



Original: English

**No. ICC-01/09-01/20 OA
Date: 8 March 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 THE PROSECUTOR v. PAUL GICHERU

Public document

Judgment

**on the appeal of the Office of Public Counsel for the Defence against the decision
of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the
Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Michael G. Karnavas

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta
Ms Marie O'Leary

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ of 10 December 2020 (ICC-01/09-01/20-61),

After deliberation,

By majority, Judge Eboe-Osuji and Judge Bossa partly dissenting,

Delivers the following

JUDGMENT

1. The Office of Public Counsel for the Defence’s appeal is admissible.
2. Mr Gicheru’s request for suspensive effect is rejected.
3. The ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ (ICC-01/09-01/20-61) is confirmed.
4. Mr Gicheru is directed to file a public redacted version of filing ICC-01/09-01/20-93-Conf or request its reclassification as public by Tuesday, 9 March 2021.
5. The Prosecutor is directed to file a public redacted version of filing ICC-01/09-01/20-95-Conf or request its reclassification as public by 12h00 on Wednesday, 10 March 2021.

REASONS

I. KEY FINDINGS

1. Article 51(3) of the Statute’s reference to the ‘next ordinary or special session’ must be interpreted as the next session at which the provisional rule is adopted, amended or rejected, rather than the next session following the adoption of the provisional rule.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

2. On 2 November 2020, the President of the Pre-Trial Division constituted Pre-Trial Chamber A (the ‘Pre-Trial Chamber’), composed of Judge Reine Adélaïde Sophie Alapini-Gansou, to exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.¹ The decision was taken pursuant to rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’), as drawn up on 10 February 2016 by the judges of the Court, acting under article 51(3) of the Statute (‘Provisional Rule 165’), and regulation 66bis(1) of the Regulations of the Court (the ‘Regulations’).

3. On 17 November 2020, having been granted leave by the Pre-Trial Chamber,² the Office of Public Counsel for the Defence (the ‘OPCD’) filed the ‘OPCD Submissions on the Inapplicability of Provisional Rule 165’.³

4. On 20 November 2020, the Prosecutor filed the ‘Prosecution’s Response to “OPCD’s Submissions on the Inapplicability of Provisional Rule 165”’.⁴

5. On 25 November 2020, having been granted an extension of time,⁵ Mr Gicheru filed ‘Paul Gicheru’s Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165’ (‘Mr Gicheru’s Observations’).⁶

6. On 10 December 2020, the Pre-Trial Chamber issued the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ (the ‘Impugned Decision’).⁷

¹ [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/15-32.

² [OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165](#), 11 November 2020, ICC-01/09-01/15-40; Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence, 12 November 2020, ICC-01/09-01/15-43 (the ‘[12 November 2020 Decision](#)’).

³ [ICC-01/09-01/15-47](#).

⁴ [ICC-01/09-01/15-52](#).

⁵ [Decision on Request for Extension of Time and Varying Other Time Limits](#), 20 November 2020, ICC-01/09-01/15-51-Red.

⁶ [ICC-01/09-01/15-53](#).

⁷ [ICC-01/09-01/20-61](#).

7. On 11 December 2020, the Pre-Trial Chamber decided to sever the case against Mr Gicheru from the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.⁸

8. On 17 December 2020, the OPCD filed the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’.⁹

9. On 18 December 2020, Mr Gicheru filed ‘Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165’, objecting to the request on the basis of the OPCD’s lack of standing.¹⁰

10. On 21 December 2020, the Prosecutor filed the ‘Prosecution’s Response to OPCD’s “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”’, objecting to the request, *inter alia*, on the basis of the OPCD’s lack of standing.¹¹

11. On 23 December 2020, the Pre-Trial Chamber granted the OPCD’s request for leave to appeal the Impugned Decision under article 82(1)(d) of the Statute (the ‘Decision Granting Leave to Appeal’).¹²

B. Proceedings before the Appeals Chamber

12. On 8 January 2021, having been granted an extension of time,¹³ the OPCD filed the ‘OPCD Appeals against the Decision on Applicability of Provisional Rule 165’ (the ‘Appeal Brief’).¹⁴

13. On 21 January 2021, the Prosecutor filed her response to the Appeal Brief, in which she argued against the grounds of appeal and also challenged the OPCD’s standing to appeal the Impugned Decision.¹⁵

⁸ [Decision Severing the Case against Mr Gicheru](#), ICC-01/09-01/20-62.

⁹ [ICC-01/09-01/20-63](#) (dated 16 December 2020 and notified on 17 December 2020).

¹⁰ [ICC-01/09-01/20-64](#), p. 3.

¹¹ [ICC-01/09-01/20-66](#), paras 2-12.

¹² [Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’](#), ICC-01/09-01/20-68.

¹³ [OPCD Request for an Extension of Time](#), 24 December 2020, ICC-01/09-01/20-70; [Decision on the Office of Public Counsel for the Defence’s request for time extension](#), 29 December 2020, ICC-01/09-01/20-74.

¹⁴ [ICC-01/09-01/20-79](#).

¹⁵ Prosecution’s Response to OPCD’s ‘Appeal[] against the Decision on Applicability of Provisional Rule 165’, ICC-01/09-01/20-83 (the ‘[Prosecutor’s Response](#)’).

14. On 21 January 2021, Mr Gicheru filed his response to the Appeal Brief, in which he supported the OPCD’s arguments under the first and third grounds of appeal.¹⁶

15. On 25 January 2021, the OPCD requested that the Prosecutor’s arguments on standing be dismissed *in limine* or, alternatively, that it be granted leave to reply to these arguments.¹⁷

16. On 26 January 2021, the Prosecutor responded to the OPCD request, objecting to both parts of the request, but submitting that a page limit of five pages would be appropriate if leave to reply is granted.¹⁸

17. On 29 January 2021, the Appeals Chamber decided that it would determine the issue of the OPCD’s standing and granted the OPCD leave to reply to the Prosecutor’s arguments.¹⁹

18. On 3 February 2021, Mr Gicheru requested that the effect of the Impugned Decision be suspended (the ‘Request for Suspensive Effect’).²⁰

19. On 4 February 2021, the OPCD replied to the Prosecutor’s arguments on standing.²¹

20. On 5 February 2021, the Prosecutor filed her response to the Request for Suspensive Effect.²²

¹⁶ 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, ICC-01/09-01/20-84-Conf-Corr (dated 1 February 2021 and notified on 2 February 2021) ([‘Mr Gicheru’s Response’](#)).

¹⁷ [OPCD Request to Dismiss *In Limine* the Prosecution’s Arguments on Standing Or, in the Alternative, Leave to Reply](#), ICC-01/09-01/20-86, para. 9.

¹⁸ [Prosecution’s Response to OPCD’s ‘Request to Dismiss *In Limine* the Prosecution’s Arguments on Standing or, in the alternative, Leave to Reply’](#), ICC-01/09-01/20-87.

¹⁹ [Decision on the Office of Public Counsel for the Defence’s request for the Prosecutor’s arguments on standing to be dismissed *in limine* and request for leave to reply](#), ICC-01/09-01/20-89.

²⁰ Paul Gicheru’s Request for Suspensive Effect Under Article 82(3) of the Rome Statute Paul Gicheru’s Request for Suspensive Effect Under Article 82(3) of the Rome Statute, 3 February 2021, ICC-01/09-01/20-93-Conf.

²¹ Reply to the “Prosecution’s Response to OPCD’s ‘Appeal[] against the Decision on Applicability of Provisional Rule 165’”, ICC-01/09-01/20-94 (the [‘Reply’](#)).

²² Prosecution’s Response to “Paul Gicheru’s Request for Suspensive Effect under Article 82(3) of the Rome Statute”, ICC-01/09-01/20-95-Conf (the [‘Response to the Request for Suspensive Effect’](#)).

III. PRELIMINARY ISSUES

A. Whether the OPCD is a ‘party’ within the meaning of article 82(1)(d) of the Statute

1. Background

21. Article 82(1) of the Statute provides that

[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

22. In the Decision Granting Leave to Appeal, the Pre-Trial Chamber noted that the ‘Appeals Chamber has previously held that “who qualifies as a ‘party’ in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal”’.²³ It recalled that, ‘besides its mandate to represent and protect the rights of Mr Bett, the OPCD was also granted leave to submit its observations regarding Provisional Rule 165 on the basis of its mandate to represent and protect the rights of any other potential suspects in these proceedings’ under regulation 77(4)(a) of the Regulations.²⁴ The Pre-Trial Chamber noted that, following the 12 November 2020 Decision granting the OPCD leave to appear, its mandate is, in any event, based on regulation 77(4)(c) of the Regulations (appearing, on the instruction or with the leave of the Chamber, in respect of specific issues).²⁵

23. The Pre-Trial Chamber observed that the Impugned Decision ‘constitutes a significant precedent for any future proceedings to be conducted on this basis’, and, therefore, considered it essential for the decision to ‘be reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such

²³ [Decision Granting Leave to Appeal](#), para. 24, referring to Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 4 March 2020, ICC-02/17-137 (the ‘[Afghanistan Decision](#)’), para. 14.

²⁴ [Decision Granting Leave to Appeal](#), para. 25, referring to [12 November 2020 Decision](#), paras 7, 9.

²⁵ [Decision Granting Leave to Appeal](#), para. 25.

proceedings’.²⁶ It concluded that, ‘in view of the importance of making early appellate review available to ensure legal certainty for these and future proceedings, 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 for the purposes of requests for leave to appeal under article 82(1)(d) of the Statute’.²⁷

24. The Pre-Trial Chamber added:

In any event, [...] ‘[b]y the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify [...] a decision on its own accord’. The Chamber considers that the power to *proprio motu* certify a decision under article 82(1)(d) of the Statute necessarily includes the authority to grant leave to appeal a decision on the application of any party or participant notwithstanding the formal standing of that party or participant. Otherwise, the Chamber’s *proprio motu* power could be limited on account of the absence of formal standing of a party or participant in contravention of the plain wording of article 82(1)(d) of the Statute.²⁸

2. Submissions

(a) Submissions of the Prosecutor

25. The Prosecutor argues that the Pre-Trial Chamber erroneously considered the OPCD to be a ‘party’ within the meaning of article 82(1) of the Statute ‘despite the tenuous nature’ of its interest in this case.²⁹

26. First, she submits that the Pre-Trial Chamber’s decision does not accord with Appeals Chamber jurisprudence to the effect that the term ‘party’ in this context is presumed to mean the prosecution and defence, and that ‘[d]epartures from this presumption “depend[] on the procedural context” or, put another way, the “type of decision”’.³⁰ In her submission, ‘[o]nly 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’.³¹

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

²⁷ [Decision Granting Leave to Appeal](#), para. 27.

²⁸ [Decision Granting Leave to Appeal](#), para. 29 (footnote omitted).

²⁹ [Response](#), para. 6.

³⁰ [Response](#), para. 7 (emphasis in original), referring to [Afghanistan Decision](#), paras 12, 14-15.

³¹ [Response](#), para. 7, referring to [Afghanistan Decision](#), paras 16-18, 21.

27. Second, the Prosecutor submits that the ‘OPCD lacks sufficient interest in these proceedings to make it a party for the purpose of article 82(1)’ as it does not need to protect the interests of either Mr Gicheru or Mr Bett.³² She contends that Mr Gicheru, ‘now the only suspect in this case’, is content with the validity of provisional rule 165 of the Rules and opposed any appeal.³³ Regarding Mr Bett, she argues that the OPCD does not represent this suspect, and that his ‘rights are not potentially prejudiced by the Decision’.³⁴ She submits that

as long as Mr Bett cannot be said to have participated in the Decision, he is 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.

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.³⁵

28. Regarding the Pre-Trial Chamber’s power to certify matters for appeal *proprio motu*, the Prosecutor argues that this does not ‘entail or imply any power to confer appellate standing on entities which are not parties to the proceedings’ or ‘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)’.³⁶

(b) Submissions of the OPCD

29. The OPCD argues that it should be recognised as a party, in the first place, because the Pre-Trial Chamber authorised it to represent and protect the rights of Mr Bett and other unrepresented suspects in this case, in accordance with the Office’s

³² [Response](#), paras 10-12.

³³ [Response](#), para. 11. The Appeals Chamber notes that Mr Gicheru’s position changed on appeal and he now supports the OPCD’s appeal, although the Prosecutor was not aware of this at the time of filing.

³⁴ [Response](#), para. 12.

³⁵ [Response](#), paras 13-14 (emphasis in original).

³⁶ [Response](#), para. 9.

mandate.³⁷ The OPCD highlights the fact that the Appeals Chamber has previously recognised the OPCD’s standing to appeal in the DRC and Darfur situations when it was exercising similar mandates.³⁸

30. The OPCD argues that it would be ‘consistent with appellate jurisprudence on the definition of “either party” in Article 82(1) of the Statute’ to recognise it as such.³⁹ It contends that its appeal ‘does not prejudice Mr Bett and other potential suspects’ as it represents their interests rather than them directly and ‘any arguments the Office makes cannot be attributed to them and “should not prejudice the arguments which the defence may put forward at a later stage”’.⁴⁰ It further argues that its appeal aligns with the interests of Mr Gicheru and that the ICTY Appeals Chamber has considered ‘the alignment of such interests to be a factor in favour of granting prospective appellants standing to appeal, even if they were not a party in those particular cases’.⁴¹

31. Finally, the OPCD argues that the Pre-Trial Chamber must be able to use its *proprio motu* power to certify issues for appeal, irrespective of the OPCD’s standing, ‘to give effect to the Appeals Chamber’s finding that [a] Pre-Trial Chamber[...] may “certify the existence of an appealable issue [...] on its own accord”’ and to allow for ‘appellate review in circumstances where resolution of the issues by the Appeals Chamber would materially advance the proceedings’.⁴²

3. *Determination by the Appeals Chamber*

32. As the Appeals Chamber has previously held, the question of

‘who qualifies as a “party” in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the

³⁷ [Reply](#), para. 1.

³⁸ [Reply](#), para. 1.

³⁹ [Reply](#), para. 1.

⁴⁰ [Reply](#), paras 1, 6, referring to Appeals Chamber, *The Prosecutor v Joseph Kony et al*, [Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 \(1\) of the Statute’ of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408, para. 61.

⁴¹ [Reply](#), paras 1, 6, referring to *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, [Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case](#), 20 January 2004, para. 5; *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused’s Motion to Subpoena Zdravko Tolimir, 13 November 2013, paras 9-12.

⁴² [Reply](#), para. 7, quoting Appeals Chamber, *Situation in The Democratic Republic of the Congo*, 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, ICC-01/04-168 (the ‘[DRC Extraordinary Review Judgment](#)’), para. 20.

appeal’; ‘the meaning of the term “either party” thus depends on the procedural context’.⁴³

33. The present appeal concerns a decision by the Pre-Trial Chamber that Provisional Rule 165 should be considered applicable until the Assembly of States Parties formally adopts, amends or rejects it in accordance with article 51(3) of the Statute.⁴⁴ The provisional rule was adopted in order to simplify and expedite article 70 cases through the reduction of the number of judges in the Pre-Trial Chamber, Trial Chamber, and Appeals Chamber and the elimination of certain procedural steps.⁴⁵

34. The Appeals Chamber notes that the OPCD sought and was granted leave by the Pre-Trial Chamber to challenge the application of Provisional Rule 165 in the present case, an issue which had not been raised by either the Prosecutor or Mr Gicheru.⁴⁶ Therefore, the OPCD triggered the legal challenge to the application of Provisional Rule 165 in this case. It was granted leave to appear on this issue given its ‘mandate to represent and protect the rights of Mr Philip Kipkoech Bett, an unrepresented suspect and party in this case, and any potential suspects who are, or would be, subject to charges of Article 70’.⁴⁷ Therefore, it represents the rights of a named suspect in this case, notwithstanding the fact that it is not in a position to take instructions from him.

35. The Appeals Chamber further notes that the importance of the issue under consideration for the conduct of proceedings in the present case, the fact that it constituted ‘a significant precedent for any future proceedings’, and the need to ensure legal certainty regarding the basis of such proceedings were considerations that led the Pre-Trial Chamber to grant the OPCD leave to appear and leave to appeal the Impugned Decision.⁴⁸ Finally, the Appeals Chamber notes that, while Mr Gicheru initially did not object to the application of the provisional rule and in fact opposed the OPCD’s initial challenge and request for leave to appeal the Impugned Decision,⁴⁹ his position changed

⁴³ [Afghanistan Decision](#), para. 14.

⁴⁴ [Impugned Decision](#), para. 40.

⁴⁵ Assembly of States Parties, [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](#), 21 September 2016, ICC-ASP/15/7, pp. 7-11.

⁴⁶ [OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165](#), 11 November 2020, ICC-01/09-01/15-40; [12 November 2020 Decision](#).

⁴⁷ [12 November 2020 Decision](#), paras 7, 9. *See also* [Decision Granting Leave to Appeal](#), para. 25.

⁴⁸ [12 November 2020 Decision](#), para. 9; [Decision Granting Leave to Appeal](#), paras 25-28.

⁴⁹ [Mr Gicheru’s Observations](#).

on appeal and he now supports the OPCD's arguments under the first and third grounds of appeal.⁵⁰ Therefore, although the OPCD does not represent Mr Gicheru's interests, the interests of Mr Gicheru and the appeal, lodged pursuant to the OPCD's mandate to represent the rights of unrepresented future accused persons, now coincide.

36. In view of the procedural context of the Impugned Decision as outlined above, the Appeals Chamber considers that the OPCD is a 'party' within the meaning of article 82(1) of the Statute for the purpose of the present appeal. Therefore, the appeal is admissible.

B. Mr Gicheru's request for suspensive effect

1. Submissions

(a) Mr Gicheru's submissions

37. Mr Gicheru submits that suspensive effect is 'necessary because if the Office of Public Counsel for the Defence's [...] appeal prevails, there would be no legal basis for the Single Judge to rule on the confirmation of charges'.⁵¹ He argues that suspensive effect should be granted in the present appeal because it would provide legal certainty for the confirmation of charges proceedings.⁵² He submits:

Were the Single Judge to precipitously move ahead with the confirmation of charges proceedings before an Appeals Chamber decision, and were the Appeals Chamber to reverse the Impugned Decision, the Single Judge's decision on the confirmation of charges would be made without legal authority. The basis of the trial proceedings would become null and void, causing further delays and complications, all of which can be avoided by granting this Request.⁵³

38. He contends that granting the request will not appreciably delay the proceedings as it is effectively impossible to carry out the Defence's duties in a diligent and responsible manner under the current schedule given the extent of material disclosed by the Prosecutor.⁵⁴ He indicates that he 'intends to request an extension of the deadlines for submitting [his] list of evidence and response to the Prosecution's

⁵⁰ [Mr Gicheru's Response](#).

⁵¹ Request for Suspensive Effect, p. 3.

⁵² Request for Suspensive Effect, para. 21.

⁵³ Request for Suspensive Effect, para.19 (footnote omitted).

⁵⁴ Request for Suspensive Effect, para. 22.

Document Containing the Charges in light of the volume of disclosure material [he] must review'.⁵⁵

(b) The Prosecutor's submissions

39. The Prosecutor argues that suspensive effect is not required or justified in the present appeal as issuance of the confirmation decision is not imminent at this time, 'the Pre-Trial Chamber is already "aware that the consequence [of the appeal] is that [it] may have to wait for an Appeals Chamber decision before ruling on the confirmation of charges"' and 'there is no basis to apprehend that the confirmation decision will be issued prior to the resolution of the appeal proceedings'.⁵⁶ She further submits that the relief sought cannot be obtained because the Impugned Decision 'did not positively order the continuation of the proceedings, but instead simply dismissed the correctness of the concerns raised by OPCD'; therefore, suspending its effect will not effectively stay proceedings before the Pre-Trial Chamber.⁵⁷

2. Determination by the Appeals Chamber

40. Article 82(3) of the Statute provides that '[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence'. Rule 156(5) of the Rules provides that '[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3'.

41. Based on these provisions, the Appeals Chamber considers that the Request for Suspensive Effect lacks a legal basis. Rule 156(5) of the Rules provides that the *party appealing* may request that the appeal have suspensive effect when filing the appeal. As the OPCD is the party appealing and it did not file such a request when filing the appeal, there is no basis for the respondent, Mr Gicheru, to file such a request at this stage.

42. In addition, the Appeals Chamber has previously held that decisions on requests for suspensive effect are within the discretion of the Appeals Chamber.⁵⁸ When

⁵⁵ Request for Suspensive Effect, p. 3; para. 22.

⁵⁶ Response to the Request for Suspensive Effect, para. 2.

⁵⁷ Response to the Request for Suspensive Effect, para. 4.

⁵⁸ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Request of the Prosecutor for Suspensive Effect](#), 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11.

examining such a request, the Appeals Chamber ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’.⁵⁹ The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.⁶⁰

43. The Appeals Chamber considers that the circumstances of the present appeal and the schedule currently fixed for the confirmation of charges proceedings do not justify a finding that the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, would lead to consequences that would be very difficult to correct and may be irreversible, or could potentially defeat the purpose of the appeal.⁶¹

44. Therefore, the Request for Suspensive Effect is rejected.

45. Finally, the Appeals Chamber notes that both the Request for Suspensive Effect and the response thereto have been marked ‘confidential’ and no public redacted versions of these documents have been filed. Therefore, Mr Gicheru is directed to file a public redacted version of filing ICC-01/09-01/20-93-Conf or request its reclassification as public by Tuesday, 9 March 2021 and the Prosecutor is directed to file a public redacted version of filing ICC-01/09-01/20-95-Conf or request its reclassification as public by 12h00 on Wednesday, 10 March 2021.

⁵⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014](#), 22 October 2014, ICC-01/05-01/13-718 (OA 9), para. 5, referring to previous jurisprudence.

⁶⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”](#), 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11 (footnotes omitted).

⁶¹ Pre-Trial Chamber, [Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings](#), 26 February 2021, ICC-01/09-01/20-103.

IV. MERITS

46. The present appeal concerns the application of Provisional Rule 165, drawn up by the judges on 10 February 2016 pursuant to the procedure set out in article 51(3) of the Statute. For the reasons explained in their joint partly dissenting opinion, Judge Eboe-Osuji and Judge Bossa are unable to concur with the conclusions of the majority of the Appeals Chamber regarding the present appeal.

A. Standard of Review

47. Regarding errors of law, the Appeals Chamber has previously found that:

[...] it will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.⁶²

B. First ground of appeal

48. The first ground of appeal concerns the interpretation of article 51(3) of the Statute, which allows the judges of the Court in certain circumstances to draw up provisional Rules to be applied 'until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties'. The OPCD argues that the Pre-Trial Chamber 'erred in finding that Provisional Rule 165 continues to be applicable considering that the Assembly of States Parties 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'.⁶³

1. *Relevant part of the Impugned Decision*

49. The Pre-Trial Chamber found 'that Provisional Rule 165 should be considered applicable *until* the ASP adopts, amends, or rejects it' for the following three reasons.⁶⁴

⁶² *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'](#), 27 May 2015, ICC-02/11-01/12-75-Red, para. 40. See also *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red, para. 18; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements \(ICC-02/05-03/09-199\) and additional instructions on translation'](#), 17 February 2012, ICC-02/05-03/09-295, para. 20.

⁶³ [Appeal Brief](#), paras 11-20.

⁶⁴ [Impugned Decision](#), para. 40 (emphasis in original).

First, it considered that ‘the text of article 51(3) of the Statute shows that a positive action of the ASP is required’: ‘*to be applied until adopted, amended or rejected* at the next ordinary or special session of the Assembly of States Parties’.⁶⁵ It considered that ‘[t]he OPCD’s argument of a “tacit rejection” leading to the non-applicability of the provisional rule is, therefore, not supported by the text itself of article 51(3) of the Statute’.⁶⁶

50. Second, the Pre-Trial Chamber noted that, if a provisional rule was found to lapse

in the absence of a decision by the ASP to either adopt, amend or reject a provisional rule at its next session [...] [it] would make recourse to article 51(3) of the Statute very problematic and its application almost impossible, because of the basic functioning of the ASP itself. The ASP is currently composed of 123 States, and the willingness to reach consensus is part of its voting process. The expectation that 123 States will automatically and systematically find a consensus on complex legal issues debated for the first time is unrealistic. In this context, a provisional rule could be applied until the next session of the ASP, then found not applicable during subsequent discussions that could take years, and then found applicable again because adopted by the ASP. Such an interpretation of article 51(3) of the Statute would create confusion and militates against the stability and continuity of judicial proceedings. It would then defeat the very *raison d’être* of article 51(3) of the Statute, namely ensuring the continuity of proceedings by giving the judges the opportunity to fill in a lacuna in the law.⁶⁷

51. While ‘mindful that its interpretation of article 51(3) of the Statute could potentially lead to an indefinite application of a provisional rule that never received any legislative validation’, the Pre-Trial Chamber found that ‘[t]he option “no decision from the ASP” is simply not foreseen by the legal texts’, and ‘it is the ASP’s responsibility to prevent the indefinite application of a provisional rule it does not want to remain in force in the absence of a legislative decision, by either adopting, amending or rejecting it’.⁶⁸

⁶⁵ [Impugned Decision](#), para. 41 (emphasis in original).

⁶⁶ [Impugned Decision](#), para. 41.

⁶⁷ [Impugned Decision](#), para. 42 (footnotes omitted).

⁶⁸ [Impugned Decision](#), para. 43.

52. Third, the Pre-Trial Chamber noted particularly its duty, in the circumstances of the case at hand, ‘to ensure that the rights of the suspect are respected, including the right to be tried without undue delay under article 67(1)(c) of the Statute’.⁶⁹

2. *The OPCD’s submissions before the Appeals Chamber*

53. The OPCD argues that the Pre-Trial Chamber’s conclusion that a provisional rule ‘remains indefinitely applicable until “positive action” by the Assembly’ is a legal error.⁷⁰ It submits that two phrases in article 51(3) of the Statute create a time limit for the application of a provisional rule: (i) ‘until adopted, amended or rejected by the Assembly’; and (ii) ‘until [...] the next ordinary or special session of the Assembly’. The OPCD argues that the Pre-Trial Chamber’s ‘interpretation effectively ignores the latter limitation’.⁷¹ The OPCD argues further that the drafting history of article 51(3) shows that ‘the phrase “until [...] next ordinary or special session” was expressly included to provide a time limitation for provisional rules’.⁷² The OPCD notes that two earlier draft versions of article 51(3) proposed requirements of positive action from the Assembly of States Parties, which, in its submission, were ‘tacitly rejected’.⁷³

54. It highlights the fact that an additional clause time-limiting the applicability of provisional rules was added after these earlier proposals and that this addition was maintained in subsequent proposals until its adoption at the Rome Conference.⁷⁴ The OPCD argues that ‘the only reasonable way to interpret Article 51(3) in light of this drafting evolution’ is that the drafters intended that the provisional rule would apply ‘only until the next session of the Assembly – ordinary or special’ and rejected the proposition that a provisional rule would apply indefinitely until positive action by the Assembly.⁷⁵ It further submits that the reason that the drafters included a strict time limitation on any provisional rule-making by the Plenary was to ensure that the

⁶⁹ [Impugned Decision](#), para. 44.

⁷⁰ [Appeal Brief](#), para. 12.

⁷¹ [Appeal Brief](#), para. 13.

⁷² [Appeal Brief](#), para. 14.

⁷³ [Appeal Brief](#), para. 14.

⁷⁴ [Appeal Brief](#), para. 15.

⁷⁵ [Appeal Brief](#), para. 16.

Assembly of States Parties retained ‘the ultimate authority with respect to rule-making for the Court’.⁷⁶

55. The OPCD argues that the possibility that the Assembly might not achieve consensus or the required majority to obtain a positive decision was not unforeseen and that, in the event that a provisional rule lapses while the urgency it is meant to address is still ongoing, the judges ‘would be free to formulate another provisional rule’.⁷⁷

56. The OPCD concludes that the Pre-Trial Chamber’s legal error ‘materially affected the Impugned Decision because it led [it] to incorrectly conclude that [Provisional Rule 165] and the corresponding Regulation 66*bis*, provided a lawful basis for the constitution of Pre-Trial Chamber A’.⁷⁸ In its view, the correct finding should have been that Provisional Rule 165 ceased to apply after the 15th Assembly of States Parties’ Session and, as a consequence there was no lawful basis to constitute the Pre-Trial Chamber and the case should revert back to Pre-Trial Chamber II.⁷⁹

3. *The Prosecutor’s submissions before the Appeals Chamber*

57. The Prosecutor submits that the Pre-Trial Chamber correctly interpreted article 51(3) of the Statute in determining that ‘provisional rule 165 remains in force “*until* the ASP formally adopts, amends or rejects it”’.⁸⁰ She submits that an alternative ““ping-pong” of provisional rules between the Plenary and the ASP would create an obvious, unnecessary and wasteful procedural burden on the Court’.⁸¹ In her view, it is the responsibility ‘of the ASP, to ensure that a provisional rule does not *de facto* become a permanent rule simply due to the ASP’s inaction’.⁸² She submits that the Assembly of States Parties has not tacitly rejected Provisional Rule 165, but 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’.⁸³

⁷⁶ [Appeal Brief](#), para. 17.

⁷⁷ [Appeal Brief](#), para. 19.

⁷⁸ [Appeal Brief](#), para. 20.

⁷⁹ [Appeal Brief](#), para. 20.

⁸⁰ [Prosecutor’s Response](#), para. 16 (emphasis in original).

⁸¹ [Prosecutor’s Response](#), para. 16.

⁸² [Prosecutor’s Response](#), para. 16.

⁸³ [Prosecutor’s Response](#), para. 17.

58. The Prosecutor submits that the Pre-Trial Chamber’s interpretation of article 51(3) gives effect to its ordinary meaning and is compatible with the second limitation contained therein (‘until [...] the next ordinary or special session of the Assembly’).⁸⁴ In her submission, the possibility for the Assembly of States Parties to address a provisional rule at the next special session or the next ordinary session shows that it need not be addressed at the next session.⁸⁵

59. The Prosecutor submits that ‘[t]he 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”’.⁸⁶ She contends that currently ‘[t]here 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’.⁸⁷ The Prosecutor argues that ‘[t]he drafting history does not establish that provisional rules were intended to lapse if the ASP failed to reach a prompt decision’.⁸⁸

4. *Mr Gicheru’s submissions before the Appeals Chamber*

60. Mr Gicheru submits that the Pre-Trial Chamber ‘advanced no reasoning or authority to support the view that “the text of article 51(3) of the Statute shows that a positive action of the ASP is required”’.⁸⁹ He argues that the ‘the plain text of Article 51(3) [...] 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”’.⁹⁰

61. Mr Gicheru underlines that ‘the ASP’s indecision during its four sessions demonstrates that it does not consider the matter urgent’ and that it was not raised by the judges again even when it was being applied and challenged.⁹¹ In his submission, it

⁸⁴ [Prosecutor’s Response](#), para. 19.

⁸⁵ [Prosecutor’s Response](#), para. 20.

⁸⁶ [Prosecutor’s Response](#), para. 22.

⁸⁷ [Prosecutor’s Response](#), para. 23 (emphasis in original).

⁸⁸ [Prosecutor’s Response](#), p. 11.

⁸⁹ [Mr Gicheru’s Response](#), para. 26.

⁹⁰ [Mr Gicheru’s Response](#), para. 26.

⁹¹ [Mr Gicheru’s Response](#), para. 27.

would have been applicable up until the Assembly of States Parties' 16th session 'since it was under consideration', but it lapsed thereafter because it was not further discussed or considered, no consensus was reached and States' objections were not remedied.⁹² He underlines that the intent of the drafters was that the Assembly of States Parties and not the judges would have authority over rule amendments.⁹³ He submits that '[g]iving *carte blanche* to the Judges to adopt provisional rules with indefinite application defeats [this] purpose', potentially 'opening the floodgates to a cascade of provisional rules under the guise of an urgency or a lacuna' and 'foster[ing] a regime where the Judges, banking on the ASP's indecisiveness, would usurp its legislative authority'.⁹⁴

5. *Relevant context and background*

62. Article 51 of the Statute provides:

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

⁹² [Mr Gicheru's Response](#), para. 28.

⁹³ [Mr Gicheru's Response](#), paras 29-30.

⁹⁴ [Mr Gicheru's Response](#), para. 31.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

63. Pursuant to article 51(3) of the Statute, on 10 February 2016, the judges of the Court, acting in plenary, adopted provisional amendments to rule 165 (applicable to the investigation, prosecution and trial of article 70 offences),⁹⁵ in order ‘to simplify and expedite article 70 proceedings by allowing for the respective functions of the Pre-Trial and the Trial Chamber to be exercised by a Chamber of one judge instead of a Chamber of three judges, and allowing for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber’.⁹⁶ To this end, Provisional Rule 165(2) was introduced as follows:

Articles 39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d), and any rules thereunder, shall not apply. A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.

64. The judges also added a section, entitled ‘Offences against the administration of justice’ to Chapter 3 of the Regulations containing regulation 66 *bis*, which requires the President of the Pre-Trial Division to constitute, in accordance with rule 165(2), a Chamber of one judge to exercise the functions and powers of the Pre-Trial Chamber with respect to article 70 offences.⁹⁷

⁹⁵ Prior to the adoption of the provisional rule, rule 165 read as follows: ‘1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source. 2. Articles 53 and 59, and any rules thereunder, shall not apply. 3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require. 4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8’.

⁹⁶ Assembly of States Parties, [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](#), 21 September 2016, ICC-ASP/15/7 (the ‘Rule 165 Report’), paras 1, 5.

⁹⁷ [Rule 165 Report](#), p. 10:

Regulation 66 *bis*

Constitution of Chambers and the panel of three judges

1. The President of the Pre-Trial Division, at the request of the Pre-Trial Chamber seized of the relevant situation, shall constitute, in accordance with rule 165(2), a Chamber composed of one judge from the Pre-Trial Division to exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58 with respect to offences defined in article 70.

65. The proposed amendment was considered by the Study Group on Governance (the ‘SGG’) and the Working Group on Amendments (the ‘WGA’) in 2016, 2017, and 2018, but a concrete recommendation was not made to the Assembly of States Parties because of a lack of consensus in light of the outstanding concerns of a few States.⁹⁸ In recent years, the issue appears to have fallen from the Assembly of States Parties’ agenda; the 2019 report of the WGA merely noted that no further update had been provided in respect of Provisional Rule 165,⁹⁹ and it was not mentioned in the 2020 report.¹⁰⁰ The Assembly of States Parties has taken no action in respect of this matter.¹⁰¹

66. The fact that the Assembly of States Parties has not adopted, amended or rejected the provisional rule in the five ordinary sessions that followed the judges’ proposal appears to be due, in part, to the practice of taking decisions by consensus on amendments to the Rules, which is interpreted as requiring unanimity.¹⁰² This practice is currently under review by the Assembly of States Parties, *inter alia*, in light of article 51(2) of the Statute, which requires only a two-thirds majority of the Assembly for this purpose.¹⁰³

2. The Presidency shall constitute, in accordance with rule 165(2), a Chamber composed of one judge to exercise the functions and powers of the Trial Chamber, and a panel of three judges to decide appeals with respect to offences defined in article 70. This provision shall not apply in the event of a joinder of charges pursuant to rule 165(4).

⁹⁸ [Rule 165 Report](#), para. 3; Assembly of States Parties, Fifteenth session, ([Report of the Working Group on Amendments](#), 8 November 2016, ICC-ASP/15/24; Assembly of States Parties, Sixteenth session, Report of the Working Group on Amendments (available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-22-ENG.pdf), 15 November 2017, ICC-ASP/16/22 (the ‘2017 WGA Report’); Assembly of States Parties, Seventeenth session, [Report of the Working Group of Amendments](#), 29 November 2018, ICC-ASP/17/35, para. 21.

⁹⁹ Assembly of States Parties, Eighteenth session, Report of the Working Group of Amendments (available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf), 3 December 2019, ICC-ASP/18/32, para. 20.

¹⁰⁰ Assembly of States Parties, Nineteenth session, Report of the Working Group of Amendments, 25 November 2020, ICC-ASP/19/28 (available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-28-ENG-WGA-report%2025nov20-1000.pdf).

¹⁰¹ Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, 24 November 2016, [Resolution ICC-ASP/15/Res.5](#), para. 125; Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, 14 December 2017, [Resolution ICC-ASP/16/Res.6](#), para. 134; Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, 12 December 2018, [Resolution ICC-ASP/17/Res.5](#), para. 151; Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, 6 December 2019, [Resolution ICC-ASP/18/Res.6](#), para. 155; Assembly of States Parties, Strengthening the International Criminal Court and the Assembly of States Parties, 16 December 2020, [Resolution ICC-ASP/19/Res.6](#), para. 159.

¹⁰² Assembly of States Parties, Report of the Bureau on the Study Group on Governance, 8 December 2020, ICC-ASP/19/21 (the ‘SGG Report 2020’), paras 39, 47, 55, 57, 60-61, 64.

¹⁰³ SGG Report 2020, paras 55-64.

67. The status of Provisional Rule 165 while it was still under consideration was discussed in 2016 and 2017. In 2016, the Government of Kenya requested the Court not to apply the provisional rule while it is still under consideration by the WGA.¹⁰⁴ However, the Government of Belgium noted that a large majority of delegations stated that the provisional rule remains applicable in the absence of a decision by the Assembly of States Parties and that it is for the Court ‘to decide on the manner in which it should implement the provisions that concern it in the Rules’.¹⁰⁵ This discussion is also reflected in the 2016 report of the WGA.¹⁰⁶ In the 2017 WGA Report, it was reiterated that the question of whether the provisional rule would apply pending a decision by the Assembly of States Parties was a matter to be adjudicated by the Court.¹⁰⁷

6. *Determination by the majority of the Appeals Chamber*

68. Article 51(3) of the Statute provides for the possibility of provisional rules ‘to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties’. The OPCD and Mr Gicheru argue that the Pre-Trial Chamber committed a legal error in finding ‘that Provisional Rule 165 should be considered applicable *until* the ASP adopts, amends, or rejects it’.¹⁰⁸

69. The Appeals Chamber considers that the phrase in question must be read as a whole and in a manner that gives meaning and effect to all of its constituent words, rather than in a disjointed manner that would suggest that provisional rules apply either ‘until adopted, amended or rejected’, or ‘until [...] the next ordinary or special session of the Assembly of States Parties’. Read as a whole, the phrase suggests that provisional rules apply until one of the specified actions is taken by the Assembly of States Parties at the next ordinary or special session.

¹⁰⁴ Assembly of States Parties, Fifteenth session, [Official Records Volume I](#), 24 November 2016, ICC-ASP/15/20, Annex V - Statement by Kenya concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, p. 69.

¹⁰⁵ Assembly of States Parties, Fifteenth session, [Official Records Volume I](#), 24 November 2016, ICC-ASP/15/20, Annex VI - Statement by Belgium concerning the report of the Working Group on Amendments to the Assembly at its seventh plenary meeting, on 22 November 2016, p. 70.

¹⁰⁶ Assembly of States Parties, Fifteenth session, [Report of the Working Group on Amendments \(Addendum 1\)](#), 21 November 2016, ICC-ASP/15/24/Add.1.

¹⁰⁷ 2017 WGA Report, para. 30.

¹⁰⁸ [Appeal Brief](#), para. 12; [Mr Gicheru’s Response](#), p. 4, para. 26; [Impugned Decision](#), para. 40 (emphasis in original).

70. The Appeals Chamber agrees with the Pre-Trial Chamber that article 51(3) of the Statute requires action by the Assembly of States Parties in the form of adoption, rejection or amendment of the provisional rule. The article does not provide for the possibility of inaction and, indeed, the drafting history shows that the drafters considered but did not accept proposals for the automatic adoption of provisional rules in the absence of an objection from the majority of States Parties.¹⁰⁹ Similarly, proposals for provisional rules to lapse in the absence of action being taken after a specified period of time were not taken up by the drafters.¹¹⁰ Thus, the final text of article 51 of the Statute affirms an active rather than a passive role for the Assembly of States Parties in exercising its decision-making powers regarding provisional rules.

71. Consequentially, in the view of the Appeals Chamber, the ordinary meaning of this phrase excludes the possibility that a provisional rule should be considered to be implicitly rejected (or adopted) in the event that the Assembly of States Parties fails to take a decision as required. This interpretation is further supported by reference to the context in which the phrase appears. Sub-paragraph 3 of article 51 of the Statute allows for the provisional adoption of rules in urgent cases in order to address specific situations that are not already provided for in the Rules. A failure on the part of the Assembly of States Parties to decide on the provisional rule adopted in these circumstances does not negate the urgency or address the need for the rule so adopted. The problem that the provisional rule sought to remedy will simply resurface if the rule is found to lapse in the event of inaction.

72. In reaching this conclusion, the Appeals Chamber has also considered as relevant context the fact that Provisional Rule 165 remained on the Assembly of States Parties' agenda, which shows that it continued to consider itself seized of the matter. The Assembly of States Parties thus appears not to have treated the provisional rule as having been implicitly rejected when it was not adopted, rejected or amended at the

¹⁰⁹ United Nations, International Law Commission, Draft Statute for an International Criminal Court, [Report of the International Law Commission on the work of its forty-sixth session](#), UN Doc. A/49/10 (1994) 43, p. 35; United Nations, [Report of the Preparatory Committee on the Establishment of an International Criminal Court, Compilation of Proposals](#), UN Doc. A/51/22 (1996), Vol. II, pp. 51–53;

¹¹⁰ [Part 4, Composition and Administration of the Court : Article 52 Rules of Procedure and Evidence: Coordinator's text, Rolling Text IV, 4 July 1998](#), UD/A/CONF-183/WGPM/IP, Article 52.

next session that followed its adoption by the judges. Rather, consideration of this matter continued during at least the next two ordinary sessions.¹¹¹

73. The Appeals Chamber also notes that the States Parties raised no objections to the adoption of regulation 66 *bis* of the Regulations (providing for the constitution of a Pre-Trial Chamber composed of one judge for article 70 cases).¹¹² The judges did not act to amend or remove this regulation allowing for the composition of Chambers in accordance with Provisional Rule 165(2). In the view of the Appeals Chamber, had the provisional rule been deemed to have been tacitly rejected by the Assembly of States Parties, the judges would have been required to have removed this regulation which gives effect to and depends on the continued application of Provisional Rule 165.¹¹³

74. The question remains as to the meaning of ‘the next ordinary or special session of the Assembly of States Parties’. The OPCD argues that this term was ‘expressly included to provide a time limitation for provisional rules’.¹¹⁴ The Appeals Chamber considers that acceptance of this argument also implies the existence of an imperative requirement for the Assembly of States Parties to take a decision regarding provisional rules at the next session following their adoption by the judges – ‘until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties’. To an extent, this interpretation would be in line with the context in which the phrase appears. The need for legal certainty in relation to rules provisionally adopted under article 51(3) of the Statute would suggest that decisions by the Assembly of States Parties should be taken on an urgent basis so that provisional rules do not remain in place for extended periods of time. Nevertheless, the Appeals Chamber notes that the Assembly of States Parties does not consider itself bound to take decisions with respect to the application of provisional rules at the session following their adoption. Thus, the

¹¹¹ See *supra* para. 65.

¹¹² Article 52(3) of the Statute provides that ‘[t]he Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force’.

¹¹³ See [Rule 165 Report](#), Annex I, Letter from the President of the International Criminal Court to the President of the Assembly, dated 29 February 2016: ‘The provisional amendments to rule 165 are also accompanied by a related amendment to the Regulations of the Court, regulation 66 *bis*, which was adopted by the judges at the same plenary session. In the event that provisional rule 165 is either amended or rejected by the Assembly of States Parties, the judges of the Court will promptly amend or annul regulation 66 *bis*, as appropriate’.

¹¹⁴ [Appeal Brief](#), para. 14.

Assembly of States Parties has implicitly rejected the view that ‘the next ordinary or special session of the Assembly of States Parties’ creates a time limitation for the adoption, rejection or amendment of provisional rules.

75. In these circumstances, the Appeals Chamber considers that article 51(3)’s reference to the ‘next ordinary or special session’ must be interpreted as the next session at which the provisional rule is adopted, amended or rejected, rather than the next session following the adoption of the provisional rule. It considers that this interpretation gives effect to the ordinary meaning of the phrase read as a whole, in its context, and taking into account the subsequent practice of the Assembly of States Parties in addressing provisional rules adopted under article 51(3) of the Statute.

76. In view of the foregoing, the Appeals Chamber considers that the Pre-Trial Chamber did not err in finding ‘that Provisional Rule 165 should be considered applicable *until* the ASP adopts, amends, or rejects it’.¹¹⁵ Accordingly, the first ground of appeal is rejected.

C. Second ground of appeal

77. Under the second ground of appeal, the OPCD argues that the Pre-Trial Chamber erred in law in finding that a new procedural regime commences at the first appearance hearing and that Provisional Rule 165 only came into effect at that time.¹¹⁶

1. Relevant part of the Impugned Decision

78. The Pre-Trial Chamber rejected the OPCD’s argument ‘that the point in time to take into consideration to determine whether Provisional Rule 165 was applied retroactively is the date of issuance of the arrest warrants’.¹¹⁷ Based on the Appeals Chamber’s jurisprudence, it found that ‘it is necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular the accused’.¹¹⁸ In the view of the Pre-Trial Chamber,

¹¹⁵ [Impugned Decision](#), para. 40.

¹¹⁶ [Appeal Brief](#), paras 21-29.

¹¹⁷ [Impugned Decision](#), para. 47.

¹¹⁸ [Impugned Decision](#), para. 47, quoting Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-2024, 12 February 2016 (the ‘[Ruto and Sang Retroactivity Judgment](#)’), para. 79.

the confirmation of charges proceedings, which begin with the Initial Appearance Hearing, is a new stage in the proceedings, distinct and separate from the investigation/pre-confirmation proceedings and the trial proceedings. Indeed, starting from the Initial Appearance Hearing, a new ‘procedural regime governing the proceedings’ becomes applicable, the suspect acquires rights that s/he were deprived of until this point in time, and s/he becomes a *party* to the proceedings. This is clear from the text of rule 121(1) of the Rules, which states that ‘[a] person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67’. All other procedural rights set forth in rule 121 of the Rules (such as the right to be assisted or represented by a counsel, the right to have access to the evidence disclosed by the Prosecution, the right to present evidence, among others) also become enjoyable at this point in time.¹¹⁹

79. The Pre-Trial Chamber found that, as it was ‘constituted on the basis of Provisional Rule 165 on 2 November 2020, before the Initial Appearance Hearing of Mr Gicheru that took place on 6 November 2020, [...] Provisional Rule 165 was not applied retroactively’.¹²⁰

80. Having found that Provisional Rule 165 was not applied retroactively, the Pre-Trial Chamber ended its analysis, without deeming it necessary to assess whether the rule has been applied retroactively *to the detriment* of Mr Gicheru. The Pre-Trial Chamber stated that ‘[o]nly if [it] had found that the rule was applied retroactively would it have been necessary to enter into the assessment of whether it was done to the detriment of the Accused’.¹²¹

2. OPCD’s submissions before the Appeals Chamber

81. The OPCD argues that the Pre-Trial Chamber erred in law in finding that Provisional Rule 165, if applicable, came into effect only at the initial appearance hearing, owing to commencement of a new procedural regime at the time.¹²²

¹¹⁹ [Impugned Decision](#), para. 47 (footnotes omitted, emphasis in original), referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on counsel for Mr Gbagbo’s request for reconsideration of the ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81\(3\)\(c\)\(i\) of the Statute’ and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé](#), ICC-02/11-01/15-1355-Red, 28 May 2020, paras 68-69.

¹²⁰ [Impugned Decision](#), para. 48.

¹²¹ [Impugned Decision](#), para. 49.

¹²² [Appeal Brief](#), para. 21.

82. The OPCD submits that Provisional Rule 165(2), as well as regulation 66*bis* of the Regulations, clearly state that a Chamber must be constituted ‘from the moment of receipt of an application under article 58’.¹²³ It argues that ‘[t]his was impossible in this case because the arrest warrant against Mr. Gicheru and Mr. Bett had already been issued in early 2015, when the Plenary drew up Provisional Rule 165 in February 2016’.¹²⁴ In its submission, the application of ‘Provisional Rule 165 after the original Rule 165 had already been utilised in the case plainly amounts to a retroactive application’.¹²⁵

83. Furthermore, the OPCD argues that the Chamber erred in finding that the confirmation of charges proceedings is a new stage in the proceedings and that ‘the suspect acquires rights that s/he was deprived of until this point in time, and s/he becomes a *party* to the proceedings’.¹²⁶ Regarding ‘detriment’ to the suspect/accused in this case,¹²⁷ it argues that the application of Provisional Rule 165 ‘negatively affects the defendants in the proceedings, by denying certain provisions of the Statute afforded to other defendants before the Court’ and that were previously applicable to them, including a bench of three judges for the pre-trial and trial phases and five judges for any appeal, as well as a bifurcated sentencing hearing.¹²⁸

3. *Prosecutor’s submissions before the Appeals Chamber*

84. The Prosecutor argues that the Pre-Trial Chamber ‘correctly adopted the test set out by the Appeals Chamber in *Ruto and Sang*’ and that ‘the 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’ because they acquire new rights at this stage.¹²⁹ The Prosecutor contends that the fact that the arrest warrants were issued on behalf of a three-judge Pre-Trial Chamber before Provisional Rule 165 was

¹²³ [Appeal Brief](#), paras 21, 23.

¹²⁴ [Appeal Brief](#), para. 25 (footnote omitted).

¹²⁵ [Appeal Brief](#), para. 25.

¹²⁶ [Appeal Brief](#), para. 26 (emphasis in original).

¹²⁷ [Appeal Brief](#), para. 27.

¹²⁸ [Appeal Brief](#), para. 28.

¹²⁹ [Prosecutor’s Response](#), paras 27-28.

promulgated ‘has no bearing on the rights of the suspects nor the subsequent conduct of pre-trial or trial proceedings, [and] cannot be said to “fix” the procedural regime’.¹³⁰

85. The Prosecutor submits that the Appeals Chamber should not address the question of detriment, as the ‘OPCD does not represent the only suspect in this case at the time of the Appeal, and the Decision is only binding on Mr Gicheru’.¹³¹ She argues that the ‘ground of appeal must be dismissed on this basis because it cannot materially affect the Decision’.¹³² In any event, the Prosecutor submits the application of Provisional Rule 165 in this case does not infringe fundamental rights and is not detrimental and, to the contrary, may favour the interests of suspects by streamlining the trial.¹³³

4. *Mr Gicheru’s submissions before the Appeals Chamber*

86. Mr Gicheru argues that the Pre-Trial Chamber ‘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’.¹³⁴

5. *Determination by the majority of the Appeals Chamber*

87. Article 51(4) of the Statute provides, in relevant part, that ‘[a]mendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted’. The Appeals Chamber has previously held that ‘[i]n order to determine whether a procedural rule has been applied retroactively to the detriment of the accused, it is necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused’.¹³⁵

88. The Appeals Chamber notes that warrants of arrest against Mr Gicheru and Mr Bett were issued on 10 March 2015 by Judge Ekaterina Trendafilova, acting as single

¹³⁰ [Prosecutor’s Response](#), para. 30.

¹³¹ [Prosecutor’s Response](#), para. 33.

¹³² [Prosecutor’s Response](#), para. 34.

¹³³ [Prosecutor’s Response](#), para. 36.

¹³⁴ [Mr Gicheru’s Response](#), para. 34.

¹³⁵ [Ruto and Sang Retroactivity Judgment](#), para. 79.

judge on behalf of Pre-Trial Chamber II.¹³⁶ Pre-Trial Chamber II was recomposed twice following the issuance of the arrest warrants.¹³⁷ On 10 February 2016, Provisional Rule 165 was adopted.¹³⁸ On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands and, on the same day, Pre-Trial Chamber A was composed by the President of the Pre-Trial Division to exercise the powers and functions of the Pre-Trial Chamber in the case of *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*.¹³⁹

89. The Appeals Chamber considers that Mr Gicheru's surrender on 2 November 2020 triggered the initial proceedings before the Court and the commencement of the confirmation of charges proceedings in his case. It was at this point that the procedural regime governing the confirmation of charges proceedings became applicable to the parties. Provisional Rule 165, which provides that a Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber and excludes the possibility of interlocutory appeals under article 82(1)(d) of the Statute at this stage, was adopted prior to the constitution of the Pre-Trial Chamber. Therefore, the Appeals Chamber finds that Provisional Rule 165 was not applied retroactively in the on-going proceedings within the meaning of article 51(4) of the Statute. Accordingly, the OPCD's arguments under the second ground of appeal are rejected.

D. Third ground of appeal

90. Under the third ground of appeal, the OPCD argues that the Pre-Trial 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

¹³⁶ [Decision on the 'Prosecution's Application under Article 58\(1\) of the Rome Statute'](#), ICC-01/09-01/15-1-Red.

¹³⁷ [Decision on the constitution of Pre-Trial Chambers and on the assignment of the Mali situation](#), 16 March 2015, ICC-01/09-01/15-2; [Decision assigning judges to divisions and recomposing Chambers](#), 16 March 2018, ICC-01/09-01/15-17.

¹³⁸ [Rule 165 Report](#), Annex II, para. 1.

¹³⁹ [Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case](#), ICC-01/09-01/15-32, pp. 3-4.

Provisional Rule 165 does not restrict any of the fundamental rights enshrined in article 67 of the Statute'.¹⁴⁰

1. *Relevant part of the Impugned Decision*

91. The Pre-Trial Chamber rejected the OPCD's argument that Provisional Rule 165 is incompatible with the Statute.¹⁴¹ It noted that: (i) article 70(2) of the Statute provides 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*', (ii) section I of Chapter IX of the Rules is dedicated to the particular procedural regime applying to these offences; and (iii) rule 163(1) of the Rules specifies that '[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70'.¹⁴² It found that this 'shows that those offences differ from offences under articles 5 to 8 of the Statute *on a procedural level as well*'.¹⁴³ It found that this view was supported 'by the fact that the original version of Rule 165 of the Rules, before it was modified by the judges, already permitted the pre-trial chamber to conduct the confirmation of charges proceedings without a hearing (Rule 165(3) of the Rules), contrary to article 61 of the Statute, and that articles 53 and 59 of the Statute shall not apply (Rule 165(2) of the Rules)'.¹⁴⁴ The Pre-Trial Chamber also found that 'Provisional Rule 165 does not restrict any of the fundamental rights enshrined in article 67 of the Statute'.¹⁴⁵

2. *OPCD's submissions before the Appeals Chamber*

92. The OPCD argues that the Rules cannot contradict 'the rights and principles enshrined in the Rome Statute'.¹⁴⁶ It highlights the Appeals Chamber's finding that rules should be applied 'in the manner [considered] to be most consistent with the norms indicated' in the Statute.¹⁴⁷ The OPCD submits that the drafters deferred article

¹⁴⁰ [Appeal Brief](#), paras 30-36.

¹⁴¹ [Impugned Decision](#), para. 53.

¹⁴² [Impugned Decision](#), para. 51 (emphasis in original).

¹⁴³ [Impugned Decision](#), para. 51 (emphasis in original).

¹⁴⁴ [Impugned Decision](#), para. 51.

¹⁴⁵ [Impugned Decision](#), para. 52.

¹⁴⁶ [Appeal Brief](#), para. 31.

¹⁴⁷ [Appeal Brief](#), para. 31, referring to *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on victims' representation and participation*, 3 October 2012, ICC-01/09-01/11-460, para. 22.

70 procedures to the Rules on the understanding that they would have control over the drafting of the Rules and any amendments to the Rules would include ‘review and assent by the ASP through a full framework outlined in Article 51’.¹⁴⁸ It also stresses that the original rule 165 drafted by the States ‘carved out an extremely limited number of exceptions, choosing to keep the bulk of the Rome Statute, including Articles 39(2)(b), 57(2), 76(2), and 82(1)(d), as applicable’.¹⁴⁹

93. The OPCD further submits that the Pre-Trial Chamber erred in finding that Provisional Rule 165 did not restrict article 67 rights and that ‘fundamental rights are imbued within the provisions of the treaty itself and found throughout the entirety of the Rome Statute’.¹⁵⁰ It highlights the example of Provisional Rule 165’s exclusion of a party’s ability to seek leave for interlocutory appeal, which runs ‘counter to the very essence of article 82(1)(d) of the Statute, namely to instantly provide legal certainty regarding matters fulfilling the criteria for leave to appeal so as to ensure that the proceedings run their course’.¹⁵¹

94. The OPCD submits that at least three rights are at stake ‘that are embedded in other parts of the Statute, but are inexorably tied to the Article 67(1) right to a fair trial’.¹⁵² It argues that ‘Provisional Rule 165 stands to pit resources over rights in that it was created, in urgency, to economize’ and that, ‘[w]hen tested judicially, it was error to find such provision not incompatible with the principles of the Rome Statute overall’.¹⁵³ The OPCD concludes that this error ‘materially affected the Impugned Decision in that finding that Provisional Rule 165 is inconsistent with the Statute itself would render it void pursuant to Article 51(4) and (5)’.¹⁵⁴

3. *Prosecutor’s submissions before the Appeals Chamber*

95. The Prosecutor argues that ‘the Rules can [...] make different provision than the Statute, where the Statute itself permits, [...] provided that these alternative provisions

¹⁴⁸ [Appeal Brief](#), para. 32.

¹⁴⁹ [Appeal Brief](#), para. 32.

¹⁵⁰ [Appeal Brief](#), para. 33.

¹⁵¹ [Appeal Brief](#), para. 34, *quoting* [Decision Granting Leave to Appeal](#), para. 32.

¹⁵² [Appeal Brief](#), para. 35.

¹⁵³ [Appeal Brief](#), para. 35.

¹⁵⁴ [Appeal Brief](#), para. 36.

remain “consistent” with bedrock provisions of the Statute’.¹⁵⁵ She submits that the OPCD’s arguments necessarily imply ‘that provisional rules cannot be promulgated for the purpose of article 70 proceedings’.¹⁵⁶ She contends that this argument is unsupported as: (i) article 70(2) of the Statute specifically allows for a ‘differing procedural regime’ applicable to article 70 offences to be set by the Rules;¹⁵⁷ and (ii) neither the Impugned Decision nor the adoption of Provisional Rule 165 by the judges ‘is necessarily “outside” the framework established by article 51 of the Statute’.¹⁵⁸

96. The Prosecutor further submits that Provisional Rule 165 does not restrict article 67 rights or the right to appeal and that the OPCD has not identified with precision which other rights it claims may be affected.¹⁵⁹ She submits that the reduction of the number of judges does not offend any right of the accused or otherwise cause any unfairness, and that a separate sentencing phase and oral hearing for this purpose is not precluded by the provisional rule if the Trial Chamber so decides.¹⁶⁰ The Prosecutor submits that, ‘while disapplying article 82(1)(d) curtails the parties’ ability to raise an interlocutory appeal, it does not entirely foreclose it’ and the parties remain able to appeal as of right any matter falling under article 82(1)(a), 82(1)(b) or 82(1)(c).¹⁶¹ She argues that there is no entitlement to avail of such a procedure under internationally recognised human rights and that ‘[t]he right to appeal as recognised in article 14(5) of the International Covenant on Civil and Political Rights, and similar instruments, vests in article 81 and not article 82 of the Statute’.¹⁶²

97. Finally, the Prosecutor submits that there is no basis to conclude that the rule adversely affects the rights of the accused under article 67 of the Statute.¹⁶³ She argues that, ‘[t]o the contrary, by adapting the trial procedures of this Court to the more limited

¹⁵⁵ [Prosecutor’s Response](#), para. 41.

¹⁵⁶ [Prosecutor’s Response](#), para. 39.

¹⁵⁷ [Prosecutor’s Response](#), para. 42.

¹⁵⁸ [Prosecutor’s Response](#), para. 43.

¹⁵⁹ [Prosecutor’s Response](#), paras 45-47.

¹⁶⁰ [Prosecutor’s Response](#), para. 46.

¹⁶¹ [Prosecutor’s Response](#), para. 48.

¹⁶² [Prosecutor’s Response](#), paras 49-50 (footnote omitted).

¹⁶³ [Prosecutor’s Response](#), para. 52.

scope of article 70 trials, provisional rule 165 *favours* the interests of the suspect or accused in a fair and expeditious trial'.¹⁶⁴

4. *Mr Gicheru's submissions before the Appeals Chamber*

98. Mr Gicheru essentially concurs with the OPCD's arguments that the Pre-Trial Chamber 'erred in law in holding that Provisional Rule 165 is compatible with the Statute'.¹⁶⁵ He submits that the Pre-Trial Chamber 'ignored the drafters' and States Parties' intent to apply "the same high international standards ... to both [Article 5 and Article 70] proceedings"¹⁶⁶.

99. Mr Gicheru further argues that '[t]he 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 similar cases are dealt with in similar proceedings'.¹⁶⁷ Mr Gicheru contends that '[t]he 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',¹⁶⁸ as 'Judges bring subjective biases about the parties as well as the procedures to be used based on his or her legal culture and experiences'.¹⁶⁹ He also argues that '[t]he statutory right to interlocutory appeal under Article 82(1)(d) is a "safeguard for the integrity of the proceedings"¹⁷⁰. He submits that the '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' and that eliminating this right 'impacts on the Accused's right to remain silent'.¹⁷¹

5. *Determination by the majority of the Appeals Chamber*

100. Article 51(4) of the Statute provides, in relevant part, that '[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute'. The question for the Appeals Chamber to determine in this

¹⁶⁴ [Prosecutor's Response](#), para. 53 (emphasis in original).

¹⁶⁵ [Mr Gicheru's Response](#), paras 36-37.

¹⁶⁶ [Mr Gicheru's Response](#), paras 38-43.

¹⁶⁷ [Mr Gicheru's Response](#), p. 18, para. 44.

¹⁶⁸ [Mr Gicheru's Response](#), para. 46.

¹⁶⁹ [Mr Gicheru's Response](#), para. 47.

¹⁷⁰ [Mr Gicheru's Response](#), para. 48.

¹⁷¹ [Mr Gicheru's Response](#), para. 49.

case is whether Provisional Rule 165 adopted by the judges contravenes this requirement.

101. As set out above, Provisional Rule 165 (applicable to the investigation, prosecution and trial of article 70 offences), was drawn up by the judges to be applied in order ‘to simplify and expedite article 70 proceedings’.¹⁷² The original version of rule 165 of the Rules provided:

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

102. The provisional rule amends the procedure applicable to article 70 proceedings in the following main ways: (i) it allows for the respective functions of the Pre-Trial and the Trial Chamber to be exercised by a Chamber of one judge instead of three and the functions of the Appeals Chamber to be conducted by a panel of three judges instead of five; (ii) it eliminates the right to seek leave to appeal interlocutory decisions under article 82(1)(d) of the Statute; and (iii) it eliminates the automatic right to a separate sentencing hearing under article 76(2) of the Statute.¹⁷³

103. The OPCD and Mr Gicheru argue on appeal that Provisional Rule 165 is incompatible with the Statute based on two strands of argumentation reflecting the reasoning of the Pre-Trial Chamber. First, they argue that the Pre-Trial Chamber erred in finding that Provisional Rule 165 is not incompatible with the Statute on the grounds that article 70(2) of the Statute allows for procedures governing article 70 offences to be established in the Rules in the sense that it allows for the relevant rules to deviate

¹⁷² See *supra* para. 63.

¹⁷³ [Rule 165 Report](#), p. 9.

from statutory requirements.¹⁷⁴ Second, they argue that the Pre-Trial Chamber erred in finding that Provisional Rule 165 does not restrict any of the fundamental rights enshrined in the Statute.¹⁷⁵ These arguments are addressed in turn below.

104. The Appeals Chamber notes that article 70(2) of the Statute provides 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'. In the view of the Appeals Chamber, this provision explicitly envisages that article 70 offences will be governed by a different set of principles and procedures to those which apply to offences under articles 5 to 8 of the Statute and that these principles and procedures will be elaborated in the Rules.

105. The regime applicable to article 70 offences is set out in Chapter 9 of the Rules. Rule 163(1) of the Rules, contained in this part of the Statute, introduces the applicability of the provisions of the Statute and the Rules *mutatis mutandis* to article 70 offences, unless otherwise provided.¹⁷⁶ Thus, the applicability of statutory principles and procedures to article 70 offences is derived from a rule, rather than the Statute itself. This being the case, the Appeals Chamber considers that there is no bar to the rules excluding the application of particular statutory provisions to article 70 offences as article 70(2) of the Statute explicitly provides for this possibility. Indeed, as noted by the Pre-Trial Chamber, the procedure applicable to article 70 offences under the original version of rule 165 of the Rules already deviated from certain statutory procedural requirements, in particular by removing the requirement for a confirmation of charges hearing.¹⁷⁷

106. The Appeals Chamber accepts the arguments of the OPCD and Mr Gicheru that the intent of the drafters regarding the procedural regime applicable to article 70 offences was reflected in the original version of the Statute and the Rules.¹⁷⁸ However, this does not exclude the possibility that the relevant rules may be amended if such is considered necessary, provided that the amendment is consistent with the Statute and

¹⁷⁴ [Appeal Brief](#), paras 31-32; [Mr Gicheru's Response](#), paras 37-43.

¹⁷⁵ [Appeal Brief](#), paras 33-36; [Mr Gicheru's Response](#), paras 44-49.

¹⁷⁶ Rule 163(1) of the Rules reads: 'Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70'.

¹⁷⁷ [Impugned Decision](#), para. 51.

¹⁷⁸ [Appeal Brief](#), para. 32; [Mr Gicheru's Response](#), paras 38-43.

does not undermine the fairness of the proceedings and the rights of the accused person. In this respect, the procedural rules applicable to article 70 proceedings have no special status that would exempt them from the possibility of change within the framework of article 51 of the Statute.

107. In addition, the Appeals Chamber observes that the drawing up of a rule by the judges to be provisionally applied in article 70 proceedings under article 51(3) of the Statute does not, as suggested by the OPCD, preclude a detailed consideration of and decision on the matter by the Assembly of States Parties.¹⁷⁹ To the contrary, the procedure outlined in article 51(3) of the Statute requires such scrutiny and oversight and ensures that the ultimate decision as to whether the provisional rule will be adopted, amended or rejected remains vested in the Assembly of States Parties.

108. Therefore, the Appeals Chamber finds that the Pre-Trial Chamber did not err in finding that Provisional Rule 165 is not incompatible with the Statute on the grounds that article 70(2) shows that the principles and procedure applicable to article 70 offences differ from article 5 to 8 offences.

109. The Appeals Chamber turns now to the second strand of argumentation under this ground of appeal and the question of whether the amendments introduced by Provisional Rule 165 restrict fundamental rights enshrined in the Statute. The Appeals Chamber notes that the OPCD's arguments in this regard focus on the exclusion of the possibility of interlocutory appeals under article 82(1)(d) of the Statute.¹⁸⁰ Mr Gicheru agrees with the OPCD's argument and adds that the changes to the composition of the Chambers assigned to article 70 cases, as well as the elimination of the right to a separate sentencing hearing, also impact on fair trial rights.¹⁸¹

110. For the reasons set out below, the Appeals Chamber is not persuaded that the changes introduced by Provisional Rule 165 are inconsistent with fundamental rights enshrined in the Statute or with internationally recognised human rights or standards in criminal proceedings.

¹⁷⁹ [Appeal Brief](#), para. 32.

¹⁸⁰ [Appeal Brief](#), para. 34.

¹⁸¹ [Mr Gicheru's Response](#), paras 38-43.

111. Regarding the composition of chambers, the Appeals Chamber notes that the legal framework of the Court already provides for many decisions that may affect the fairness of proceedings to be taken by a single judge in all cases.¹⁸² It also notes that the equivalent of article 70 offences are prosecuted before a single judge at other international or hybrid tribunals.¹⁸³ Finally, article 70(4)(b) of the Statute provides that the Court may request a State Party to submit an article 70 offence to its competent authorities for the purpose of prosecution, and there is certainly no guarantee that such cases would be tried domestically before a Chamber composed of more than one judge. Therefore, the Appeals Chamber finds no basis to conclude that Provisional Rule 165's reduction of the number of judges hearing the case at each phase of article 70 proceedings would affect the fairness of proceedings or deviate from international standards.

112. Regarding the exclusion of the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute,¹⁸⁴ the Appeals Chamber underlines that the Pre-Trial and Trial Chambers are required to ensure that the rights of the suspect or accused person are respected. Any concern that they may have failed in this duty may be raised before the Appeals Chamber in a final appeal and any necessary remedy may be applied at that stage. Therefore, the Appeals Chamber concludes that the elimination of the procedural possibility of interlocutory appeals under article 82(1)(d) of the Statute does not vitiate any right vested in the parties generally or in the accused in particular.

113. Regarding the question of separate sentencing proceedings, the Appeals Chamber notes that Provisional Rule 165 excludes the application of article 76(2) of the Statute, which provides that a Trial Chamber may hold a hearing for the purpose of sentencing

¹⁸² Article 57(2)(b) of the Statute allows for certain functions and powers of the Pre-Trial Chamber to be exercised by a single judge, including virtually all procedural decisions leading to the confirmation of charges. Similarly, rule 132 *bis*(1) of the Rules provides that 'a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial' and article 64(8)(b) empowers the presiding judge of a Trial Chamber to 'give directions for the conduct of proceedings'.

¹⁸³ Rule 77(D) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone; rule 77(D)(i) of the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone; rule 60*bis*(C) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon; article 12(1) of the Statute of the International Residual Mechanism for Criminal Tribunals; rule 90(C) of the Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals; article 25(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office.

¹⁸⁴ See [DRC Extraordinary Review Judgment](#), para. 38.

and must do so if requested by the Prosecutor or the accused.¹⁸⁵ Nonetheless, the Appeals Chamber notes that the Trial Chamber, composed of one judge, retains the discretion to manage its own proceedings, and is obliged under article 64(2) of the Statute to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused. Therefore, it considers that a Trial Chamber may still hold a separate sentencing hearing if it considers this to be necessary in the circumstances of the case before it and may conduct sentencing proceedings in writing following conviction.

114. The Appeals Chamber notes Mr Gicheru's concern that the accused person's right to remain silent under article 67(1)(g) would be impacted if he or she were required to advance mitigating circumstances for the purpose of sentencing, while simultaneously asserting his or her innocence in the context of a trial.¹⁸⁶ It underscores that Provisional Rule 165 does not give rise to such concerns as it has no impact on the timing of sentencing proceedings. It merely excludes the automatic requirement to hold a *hearing* for such purposes if this is requested by the Prosecutor or accused person.

115. Therefore, the Appeals Chamber finds no basis to conclude that Provisional Rule 165's exclusion of the requirement for a sentencing hearing if requested in article 70 proceedings would affect the fairness of proceedings or deviate from international standards.

116. In view of the foregoing consideration of the submissions of the OPCD and Mr Gicheru under the third ground of appeal, the Appeals Chamber rejects the argument that the Pre-Trial 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'.

¹⁸⁵ Article 76(2) of the Statute provides: 'Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence'.

¹⁸⁶ [Mr Gicheru's Response](#), para. 49.

V. APPROPRIATE RELIEF

117. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’.

Judge Eboe-Osuji and Judge Bossa append a joint partly dissenting opinion to this judgment.

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



Judge Howard Morrison
Presiding

Dated this 8th day of March 2021

At The Hague, The Netherlands