 Report](#), para. 5.

⁶⁸ [Rule 165 Report](#), para. 12.

hearing’.⁶⁹ As to the urgency of the amendments, the Judges referred to ‘the current resource constraints facing the judiciary’.⁷⁰ As foreseen by article 51(3) of the Statute, provisional rule 165 of the Rules was ‘transmitted to the ASP for its adoption, amendment or rejection’.⁷¹

30. The report of the Working Group on Amendments for the 15th session of the ASP *inter alia* mentions that, ‘although a large majority of States Parties supported the adoption of the provisional amendments by the Assembly, there was no final view on the matter’.⁷² The ASP subsequently ‘[welcomed] the report of the Working Group on Amendments’ in a resolution adopted at its 15th session without indicating that any further action was taken in relation to provisional rule 165 of the Rules.⁷³ The Working Group on Amendments also did not manage to agree on recommendations regarding provisional rule 165 of the Rules in preparation for the subsequent sessions of the ASP,⁷⁴ including on the question of whether this rule was still applicable pending a decision by the ASP.⁷⁵ The ASP did not adopt, amend or reject provisional rule 165 of the Rules at its 16th, 17th or 18th session either.⁷⁶

⁶⁹ [Rule 165 Report](#), para. 14.

⁷⁰ [Rule 165 Report](#), para. 20.

⁷¹ [Rule 165 Report](#), para. 22.

⁷² Assembly of States Parties, [Report of the Working Group on Amendments](#), 8 November 2016, ICC-ASP/15/24, para. 37.

⁷³ Assembly of States Parties, [Strengthening the International Criminal Court and the Assembly of States Parties](#), 24 November 2016, ICC-ASP/15/Res.5, para. 125.

⁷⁴ Assembly of States Parties, [Report of the Working Group on Amendments](#), 15 November 2017, ICC-ASP/16/22, paras 27-30; Assembly of States Parties, [Report of the Working Group on Amendments](#), 29 November 2018, ICC-ASP/17/35, para. 21; Assembly of States Parties, [Report of the Working Group on Amendments](#), 3 December 2019, ICC-ASP/18/32, para. 20.

⁷⁵ Assembly of States Parties, [Report of the Working Group on Amendments](#), 15 November 2017, ICC-ASP/16/22, para. 30.

⁷⁶ Assembly of States Parties, [Strengthening the International Criminal Court and the Assembly of States Parties](#), 14 December 2017, Resolution ICC-ASP/16/Res.6, paras 134-136; Assembly of States Parties, [Strengthening the International Criminal Court and the Assembly of States Parties](#), 12 December 2018, Resolution ICC-ASP/17/Res.5, paras 151-153; Assembly of States Parties, [Strengthening the International Criminal Court and the Assembly of States Parties](#), 6 December 2019, Resolution ICC-ASP/18/Res.6, paras 155-160.

IV. DETERMINATION BY THE CHAMBER

On whether the Chamber is entitled to rule on the issue of its own constitution and competence

31. At the outset, the Chamber notes that the OPCD, representing ‘Mr Bett and all other unrepresented defendants’, seized the Chamber of a request urging it to find that ‘[t]he constitution of Pre-Trial Chamber A had no legal basis, and [that] it is [...] not established by law’ and that ‘[t]he case of *Gicheru [and] Bett* [be] reverted back to PTC II’.⁷⁷ As noted above, on 12 November 2020, the Chamber granted leave to the OPCD to submit observations.⁷⁸ Moreover, the question has also been raised by the Prosecutor and commented by Mr Gicheru during the First Appearance Hearing.⁷⁹

32. The Chamber recalls that under article 21(3) of the Statute, it has the obligation to ensure that ‘the application and interpretation of law pursuant to this article [...] be consistent with internationally recognized human rights’. The Chamber notes that the right to be tried by a tribunal - and, by analogy, a chamber⁸⁰ - established by law is enshrined in article 14(1) of the International Covenant on Civil and Political Rights,⁸¹ in article 8(1) of the American Convention on Human Rights,⁸² in article 6(1) of the

⁷⁷ [OPCD Request](#), para. 50.

⁷⁸ *See above*, para. 7.

⁷⁹ ICC-01/09-01/15-T-001-CONF-ENG (the Chamber refers to a public portion of the transcripts).

⁸⁰ The Chamber considers that it can reason by analogy because verifying the legality of the constitution of a tribunal or the legality of the constitution of a chamber of the same tribunal serves the same purpose: to ensure that the body in charge of judicial proceedings is provided for in the law, and as a consequence, is not arbitrary by essence.

⁸¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668 (the ‘ICCPR’), para. 14(1) (‘In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’).

⁸² American Convention on Human Rights ‘Pact of San Jose, Costa Rica’, 22 November 1969, 1144 United Nations Treaty Series 17955, article 8(1) (‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law.’).

European Convention on Human Rights⁸³ and mentioned in the jurisprudence of the African Court on Human and Peoples' Rights.⁸⁴

33. According to the jurisprudence of the European Court of Human Rights, '[t]he phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it'.⁸⁵ Accordingly, in the view of the Chamber, whether the Chamber has been constituted in accordance with the 'particular rules that govern it', namely, the Statute and the Rules in the first place, pertains to the question of whether the Chamber has been established in conformity with the applicable law.

34. In addition, the Chamber considers that it is entitled to address the issue of the legality of its own constitution and competence in virtue of the principle of *la compétence de la compétence*, which, according to the jurisprudence of the ICTY, subsumes the question of whether a Court - or, by analogy, a chamber - was validly constituted.⁸⁶ Should the Chamber decline to rule on the question, it would allow a doubt on an issue of paramount importance to remain present throughout the present proceedings.

35. Therefore, the Chamber finds that it is entitled to rule on the question of the legality of its own constitution.

On whether the two criteria set out in Article 51(3) of the Statute were met

36. Under article 51(3) of the Statute, judges may draw up provisional rules only 'in urgent cases where the Rules do not provide for a specific situation before the Court'. This article therefore establishes two criteria to be met in order for the judges to be

⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889, article 6(1) ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.').

⁸⁴ See *Christopher Jonas v United Republic of Tanzania*, Judgement, 28 September 2017, paras 64, 65 ; *Ingabire Victoire Umuhoza v Republic of Rwanda* Judgement, Judgement, 24 November 2017, para. 101, n. 4; *Anudo Ochieng Anudo v United Republic of Tanzania*, Judgement, 22 March 2018, para. 111.

⁸⁵ *Sokurenko and Strygun v. Ukraine*, [Judgement](#), 20 July 2006, para. 24 and references cited therein.

⁸⁶ See Pre-Trial Chamber I, [Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute'](#), 6 September 2018, ICC-RoC46(3)-01/18-37, paras 30-32. See also, ICTY, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, IT-94-1, paras 10-12, 18, 22.

allowed to draw up provisional rules: first, the urgency of the situation making it ineffective to propose an amendment under article 51(2)(b) of the Statute (that would not enter into force until adopted by the ASP) and, second, the existence of a lacuna in the applicable law. The OPCD and the defence argue that it is for the judges of the Court, and not for the ASP, to review the judges' assessment of those two criteria, justifying their recourse to article 51(3) of the Statute.⁸⁷ Contrary to what is argued by the OPCD and the defence, the Chamber does not consider that in its assessment of the applicability of Provisional Rule 165 to the present proceedings, it is required or even allowed to also determine whether the judges erred in finding that the two criteria of article 51(3) of the Statute were met.

37. The Chamber finds that it cannot review the decision made by the judges of this Court sitting in plenary sessions in accordance with rule 4 of the Rules. In this regard, the Chamber notes that a contrary finding would eventually require a judge who was participating in the plenary session where the provisional rule was adopted to then rule on the legality of the decision in which he or she participated. Furthermore, the Chamber is of the view that the review power of the plenary decision adopting a provisional rule is solely in the hands of the ASP, as per article 51(3) of the Statute, which provides that the ASP rejects, amends or adopts the provisional rule adopted by the judges in plenary session. The ASP may reject the provisional rule for the reason that one or both criteria mentioned in the preceding paragraph were not met and that therefore the judges abused their power in adopting the provisional rule.

38. As a result, the Chamber, in its analysis below, will not enter into assessing whether the judges erred in finding that the two criteria of article 51(3) of the Statute were met.

On whether Provisional Rule 165 is applicable in the present proceedings

39. The Chamber recalls that article 51(3) of the Statute reads, in relevant part, as follows: 'the judges may [...] 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'. The question at hand is whether a provisional rule drawn up by judges pursuant

⁸⁷ [OPCD's Request](#), paras 37, 38, [Defence's Response](#), para. 30. See also [Prosecution's Response](#), para. 33.

to article 51(3) of the Statute remains applicable if, ‘at [its] next ordinary or special session’, the ASP does not adopt, amend or reject it. The OPCD argues that because the text mentions ‘the next ordinary or special session’, this is the point in time after which, if a rule has not been adopted or amended, it faces ‘tacit rejection’ and should not be applied anymore. The defence and the Prosecutor argues that the provisional rule remains applicable ‘*until*’ the ASP formally adopts, amends or rejects it.

40. For the following reasons, the Chamber finds that Provisional Rule 165 should be considered applicable *until* the ASP formally adopts, amends or rejects it.

41. At the outset, the Chamber notes that, in its view, the text of article 51(3) of the Statute shows that a positive action of the ASP is required: ‘the judges may [...] 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’. The OPCD’s argument of a ‘tacit rejection’ leading to the non-applicability of the provisional rule is, therefore, not supported by the text itself of article 51(3) of the Statute.

42. The Chamber also notes that, as argued by the Prosecutor, finding that, in the absence of a decision by the ASP to either adopt, amend or reject a provisional rule at its next session, the provisional rule lapses, would make recourse to article 51(3) of the Statute very problematic and its application almost impossible, because of the basic functioning of the ASP itself. The ASP is currently composed of 123 States, and the willingness to reach consensus is part of its voting process.⁸⁸ The expectation that 123 States will automatically and systemically find a consensus on complex legal issues debated for the first time is unrealistic.⁸⁹ In this context, a provisional rule could be applied until the next session of the ASP, then found not applicable during subsequent discussions that could take years,⁹⁰ and then found applicable again because adopted by the ASP. Such an interpretation of article 51(3) of the Statute would create confusion and militates against the stability and continuity of judicial proceedings. It would then defeat the very *raison d’être* of article 51(3) of the Statute, namely ensuring the

⁸⁸ See rule 61 of the Rules of Procedure of the Assembly of States Parties.

⁸⁹ The examination by the ASP of proposal amendments relating to rules 100, 101 and 104 of the Rules took between a year and two years before they were adopted. The examination by the ASP of proposal amendments to rule 76(3) and rule 140*bis* of the Rules seems to have been abandoned after having been discussed for several years.

⁹⁰ See above n. 89.

continuity of proceedings by giving the judges the opportunity to fill in a lacuna in the law.⁹¹

43. The Chamber is however mindful that its interpretation of article 51(3) of the Statute could potentially lead to an indefinite application of a provisional rule that never received any legislative validation, while this power indisputably rests solely in the hands of the ASP. In this regard, the Chamber stresses that, in its view, article 51(3) of the Statute requires a formal decision from the ASP to either adopt, amend or reject provisional rules, and provide the Court with clear answers as to its amendment proposals under this article of the Statute. The option ‘no decision from the ASP’ is simply not foreseen by the legal texts.⁹² Likewise, it is the ASP’s responsibility to prevent the indefinite application of a provisional rule it does not want to remain in force in the absence of a legislative decision, by either adopting, amending or rejecting it. Therefore, the provisional rule adopted by the judges remains applicable until the next session of the ASP where such a formal decision is adopted.

⁹¹ [International Law Commission, Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Draft Statute for An International Criminal Court, A/49/10, p. 65](#) (‘Some members of the Commission expressed concern at the prospect that rules might be provisionally applied to a given case, only to be subsequently disapproved by States parties. In their view, if the judges were not to be entrusted with the task of making rules without any requirement of subsequent approval, they should not be able to make rules having provisional effect. The idea of rules having provisional effect was particularly difficult to accept in penal matters. On the other hand the Commission felt that, although the power to give provisional effect to a rule should be exercised with care, there might be cases where it would be necessary, and that some flexibility should be available.’).

⁹² The Chamber notes that a research in the drafting history of article 51(3) of the Statute shows that the necessity for the ASP to take a decision on the provisional rule existed since the beginning of the drafting, and remained all along the negotiations. *See* Working Group on the Composition and Administration of the Court, [Consolidated text for articles 37,43 and 43 bis](#), 27 March 1998, A/AC-249/1998/WG-7/CRP-2/ADD-5, p. 2; [Proposal Submitted by the United States of America](#), 3 March 1998, A/AC-249/1998/DP-1; [Draft Statute for the International Criminal Court. Part 4, Composition and Administration of the Court](#), 2 April 1998, A/AC-249/1998/CRP-10; [Report of the Preparatory Committee on the Establishment of an International Criminal Court : Addendum](#), 14 April 1998, A/CONF-183/2/ADD-1, p. 73; Working Group on Procedural Matters, [Part 4, Composition and Administration of the Court : Article 52 Rules of Procedure and Evidence : Coordinator's text, Rolling Text IV](#), 4 July 1998, UD/A/CONF-183/WGPM/IP; [Part 4, Composition and Administration of the Court : \[International Criminal Court\] : Recommendations of the Coordinator](#), 8 July 1998, A/CONF-183/C-1/L-45/ADD-1; [Draft Statute for the International Criminal Court : Compendium of Draft Articles Referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998](#), 9 July 1998, A/CONF-183/C-1/L-58; [Report of the Drafting Committee to the Committee of the Whole : Part 4. Composition and Administration of the Court](#), 13 July 1998, A/CONF-183/C-1/L-67; [Summary Record of the 24th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations, on Monday, 6 July 1998](#), 20 November 1998, A/CONF-183/C-1/SR-24. *See also* [A/CONF-183/C-1/L-67/Rev-1](#); [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court - Official Records, Vol I](#), 3 December 2020, A/CONF.183/13 (Vol. I).

44. Finally, the Chamber gives particular attention to the circumstances of the case at hand where it has a duty to ensure that the rights of the suspect are respected, including the right to be tried without undue delay under article 67(1)(c) of the Statute.⁹³

45. Therefore, the Chamber concludes, based on the foregoing reasons, that Provisional Rule 165 is applicable to the present case.

On whether Provisional Rule 165 was applied retroactively and to the detriment of Mr Gicheru, in contravention of article 51(4) of the Statute

46. Alternatively, the OPCD refers to article 51(4) of the Statute that stipulates that ‘provisional rules should not be applied retroactively to the detriment of the person who is being investigated or prosecuted’. The OPCD submits that, accordingly, Provisional Rule 165, if found applicable, should not be applied in the case of *Gicheru and Bett* because arrest warrants against them were issued before February 2016 (the date on which Provisional Rule 165 entered into force).

47. The Chamber does not agree with the OPCD that the point in time to take into consideration to determine whether Provisional Rule 165 was applied retroactively is the date of issuance of the arrest warrants. According to the jurisprudence of the Appeals Chamber: ‘In order to determine whether a procedural rule has been applied retroactively to the detriment of the accused, it is necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused.’⁹⁴ In this respect, the Chamber considers that the confirmation of charges proceedings, which begin with the Initial Appearance Hearing, is a new stage in the proceedings,⁹⁵ distinct and separate from the

⁹³ See also, by analogy, article 64(2) of the Statute (‘The Trial Chamber shall ensure that a trial is fair and *expeditious* and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’) (emphasis added).

⁹⁴ Appeals Chamber, *The Prosecutor v. Ruto and Sang*, [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”](#), ICC-01/09-01/11-2024, 12 February 2016, para. 79; see also para. 80 (‘The Appeals Chamber considers 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.’), para. 81.

⁹⁵ See in this respect Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on counsel for Mr Gbagbo’s request for reconsideration of the ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81\(3\)\(c\)\(i\) of the Statute’ and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé](#), ICC-02/11-01/15-1355-

investigation/pre-confirmation proceedings and the trial proceedings. Indeed, starting from the Initial Appearance Hearing, a new ‘procedural regime governing the proceedings’ becomes applicable, the suspect acquires rights that s/he was deprived of until this point in time, and s/he becomes a *party* to the proceedings. This is clear from the text of rule 121(1) of the Rules, which states that ‘*[a] person* subject to a warrant of arrest or a summons to appear under article 58 *shall appear before the Pre-Trial Chamber*, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, *the person shall enjoy the rights set forth in article 67.*’⁹⁶ All other procedural rights set forth in rule 121 of the Rules (such as the right to be assisted or represented by a counsel, the right to have access to the evidence disclosed by the Prosecution, the right to present evidence, among others) also become enjoyable at this point in time.

48. Because this Chamber has been constituted on the basis of Provisional Rule 165 on 2 November 2020,⁹⁷ before the Initial Appearance Hearing of Mr Gicheru that took place on 6 November 2020,⁹⁸ the Chamber finds that Provisional Rule 165 was not applied retroactively.

49. Having found that Provisional Rule 165 was not applied retroactively, the Chamber should end its analysis here, without it being necessary to assess whether it was applied retroactively *to the detriment* of Mr Gicheru. Only if the Chamber had found that the rule was applied retroactively would it have been necessary to enter into the assessment of whether it was done to the detriment of the Accused.

On whether Provisional Rule 165 is incompatible with the Statute

50. The OPCD, still referring to article 51(4) of the Statute, which states that ‘any provisional Rule shall be consistent with [the] Statute’,⁹⁹ also argues that Provisional

Red, 28 May 2020, paras 68 (‘It may be mentioned in this regard that what distinguishes this case from others in which a suspect or accused person may have failed to appear before the Court, is that the threshold erected in article 60 of the Statute has been crossed. This is in the sense that any suspect or accused (or in this case, acquitted person) who has physically appeared before the Court pursuant to article 60, has crossed the threshold of the Court’s effective exercise of jurisdiction.’), 69.

⁹⁶ (Emphasis added).

⁹⁷ See above para. 3.

⁹⁸ See above para. 5.

⁹⁹ See [OPCD’s Submissions](#), paras 35-36, 39-49.

Rule 165 is in contravention with the Statute because it reduces the number of sitting judges for each judicial stage of article 70 proceedings and interferes with other rights enshrined in articles 76(2) and 82(1)(d) of the Statute.

51. In this respect, the Chamber notes that article 70(2) of the Statute reads as follows: ‘*[t]he 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.*’¹⁰⁰ The fact that section I of Chapter IX of the Rules is dedicated to the particular procedural regime applying to offences under article 70 of the Statute shows that those offences differ from offences under articles 5 to 8 of the Statute *on a procedural level* as well. As noted by the defence,¹⁰¹ this is clear from the text of rule 163(1) of the Rules: ‘Unless otherwise provided in sub-rules 2 and 3, rule 162 *and rules 164 to 169*, the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70.’¹⁰² This is also shown, for example, by the fact that the original version of Rule 165 of the Rules, before it was modified by the judges, already permitted the pre-trial chamber to conduct the confirmation of charges proceedings without a hearing (Rule 165(3) of the Rules), contrary to article 61 of the Statute, and that articles 53 and 59 of the Statute shall not apply (Rule 165(2) of the Rules).

52. In addition, and as submitted by the defence,¹⁰³ Provisional Rule 165 does not restrict any of the fundamental rights enshrined in article 67 of the Statute.

53. Therefore, and based on the foregoing, the Chamber finds that the OPCD has not shown that Provisional Rule 165 is incompatible with the Statute.

¹⁰⁰ (Emphasis added).

¹⁰¹ [Defence’s Response](#), para. 35.

¹⁰² (Emphasis added).

¹⁰³ [Defence’s Response](#), para. 24.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **DISMISSES** the OPCD's Submissions;
- b) **FINDS** that Provisional Rule 165 of the Rules is applicable in the present proceedings ; and
- c) **FINDS** that it is competent as a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case, in accordance with Provisional Rule 165(2) of the Rules and regulation 66*bis*(1) of the Regulations.

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



Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Thursday, 10 December 2020

At The Hague, The Netherlands