

29 February 2016

Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence

I. Introduction

1. This report is presented to the Assembly of States Parties in order to inform States Parties that, on 10 February 2016, the judges of the International Criminal Court (“Court”), acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence (“Rules”), which governs the investigation, prosecution and trial of “offences against the administration of justice” pursuant to article 70 of the Rome Statute (“Statute”). This provisional amendment was adopted in accordance with article 51(3) of the Statute which provides that, in urgent cases where the Rules do not provide for a specific situation before the Court, a two-thirds majority of the judges may draw up a provisional rule to be applied until adopted, amended or rejected by the Assembly of States Parties. At the same time, the judges also adopted a related amendment to the Regulations of the Court (“Regulations”).
2. The provisional amendments to rule 165 reflect Court-wide consultation, having been recommended by the Advisory Committee on Legal Texts (“ACLT”). As provided in regulation 4(1) of the Regulations, the ACLT is composed of three judges (one from each Division), one representative from the Office of the Prosecutor (“OTP”), one representative from the Registry and one representative of counsel included in the list of counsel.
3. The provisionally amended rule 165 simplifies and expedites article 70 proceedings by allowing for the respective functions of the Pre-Trial and the Trial Chamber, including the confirmation of charges and the trial, to be exercised by a chamber of one judge instead of a chamber of three judges. The provisionally amended rule 165 further allows for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber.

II. The Legal Framework for article 70 proceedings

4. Article 70 of the Statute governs “Offences against the administration of justice”. Paragraph 2 of article 70 provides, *inter alia*, that “[t]he principles and procedures governing the Court’s exercise of jurisdiction over these offences shall be those provided for in the Rules of Procedure and Evidence”.

5. The drafting history of article 70 indicates that “many delegations” were concerned “that various principles and procedures in the Statute were not appropriate for non-core crimes.”¹ However, “[g]iven the complexity of devising an appropriate procedure for prosecuting these offences and the little time available in Rome to resolve these issues, the conference decided as a general matter to leave elaboration of more detailed standards to the Rules.”² The resulting language of paragraph 2 is “the general delegation of authority given to the drafters of the Rules” to devise procedures relating to article 70 offences.³
6. Rules 162-169 elaborate the principles and procedures governing article 70 offences. Rule 163 explains the relationship between the Statute and the Rules with respect to article 70 offences and provides, in paragraph 1, 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.”⁴ This principle is subject to paragraphs 2 and 3, which exclude the application of Parts 2 (“Jurisdiction, admissibility and applicable law”) and 10 (“Enforcement”) of the Statute, with some limited exceptions, to article 70 offences.
7. The drafting history of the Rules reveals that during the discussions regarding the procedure for article 70 offences, “it was suggested that in dealing with such offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber.”⁵

III. Provisionally Amended Rule 165

8. The provisional amendments to rule 165 stem from the recognition that the nature and gravity of offences under article 70 differ markedly from those under article 5 and that the procedure governing article 70 proceedings should reflect that difference. Jurisdiction over article 70 offences should be exercised in an expeditious and simple manner. In particular, it does not appear necessary for the confirmation of charges and trial for such offences to be respectively carried out by three judges, along with five judges to review decisions on appeal. Following the examples of other criminal tribunals, in particular the

¹ Donald K. Piragoff, “Article 70”, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVER’S NOTES, ARTICLE BY ARTICLE 1751, 1755 (Otto Triffterer and Kai Ambos, eds., 3d ed. 2016). Indeed, one commentator has observed that “[t]he term ‘offences’ used in the title of article 70 distinguishes the concept from ‘crimes within the jurisdiction of the Court’.” William A. Schabas, “Article 70”, in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 852, 856 (2010).

² Piragoff, “Article 70”, *supra* note 1, at 1755.

³ *Id.* at 1757.

⁴ See also Hakan Friman, “Offences and Misconduct Against the Court”, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 605, 608 (Roy S. Lee ed., 2001) (“As the Final Report of the Preparatory Committee had pointed out, article 70 should not be considered in isolation; the question was how it should relate to other provisions of the Statute. The method developed by the experts . . . was to work on the assumption that all provisions of the Statute were also applicable to the offences under article 70, unless excluded or modified in the Rules. This principle was established in . . . rule 163 . . .”).

⁵ *Id.* at 614. Some delegations expressed opposition to this proposal on the ground that it “was incompatible with the Statute (in particular article 39, paragraph 2 (b)), except regarding the Pre-Trial Chamber.” *Id.* at 615. The delegations could not agree on this point “and the rule on reduced chambers had to be deleted.” *Id.*

Special Court of Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL),⁶ rule 165 has been provisionally amended so that the confirmation of charges hearing and the trial be respectively conducted by one judge and the appeals by a panel of three judges. I

9. The legal basis for the provisional amendment is clear. As noted at paragraph 4 above, the plain language of article 70(2) of the Statute indicates that a distinct procedural regime for article 70 offences may be provided for in the Rules. This reading of article 70(2) is further buttressed by the drafting history of article 70(2) as described in Part II of this Report.
10. In accordance with the clear mandate in article 70(2) to include further principles and procedures in the Rules, the provisional amendments introduced by the judges to rule 165 are as follows:

Original rule 165	Provisional rule 165
<p>Rule 165 Investigation, prosecution and trial</p> <p>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.</p> <p>2. Articles 53 and 59, and any rules thereunder, shall not apply.</p>	<p>Rule 165 Investigation, prosecution, trial <u>and appeal</u></p> <p>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.</p> <p>2. Articles <u>39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d)</u>, and any rules thereunder, shall not apply. <u>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</u></p>

⁶ Rule 77 of the SCSL RPE provides that “[w]hen a Judge or Trial Chamber has reason to believe that a person may be in contempt . . . , it may: (i) deal with it summarily; (ii) refer the matter to the appropriate authorities of Sierra Leone; or (iii) direct the Registrar to appoint an experienced independent counsel”. Where an independent counsel has been appointed, he investigates the matter and reports back to the Chamber as to whether there are sufficient grounds to initiate proceedings. If the Chamber is satisfied, it may “direct the independent counsel to prosecute the matter.” Importantly, “a single judge of any Trial Chamber”, rather than a Trial Chamber of three judges, may be appointed to hear cases which the independent Counsel is directed to prosecute. Appeals may be heard by a bench of at least three but fewer than five judges of the Appeals Chamber.

Rule 60 bis of the STL RPE, which was introduced on 20 February 2013, introduces the concept of a single “Contempt Judge” who will hear contempt cases. Pursuant to the amendment, once a Judge or Chamber has received information that contempt might have occurred, he or it must “refer the matter to the President for referral to a Contempt Judge”, submitting supporting material where appropriate. The amendment provides that a Contempt Judge is designated by the President, to hear cases of offences against the administration of justice. The designation is made from a predetermined roster of all Judges of the Tribunal, in accordance with a Practice Direction issued by the President (Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, 27 Feb. 2015). If the Contempt Judge “considers that there are sufficient grounds to proceed against a person for contempt, he may . . . direct the Prosecutor to prosecute the matter”, direct the Registrar to appoint an *amicus curiae* to investigate the matter or initiate proceedings himself. Any decision by the Contempt Judge disposing of the case is subject to appeal to a three-judge bench designated by the President from a pre-determined roster in accordance with the Practice Direction.

	<u>panel of three judges shall be established in the Regulations.</u>
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.	3. For purposes of article 61, <u>the Pre-Trial Chamber, as constituted under sub-rule 2,</u> 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.	4. <u>The Trial Chamber seized of the case from which the article 70 proceedings originate may,</u> as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges <u>in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.</u>

11. Provisional rule 165 is consistent with the other rules contained in section 1 of chapter 9 of the Rules. Rule 163(1) provides that “[u]nless otherwise provided in . . . 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.” In other words, rule 163(1) provides that relevant provisions of the Statute apply by default unless otherwise displaced by the rules governing article 70 offences. A plain reading of this provision fails to indicate any tension with the provisional amendments. Rather, rule 163(1) reinforces the principle set forth in article 70(2) that the Rules will govern article 70 proceedings and clarifies that to the extent that there are any gaps in procedure, those gaps will be filled by the relevant provisions of the Statute.
12. It is further noted that the concept of a judge taking certain decisions alone is not new to the legal framework of the Court. Article 57(2)(b) of the Statute provides that “a single judge of the Pre-trial Chamber may exercise” a range of functions and powers of the Pre-Trial Chamber. With respect to trial proceedings, rule 132 *bis* provides that “a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.” In addition, pursuant to article 64(8)(b), the presiding judge of a Trial Chamber may also “give directions for the conduct of proceedings”. With regard to the procedure in provisionally amended rule 165(2), constituting Pre-Trial and Trial Chambers composed of one judge is distinct from the procedure for the designation of a Single Judge.
13. The ACLT, as well as the judges of the Court, when analysing the proposal for amendment to rule 165, discussed the possible tension created between article 39 of the Statute and any proposal to reduce the number of judges hearing article 70 proceedings. It was agreed that article 70(2) allowed for certain Rules amendments for article 70 proceedings which derogate from the procedures set out in the Statute. The original rule already derogated from the procedures set out in the Statute by removing the requirement

for holding a confirmation hearing. It was considered that reducing the number of judges required to hear article 70 proceedings was possible if both articles 39(2)(b) and 57(2) of the Statute were added to rule 165(2) of the Rules.

14. It was also considered that removing the separate sentencing hearing procedure under article 76 and leave to appeal procedures from article 70 proceedings would further expedite article 70 proceedings and allow for more resources to be diverted to the article 5 proceedings which form the core of the Court's mission. Even with these amendments, it was discussed that the Trial Chamber of one judge could still allow for a separate sentencing hearing under article 76 if circumstances warranted such a hearing.

IV. Amendment to the Regulations of the Court

15. The second paragraph of provisional rule 165 provides that “[t]he procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations”.
16. The judges of the Court considered that it was prudent to propose changes to the Rules only to the extent that such changes were strictly necessary. Accordingly, it was considered that the details of the modalities for the composition of Chambers of one judge and the panel of three judges in article 70 proceedings should be included in the Regulations.
17. The judges have, accordingly, added a section 5, entitled “Offences against the administration of justice” to Chapter 3 of the Regulations, which deals with “Proceedings before the Court”. Within this section, the judges have added regulation 66 *bis*, which provides:

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.
 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).
18. Consistently with the Presidency's responsibility for the proper administration of the Court, set out in article 38(3)(a) of the Statute,⁷ the Presidency is responsible for constituting a Trial Chamber composed of one judge and a panel of three judges to decide

⁷ See also rule 130 of the Rules and regulation 46 of the Regulations.

appeals for article 70 proceedings. However, as regards pre-trial proceedings, it was noted that the Presidency does not assign cases – only situations – to Pre-Trial Chambers. Additionally, since the pre-trial judges will be the first to be aware of the initial stages of an article 70 investigation (which may occur under seal), for pre-trial proceedings, the President of the Pre-Trial Division will constitute a Pre-Trial Chamber composed of one judge to issue a warrant of arrest or summons to appear and hear the entire confirmation phase of the proceedings.

V. Urgency of the amendments

19. The judges have adopted provisional rule 165 in accordance with the provision in article 51(3) of the Statute that: “[a]fter the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties”.
20. Considering that the Court has now been called upon to exercise its jurisdiction over offences against the administration of justice under article 70, the judges considered that the current resource constraints facing the judiciary rendered it urgent that the amendment to rule 165 be provisionally adopted. The pool of judges available to deal with all situations and cases before the Court is limited and as the Court proceeds with an increased number of active trials in article 5 proceedings, it is no longer sustainable for article 70 proceedings to demand the same resource commitment as article 5 proceedings. Current financial constraints call for a procedural framework allowing for a more flexible and efficient allocation of judicial resources. Such increased flexibility must be immediately available, as the Court has already reached the critical juncture at which it will be unable to allocate the required judicial resources to article 70 proceedings.
21. Accordingly, the judges considered that the necessary conditions of urgency existed to warrant recourse to the procedure outlined in article 51(3) of the Statute. Therefore, they decided to draw up this provisional rule and apply it in accordance with that provision, as well as article 51 (4) of the Statute.

VI. Conclusion

22. The judges of the Court consider that provisional rule 165 of the Rules and regulation 66 *bis* of the Regulations constitute a fair and efficient manner to address offences against the administration of justice arising under article 70 of the Statute. Most importantly, provisional rule 165 ensures that the rights of accused persons, as set out in article 67 of the Statute, are safeguarded and maintains the essential structure of a multi-level hearing by an independent and impartial body with the opportunity for appellate review. Provisional rule 165 ensures that the Court is able to focus its judicial resources on article 5 proceedings, although without sacrificing the fairness of article 70 proceedings. As is foreseen in article 51(3) of the Statute, provisional rule 165 is hereby transmitted to the ASP for its adoption, amendment or rejection in accordance with that article.