

**Cour
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**International
Criminal
Court**

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*No.: ICC-01/09-01/20
Date: 2 February 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 with Public Annexes A, B and C

Public Redacted Version of “Corrected Version of “Paul Gicheru’s Response to OPCD Appeal against the Decision on Applicability of Provisional Rule 165,” 21 January 2021, ICC-01/09-01/20-84-Conf”, 1 February 2021, ICC-01/09-01/20-84-Conf-Corr

Source: Counsel for Paul Gicheru

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Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of Public Counsel for the Defence (“OPCD”) Appeal against the Decision on the Applicability of Provisional Rule 165 (“Impugned Decision”).¹ This Response and Annex A are filed confidential pursuant to Regulation 23*bis*(1) of the Regulations of the Court as they contain confidential material.

I. QUESTIONS PRESENTED

Question One

Whether the Chamber erred in finding that Provisional Rule 165 continues to be applicable considering that the Assembly of States Parties (“ASP”) has not adopted a specific decision adopting, amending or rejecting Provisional Rule 165 in accordance with the terms of Article 51(3) of the Statute.

Answer

The Single Judge erred in law in finding that Provisional Rule 165 continues to be applicable absent an ASP decision. The plain text of Article 51(3), interpreted in accordance with the ordinary meaning given to the terms, unequivocally provides that Provisional Rule 165 has lapsed since it has not been raised, discussed, or considered in three consecutive ASP sessions. The drafters of the Rome Statute and States Parties did not intend for the Judges to adopt provisional rules with indefinite application absent ASP approval.

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-79](#), OPCD Appeals against the Decision on Applicability of Provisional Rule 165, 8 January 2021 (“OPCD Appeal”); *Prosecutor v. Gicheru*, [ICC-01/09-01/20-61](#), Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020 (“Impugned Decision”).

Question 2

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.

Answer

The Single Judge did not err in law in finding that a new procedural regime commences at the Initial Appearance Hearing, correctly interpreting the Appeals Chamber's jurisprudence on retroactivity in considering that the Initial Appearance Hearing begins a new "procedural regime governing the proceedings," where the suspect becomes a party to the proceedings and acquires rights he or she was deprived of until this point in time.

Question 3

Whether the Chamber erred in finding that Provisional Rule 165 is not incompatible with the Statute on the grounds that Article 70(2) of the Statute stipulates that "[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" and, in addition, that Provisional Rule 165 does not restrict any of the fundamental rights enshrined in Article 67 of the Statute.

Answer

The Single Judge erred in law in finding that Provisional Rule 165 is compatible with the Statute and does not restrict Article 67 fair trial rights. The drafters of the Rome Statute and States Parties did not intend to create a two-tiered procedure for Article 5 and Article 70 proceedings. The differential treatment of Article 70 proceedings under Provisional Rule 165 infringes on the right to equality in Article 67(1) of the Statute, which requires that differential treatment be justified on objective and reasonable grounds.

II. PRELIMINARY MATTERS

A. Standard of Review

1. The Appeals Chamber reviews errors of law *de novo*, arriving at its own conclusions as to the appropriate law in determining whether the Single Judge misinterpreted the law.² If the Appeals Chamber finds that the Single Judge committed an error of law, it will only intervene if the error materially affected the Impugned Decision, meaning that had the Single Judge not made the error, she would have rendered a “substantially different” decision than the one affected by the error.³

B. Departing Explanation

2. Mr. Gicheru agreed to proceed on the basis of Provisional Rule 165 for expediency purposes, explicitly stating that his acquiescence should not extend to other cases and should not be precedent setting.⁴ Indeed, in objecting to the OPCD’s request for leave to appeal the Impugned Decision for lack of standing, the Defence acknowledged that meritorious claims were raised.⁵ With the Single Judge having granted the OPCD leave to appeal on the three legal errors it raised for the Appeals Chamber to determine whether the application of Provisional Rule 165 is legally sound for these and future proceedings,⁶ Mr. Gicheru departs from his previous held positions.
3. Prior to the ASP’s 19th session, the Defence submitted that the legal consequence of the ASP’s inaction on Provisional Rule 165 is that it continues to apply since it

² *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [ICC-01/13-98](#), Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros,”’ 2 September 2019, para. 26.

³ *Id.*

⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-53](#), Paul Gicheru’s Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165, 25 November 2020 (“Defence Response to OPCD Submissions”); *Prosecutor v. Gicheru*, [ICC-01/09-01/20-64](#), Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165, 18 December 2020 (“Defence Response to OPCD Leave to Appeal”).

⁵ [Defence Response to OPCD Leave to Appeal](#).

⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-68](#), Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165,’ 23 December 2020 (“Decision on Leave to Appeal”) para. 42.

arguably remained under consideration.⁷ However, given that the Presidency did not raise Provisional Rule 165 with the ASP and that the ASP did not discuss Provisional Rule 165 at its 19th session when the issue was live before the Single Judge, any claim that Provisional Rule 165 continues to be under consideration is fanciful.

4. The Defence also initially submitted that having a Single Judge perform the functions of a three-Judge bench is consistent with the Statute, prohibiting interlocutory appeals does not deny the right of review, and that any detrimental effect on the Accused's fair trial rights resulting from the removal of an automatic right to a separate sentencing hearing is likely to be *de minimis*.⁸ However, upon further reflection, considering that States Parties objected to Provisional Rule 165, that proposals by States Parties were not adopted or modified, that Provisional Rule 165 has not been discussed during the past three ASP sessions, and that neither the Presidency nor the ASP attempted to resolve issues surrounding Provisional Rule 165 during the 19th session, the inevitable, indeed indisputable, conclusion that follows is that Provisional Rule 165 does not meet the high standards in the Rome Statute.
5. Whether Provisional Rule 165 is applicable and whether it is consistent with the Statute, *must* be considered within the context of the inherent overarching issue before the Appeals Chamber:

Whether the drafters of the Rome Statute and the States Parties agreed to a legal regime where, for financial reasons, the Judges may adopt a two-tiered process under which individuals suspected of Article 70 offences would be afforded fewer procedural safeguards than individual suspected of Article 5 crimes.

III. BACKGROUND

6. 18 months into the trial proceedings in *Bemba et al.*, the ICC's first Article 70 case, invoking "urgency," the Judges adopted Provisional Rule 165 on 10 February 2016 under Article 51(3) of the Statute for immediate application "until adopted,

⁷ [Defence Response to OPCD Submissions](#), para. 14.

⁸ *Id.*, para. 24.

amended or rejected at the next ordinary or special session of the Assembly of States Parties.”⁹ The *urgency* was resource-based: “the situation of an extensive drain on judicial resources caused by the allocation of judicial resources to peripheral article 70 proceedings at the same time as the Court’s workload on article 5 core crimes trials was continuing to increase.”¹⁰ Five years later, with no final view having been reached during the four interim ASP sessions – despite the claimed *urgency* by the Judges – Provisional Rule 165 remains in limbo.

7. In adopting Provisional Rule 165, the Judges intended to “simplif[y] and expedite[] article 70 proceedings,” by reducing the number of Judges in the Chambers, restricting the right to interlocutory appeal, and eliminating an automatic right to separate sentencing hearings.¹¹ “[I]t had become evident to the Court that such a commitment of judicial resources to article 70 proceedings was not commensurate to the relationship between article 5 core crimes proceedings (which the Court was established to address) and article 70 proceedings (which were ancillary in nature).”¹²
8. Proclaiming that Article 70(2) “allow[s] for certain Rules amendments for article 70 proceedings which derogate from the procedures set out in the Statute” and that Rule 163 permits some statutory provisions to be displaced by rules governing Article 70 offences,¹³ the Judges found Provisional Rule 165 consistent with the Statute. The Judges reasoned that “it does not appear necessary for the confirmation of charges and trial for such offences to be respectively carried out by three judges, along with five judges to review decisions on appeal”¹⁴ and

⁹ Report of the Working Group on Amendments, [ICC-ASP/19/28](#), 25 November 2020. [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#), 29 February 2016 (“Plenary Report”), paras. 19-20.

¹⁰ Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, [ICC-ASP/15/7](#), 21 September 2016 (“Study Group on Governance Report”), para. 10.

¹¹ [Plenary Report](#), paras. 3, 10.

¹² [Study Group on Governance Report](#), para. 11.

¹³ [Plenary Report](#), paras. 11-13.

¹⁴ *Id.*, para. 8.

“removing the separate sentencing hearing ... and leave to appeal procedures ... would further expedite article 70 proceedings.”¹⁵

9. Reacting to the Judges’ adoption of Provisional Rule 165, Kenya submitted a letter to the President of the ASP on 17 March 2016, objecting that Provisional Rule 165 was *ultra vires* because:

- a. There was no urgency, since the proposal for a reduced number of Judges to address Article 70 offences was submitted to the Advisory Committee on Legal Texts in July 2015 but was not considered sufficiently urgent to submit to the ASP for consideration at its 14th session;
- b. The Judges should not have made recourse to Article 51(3) since the Rules *do* provide for the specific situation before the Court;
- c. Provisional Rule 165 is inconsistent with statutory provisions concerning the composition of the Chambers, interlocutory appeals, and separate sentencing hearings; and
- d. The provisional rule amendments set a “problematic precedent which gives rise to the concern that this procedure could be used in future to circumvent substantive rights enshrined in the Statute....”¹⁶

10. During the ASP’s 15th session (16-24 November 2016), Provisional Rule 165 was not adopted, amended, or explicitly rejected.¹⁷ “[A] few delegations asked the Court to continue not to apply the provisional rule while the matter is still under consideration by the Working Group on Amendments.”¹⁸ Others “took the view that the provisional amendments remained applicable pending a decision by the Assembly of whether to adopt, amend or reject” it and that it was “for the Court to

¹⁵ *Id.*, para. 14.

¹⁶ [Study Group on Governance Report](#), Annex III, Letter from the Attorney General of Kenya to the President of the Assembly, dated 17 March 2016.

¹⁷ Report of the Working Group on Amendments, [ICC-ASP/15/24](#), 21 November 2016, para. 37.

¹⁸ Report of the Working Group on Amendments, Addendum III, [ICC-ASP/15/24/Add.1](#), 21 November 2016, Consideration of proposals to amend the Rules of Procedure and Evidence, para. 37 *bis*.

adjudicate the matter.”¹⁹ France and Germany submitted a “non-paper” proposing that Provisional Rule 165 be modified to: (a) keep the number of sitting Judges in the Chambers (except the Pre-Trial Chamber, which would have a Single Judge for decisions other than the confirmation of charges); and (b) retain the rights to interlocutory appeal and to a separate sentencing hearing.²⁰

11. During the ASP’s 16th (4-14 December 2017) and 17th (5-12 December 2018) sessions, the proposal by France and Germany was discussed, with some States Parties objecting to the proposal, but the Working Group was not in a position to make a concrete recommendation to the ASP.²¹
12. During the ASP’s 18th session (2-7 December 2019), no discussions were held, no consideration was given to, and no additional proposals were made to adjust Provisional Rule 165.
13. Prior to the ASP’s 19th session (14-23 December 2020), [REDACTED].²²
14. One month before the ASP’s 19th session, Mr. Gicheru travelled to the Netherlands on 2 November 2020 to surrender to the ICC.²³ The same day, Pre-Trial Chamber II requested the President of the Pre-Trial Division to constitute a Pre-Trial Chamber on the basis of Provisional Rule 165.²⁴
15. On 6 November 2020, Mr. Gicheru appeared at the Initial Appearance Hearing. The OPCD filed a request to appear before the President of the Pre-Trial Division on

¹⁹ *Id.*, para. 37 *ter*.

²⁰ [Report of the Working Group on Amendments](#), Annex V, Non-Paper submitted by France and Germany: Proposed amendments to provisional rule 165 of the Rules of Procedure and Evidence.

²¹ Report of the Working Group on Amendments, [ICC-ASP/17/35](#), 29 November 2018, para. 21; Report of the Working Group on Amendments, [ICC-ASP/16/22](#), 15 November 2017.

²² [REDACTED]; [REDACTED]; [REDACTED].

²³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-34](#), Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, para. 2.

²⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-31](#), Request to the President of the Pre-Trial Chamber Division to constitute a Chamber for the purposes of conducting the proceedings under article 70 of the Statute, 2 November 2020.

the applicability of Provisional Rule 165,²⁵ which was denied *in limine* since no case was pending before the Pre-Trial Division.²⁶

16. [REDACTED].²⁷ [REDACTED]²⁸ [REDACTED]²⁹

17. The OPCD resubmitted its request for leave to appear on the applicability of Provisional Rule 165 on 11 November 2020, which the Single Judge granted the following day.³⁰ In its brief of 17 November 2020, the OPCD argued that: (a) Pre-Trial Chamber A is not lawfully constituted because Provisional Rule 165 is not in force; (b) Provisional Rule 165 is barred by the principle of non-retroactivity; and (c) Provisional Rule 165 is inconsistent with the Statute.³¹

18. Responding on 20 November 2020, the Prosecutor argued that: (a) Provisional Rule 165 is in force since the ASP has not yet decided to adopt, amend, or reject it; (b) Provisional Rule 165 is not being applied retroactively to the detriment of Mr. Gicheru; and (c) Provisional Rule 165 is compatible with the Statute.³²

19. Responding to OPCD's submissions on 25 November 2020, the Defence argued that: (a) Pre-Trial Chamber A is lawfully established because Provisional Rule 165 is in force and applicable; (b) Provisional Rule 165 is not being applied retroactively to the detriment of Mr. Gicheru; and (c) Provisional Rule 165 is consistent with the Statute.³³

²⁵ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-36](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 6 November 2020.

²⁶ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-37](#), Decision Rejecting *in limine* the 'OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165,' 6 November 2020.

²⁷ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 13, lines 3-6.

²⁸ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 13, lines 7-11.

²⁹ *Prosecutor v. Gicheru*, ICC-01/09-01/20-T-001-CONF-ENG ET, Transcript, p. 15, lines 10-11.

³⁰ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-40](#), OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020; *Prosecutor v. Gicheru*, [ICC-01/09-01/20-43](#), Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020.

³¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-47](#), OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020.

³² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-52](#), Prosecution's Response to "OPCD's Submissions on the Inapplicability of Provisional Rule 165," 20 November 2020.

³³ [Defence Response to OPCD Submissions](#).

20. The Single Judge, in the Impugned Decision of 10 December 2020, held that Provisional Rule 165 is applicable in the present proceedings.³⁴ Reasoning that the text of Article 51(3) shows that positive action by the ASP is required – to adopt, amend, or reject the provisional rule – the Single Judge considered that if the Rule lapses at the “next session,” this “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.”³⁵ She further found that Provisional Rule 165 was not being applied retroactively and that it is compatible with the Statute and does not restrict any Article 67 fair trial rights.³⁶
21. In the midst of the ASP’s 19th session, the OPCD on 16 December 2020 sought leave to appeal the Single Judge’s decision.³⁷
22. On the last day of the ASP’s 19th session, 23 December 2020, the Single Judge granted the OPCD’s leave to appeal the Impugned Decision.³⁸ Since Provisional Rule 165 was being invoked for the first time and her decision “constitutes a significant precedent for any future proceedings to be conducted on this basis,”³⁹ the Single Judge considered her decision reviewable since the very basis for the proceedings would likely undergo appellate scrutiny *only* after a trial judgment is rendered.⁴⁰ Three issues were certified for appeal.⁴¹
23. The ASP concluded its 19th session on 23 December 2020 without discussing, considering, or proposing any adjustments to Provisional Rule 165, and without having to consider any requests to augment the budget to deal with Article 70 cases. Yet the ASP found no obstacles in considering and adopting a resolution

³⁴ [Impugned Decision](#), p. 22.

³⁵ *Id.*, paras. 41-42.

³⁶ *Id.*, paras. 47-52.

³⁷ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-63](#), Request for leave to appeal the Decision on the Applicability of Provisional Rule 165, 16 December 2020, notified on 17 December 2020.

³⁸ [Decision on Leave to Appeal](#).

³⁹ [Decision on Leave to Appeal](#), para. 26.

⁴⁰ *Id.*, para. 32.

⁴¹ [Decision on Leave to Appeal](#), paras. 18, 38.

amending the Judges' conditions of service and augmenting their compensation packages.⁴²

IV. RESPONSE

A. Issue 1: Provisional Rule 165 is not in force

24. The Single Judge erred in law in holding that "Provisional Rule 165 should be considered applicable *until* the ASP formally adopts, amends or rejects it,"⁴³ by erroneously finding that: (a) the plain text of Article 51(3) shows that positive action of the ASP is required;⁴⁴ and (b) it would defeat the *raison d'être* of Article 51(3) if provisional rules lapsed absent an ASP decision to adopt, amend, or reject them.⁴⁵
25. Essentially, the Defence concurs with the OPCD's arguments that: (a) the plain text of Article 51(3) that provides that the ASP must adopt, amend, or reject the provisional rule at its next session;⁴⁶ (b) the drafting history shows that the phrase "next ordinary or special session" was expressly included to provide a time limitation for provisional rules;⁴⁷ and (c) the Single Judge wrongly prioritized pragmatic issues over the intent of the drafters.⁴⁸

i. The plain text of Article 51(3) provides that Provisional Rule 165 lapsed

26. The Single Judge advanced no reasoning or authority to support her view that "the text of article 51(3) of the Statute shows that a positive action of the ASP is required."⁴⁹ According to the Appeals Chamber, the interpretation of the Statute is governed by Article 31 of the Vienna Convention, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in light of its object and purpose."⁵⁰ No conjectural

⁴² Resolution on the remuneration of the judges of the International Criminal Court, [ICC-ASP/19/Res.3](#), 16 December 2020.

⁴³ [Impugned Decision](#), para. 40.

⁴⁴ *Id.*, para. 41.

⁴⁵ *Id.*, para. 42.

⁴⁶ [OPCD Appeal](#), paras. 12-13.

⁴⁷ *Id.*, paras. 14-18.

⁴⁸ *Id.*, para. 19.

⁴⁹ [Impugned Decision](#), para. 41.

⁵⁰ *Situation in the Democratic Republic of Congo*, [ICC-01/04-168](#), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal,

emendation was necessary to discern the plain text of Article 51(3). It unambiguously circumscribes the Judges' provisional rule-making authority in two ways by requiring that: (a) the need for a new rule must be "urgent"; and (b) the ASP must adopt, amend, or reject the provisional rule at its "next ordinary or special session."

27. While an urgency arguably existed motivating the Judges to adopt Provisional Rule 165 on the cusp of completion of the *Bemba et al.* trial, the ASP's indecision during its four sessions demonstrates that it does not consider the matter urgent. During the past three sessions, the Judges did not raise Provisional Rule 165 with the ASP, [REDACTED], and even when Provisional Rule 165 was being applied and challenged. Nor does it appear that the Judges made any specific request to augment the ICC's budget to deal with Article 70 offences.⁵¹

28. Provisional Rule 165 seemingly remained applicable up until the ASP's 16th session since it was under consideration. However, it had not been raised, discussed, or considered at the 17th, 18th, or 19th sessions when the ASP would have been aware that it was being applied and challenged, no consensus was ever reached, and States Parties' objections to Provisional Rule 165 were not remedied. The text of Article 51(3) unequivocally provides that Provisional Rule 165 lapsed in this instance.

ii. The drafters of the Rome Statute and States Parties did not intend for the Judges to adopt provisional rules with indefinite application absent ASP approval

29. That it would defeat the *raison d'être* of Article 51(3) – to "giv[e] the judges the opportunity to fill in a lacuna in the law"⁵² – if provisional rules lapsed absent an ASP decision to adopt, amend, or reject them, is contrary to the intent of the

13 July 2006, para. 33, quoting [Vienna Convention on the Law of Treaties](#), 1155 UNTS 18232, entered into force 27 January 1980, Art. 31(1).

⁵¹ Notably, following Provisional Rule 165, in 2018, the Judges sued the ICC seeking an adjustment of their salary by 26.7% and health insurance coverage. See *H. and Others v. ICC*, International Labour Organization, *Administrative Tribunal*, [Judgment No. 4354](#), 7 December 2020, p. 3.

⁵² [Impugned Decision](#), para. 42.

drafters. While the drafters recognized that an urgent situation would arise from time to time where existing rules would need to be tweaked or a *lacuna* would need to be filled in by positive rules on a temporary basis, they provided that the ASP, *not* the Judges, would have ultimate authority over the Rules.⁵³

30. The frequent tinkering of the Rules and invocation of inherent powers at the *ad hoc* tribunals influenced States Parties at the Rome Conference to adopt comprehensive Rules and provide the ASP with primary authority over amendments.⁵⁴ During the drafting of the Rome Statute “the view was generally expressed that the method used for the statutes of the [ICTY] and of the [ICTR], which left it to the judges to elaborate and adopt substantive rules of procedure and evidence, was not an appropriate model” for a permanent Court “established on a consensual basis by States parties to its Statute.”⁵⁵
31. Giving *carte blanche* to the Judges to adopt provisional rules with indefinite application defeats the purpose of Article 51(3) in having the ASP control the rule-making process. Finding Provisional Rule 165 applicable – in light of the context of its drafting and the attendant history, which shows a lack of ASP consensus – risks opening the floodgates to a cascade of provisional rules under the guise of an urgency or a *lacuna*. Such a ruling would effectively foster a regime where the Judges, banking on the ASP’s indecisiveness, would usurp its legislative authority.

⁵³ [Rome Statute](#), Art. 51.

⁵⁴ By the time the Rome Statute was finalized in 1998, the Judges amended the ICTY and ICTR Rules 13 and 5 times. Because of their ever-evolving procedural framework, the Judges of the ICTY and ICTR frequently resorted to their inherent powers to fill in procedural gaps. See [ICTY Statute](#), Art. 15; [ICTR Statute](#), Art. 14; ICTY Rules of Procedure and Evidence, [IT/32/Rev.13](#), 10 July 1998; ICTR Rule of Procedure and Evidence, [Rev. 5](#), 8 June 1998; *Prosecutor v. Rutaganda*, ICTR-96-03-R, [Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification](#), 8 December 2006; *Prosecutor v. Brđanin and Talić*, IT-99-36, [Decision on Second Motion by Brđanin to Dismiss the Indictment](#), 16 May 2001; *Prosecutor v. Barayagwiza*, ICTR-97-19, [Decision](#), 3 November 1999; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, [Judgement](#), 23 May 2005.

⁵⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, Official Records of the General Assembly, 51st Session, Supplement No. 22 (1996), [UN Doc. A/51/22](#), para. 186.

32. The Appeals Chamber should find that Provisional Rule 165 is inapplicable and that there was no lawful basis for Pre-Trial Chamber A.

B. Issue 2: Provisional Rule 165 is not being applied retroactively

33. The Single Judge did not err in law in holding that the “point in time” for considering whether Provisional Rule 165 was applied retroactively is the Initial Appearance Hearing.⁵⁶

34. The Single Judge correctly interpreted the Appeals Chamber’s jurisprudence on retroactivity and rightly considered that the Initial Appearance Hearing begins a new “procedural regime governing the proceedings,” where the suspect becomes a party to the proceedings and acquires rights he or she was deprived of until this point in time.⁵⁷ Provisional Rule 165 had no effect on the issuance of the arrest warrant against Mr. Gicheru nor any procedural circumstance prior to his surrender on 2 November 2020.

35. Even if meritorious, the OPCD’s arguments – that (a) Provisional Rule 165 and Regulation 66*bis* of the Regulations of the Court provide that a one-Judge Chamber must be constituted from the moment of receipt of an application for an arrest warrant;⁵⁸ and (b) a suspect is party to the proceedings from the issuance of an arrest warrant or summons – are immaterial.⁵⁹

C. Issue 3: Provisional Rule 165 is inconsistent with the Statute and restricts Article 67 fair trial rights

36. The Single Judge erred in law in holding that Provisional Rule 165 is compatible with the Statute because: (a) Article 70(2) and Chapter IX of the Rules show that Article 70 proceedings differ from Article 5 proceedings on a procedural level;⁶⁰ and (b) Provisional Rule 165 does not restrict any Article 67 fair trial rights.⁶¹

⁵⁶ [Impugned Decision](#), para. 47.

⁵⁷ [Impugned Decision](#), para. 47.

⁵⁸ [OPCD Appeal](#), paras. 21-25.

⁵⁹ *Id.*, paras. 21, 26.

⁶⁰ [Impugned Decision](#), para. 51.

⁶¹ *Id.*, para. 52.

37. The Defence effectively concurs with the OPCD's arguments that: (a) the Rules cannot contradict rights enshrined in the Statute;⁶² (b) while Article 70(2) delegates the procedure for Article 70 offences to the Rules, this was done with the understanding that the ASP would dictate the regime for such proceedings and the core provisions of the Statute would apply unless entirely incompatible;⁶³ and (c) Provisional Rule 165 restricts Article 67 fair trial rights embedded in other parts of the Statute.⁶⁴

i. The drafters of the Rome Statute and States Parties did not create a two-tiered procedure for Article 5 and Article 70 proceedings

38. The Single Judge ignored the drafters' and States Parties' intent to apply "the same high international standards ... to both [Article 5 and Article 70] proceedings."⁶⁵ Article 67(1) of the Statute provides that all suspects and accused before the ICC are guaranteed their fair trial rights "in full equality."

39. According to Håkan Friman, a former member of the Swedish delegation to the ICC, during the drafting of the Rome Statute "it was suggested that in dealing with [Article 70] offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber."⁶⁶ This proposal was not accepted because "delegations argued that the proposal was incompatible with the Statute."⁶⁷ The drafters also contemplated whether separate appeal provisions would be necessary for Article 70 proceedings, but concluded that appeals would be covered by the existing provisions in Part 8 of the Statute (Appeal and Revision).⁶⁸

⁶² [OPCD Appeal](#), para. 31.

⁶³ *Id.*, para. 32.

⁶⁴ *Id.*, paras. 33-35.

⁶⁵ Håkan Friman, *Offences and Misconduct Against the Court*, in Roy S. Lee (ed), *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 615 (Transnational Publishers 2011) (Annex B).

⁶⁶ *Id.*, p. 614.

⁶⁷ *Id.*, p. 615.

⁶⁸ *Id.*, p. 614-15.

40. The drafters' intent is reflected in the Statute and Rules. Article 70(2) and Rule 163 only eliminate procedures that are irrelevant for Article 70 proceedings. Article 70(2) provides that the procedure for Article 70 proceedings would be set forth in the Rules, while Rule 163(1) provides that the Statute and Rules apply *mutatis mutandis* to Article 70 proceedings unless displaced by Rules 163(2)-(3) and Rules 164 to 169.
41. Rule 163(2) eliminates Part 2 of the Statute concerning jurisdiction and admissibility, except for Article 21 concerning the applicable law. Rule 163(3) eliminates Part 10 of the Statute concerning enforcement of sentences, except for Articles concerning the role of States in enforcing sentences of imprisonment,⁶⁹ transfer of persons upon completion of sentence,⁷⁰ enforcement of fines and forfeiture measures,⁷¹ and surrender of escaped persons.⁷² The only substantive difference in Rules 164 to 169 governing Article 70 proceedings is that the Pre-Trial Chamber may confirm the charges on the basis of written submissions.⁷³
42. Even where Rule 163 displaces certain procedures, other Rules fill in "gaps" concerning the procedural rights of the Accused. For instance, Rule 168 codifies the *ne bis in idem* principle for Article 70 proceedings, filling in the gap created by Rule 163(2)'s exclusion of Part 2 of the Statute.
43. Had the drafters of the Rome Statute and States Parties intended to treat Article 5 and Article 70 proceedings differently, they would have adopted express provisions providing a different procedure and would have justified the differences on objective and reasonable criteria.

ii. The differential treatment of Article 70 proceedings under Provisional Rule 165 infringes on the right to equality in Article 67(1) of the Statute

⁶⁹ [Rome Statute](#), Art. 103.

⁷⁰ [Rome Statute](#), Art. 107.

⁷¹ [Rome Statute](#), Art. 109.

⁷² [Rome Statute](#), Art. 110.

⁷³ Original Rule 165(2).

44. The Single Judge failed to apply the right to equality enshrined in Article 67(1) of the Statute, which “requires that similar cases are dealt with in similar proceedings.”⁷⁴ Differential treatment must be justified on “objective and relevant grounds.”⁷⁵
45. The Judges did not advance objective and reasonable grounds to treat Article 5 and Article 70 proceedings differently when they adopted Provisional Rule 165. The Judges’ reason for adopting Provisional Rule 165 was exclusively resource-based.⁷⁶ The Judges’ proclamation that Provisional Rule 165 “stem[s] from the recognition that the nature and gravity of offences under article 70 differ markedly from those under article 5,” fails to recognize that the five-year sentence of imprisonment for Article 70 offences is not inconsequential,⁷⁷ nor is its impact on the Accused’s fair trial rights.
46. The statutory right to a Chamber composed of three Judges under Article 39(2)(b) reduces the risk of having errors made by a Single Judge that affect the quality of the proceedings to such a degree that they deny the Accused a fair trial. The drafters of the Rome Statute and States Parties undoubtedly considered this when they carefully delineated under Article 57(2) of the Statute which decisions and orders require a majority of Judges of the Pre-Trial Chamber.

⁷⁴ See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [CCPR/C/GC/32](#), 23 August 2007, para. 14 (“General Comment 32”). See also *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-955](#), Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, paras. 35-36; *Prosecutor v. Bemba et al.*, [ICC-01/05-01/13-2276-Red](#), Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute,” 8 March 2018, para. 245.

⁷⁵ [General Comment No. 32](#), para. 14. See also Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, [CCPR/CO/73/UK](#) (2001), para. 18.

⁷⁶ [Plenary Report](#), para. 20.

⁷⁷ In many jurisdictions, Article 70 offences would be considered felonies or serious crimes. See [French Criminal Code](#) of 1 March 1994, Arts. 111-1, 131-3; [Italian Criminal Code](#) of 19 October 1930 modified on 14 August 2020, Arts. 17, 39; [Spain Criminal Code](#), Organic Act 10/1995, dated 23 November 1995, Arts. 13, 33; [People’s Republic of China Criminal Law](#), adopted by the 2nd Session of the 5th National People’s Congress on 1 July 1979, Art. 32; [Cameroun Criminal Code](#), Loi n° 2016/007 of 12 July 2016, Art. 21; [German Criminal Code](#), 1971 as amended in 2019, Section 12; [UK Criminal Law Act](#), 1977 Part VI; [Canada Criminal Code](#) (R.S.C., 1985), §787.

47. While a Single Judge is capable of conducting a fair Article 70 trial, Judges bring subjective biases about the parties as well as the procedures to be used based on his or her legal culture and experiences.⁷⁸ Having a panel of Judges diminishes the risk of error. This is especially apparent in assessing the evidence adduced in making findings of fact. Considering the high bar for establishing factual errors under the Appeals Chamber's standard of review,⁷⁹ having a three-Judge Chamber and a deliberative process is imperative.
48. The statutory right to interlocutory appeal under Article 82(1)(d) is a "safeguard for the integrity of the proceedings."⁸⁰ It "pre-empt[s] the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial,"⁸¹ by "instantly provid[ing] legal certainty regarding matters fulfilling the criteria for leave to appeal so as to ensure that the proceedings run their course."⁸² The Single Judge's decision granting leave highlights the importance of interlocutory appeal. Eliminating the right to interlocutory appeal also eliminates the *Chamber's discretion* to certify issues for appeal that would, in their opinion, materially advance the proceedings.⁸³
49. The statutory right to a separate sentencing hearing under Article 76 ensures that the Accused does not have to simultaneously argue innocence while advancing mitigating factors in the alternative. The ICTY and ICTR only abandoned separate sentencing hearings based on expediency and cost, with former prosecutors and

⁷⁸ Effectively, Article 64 of the Rome Statute and Rule 140 give the Presiding Judge wide discretion to adopt trial procedures based on his or her legal culture, experiences, and biases. See [Rome Statute](#), Arts. 64(2), 64(3)(a), Rule 140. See also Michael G. Karnavas, *The Serendipitous Nature of the ICC Trial Proceedings Risks the ICC's Credibility*, in Martin Böse, Michael Bohlander, and André Klip eds., *JUSTICE WITHOUT BORDERS, ESSAYS IN HONOUR OF WOLFGANG SCHOMBURG* (Brill Nijhoff 2017) (Annex C).

⁷⁹ The Appeals Chamber will only reverse factual findings if no reasonable trier of fact could have reached them. *Prosecutor v. Bemba et al.*, [ICC-01/05-01/08-3636-Red](#), Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute," 8 June 2018, paras. 38-46.

⁸⁰ *Situation in the DRC*, [ICC-01/04-168](#), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 11.

⁸¹ *Id.*, para. 19.

⁸² [Decision on Leave to Appeal](#), para. 32.

⁸³ [Rome Statute](#), Art. 82(1)(d).

Judges admitting that this was a “mistake.”⁸⁴ Eliminating the separate sentencing hearing impacts on the Accused’s right to remain silent under Article 67(1)(g) since the only way to introduce mitigating circumstances may be to waive the right to silence and self-incrimination. Having the opportunity to submit written submissions does not ameliorate the impact on Article 67(1)(g), since they would have to be submitted before the Accused is convicted.

50. Had the drafters of the Rome Statute and States Parties wanted a two-tiered process for Article 5 and Article 70 proceedings, they would have drafted express provisions varying the composition of the Chambers, eliminating the right to interlocutory appeal, and eliminating the right to a separate sentencing hearing.

51. The Appeals Chamber should find that Provisional Rule 165 is inconsistent with the Statute and void under Article 51(4).

V. CONCLUSION AND RELIEF SOUGHT

52. Provisional Rule 165 is not in force and cannot be a legal basis for the composition of Pre-Trial Chamber A. Even if Provisional Rule 165 is found to be in force, it cannot be applied because it is inconsistent with the Statute and restricts Article 67 fair trial rights. The Impugned Decision must be reversed, and the case must revert to Pre-Trial Chamber II.

WHEREFORE, for the above reasons, the Appeals Chamber should grant the OPCD Appeal.

⁸⁴ Robert D. Sloan, [Sentencing for the Crime of Crimes. The Evolving ‘Common Law’ of Sentencing at the International Tribunal for Rwanda](#), 5 J. INT’L CRIM. JUST. 713, 734 (2007). Mark. B. Harmon and Fergal Gaynor, [Ordinary Sentences for Extraordinary Crimes](#), 5 J. INT’L CRIM. JUST. 638, 708 (2007). Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rev.1, 10 June 2009, [Explanatory Memorandum by the Tribunal’s President](#), para. 41.

Respectfully submitted, 2 February 2021,

In The Hague, the Netherlands.

A handwritten signature in black ink, appearing to read 'M. Karnavas', is positioned above a horizontal line.

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