

**Cour
Pénale
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**International
Criminal
Court**

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Date: **16 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***

Public

**Request for leave to appeal
the Decision on the Applicability of Provisional Rule 165**

Source: Office of Public Counsel for the Defence

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

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I. INTRODUCTION

1. The OPCD seeks leave to appeal the Pre-Trial Chamber A (the “Chamber”) Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence (the “Impugned Decision”). The issues identified relate to statutory interpretation and meet the criteria for leave to appeal pursuant to Article 82(1)(d); in fact, final resolution on this issue is imperative at this time as the Impugned Decision would foreclose any other appellate review under this provision, of any kind, on any issue, before the entire trial is completed.
2. Leave is sought for the following three issues:
 - a. *Whether the Chamber erred in law in inconsistent interpretation of Article 51(3) by holding that the text requires a positive action “until adopted, amended or rejected” by the direct language, but not applying the same reasoning to the language relating to the temporal element of “at the next ordinary or special session of the Assembly of States Parties”;*
 - b. *Whether the Chamber erred in law in finding that a new procedural regime commences at the Initial Appearance Hearing and that the Provisional Rule only came into effect at that time;*
 - c. *Whether the Chamber erred in law in finding that the procedural regime under Provisional Rule 165 does not restrict any fundamental rights afforded in the Rome Statute by impermissibly limiting such consideration to Article 67.*
3. All three issues meet the two-pronged test set forth in Article 82(1)(d) as they “significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial” and immediate resolution “may materially advance the proceedings”.

II. RELEVANT PROCEDURAL BACKGROUND

4. On 11 November 2020, the OPCD filed a request for leave to appear on the applicability of Provisional Rule 165. The OPCD sought standing to make 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 of the Court “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”.¹ On 12 November 2020, the Chamber granted leave to the OPCD to submit the observations set out in its request.²

5. On 17 November 2020, OPCD filed its Submissions on the Inapplicability of Provisional Rule 165.³
6. On 10 December 2020, the Chamber dismissed the request of OPCD and found that Provisional Rule 165 is applicable and that it has been properly constituted as a Chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case.⁴
7. On 11 December 2020, the Chamber rendered its decision in which it decided to sever the case against Mr Gicheru from the present case and considered that Pre-Trial Chamber II shall remain seized of the present case in so far as it relates to Mr Bett.⁵

III. SUBMISSIONS

A. Preliminary Issues

8. Before turning to the issues sought for appeal, the OPCD will address three preliminary issues clarifying that: (i) OPCD has standing to request leave to appeal; (ii) this request for leave to appeal is before the correct Chamber, and;

¹ OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020, [ICC-01/09-01/15-40](#).

² Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020, [ICC-01/09-01/15-43](#).

³ OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020, [ICC-01/09-01/15-47](#).

⁴ Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020, [ICC-01/09-01/15-61](#).

⁵ Decision Severing the Case against Mr Gicheru, 11 December 2020, [ICC-01/09-01/15-62](#).

(iii) notwithstanding the Impugned Decision holding that Provisional Rule 165 applies, that Pre-Trial Chamber A has the power to certify issues for appeal under Article 82(1)(d).

9. First, OPCD was granted standing to submit the observations on the applicability of Provisional Rule 165, with the understanding that this was done “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”.⁶ As a party to the proceedings, it is Mr. Bett who would have the right to seek leave to appeal under Article 82(1)(d), but, as he is absent, it falls on the OPCD to continue the standing it has already been granted to represent and protect Mr. Bett’s interests and exercise this right to seek leave to appeal the Impugned Decision.
10. Second, although Pre-Trial Chamber A has severed the case against Mr. Gicheru, holding that “Pre-Trial Chamber II shall remain seized of the present case in so far as it relates to Mr Bett”,⁷ it is right that Pre-Trial Chamber A is seized of this request because the Rules state that a request for leave to appeal must be made “to the Chamber that gave the decision”.⁸ There is therefore no other Chamber that can be seized of this request except Pre-Trial Chamber A. The OPCD notes that the implication that Pre-Trial Chamber II “shall remain seized” of Mr Bett’s case – suggesting it was always with that Chamber and never with Pre-Trial Chamber A – highlights the potential procedural confusion that can be caused by Provisional Rule 165 and its use which further emphasises the need for the Appeals Chamber’s resolution of the issues presented for appeal.

⁶ Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020, [ICC-01/09-01/15-43](#), paras 7, 9.

⁷ Decision Severing the Case against Mr Gicheru, 11 December 2020, [ICC-01/09-01/15-62](#), p. 8.

⁸ Rule 155(1) of the Rules of Procedure and Evidence (emphasis added).

11. Third, the result of the Impugned Decision is that Provisional Rule 165 ostensibly applies which foregoes any ability to make request for interlocutory appeal pursuant to Article 82(1)(d). However, the OPCD submits that Pre-Trial Chamber A can grant such request for leave to appeal in the interests of the right of a review which keeps the matter 'live' through any final decision. The "purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality",⁹ meaning that the issue of the applicability of Provisional Rule 165 cannot be considered 'final' until it is decided by the Appeals Chamber. The alternative – to find that a litigant has no right to seek leave to appeal a decision applying a procedural regime that provides no right to seek leave to appeal – creates a circular logic, a catch-22, that unfairly frustrates the opportunity to seek immediate resolution of the appealable issues.

B. Issues for Appeal

i. First Issue Sought for Appeal

12. The OPCD submits that the First Issue is an appealable issue and not mere disagreement, as it raises a discrete legal question on the proper statutory interpretation of Article 51(3) of the Statute. The Chamber has interpreted that a provisional rule is to be applied indefinitely until a positive action is taken by the ASP,¹⁰ but this is to diminish the effect of the qualifying phrase that such action must be taken "at the next ordinary or special session" of the ASP, which must also have interpretative significance given that the drafters chose to include this temporal limitation. The need for such time limit "to prevent the indefinite application of a provisional rule it does not want to remain in force in the absence of a legislative decision" was identified by the Chamber

⁹ ICTY, Appeals Chamber, [Prosecutor v. Delalic et al, Judgement](#), 20 February 2001, para. 122.

¹⁰ Impugned Decision, paras 40–43.

herself,¹¹ yet little weight was given to the one identified in Article 51(3). Inferring that a provisional rule applies until the “positive action” contemplated in the Article, while giving less weight to the express temporal limitation, invites the reasonable legal question whether such an interpretation is the correct one.

13. Indeed, interpreting Article 51(3) when there has been “no decision from the ASP” is a legal question fraught with difficulty because it is a circumstance that the Chamber acknowledged “is simply not foreseen by the legal texts”.¹² The Chamber has opted for an interpretative approach that considers the pragmatic difficulty of achieving legislative consensus at the ASP and the practical consequences of a provisional rule that automatically lapses at an ASP’s next session.¹³ There are, however, other legitimate interpretative approaches that need to be considered, including one that prioritises giving effect to every clause and word of the provision, including the temporal limitation in Article 51(3).¹⁴ The OPCD submits that it is important for this legal issue to be considered by the Appeals Chamber given that it involves a situation not foreseen by the legal texts and one which impacts the boundary between legislative and judicial law-making at the ICC.
14. If granted leave to appeal for the First Issue, the OPCD would demonstrate that the Chamber erred in providing inconsistent reasoning in holding that “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”¹⁵ but not

¹¹ *Ibid.*, para. 43.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *See, e.g.*, United States Supreme Court, *Montclair v. Ramsdell*, [107 U.S. 147](#), 152 (1883) (“It is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”).

¹⁵ Impugned Decision, para. 43.

requiring the time-element of “the next regular or special session of the Assembly of States Parties” set out in the same Article.

ii. Second Issue Sought for Appeal

15. Similarly, the Second Issue is an appealable issue as it raises a critical legal question of the timeline of a case and at what point a defendant can expect a permissible change of the pertinent rules, in this case Provisional Rule 165. For this, the texts themselves disagree with the Impugned Decision about when this particular rule comes into force for an individual defendant and, furthermore, the ICC jurisprudence demonstrates that a person is a party to the proceedings from the point of being named in an arrest warrant or summons.

16. Provisional Rule 165, itself, tells us when it starts applying: “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 under article 58”.¹⁶ As the Rule is intended to be utilised from the point of consideration of the arrest warrant or summons, it is clear that it is at that point at which this procedural regime begins to apply, and when ‘detriment’ would apply for the purpose of determining retroactivity. Therefore, analysis of when an individual becomes a “party” or holds certain Article 67 rights do not appear to be relevant considerations to the question of when the Provisional Rule 165 regime becomes applicable to the person.

17. However, the Impugned Decision’s consideration that “a new ‘procedural regime governing the proceedings’” becomes applicable at the Initial Appearance Hearing such that “the suspect acquires rights that s/he was deprived of until this point in time and s/he becomes a *party* to the

¹⁶ Rule 165(2) of the Rules (emphasis added). *See also* Regulation 66*bis* of the Regulations of the Court (“The President of the Pre-Trial Division [...] shall constitute, in accordance with rule 165(2), a Chamber composed of one judge from the Pre-Trial Division to exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58 with respect to offences defined in article 70”) (emphasis added).

proceedings"¹⁷ is also not fully consistent with ICC case law. While the Appeals Chamber has outlined a 'threshold' crossed by a defendant in an initial appearance, this finding was made with respect to issues of continuing detention and appearance in hearings before the Court, and does not delineate when an individual becomes a 'party' to the proceedings. To the contrary, once a person is named in the arrest warrant or summons, the ICC Chambers have routinely acknowledged a suspect's standing to submit on those initial issues such as admissibility and jurisdiction. Furthermore, defendants are afforded the Rome Statute's fair trial rights even at these earliest stages of the proceedings.¹⁸ This guarantee applies equally to procedural rights.¹⁹

18. If granted leave to appeal on the Second Issue, the OPCD would demonstrate that: (i) Provisional Rule 165(2), as well as Regulation 66*bis*, clearly state that a Chamber constituted under must be constituted "from the moment of receipt of an application under article 58"; (ii) a suspect is a party to the proceedings from the issuance of an arrest warrant or summons with a full battery of rights assured by the Rome Statute; and, therefore, (iii) Provisional Rule 165 would apply from the moment a Chamber considers the arrest warrant application.

iii. Third Issue sought for appeal

19. Finally, the OPCD submits that the Third Issue constitutes an appealable issue in the Rome Statute framework; far from disagreement, the OPCD was not alleging error only pursuant to Article 67, but that the other rights contained in the Rome Statute were being abridged by employment of the amendments contained in Provisional Rule 165, making it inconsistent with the core texts.

¹⁷ Impugned Decision, para. 47. [Emphasis in original.]

¹⁸ *Situation in DRC*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, [ICC-01/04-135-tEN](#), 31 March 2006, para. 36 ("It is the Chamber's view nonetheless that the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase.")

¹⁹ *Ibid.* para. 38.

20. The Pre-Trial Chamber's finding that fundamental rights under Article 67 were not violated only reveals a portion of the considerations that should have been made in determining incompatibility of Provisional Rule 165 with the entirety of the Rome Statute and its underlying principles. By not analysing the impact on rights contained in Articles 39(2)(b), 76(2), and 82(1)(d), and restricting such consideration to the rights found in Article 67, the Trial Chamber has allowed for a procedural regime for Article 70 that could disallow any other fundamental right contained in the Rome Statute. While it is true that there may be some procedural differences between Article 70 and Article 5 cases, the suspects and accused in cases of offences against the administration of justice should possess no fewer rights in their proceedings. This principle is evident in that the totality of rights afforded under the Rome Statute are granted to all defendants with the founders creating only limited, cautious exceptions to Article 70 cases in drafting Chapter 9, §1, of the Rules of Procedure and Evidence. Notably, where rights were contained in excised chapters of the Statute, the drafters ensured their presence in the Rules;²⁰ significantly, Article 21(3) applies to all proceedings "consistent with the essence of the Statute, which requires that the application of its provisions be consonant with internationally recognised human rights".²¹ These human rights "must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of

²⁰ See, e.g. Rule 163(2) removing application of all of Chapter 2 (save the provision of applicable law) which includes the right of *ne bis in idem*, which they otherwise preserved by necessary rewording in Rule 168.

²¹ *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, [ICC-02/04-112](#), 19 December 2007, para. 26.

the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".²²

21. If granted leave to appeal on the Third Issue, the OPCD would demonstrate that the Chamber erred in holding that defendants facing charges under Article 70 should be permitted differing procedural rights from those tried under Article 5 without limitation except for the rights under Article 67.

C. All three issues meet the criteria set out in Article 82(1)(d)

i. The issues significantly affect the fairness of proceedings

22. The issues significantly affect the fairness of proceedings as all three identify how the rights of suspects and accused in Article 70 proceedings can be curtailed by decisions labelled as purely 'procedural'. As noted by ICC Pre-Trial Chamber II, "the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair trial enshrined in human rights instruments".²³ Here, the very core of these issues is one of the fairness of trials that will be held at the ICC and the rights that Mr Bett and other defendants will be permitted in the course thereof.

23. Precluding rights of defendants in these proceedings by mere virtue of the type of crimes alleged is in direct contradiction of equality principles seeped in human rights instruments. Each of the three issues presents an error that can impact the fairness of the trial in this case and the principles that underpin all discussions of what rights are afforded to defendants before the ICC.

24. Matters of whether judicially created law can remain in effect, whether a person is a 'party' before they arrive at the Court, and if a new rule is

²² *Prosecutor v. Lubanga*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, [ICC-01/04-01/06-772](#), para. 37.

²³ *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, [ICC-02/04-112](#), 19 December 2007, para. 26.

inconsistent with the Rome Statute itself are all impossibly indivisible from fair trial considerations, and fairness itself.

ii. The Issues significantly affect the expeditiousness of proceedings

25. Immediate resolution of these issues is imperative to ensure the correct Pre-Trial Chamber can be properly assigned to prevent delay. As held by the Appeals Chamber:

*The meaning conveyed by "advance" in the latter part of sub-paragraph (d) is 'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.*²⁴

This 'safety net' is especially needed when the issues sought on appeal concern the applicability of the entire procedural framework for the proceedings.

26. The implications of these grounds of appeal have far-reaching consequences and no review by the Appeals Chamber will leave litigation open on these matters. Most importantly, the Impugned Decision, itself, has the power to foreclose any interlocutory appeal of any decision under Article 82(1)(d) in this case or any other Article 70 case to come before the Court, ever. This matter must be addressed to advancement of Article 70 proceedings overall as "[t]he term 'proceedings' in the second part of article 82 (1) (d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety".²⁵

27. The fact that Mr Bett is not before the Court at this time is exactly why resolution on these outstanding errors of the Impugned Decision should be addressed as they will otherwise lie in wait until any final appeal stage in that case. If errors are found at that time, it could go toward invalidating the judgement or causing remand, which is the clear antithesis of expedition. They

²⁴ *Situation in DRC*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, [ICC-01/04-168](#), 24 July 2006, para. 15.

²⁵ *Ibid.*, para 17.

may further cast substantial doubt on the legal integrity of any Article 70 proceedings adjudicated in the meantime.

28. As the unpredictability of Provisional Rule 165 itself is the cause of the litigation, the Pre-Trial Chamber should allow review to ensure stability of its ruling, especially if there is absence of action by the Assembly of States Parties in the interim.

IV. RELIEF REQUESTED

29. For the foregoing, the OPCD respectfully requests Pre-Trial Chamber A to grant leave to appeal on the three issues named in this request.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 16th Day of December 2020
at The Hague, The Netherlands