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No.: **ICC-01/09-01/20**
Date: **21 January 2021**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. PAUL GICHERU

Public

Prosecution's Response to OPCD's "Appeal[] against the Decision on Applicability of Provisional Rule 165"

Source: **Office of the Prosecutor**

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Introduction

1. On 10 December 2020, the Pre-Trial Chamber affirmed that it is validly constituted according to provisional rule 165, which remains in force until such time as it is expressly adopted, amended, or rejected by the Assembly of States Parties ("ASP").[1] Both the parties in this case—the Prosecution and the Defence—substantially concur with the reasoning and conclusions of the Pre-Trial Chamber on this question.[2]

Submissions

2. The appeal of the Office of Public Counsel for Defence ("OPCD") against the Decision should be dismissed.[3] The Pre-Trial Chamber correctly interpreted article 51(3) to conclude that provisional rule 165 remains valid. It correctly applied the case law of the Appeals Chamber to determine that provisional rule 165 is not impermissibly retroactive, and is consistent with the Statute, as required by article 51(4).

3. In any event, the Appeals Chamber need not assess the merits of the Appeal, which is inadmissible and may be dismissed *in limine*. While the Pre-Trial Chamber exceptionally granted OPCD permission to make submissions on provisional rule 165[4]—and, at OPCD's further request (and out of an abundance of caution), certified its subsequent decision for appeal[5]—OPCD is not a "party" for the purpose of article 82(1)(d) of the Statute.

A. The Appeal is inadmissible

4. The Pre-Trial Chamber certified issues for appeal arising from the Decision, rejecting the objections of both the Prosecution and Defence that OPCD lacks standing to pursue an appeal under article 82(1).[6] The Decision was not rendered under any special procedure warranting departure from the presumption that the Prosecution and the Defence solely and exclusively constitute the parties to the proceedings. This was not altered by the exceptional grant of leave to OPCD to make submissions at first instance concerning the validity of provisional rule 165.

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[1] *See* ICC-01/09-01/15-61 ("Decision").
[2] *See e.g.* ICC-01/09-01/15-52 ("Prosecution Submissions"); ICC-01/09-01/15-53 ("Defence Submissions"). *See also* ICC-01/09-01/20-66 ("Prosecution ALA Response"); ICC-01/09-01/20-64 ("Defence ALA Response").
[3] *See* ICC-01/09-01/20-79 ("Appeal"). *See also* ICC-01/09-01/15-47 ("OPCD Submissions").
[4] ICC-01/09-01/15-43 ("Decision Granting Leave to OPCD to Appear").
[5] ICC-01/09-01/20-68 ("Certification Decision"), para. 43.
[6] *See* Certification Decision, paras. 21-23, 28.

A.1. The Appeals Chamber is the guardian of its own proceedings, and has authoritatively interpreted the meaning of the term "party" in article 82(1)

5. Since the Appeals Chamber will always make the final determination as to the admissibility of an appeal, first-instance chambers should follow appellate jurisprudence on the question of standing for appeal with particular attention. This is necessary to provide legal certainty and preserve judicial economy, and to ensure that the Appeals Chamber—and the parties—are not distracted by interlocutory appeals which cannot materially advance the proceedings. Where a first-instance chamber has misinterpreted or failed to follow clear appellate precedent, as in this case, correction by the Appeals Chamber may be warranted.

6. Less than one year ago, by majority, the Appeals Chamber issued landmark guidance on the meaning of the term "party" in article 82(1) of the Statute.[7] While the Pre-Trial Chamber briefly cited this judgment,[8] it nonetheless substituted its own test to the effect that: "the term 'party' in the *chapeau* of article 82(1) of the Statute should be interpreted as encompassing *all those having a particular interest in the outcome of the proceedings*".[9] On this basis, and despite the tenuous nature of OPCD's interest in this case explained below, the Pre-Trial Chamber erroneously considered it to be a "party" in the meaning of article 82(1).

7. In particular, the Pre-Trial Chamber overlooked the Appeals Chamber's reminder that the term "party" in article 82(1) "refers, in the first place, *to the prosecution and the defence*".[10] Departures from this presumption "depend[] on the procedural context"[11] or, put another way, the "*type* of decision".[12] Only decisions which are rendered under specific procedures defined in the Court's legal texts—such as those under articles 15, 18(4), 19(2), 19(3), and 56(3)—may depart from this presumption and confer different entities with the status of "party" in order to fulfil their function.[13] Even those few cases which the Pre-Trial Chamber considered to be more permissive[14] tend to follow this same approach.[15]

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[7] ICC-02/17-137 OA OA2 OA3 OA4 ("*Afghanistan* Standing Decision"). *But see* ICC-02/17-137-Anx-Corr ("Dissenting Opinion of Judge Ibáñez Carranza").
[8] Certification Decision, para. 24.
[9] Certification Decision, para. 27 (emphasis added).
[10] *Afghanistan* Standing Decision, para. 15 (emphasis added). *See also e.g.* K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (Oxford: OUP, 2016), pp. 570-571 (text accompanying fns. 178-179).
[11] *Afghanistan* Standing Decision, para. 12.
[12] *Afghanistan* Standing Decision, para. 14 (emphasis added). *See also* para. 16.
[13] *Afghanistan* Standing Decision, paras. 16-18, 21.
[14] Certification Decision, para. 26.
[15] *See* Certification Decision, fn. 39. The Pre-Trial Chamber refers to the standing permitted to OPCD to seek leave to appeal virtually simultaneous decisions in the *Darfur* and *DRC* situations, concerning the procedural

8. In this case, the Decision was not taken under the auspices of any collateral procedure justifying and requiring a departure from the presumption that the parties, for the purpose of article 82(1), were exclusively the Prosecution and the Defence. While the Pre-Trial Chamber considered that the *subject-matter* of the Decision was unusual and of wider importance[16]—which was no less true in the *Afghanistan* judgment[17]—this did not change the *type* of decision rendered. It was unexceptional pre-trial litigation, falling under articles 60 and 61. Both the Prosecution and Defence had expressed their views, on a reasoned basis, and there was no forensic need for OPCD to be afforded broader rights to pursue the matter on appeal.

9. Nor does the ability to certify matters for appeal *proprio motu* entail or imply any power to confer appellate standing on entities which are not parties to the proceedings.[18] Rather, *proprio motu* certifications are a means to promote judicial economy, subject to the ordinary appellate procedure and admissibility requirements. They do not usurp the role of the parties in subsequently conducting such appeals, or declining to do so, and they do not alter the objective assessment of which entities are a "party" in the meaning of article 82(1). Like any other appeal, these safeguards help ensure the Court's judicial economy and the guarantee of fair and expeditious proceedings, to which in particular the accused is entitled.

A.2. Leave to make submissions on provisional rule 165 did not make OPCD a "party" for the purpose of article 82(1)

10. The Decision arose from the OPCD's original request to make submissions on the validity of provisional rule 165, when Mr Gicheru was not yet represented by counsel. But

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status of victims during investigations by the Prosecution, which the Appeals Chamber addressed as a single conjoined matter: *see e.g.* ICC-02/05-118 ("*Darfur* Certification Decision (Victim Participation)"); ICC-02/05-177 OA OA2 OA3 ("*Darfur* Appeal Judgment (Victim Participation)"); ICC-01/04-438 ("*DRC* Certification Decision (Victim Participation)"); ICC-01/04-556 OA4 OA5 OA6 ("*DRC* Appeal Judgment (Victim Participation)"). In this unusual context, and in the absence of any accused or Defence counsel, and where it had in any event also filed its own appeal, the Prosecution had not opposed OPCD's standing to seek leave to appeal after the Pre-Trial Chamber had granted OPCD leave to participate in the first-instance proceedings: *see e.g.* ICC-02/05-115 ("*Darfur* Prosecution Response to OPCD"), para. 6. In addition, the Pre-Trial Chamber refers to the standing granted to Jordan to appeal the Pre-Trial Chamber's decision that it had not complied with its obligation to cooperate with the Court: ICC-02/05-01/09-319 ("*Bashir* Certification Decision (Non-Compliance by Jordan)"); ICC-02/05-01/09-397-Corr OA2 ("*Bashir* Appeal Judgment (Non-Compliance by Jordan)"). However, similar to the reasoning in *Afghanistan*, non-compliance proceedings under article 87(7) are a specific collateral procedure in which the respondent State must be treated as a party.

[16] *See e.g.* Certification Decision, para. 26 ("Considering that Provisional Rule 165 has been invoked for the first time in the present proceedings, the [Decision] constitutes a significant precedent for any future proceedings to be conducted on this basis. For this reason, the Chamber considers that it is essential that the [Decision] be reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such proceedings").

[17] There was no doubt that the interests raised by the legal representatives of victims in *Afghanistan* were important, but their appeals were still inadmissible because they did not (objectively) have the status of "party" to article 15 proceedings.

[18] *Contra* Certification Decision, para. 29.

the fact that the matter was originally raised by OPCD does not itself justify granting OPCD standing to pursue it on appeal. Even if the test proposed by the Pre-Trial Chamber were consistent with the *Afghanistan* guidance, OPCD lacks sufficient interest in these proceedings to make it a party for the purpose of article 82(1).

11. First, it is uncontested that OPCD does not require the status of "party" to protect the interests of Mr Gicheru, who is now the only suspect in this case.[19] Not only did Mr Gicheru express himself content with the validity of provisional rule 165, while self-representing, but this position was vigorously affirmed through counsel.[20] The Defence opposed any appeal.[21]

12. Second, the Pre-Trial Chamber itself clarified that OPCD was given leave to make submissions "on the basis of its mandate to represent and protect the rights of any *other* potential suspects in these proceedings",[22] and implied that this also necessitated OPCD's standing to appeal.[23] Mr Bett was the only other suspect in the original proceedings. Yet even if the Severance Decision were considered irrelevant for the purposes of this appeal (because it came after the Decision), OPCD does not represent Mr Bett, and Mr Bett's rights are not potentially prejudiced by the Decision. Consequently, even on that basis, there is still no objective justification for treating OPCD as a party in the meaning of article 82(1).

13. It is well established that, as a general principle, fugitives from the Court (like Mr Bett) do not assume their rights as a party until they have appeared before the Court. The Pre-Trial Chamber itself held as much.[24] This exclusion is not only consistent with the legal requirement for fugitives to surrender themselves, but promotes judicial economy in litigating cases where suspects *have* appeared before the Court, such as Mr Gicheru. Fugitives are, however, safeguarded from any legal prejudice by the doctrine of *res judicata*, which means that decisions are binding only on the parties to that litigation, for the purpose of that case.[25] In other words, as long as Mr Bett cannot be said to have participated in the Decision, he is

[19] ICC-01/09-01/15-62 ("Severance Decision").
[20] OPCD was granted leave to make submissions on provisional rule 165 on 12 November 2020: Decision Granting Leave to OPCD to Appear. Mr Gicheru appointed counsel on 18 November 2020: ICC-01/09-01/15-50, para. 5 ("Defence Request for Extension of Time"); ICC-01/09-01/15-48 ("Notification of Counsel"). Through counsel, Mr Gicheru responded to OPCD's submissions on 25 November 2020: Defence Submissions.
[21] *See e.g.* Defence ALA Response.
[22] Certification Decision, para. 25 (emphasis added). *Cf.* Prosecution ALA Response, para. 7.
[23] Certification Decision, para. 28.
[24] Decision, para. 47. *See also e.g.* ICC-01/09-43 ("*Kenya* Summons Certification Decision"), para. 9 (persons named in an article 58 request are not parties).
[25] *See* ICC-01/04-01/06-568 OA3 ("*Lubanga* Disclosure Appeal Judgment, Dissenting Opinion of Judge Pikis"), paras. 17, 19.

not bound by it—he remains free to challenge provisional rule 165 (if it so remains) as and when he appears before the Court, and to seek to appeal such a ruling if he then wishes.

14. It is thus in Mr Bett's own interests that OPCD is *not* treated as if it were counsel for Mr Bett, since this would undermine Mr Bett's right to conduct his defence autonomously in the future by potentially making him a "party" to this litigation for the purpose of *res judicata*. Ironically, by seeking to obtain an appeal judgment on provisional rule 165 in Mr Gicheru's case, OPCD risks *limiting* Mr Bett's freedom to challenge provisional rule 165, due to the much greater persuasive authority of any appeal judgment that may ensue, upholding the Decision. Dismissing the Appeal in this case *in limine* is, in fact, the best way of preserving Mr Bett's interests.

15. All this is not to say that OPCD's mandate is meaningless—there may well be times when it is necessary to consider the potential interests of the defence in the abstract, and without the direct instructions of the suspect or accused.[26] The potentially broad scope of regulation 77 is noted and understood.[27] There may even be times when the procedural context of a decision does make OPCD a "party" for the purpose of article 82(1), consistent with the guidance in *Afghanistan*. But this is simply not one of those times. The application of provisional rule 165 in this case is significant only to the Prosecution and Mr Gicheru, and there is no procedural or forensic basis to justify prolonging this litigation merely at the instance of OPCD. The parties should be free to focus their efforts and limited resources on preparing for confirmation proceedings, as they wish.

B. Provisional rule 165 remains in force

16. The Pre-Trial Chamber correctly interpreted article 51(3) of the Statute, and applied its requirements to provisional rule 165. On that basis, it correctly determined that provisional rule 165 remains in force "*until* the ASP formally adopts, amends or rejects it."[28] In particular, consistent with the submissions of the Prosecution and the Defence, it concluded that "the text of article 51(3) of the Statute shows that a positive action of the ASP is required",[29] and that any tacit requirement for the ASP to take positive action at its next session "would make recourse to article 51(3) of the Statute very problematic and its

[26] *See also* ICC-02/04-01/05-408 OA3 ("*Kony et al.* Admissibility Appeal Judgment"), para. 1.
[27] *See* Prosecution ALA Response, para. 7 (fn. 22, quoting ICC-02/17-97 OA OA2 OA3 OA4 ("*Afghanistan* OPCD Participation Decision").
[28] Decision, para. 40 (emphasis supplied).
[29] Decision, para. 41.

application almost impossible, because of the basic function of the ASP itself."[30] Since a 'ping-pong' of provisional rules between the Plenary and the ASP would create an obvious, unnecessary and wasteful procedural burden on the Court,[31] the Pre-Trial Chamber concluded that reading a "tacit rejection" procedure into article 51(3) would "defeat [its] very *raison d'être*".[32] It is not the responsibility of the Court, but of the ASP, to ensure that a provisional rule does not *de facto* become a permanent rule simply due to the ASP's inaction.[33]

17. OPCD essentially repeats its first instance arguments on appeal, to claim that the Pre-Trial Chamber ignored the ordinary meaning of all the terms of article 51(3) (especially the reference to "the next ordinary or special session" of the ASP),[34] and failed to take into account aspects of the drafting history which it considers to show that the drafters "intended a strict time limitation on any provisional rule-making".[35] However, these arguments fail to show that the Pre-Trial Chamber erred in interpreting article 51(3) of the Statute, and that it is necessary to regard the ASP as having tacitly rejected provisional rule 165 by their inaction, causing it to lapse. To the contrary, it is clear that the vast majority of States Parties favour provisional rule 165, and the delay in reaching a final decision is due to scheduling and other problems afflicting the ASP's internal procedure.

B.1. The Decision did not ignore the ordinary meaning of the terms of article 51(3)

18. OPCD argues that article 51(3) contains "two limiting phrases as to how long a provisional rule may be applied", and that the second of these phrases ("until […] the next ordinary or special session of the Assembly") was effectively ignored by the Pre-Trial Chamber.[36] It suggests that the Pre-Trial Chamber's interpretation of article 51(3), excluding the possibility of a 'tacit rejection' by the ASP of a provisional rule, must be erroneous if it does not give effect to this additional term.[37]

19. OPCD's argument must fail because: first, it overlooks that the Pre-Trial Chamber's interpretation remains compatible with the second clause; second, it overlooks that OPCD's preferred reading creates an inconsistency with the first clause; and third, because in any

[30] Decision, para. 42 (further observing that any "expectation that 123 States will automatically and systemically find a consensus on complex legal issues debated for the first time is unrealistic").
[31] *Contra* Appeal, para. 19.
[32] Decision, para. 42.
[33] Decision, para. 43.
[34] Appeal, paras. 12-13.
[35] Appeal, para. 17. *See generally* paras. 14-19.
[36] Appeal, para. 13.
[37] Appeal, para. 13.

event it is well established that the express terms of a treaty provision have to be read with their context and object and purpose.[38]

20. There is no contradiction in asserting both that the drafters of the Statute intended a provisional rule to be the subject of a positive decision by the ASP (to adopt, amend, or reject it), and that this would occur "at the next ordinary or special session of the ASP". In this regard, it is important to take into account that the term "next" is not employed in isolation, but is joined with the reference to "ordinary or special" sessions of the ASP. By this formula, while the drafters evidently wished to urge the ASP to address itself to provisional rules as soon as possible, it also chose not to impose any strict limit.[39] This is necessarily implied by the allowance that the ASP could address a provisional rule at any special session it convened—but also that it could decline to address it in a special session (which might be convened for other reasons) and instead address it in a general session. The corollary is also true: the ASP need not address a provisional rule at the next ordinary session, but may address it at a special session—which, by definition, is not regularly scheduled. In other words, the interest in the ASP addressing a provisional rule promptly remains subject to the legislative and other priorities of the ASP, and includes the possibility for the ASP to address it on a special basis, outside its ordinary schedule. Overall, reading the clause as a whole, it may urge the ASP to act promptly, but it cannot be mandatory because it still ultimately permits the ASP to determine when it is appropriate to take action on the provisional rule.

21. This reading is further confirmed by the absence of any mention in article 51(3) of the consequences of a 'tacit rejection' of a provisional rule (by not adopting, amending, or rejecting it at the next ordinary or special session of the ASP). If the drafters intended a strict 'guillotine' on provisional rules for those circumstances where the ASP simply failed to reach a consensus, it is to be expected that they would have provided for this outcome, which might be relatively frequent. But they did not. This militates against OPCD's reading of article 51(3). So, too, does the drafters' wording of the first condition in article 51(3) ("adopted, amended, or rejected"), which implies a *positive* decision since the first two verbs are unequivocally positive actions. If the drafters had really intended a 'tacit rejection' doctrine, they could simply have provided that a provisional rule is effective until it is "considered" by the ASP, or formulated the clause in reverse ('the provisional rule is effective until the next

[38] *See e.g.* ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 33.
[39] *See also* Appeal, paras. 15-16.

ordinary session of the ASP, unless it is adopted or amended'). But, again, they did not do this.

22. The Pre-Trial Chamber also rightly took into account the object and purpose of the Statute, and article 51(3), which it considered was necessary to "ensur[e] the continuity of proceedings by giving the judges the opportunity to fill in a lacuna in the law."[40] It is implicit that article 51(3) must be effective in the context of the ASP's working practices. As the Chamber rightly noted, these do not lend themselves to a strict deadline. Reading article 51(3) as OPCD proposes would risk turning the provision into a dead letter. OPCD is wrong to suggest that the Chamber was not entitled to take these "pragmatic issues" into account—precisely because they were "foreseeable", it cannot be assumed that the drafters were blind to them, and consequently they too are relevant to the assessment of the drafters' intent.[41]

23. Article 31(3)(b) of the Vienna Convention on the Law of Treaties further provides that, "together with the context", it is necessary to take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[42] There is no consensus among States Parties that a provisional rule lapses in validity simply because the ASP did *not* take positive action to adopt or amend it at the next ordinary session. To the contrary, while one State (Kenya) "ask[ed] the Court to continue not to apply the provisional rule while the matter of rule 165 is still under consideration" by the ASP,[43] another State (Belgium) spoke on behalf of "a large majority of delegations" in expressing the view that "the provisional rule, as amended by the Court, remains applicable".[44] Notably, even Kenya *requested* the Court to refrain from applying provisional rule 165, and did not express the view that it was now invalid as a matter of law.

24. Taking into account the ordinary meaning of all the terms in article 51(3)—and considering the context and object and purpose of the Statute, and the subsequence practice at the ASP—the Pre-Trial Chamber must be considered to have adopted the correct

[40] Decision, para. 42.
[41] *Contra* Appeal, para. 19.
[42] *See further* R. Gardiner, *Treaty Interpretation*, 2nd Ed. (Oxford: OUP, 2015) ("Gardiner"), p. 253 ("concordant practice of the parties is best evidence of their correct interpretation"); A. Aust, *Modern Treaty Law and Practice*, 3rd Ed. (Cambridge: CUP, 2013) ("Aust"), pp. 214-215 ("subsequent practice […] is a most important element in the interpretation of any treaty")
[43] ICC ASP, *Assembly of States Parties to the Rome Statute of the International Criminal Court*, Fifteenth Session, 16-24 November 2016, Official Records: Volume I, ICC-ASP-15-20 ("2016 ASP Proceedings"), Annex V (Statement by Kenya), para. 5.
[44] 2016 ASP Proceedings, Annex VI (Statement by Belgium), para. 3.

interpretation of article 51(3), requiring that a provisional rule remains valid until it is adopted, amended, or rejected by a positive action of the ASP.

B.2. The drafting history does not establish that provisional rules were intended to lapse if the ASP failed to reach a prompt decision

25. OPCD seeks to support its interpretation by reference to the drafting history of article 51(3), showing that the drafters considered—but chose not to adopt—a strict time limit for the validity of provisional rules.[45] It argues that this shows "that the delegations were not satisfied with the proposal that allowed a provisional rule to apply indefinitely until positive action by the [ASP]",[46] and that States' concern to retain the power in drafting and adopting the Court's Rules demands a restrictive interpretation of article 51(3).[47] Yet this does not do justice to the vexed and uncertain position reflected by these documents. From the same material, it might equally be said that the drafters were not satisfied with any proposal which caused a provisional rule to lapse automatically, simply because the ASP could not promptly achieve consensus. Indeed, OPCD rightly acknowledges that—at an even earlier stage—the drafters had expressly rejected its 'tacit rejection' theory, by failing to adopt proposed language which allowed "provisional application [of a rule] prior to its approval or confirmation" but stated that a "rule not approved or confirmed shall lapse".[48]

26. The circumstances of this appeal illustrate that, while the drafting history of the Statute is frequently a helpful recourse for this Court, it will not always be infallible. Treaty interpretation is not a mechanical exercise, and occasions will arise when some of the tools in articles 31 and 32 of the Vienna Convention will prove more illuminating than others.[49] This is precisely why treaty interpretation does not depend on a single means of analysis, but rather reflects a holistic approach. Accordingly, with regard to the interpretation of article 51(3), the Pre-Trial Chamber was not only correct in its approach, but also in its conclusion. Provisional rules remain valid until a positive decision by the ASP to adopt, amend, or reject them, and this interpretation best serves the ordinary meaning of the terms employed, in

[45] Appeal, paras. 14-15.
[46] Appeal, para. 16.
[47] Appeal, para. 18. *See also* para. 17.
[48] Appeal, para. 18 (citation at fn. 33).
[49] *See further* Aust, p. 217 (reference to the *travaux préparatoires* as supplementary means of interpretation under article 32 is confined to "an elucidation of the meaning of the text" as interpreted under article 31, and "not a fresh investigation as to the supposed intentions of the parties […] [*T*]*ravaux* are by their nature less authentic than the other elements, often being incomplete and misleading").

context and having regard to the object and purpose of the Statute and article 51(3) itself, as informed by the subsequent practice of the ASP and the drafting history.

C. The procedural regime was not 'fixed', for the purpose of article 51(4), when the arrest warrant was issued

27. Article 51(4) provides that a provisional rule "shall not be applied retroactively to the detriment" of the suspect or accused. The Pre-Trial Chamber duly considered whether, on this basis, it was impermissible to apply provisional rule 165 in this case and concluded that it was not.[50] It correctly adopted the test set out by the Appeals Chamber in *Ruto and Sang*,[51] which is the leading authority on this question, and is not challenged by OPCD.[52] This test is a mixed question of fact and law.[53]

28. OPCD argues that the Pre-Trial Chamber erred in applying the *Ruto and Sang* test, particularly "the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused."[54] In OPCD's submission, this point in time was either "the issuance of [the] arrest warrant"[55] or even the *request* for issuing an arrest warrant,[56] and not—as the Pre-Trial Chamber found—"the confirmation of charges proceedings, which begin with the Initial Appearance Hearing".[57] Yet OPCD fails to show that the Pre-Trial Chamber erred in considering that a suspect's initial appearance marks a "distinct and separate" stage of proceedings from the "investigation/pre-confirmation proceedings", because at this time "the suspect acquires [new] rights" and—for the first time—"becomes a *party* to the proceedings", as illustrated by rule 121(1).[58]

29. It is irrelevant that regulation 66*bis*, which was adopted to implement provisional rule 165, provides for the composition of a single-judge Pre-Trial Chamber (for the purpose of

[50] Decision, paras. 46, 48-49.
[51] Decision, para. 47 (fn. 94, citing ICC-01/09-01/11-2024 OA10 ("*Ruto and Sang* Appeal Judgment").
[52] *See* Appeal, para. 22.
[53] *See* Prosecution Submissions, para. 19 (recalling that, in *Ruto and Sang*, "'the date of the start of the trial' was held to be 'the appropriate point at which to determine 'retroactivity'' […] based on the content of the amended rule in question (relating to the admission of evidence), and the Appeals Chamber's view that, 'at the commencement of the trial, there was a clear procedural regime with respect to the introduction of prior recorded testimony on which the accused could rely'", quoting *Ruto and Sang* Appeal Judgment, paras. 80-81).
[54] *Ruto and Sang* Appeal Judgment, para. 79; Decision, para. 47. *See* Appeal, para. 23.
[55] Appeal, para. 23 ("[T]he […] Decision erred in finding that the Provisional Rule only came into effect at the moment of the Initial Appearance Hearing rather than at the issuance of [the] arrest warrant").
[56] Appeal, para. 27 ("The correct point in time is at the moment of receipt of an application under Article 58").
[57] Decision, paras. 47-48. *See* Appeal, paras. 23, 26.
[58] Decision, para. 47 (emphasis supplied). Rule 121(1) provides that a suspect shall make their initial appearance before the Pre-Trial Chamber promptly upon arriving at the Court and that, henceforth, "[s]ubject to the provisions of article 60 and 61, the person shall enjoy the rights set forth in article 67".

article 70 proceedings) "from the moment of receipt of an application under article 58" for an arrest warrant.[59] Likewise, it is irrelevant that this was the expectation of the Plenary in drawing up provisional rule 165.[60] OPCD's analogy confuses the intended scope of the provisional rule—which does indeed cover all stages from the Prosecutor's article 58 request to any appeal against the final verdict—with the point at which the procedural regime is 'fixed' in a particular case for the limited purpose of article 51(4). Yet there is no basis in law or logic to conclude that the former must dispose of the latter.

30. It is uncontested that provisional rule 165 had not been promulgated at the time the arrest warrants were issued in these proceedings. But this does not show that the suspects had at that point any legitimate expectation as to the procedural regime of the Court.[61] To the contrary, as the Prosecution previously recalled, in this case provisional rule 165 only "affects the regime applicable to litigation before the Court in pre-trial, trial, and appeal proceedings".[62] It has no impact on the arrest warrants, which were issued on behalf of a three-judge Pre-Trial Chamber in accordance with rule 165 as unamended.[63] This fact alone, which has no bearing on the rights of the suspects nor the subsequent conduct of pre-trial or trial proceedings, cannot be said to 'fix' the procedural regime.[64]

31. Indeed, for such time as the suspects remained fugitives from the Court, they cannot be said to have relied on the particularities of the Court's litigation regime at all.[65] To the contrary, by refusing to comply with the arrest warrant, they entirely repudiated the procedural regime. The earliest time at which Mr Gicheru can be said to have relied on the procedural regime governing his pre-trial and trial proceedings (and thus founding his legitimate expectation that it would remain unchanged) is when he surrendered himself to the Court. And, as far as Mr Bett is concerned, since he remains a fugitive, he cannot yet be considered to have relied upon the Court's procedural regime at any point.

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[59] *Contra* Appeal, para. 23.
[60] *Contra* Appeal, para. 24.
[61] *See further* Prosecution Submissions, para. 18 (recalling that article 51(4) only prohibits retroactive application to the detriment of the suspect or accused person after the point in time at which the procedural regime governing the proceedings becomes applicable to the parties because, "[u]nlike the prohibition of the retroactive application of *substantive* law (for which the material point in time is always the time of the conduct allegedly committed by the suspect or accused), the prohibition of the retroactive application of *procedural* law depends on a judicial assessment of when the suspect or accused could reasonably assume that the proceedings against them would occur in a certain way").
[62] Prosecution Submissions, para. 21.
[63] *See e.g.* Appeal, para. 25.
[64] *Contra* Appeal, para. 25.
[65] *See also* Prosecution Submissions, para. 22; Defence Submissions, para. 22.

32. OPCD is incorrect to assert that suspects are "routinely" afforded standing as a party prior to appearing before the Court.[66] While some cases have recognised a limited opportunity for *in absentia* suspects to challenge the admissibility of the case against them,[67] this is exceptional. It does not imply any broader right for fugitives to assume their rights as a party, which would indeed contravene the established rule against *in absentia* proceedings for suspects who have not appeared before the Court (other than under article 61). Nor does it establish any legitimate expectation as to procedural matters which do not pertain to admissibility challenges—especially since this procedure does not apply to article 70 prosecutions.[68]

33. Accordingly, the Pre-Trial Chamber was correct to find that the relevant procedural regime for Mr Gicheru and Mr Bett was not fixed until long after their arrest warrants had been issued, but was fixed for Mr Gicheru by the time of his initial appearance.[69]

34. In any event, since the Pre-Trial Chamber found that provisional rule 165 was not applied retroactively in this case, it did not proceed to consider whether its application was detrimental to the suspects.[70] If the Appeals Chamber disagrees with the Pre-Trial Chamber in the former respect, OPCD asks it to make its own assessment of detriment.[71] Yet since OPCD does not represent the only suspect in this case at the time of the Appeal,[72] and the Decision is only binding on Mr Gicheru, the Appeals Chamber should not entertain such an academic exercise—especially against the apparent wishes of the Defence.[73] If it is impossible to show any relevant detriment, then this ground of appeal must be dismissed because it cannot materially affect the Decision.

35. Even if the question of detriment were to be considered, the *Ruto and Sang* Appeals Chamber has held that "a certain threshold" must be established, "which is that the overall position of the accused in the proceedings [is] negatively affected by the disadvantage".[74] OPCD argues that this is manifest in denying Mr Gicheru and Mr Bett means of procedural

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[66] *Contra* Appeal, para. 26.
[67] *See* ICC-01/04-169 OA ("*DRC* Arrest Warrant Appeal Judgment"), para. 51; *Kony et al.* Admissibility Appeal Judgment; ICC-01/11-01/11-662 ("*Gaddafi* Admissibility Decision"), paras. 21-24.
[68] Rules of Procedure and Evidence, rule 163(2) (disapplying Part 2 of the Statute, except for article 21).
[69] Decision, para. 48.
[70] Decision, para. 49.
[71] Appeal, para. 27.
[72] *See above* para. 12.
[73] Defence Submissions, paras. 23, 31-47.
[74] *Ruto and Sang* Appeal Judgment, para. 78 (also noting that "it is not any disadvantage caused by the amendment of a rule that is sufficient"). *See also* Appeal, para. 28.

recourse "they themselves held at the time of issuance of their arrest warrant"—namely, decision-making by a bench of at least three judges, with "potential interlocutory appellate review" and "the assurance of a bifurcated sentencing hearing".[75] But these so-called disadvantages are merely theoretical.

36. First, as explained below, changes to the composition of the bench, the scope of interlocutory appeals, and the procedure for hearing submissions on sentence (in the event of conviction) neither infringe fundamental rights nor are detrimental in this case.[76] To the contrary, by streamlining the trial to some degree, they may favour the interests of suspects.

37. Second, and in any event, none of these mechanisms are available to a suspect before they surrender to the Court. Since article 58 proceedings are ordinarily *ex parte*, suspects may not avail themselves either of the Pre-Trial Chamber or any right of appeal without appearing before the Court (which would itself serve to fix the applicable procedural regime, as the Pre-Trial Chamber found).[77] It is illogical to suggest that a suspect is vested with legitimate expectations of a certain procedural regime at this Court before they may seek to access those proceedings—of which, indeed, they may not even be aware. *A fortiori*, it is illogical to suggest that the procedural regime for *sentencing*—which is conditional upon conviction—was fixed so early. This paradox underlines the correctness of the conclusion that the procedural regime in this case (against Mr Gicheru) did not become fixed for the purpose of article 51(4) at least until he surrendered himself, and made his initial appearance.

D. Provisional rule 165 is consistent with the Statute

38. At the request of OPCD, the Pre-Trial Chamber considered whether provisional rule 165 is compatible with the Statute, as further required by article 51(4) and (5).[78] It confirmed that the provisional rule is indeed compatible,[79] not only because provisional rule 165 "does not restrict any of the fundamental rights enshrined in article 67 of the Statute"[80] but also because article 70(2) is an enabling provision which recognises that trials for offences against the administration of justice may be conducted on the basis of different procedures than those

[75] Appeal, para. 28.
[76] *See below* paras. 46, 53.
[77] *See above* fn. 24.
[78] Decision, para. 50.
[79] Decision, para. 53.
[80] Decision, para. 52.

applying to trials for article 5 crimes.[81] Once again, this reasoning was consistent with the positions urged both by the Prosecution and the Defence.[82]

39. While ultimately accepting the significance of article 70(2), OPCD now contends that it necessarily implies that provisional rules cannot be promulgated for the purpose of article 70 proceedings.[83] It does not. OPCD further repeats its claim that provisional rule 165 is "incompatib[le] with fair trial rights",[84] but fails to substantiate this conclusion.

40. OPCD's broader claim—that the Appeals Chamber should reverse the Decision not because provisional rule 165 itself is incompatible with the Statute, but for fear of "*further* […] provisional amendments that are in contradiction to the Rome Statute"[85]—must be dismissed as premature, vague and undeveloped. The Appeals Chamber—and, indeed, the Court—can only rule on the validity of provisional or amended rules as they have been adopted, and cannot take into account mere hypotheticals. Such fears are, in any event, implausible when such provisional or amended rules can only emanate from the Plenary itself, in two-thirds majority, or the ASP.

D.1. Article 70(2) permits the promulgation of rules for the conduct of prosecutions under article 70 of the Statute, including provisional rules under article 51(3)

41. OPCD stresses the general principle that provisions of the Rules "cannot be in contradiction to the rights and principles enshrined in the Rome Statute", recalling the supremacy of the Statute set out in article 51(4) and (5).[86] However, while this is true, it does not mean that the Rules can never make different provision than the Statute, where the Statute itself permits, and provided that these alternative provisions remain "consistent" with bedrock provisions of the Statute, such as the guarantees of fairness set out in articles 66 and 67, read as necessary with article 21(3). The requirement of "consistency"—which is the term used in article 51(4)[87]—is important: it does not mean 'the same as', but '*congruous*' or *'compatible'*,[88] and thus allows for alternative provisions of detail to be made if these likewise serve the principles of the Statute. This small degree of flexibility is essential,

[81] Decision, para. 51.
[82] *See* Prosecution Submissions, paras. 26-30, 32; Defence Submissions, paras. 31-47.
[83] Appeal, paras. 31-32.
[84] *See* Appeal, paras. 33-35.
[85] Appeal, para. 36 (emphasis added).
[86] Appeal, para. 31.
[87] Statute, art. 51(4). *Contra* Appeal, para. 32 (suggesting, without justification or explanation, that the threshold should be "entirely incompatible").
[88] *See* OED Online, "consistent, adj. and n.", 6 ("Agreeing or according to in substance or form; congruous, compatible"), 7 ("constantly adhering to the same principles of thought or action").

insofar as more specific procedural rules will, at least on occasion, inevitably interpret statutory principles. It is why the States Parties themselves—now through the ASP—remain the legislator for the Rules.[89]

42. As the Pre-Trial Chamber rightly found, article 70(2) is just such an enabling provision, which expressly states that "[t]he principles and procedures governing the Court's exercise of jurisdiction over offences [against the administration of justice] shall be those provided for in the Rules of Procedure and Evidence".[90] OPCD concedes as much, in recognising that the drafters of the Statute intended by this means that "the differing procedural regime" for trying article 70 offences would be set by the Rules.[91]

43. However, OPCD's further claim—seemingly to the effect that the procedures governing article 70 trials cannot be further elaborated by provisional rules under article 51(3)[92]—is untenable. First, nothing in the Decision (or indeed the adoption by the Plenary of provisional rule 165 itself) is necessarily "outside" the framework established by article 51 of the Statute, which specifically permits the elaboration of provisional rules in article 51(3). Second, even provisional rules are expressly subject to adoption, amendment, or rejection by the ASP, as stated by article 51(3). In this way, they remain subject to a "rigorous process requiring approval of States Parties", which the drafters of the Statute considered appropriate for adopting the procedural framework of article 70 trials.[93] Article 51(3) itself contains suitable limits to make sure the legislative pre-eminence of the ASP is retained.[94] Third, OPCD's implication that the drafters of the Statute did not contemplate the adoption of provisional rules with respect to article 70 procedure, complying with the requirements of article 51(3), is not only unsupported but contrary to common sense. While article 70 trials are of course

[89] *See e.g.* Statute, art. 51(1).
[90] Statute, art. 70(2).
[91] *See e.g.* Appeal, para. 32 ("Article 70(2) assigns the principles and procedures to be used in cases of offences against the administration of justice to the RPE due to 'the complexity of devising an appropriate procedure for prosecuting these offences and the little time available in Rome to resolve these issues' […] the ICC Judges' Plenary Report indicated Article 70(2) as the basis for allowing such differing procedural regime").
[92] Appeal, para. 32 ("[A]ny amendment of RPE—especially those which truncate use of Rome Statute provisions—is not meant to be done outside of a process which includes review and assent by the ASP through a full framework outlined in Article 51. This is explained in the *Commentary* which highlights that *'[t]he recognition […] that elaboration and amendment of the Rules […] would be a rigorous process requiring approval of States Parties, provided comfort in arriving at agreement on the article'* deferring Article 70 procedures to the RPE", emphasis supplied).
[93] D. Piragoff, 'Article 70: offences against the administration of justice,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (Munchen/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1755 (mn. 13).
[94] *See e.g.* Statute, art. 51(3) (conditioning the drawing up of provisional rules by the Plenary, in two-thirds majority, on "urgent cases where the Rules do not provide for a specific situation before the Court", and further providing that the ASP will thereafter decide whether to adopt, amend, or reject the provisional rule).

important, they are not more significant than article 5 trials, which are also governed by the rules in critical respects. If the drafters were content to permit the drawing up of provisional rules with regard to article 5 trials, then this must have applied no less to article 70 trials.

44. In determining whether the elaboration of provisional rules for article 70 proceedings is permissible *in any circumstances*, it is irrelevant that provisional rule 165 may broaden the "extremely limited number of exceptions" to the procedural framework held in common between article 5 trials and article 70 trials.[95] This speaks nothing to the relationship of principle between articles 51 and 70(2), as it was intended by the drafters of the Statute, but rather goes to the question whether a particular provisional rule—or, indeed, amended rule—is compatible with the Statute, as required by article 51(4). No such concern arises for provisional rule 165, as the following paragraphs show.

D.2. Provisional rule 165 does not restrict article 67 rights

45. OPCD generally submits that the Pre-Trial Chamber erred "in finding that Provisional Rule 165 did not restrict Article 67 rights in that fundamental rights are imbued within the provisions of the treaty itself and found throughout the entirety of the Rome Statute, anchored by the fairness provisions of Article 67."[96] While of course due process rights are not necessarily isolated in any one statutory provision, it remains incumbent on the appellant to make their claim of error with specificity, so that it may be fairly addressed by the respondents to the appeal. Accordingly, the Prosecution understands OPCD to maintain that provisional rule 165 is incompatible with the rights in article 67, as well as with the right to appeal more generally, which is the focus of OPCD's submissions in their brief.[97]

46. Before the Pre-Trial Chamber, OPCD further argued that provisional rule 165 is incompatible 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 article[] 76(2)".[98] Yet these concerns appear to have been dropped for the purpose of the Appeal, insofar as they are only cited as potential "detriment" for purpose of article 51(4) but not violations of fundamental rights.[99] In any event, OPCD was reminded that restricting the

[95] *Contra* Appeal, para. 32.
[96] Appeal, para. 33. *See also* para. 35 (referring to "a chorus of concern about how the totality of Provisional Rule 165 can align with the core tene[]ts of the Rome Statute", and asserting that "'the rights of the accused have primacy 'over any other conflicting interest'"").
[97] *See* Appeal, paras. 34-35.
[98] Decision, para. 50. *See further* OPCD Submissions, paras. 39-49.
[99] *See* Appeal, para. 28.

number of judges hearing an article 70 case offends no right of the accused or otherwise cause any unfairness—especially given the more limited penalty permitted for such offences.[100] Likewise, provisional rule 165 neither precludes a separate penalty phase if an article 70 trial results in conviction, nor even an oral hearing for this purpose if the Trial Chamber so decides.[101]

D.2.a. Provisional rule 165 does not impermissibly restrict the right to appeal

47. OPCD asserts that "[p]erhaps the most glaring example of Provisional Rule 165's incompatibility with fair trial rights is the disallowance of a party's ability to seek leave for interlocutory appeal under Article 82(1)(d)."[102] They suggest that "[a]t stake here are at least three rights that are embedded in other parts of the Statute, but are inexorably tied to the Article 67(1) right to a fair trial",[103] yet do not specify which rights they mean. It is understood, however, that they may intend to refer to "legal certainty […] in the course of a trial", "fairness", and the opportunity for a second-instance review.[104]

48. Provisional rule 165 serves, *inter alia*, to disapply article 82(1)(d).[105] As such, it removes the right of a "party" to the proceedings to request the first-instance chamber to certify for appeal an issue arising from its decision which significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, where immediate resolution by the Appeals Chamber may materially advance the proceedings.[106] However, while disapplying article 82(1)(d) curtails the parties' ability to raise an interlocutory appeal, it does not entirely foreclose it. The parties remain able to appeal as of right any matter falling under article 82(1)(a) (decisions with respect to jurisdiction or admissibility) or 82(1)(b) (decisions granting or denying release of the suspect/accused), and the Prosecution may also appeal under article 82(1)(c) (decisions of the Pre-Trial Chamber to act on its own initiative

[100] *See* Prosecution Submissions, para. 28 (recalling that, since article 70 offences "may be tried not only by the Court but also by national jurisdictions", "persons suspected of article 70 offences enjoy no right or legitimate expectation as to the particular composition of the judicial authority which will conduct pre-trial and trial proceedings against them, provided it conf[o]rms to internationally recognised standards", and noting that "[i]nternational acceptance that offences against the administration of justice may be properly tried before a single judge is further illustrated by the practice of other *ad hoc* tribunals hearing such cases before a single judge, such as the SCSL, the RSCSL, the STL, the IRMCT, and the KSC"; citing SCSL Rules, rule 77(D); RSCSL Statute, art. 12(1); RSCSL Rules, rule 77(D)(i); STL Rules, rule 60*bis*(C); IRMCT Statute, art. 12(1); KSC Law, art. 25(2)). *See also* Defence Submissions, paras. 38-39.
[101] *See* Prosecution Submissions, para. 29 (bullet 2); Defence Submissions, paras. 45-47.
[102] Appeal, para. 34.
[103] Appeal, para. 35.
[104] *See* Appeal, para. 34.
[105] *See* Decision, paras. 27-28; Prosecution Submissions, para. 21.
[106] Statute, art. 82(1)(d).

under article 56(3)). In other words, provisional rule 165 raises the threshold of matters which are considered to justify interlocutory appeal, but does not prohibit this means of recourse.

49. Provisional rule 165 must also be considered in the context of the well-established jurisprudence that there is no right to an interlocutory appeal under article 82(1)(d).[107] As the Court has repeatedly emphasised, this procedural mechanism reflects a discretionary judicial power, which is "exceptional"[108] and to be applied restrictively.[109] While the parties are entitled to *request* the first-instance chamber to consider certifying a matter for appeal (if it meets the requirements of the Statute), this does not arise from any fundamental right to raise appeals at the interlocutory stage, but instead emanates from the "axiomatic" right of the parties to request a chamber to exercise any power with which it is vested.[110] In other words, while article 82(1)(d) is applicable to proceedings, parties may request a chamber to consider its application—but this entitlement does not itself emanate from internationally recognised human rights. This is consistent with, and implied by, the fact that first-instance decisions under article 82(1)(d) are not themselves reviewable,[111] and confirmed by express reasoning of the Appeals Chamber on this very point.[112] The right to appeal as recognised in article 14(5) of the International Covenant on Civil and Political Rights, and similar instruments,[113] vests in article 81 and not article 82 of the Statute.[114]

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[107] *See also* Defence Submissions, para. 42.
[108] *See e.g.* ICC-01/13-115 ("*Comoros* Second ALA Decision"), para. 6.
[109] *See e.g.* ICC-01/13-73 ("*Comoros* First ALA Decision"), para. 22 ("the remedy provided for in article 82(1)(d) […] is of a restrictive character").
[110] *DRC* Extraordinary Review Appeal Judgment, para. 20 ("If [a chamber] fails to address the appealability of an issue it may do so on the application of any party to the proceedings. It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it").
[111] *DRC* Extraordinary Review Appeal Judgment, para. 34.
[112] *See DRC* Extraordinary Review Appeal Judgment, paras. 20 (emphasising that "[a]rticle 82(1)(d) of the Statute does not confer a right to appeal interlocutory […] decisions", but that rather "[a] right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber", and that it is this opinion which "constitutes the definitive element for the genesis of a right to appeal"), 38 ("*[o]nly [appeals of] final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict* are assured as an indispensable right", emphasis added, citing International Covenant on Civil and Political Rights, art. 15(4)). *See also* para. 32 ("nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal").
[113] *See also e.g.* ACHR, art. 8(2)(h); L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: OUP, 2011), pp. 660-661 (mn. 25.28).
[114] *See also* G. Boas et al., 'Appeals, reviews, and reconsideration,' in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013), pp. 1002-1003; G. Boas et al., *International Criminal Law Practitioner Library—Volume III: International Criminal Procedure* (Cambridge: CUP, 2011), p. 435.

50. It follows that OPCD is incorrect to assert that the power vested in first-instance chambers to certify matters for interlocutory appeal under article 82(1)(d), for the purpose of article 5 proceedings, may not be removed for the purpose of article 70 proceedings. To the contrary, a right to interlocutory appeal is neither guaranteed by article 67 nor by internationally recognised human rights, which may be relevant by means of article 21(3).

51. Since it removes the first-instance chamber's power to certify issues for interlocutory appeal under article 82(1)(d), provisional rule 165 may also be tested against the three criteria which OPCD seems to raise as further or alternative bases to contend that it is incompatible with the due process rights guaranteed by the Statute—legal certainty, fairness, and second-instance review.[115] In the first respect, while it is true that provisional rule 165 diminishes the opportunity for appellate 'course correction' mid-trial, this is balanced by the much shorter length of article 70 trials. As such, not only is there less opportunity for legal ambiguity to arise, but the adverse consequences of straying off course are diminished—the trial will reach a verdict more quickly, with the possibility of prompt appellate review under article 81.[116] In the second respect, concerning fairness, provisional rule 165 applies equally to both parties, and the Pre-Trial or Trial Chamber remains duty-bound to ensure the fairness of proceedings. To any extent they err in doing so, again, this may be remedied by the Appeals Chamber in the course of a final appeal. And, finally, in terms of appellate review, it is self-evident that this right remains guaranteed by article 81 of the Statute, supplemented as necessary by article 82(1)(a) to (c). While provisional rule 165 narrows the scope of interlocutory appeals for article 70 trials, compared to article 5 trials, the internationally recognised right to appeal nonetheless remains intact, and capable of vigorous and effective use.

D.2.b. Provisional rule 165 does not impermissibly restrict any other article 67 right

52. OPCD's claim that provisional rule 165 is otherwise inconsistent with fundamental due process rights is undeveloped and wrong.[117] It is contradicted by the view of the Defence, unequivocally, that provisional rule 165 "does not eliminate any fundamental fair trial right under Article 67 of the Statute."[118] There simply is no basis to conclude that anything in provisional rule 165 adversely affects: the right of the accused to be informed promptly and

[115] *See above* para. 47.
[116] *See also* *Bemba et al.* Certification Decision, para. 17 ("[A]rticle 81 of the Statute […] is the proper procedural avenue where alternative views to the ones held by the Trial Chamber can be subjected to the scrutiny of the Appeals Chamber, once the matter has been extensively debated at trial").
[117] *See* Appeal, paras. 30, 33, 35.
[118] Defence Submissions, para. 24.

in detail of the charges; to have adequate time and facilities to prepare their defence; to be tried without undue delay; to conduct their defence in person or through counsel of their choosing; to challenge the evidence against them; to receive interpretation and translation services where necessary; to remain silent; to make a sworn or unsworn statement in their defence; or to require the Prosecution to prove its case beyond reasonable doubt.[119]

53. To the contrary, by adapting the trial procedures of this Court to the more limited scope of article 70 trials, provisional rule 165 *favours* the interests of the suspect or accused in a fair and expeditious trial. It is thus no coincidence that the Defence joins the Prosecution in opposing OPCD's submissions and (it is presumed) the Appeal.[120] OPCD's allegation that provisional rule 165 prioritizes "resources over rights"—because it was, at least in part, designed "to economize" the Court[121]—seems to be based on the mistaken premise that longer and more expensive trials are necessarily fairer trials. This flies in the face of most practical experience. For article 70 offences, which are subject to a limited maximum penalty and usually concern more focused disputes of law and fact,[122] all parties have a shared interest in reasonable adjustments to the procedure for article 5 crimes, which were designed to discover the truth about the most serious crimes of international concern.

Conclusion

54. For all the reasons above, the Appeal should be dismissed *in limine* because it is inadmissible. Alternatively, it should be dismissed on its merits because it fails to show any error materially affecting the Decision.

Fatou Bensouda, Prosecutor

Dated this 21st day of January 2021

At The Hague, The Netherlands

[119] Statute, art. 67(1)(a) to (i).
[120] *See* Defence Submissions.
[121] Appeal, para. 35.
[122] *See also* Decision, para. 29; Defence Submissions, paras. 34, 47.