

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/09-01/20**

Date: **8 January 2021**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public

OPCD Appeals against the Decision on Applicability of Provisional Rule 165

Source: Office of Public Counsel for the Defence

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

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I. INTRODUCTION

1. The Office of Public Counsel for the Defence has been granted leave to file before the Honourable Appeals Chamber on three issues of alleged error in the *Decision on the Applicability of Rule 165 of the Rules of Procedure and Evidence* (“Impugned Decision”)¹. The three issues for review are as follows:
 - a. *Whether the 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;*
 - b. *Whether the Chamber erred in law in finding that a new procedural regime commences at the Initial Appearance Hearing and that the Provisional Rule only came into effect at that time;*
 - c. *Whether the Chamber erred in 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.*²
2. The OPCD submits that each error alleged materially affected the Impugned Decision in that, if reversed, would have rendered a substantially different decision. Quite simply, had Pre-Trial Chamber A (“PTC A”) ruled differently on any of these three issues, Provisional Rule 165 would have been found inapplicable in the present case with reversion to use of the originally drafted, and originally used, Rule 165. If so, the defendants in the case would have multi-judge panels to adjudicate guilt or acquittal, the possibility to ask for

¹ Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence, 10 December 2020, [ICC-01/09-01/15-61](#).

² Issues 1 and 3 have been reformulated by PTC A in Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, 23 December 2020, [ICC-01/09-01/20-68](#), para. 38.

appellate review under Article 82(1)(d) in case of potential fair trial violations in the duration of the case, and the opportunity to submit full mitigating circumstances in a separate sentencing hearing should they be found guilty. Instead, the defendants are now subject to a Rule that was created only *after* they became defendants in the case and one that restricts their procedural avenues to justice. The OPCD respectfully requests that the Appeals Chamber rectify these legal errors for the sake of establishing norms applicable to amendments of the core texts and legal certainty for parties and participants in ICC proceedings.

II. RELEVANT PROCEDURAL HISTORY

3. The arrest warrant against Mr Paul Gicheru and Mr Philip Kipkoech Bett was issued under seal on 10 March 2015 for alleged responsibility under Article 70(1)(c) of the Rome Statute.³
4. On 1 March 2016, the Court announced that Provisional Rule 165 had been promulgated by the Judges pursuant to Article 51(3).⁴ At the 15th ASP General Assembly, held from 16-24 November 2016, the Assembly considered Provisional Rule 165, but there was no final view on the matter.⁵
5. Upon surrender of Mr. Gicheru on 2 November 2020, PTC A was composed of a Single Judge, in accordance with Provisional Rule 165(2), to exercise the

³ Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, 10 March 2015, public redacted version issued 10 September 2015, [ICC-01/09-01/15-1-Red.](#)

⁴ [Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence](#), 29 February 2016 (“Plenary Report”).

⁵ See [ICC-ASP/15/Res.5](#), para. 125 (as cited in the provisionally amended ICC RPE 165, p. 68, fn.10), “Welcom[ing] the Report of the Working Group on Amendments;” referencing [ICC-ASP/15/24](#), Add.1 and Add.2 which states that “*although a large majority of States Parties supported the adoption of the provisional amendments by the Assembly, there was no final view on the matter at that stage. The Working Group was therefore not in a position to make a concrete recommendation to the Assembly at that time. It agreed to reconvene during the fifteenth session of the Assembly to continue the discussion on the provisional amendments*” (para. 37) [Emphasis added.].

powers and functions of the Pre-Trial Chamber in the case. The first appearance of Mr Gicheru took place on 6 November 2020.⁶

6. On 12 November 2020, the Chamber granted an OPCD request for leave to submit observations⁷ on the competence of PTC A under Provisional Rule 165 and Regulation of the Court (“RoC”) 66bis(1) “in line with its mandate to represent and protect the rights of Mr Philip Kipkoech Bett, an unrepresented suspect and party in this case, and any potential suspects who are, or would be, subject to charges of Article 70”.⁸ OPCD filed these submissions on 17 November 2020.⁹
7. On 10 December 2020, the Chamber dismissed the request of OPCD and found that Provisional Rule 165 is applicable and that it has been properly constituted as a Chamber for the present case.¹⁰ The next day, PTC A severed the case against Mr Gicheru and found “that Pre-Trial Chamber II shall remain seized of the present case in so far as it relates to Mr Bett”.¹¹
8. On 16 December 2020, the OPCD sought leave to appeal on three grounds.¹² Both the Defence¹³ and Prosecution¹⁴ responded objecting to the request. Leave was granted by PTC A on 23 December 2020.¹⁵

⁶ Order Setting the Date for the Initial Appearance of Mr Gicheru, 4 November 2020, [ICC-01/09-01/15-34](#).

⁷ OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020, [ICC-01/09-01/15-40](#).

⁸ 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](#).

⁹ OPCD Submissions on the Inapplicability of Provisional Rule 165, 17 November 2020, [ICC-01/09-01/15-47](#).

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

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

¹² Request for leave to appeal the Decision on the Applicability of Provisional Rule 165, 16 December 2020, [ICC-01/09-01/20-63](#).

¹³ Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165, 18 December 2020, [ICC-01/09-01/20-64](#).

¹⁴ Prosecution’s Response to OPCD’s “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”, 21 December 2020, [ICC-01/09-01/20-66](#).

¹⁵ Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, 23 December 2020, [ICC-01/09-01/20-68](#).

9. On 24 December 2020, the OPCD sought a 4-day extension of time to file the appellate brief given the timing and resources of the recess;¹⁶ the Appeals Chamber granted the request allowing until 16h on 8 January 2021 to file.¹⁷

III. STANDARD OF REVIEW

10. With regard to errors of law, “the Appeals Chamber has held 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. A judgment is ‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error’.”¹⁸

IV. SUBMISSIONS

Issue One: Whether the 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

11. Under Article 51(3), Provisional Rule 165 is “to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties”. After being drawn up by a Plenary of Judges on 10 February 2016, however,¹⁹ Provisional Rule 165 was not adopted, amended or rejected at

¹⁶ OPCD Request for an Extension of Time, 24 December 2020, [ICC-01/09-01/20-70](#).

¹⁷ Decision on the Office of Public Counsel for the Defence’s request for time extension, 29 December 2020, [ICC-01/09-01/20-74](#).

¹⁸ *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgement on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, 2 September 2019, [ICC-01/13-98](#), para. 26.

¹⁹ Plenary Report, para. 1.

the next ASP Session in 2016.²⁰ Issue One on appeal is whether Provisional Rule 165 continues to be applicable in these circumstances.

12. In the Impugned Decision, PTC A concluded that it remains indefinitely applicable until “positive action” by the Assembly.²¹ The OPCD submits that this is a legal error, because it is not an interpretation of Article 51(3) that is consistent with the rules of treaty interpretation. Namely, such a reading ignores the ordinary meaning of the term “to be applied until [...] the next ordinary or special session”. The intent of the drafters by including this phrase was to ensure any provisional rule drawn up by the Judges had a finite duration, in part, to preserve the States Parties as the sentinel of RPE amendments, a role assigned by the Rome Statute.
13. In its plain meaning, Article 51(3) provides two limiting phrases as to how long a provisional rule may be applied: (1) “until adopted, amended or rejected” by the Assembly; and (2) “until [...] the next ordinary or special session of the Assembly”. The first appears to limit the duration until one of the actions described is taken by the Assembly, while the second limits the duration until a specific event, namely the ASP session immediately after the provisional rule was drawn up. Both are included in the provision, but PTC A’s interpretation effectively ignores the latter limitation. Statutory interpretation principles emphasise that Courts should avoid reading a provision which renders any language “superfluous, void or insignificant”.²² Courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed”.²³

²⁰ See [ICC-ASP/15/Res.5](#), para. 125 and, *infra*, fn. 5.

²¹ Impugned Decision, paras 40–45.

²² See, e.g., US Supreme Court *Hibbs v. Winn*, [542 U.S. 88](#), 101 (2004) (quoted in *Corley v. United States*, [556 U.S. 303](#), 314 (2009)); *Astoria Federal Savings & Loan Ass’n v. Solimino*, [501 U.S. 104](#), 112 (1991); *Sprietsma v. Mercury Marine*, [537 U.S. 51](#), 63 (2003); *Bailey v. United States*, [516 US 137](#), 146 (1995).

²³ US Supreme Court, *Montclair v. Ramsdell*, [107 U.S. 147](#), 152 (1883).

14. When the drafting history is taken into account, it is clear that the phrase “until [...] next ordinary or special session” was expressly included to provide a time limitation for provisional rules. Earlier draft versions of Article 51(3), which only had the positive action requirement for the ASP, were tacitly rejected:

- **Proposed by the United States on 2 March 1998:** “In urgent cases, the Chambers may devise a provisional rule, which shall have application until such time as the Assembly may approve, reject or amend it in accordance with paragraph 2”.²⁴
- **The Draft Statute on 1 April 1998:** “In urgent cases, the judges may by [consensus] [a two-thirds majority] draw up a rule to be applied provisionally until the Assembly of States Parties adopts, amends or rejects it”.²⁵

15. If one of these earlier versions had been adopted at the Rome Conference in 1998, the OPCD might agree with the Pre-Trial Chamber that a provisional rule would continue to apply until a positive action is taken by the Assembly. However, after these earlier proposals, an additional clause time-limiting the applicability of provisional rules was added:

- **Proposal by the Coordinator on 4 July 1998:** “[...] in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by two-thirds majority, draw up Rules to be applied provisionally for a period not exceeding six months until the Assembly of States Parties adopts, amends or rejects them.”²⁶

²⁴ [Preparatory Committee on the Establishment of an International Criminal Court, 16 March–3 April 1998, Proposals submitted by the United States of America](#), 2 March 1998, A/AC.249/1998/DP.1, p. 4.

²⁵ Draft Statute for the International Criminal Court, Part 4, Composition and Administration of the Court, A/AC-249/1998/CRP-10, 1 April 1998, p. 14.

²⁶ [Working Group on Procedural Matters, 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, p. 1.

- **Proposal by the Coordinator on 8 July 1998:** “[...] in urgent cases where the Rules do not provide for a specific situation before the court, the judges may, by two-thirds majority, draw up Rules to be applied provisionally until adopted, amended or rejected, at its next ordinary or special meeting of the Assembly of States Parties.”²⁷
- **As finally adopted at the Rome Conference:** “[...] 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”.

16. This drafting history shows that the delegations were not satisfied with the proposal that allowed a provisional rule to apply indefinitely until positive action by the Assembly. While the Pre-Trial Chamber noted that the requirement for the ASP to take a decision on the provisional rule “remained all along the negotiations”,²⁸ it ignored that the drafters expressly included the time limitation in July 1998. The initial duration of six months was not adopted, but the drafters concluded that a provisional rule would apply, as a maximum duration, only until the next session of the Assembly – ordinary or special. This is the only reasonable way to interpret Article 51(3) in light of this drafting evolution.

17. There are important reasons why the drafters intended a strict time limitation on any provisional rule-making by the Plenary. It was heavily debated at the early stages of the drafting process as to who would be responsible for creating rules. Both the ILC Draft Statute²⁹ and the Zutphen draft³⁰ envisaged

²⁷ [Committee of the Whole, Part 4, Composition and Administration of the Court: \[International Criminal Court\]: Recommendations of the Coordinator](#), 8 July 1998, A/CONF-183/C-1/L-45/ADD-1, p. 2.

²⁸ Impugned Decision, fn. 92.

²⁹ See International Law Commission, [Draft Statute for an International Criminal Court with commentaries](#) (1994), Article 19. Rules of the Court, p. 35.

that Judges would draft the rules, like at the ICTY and ICTR, and the States Parties would simply approve them. But during the negotiations, “this balance drastically shifted in favour of State involvement” and “in the direction of conferring on States the power to both draft and adopt the Rules”.³¹ Article 51, as finally adopted, reflects “in many ways the concern of States to give the Assembly of States Parties the ultimate authority with respect to rule-making for the Court”.³²

18. While a provisional rule-making power was retained for Judges in paragraph 3 of the article, it must be interpreted restrictively in light of the careful division of powers assigned in Rome, which limited the Judges’ power to amend rules only in urgent cases. Notably, even in the earlier suggestions by the ILC and at Zutphen, the system envisaged a limiting clause which stated that a rule drafted by Judges “may provide for its provisional application in the period prior to its approval or confirmation [but that a] rule not approved or confirmed shall lapse”.³³ If the drafters envisaged that Judges who had primarily responsibility for drafting rules had provisional rules which lapsed automatically, it cannot be the intent when the drafters settled to give Judges only the power to draft or amend rules in urgent cases that their provisional rules would apply indefinitely.

19. In the Impugned Decision, the Pre-Trial Chamber reasoned that a provisional rule that lapses would make recourse to Article 51(3) “very problematic and its application almost impossible, because of the basic functioning of the ASP

³⁰ See United Nations General Assembly, [Report of the Inter-sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee in the Establishment of an International Criminal Court](#), Article 43(19), p. 83.

³¹ Silvia A. Fernandez de Gurmendi, ‘International Criminal Law Procedures, the Process of Negotiations’, in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (The Hague, Kluwer Law International, 1999), p. 237.

³² Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck 2016), p. 1342 (“Triffterer & Ambos”).

³³ International Law Commission, [Draft Statute for an International Criminal Court with commentaries](#) (1994), Article 19(4) p. 35; United Nations General Assembly, [Report of the Inter-sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee in the Establishment of an International Criminal Court](#), Article 43(19) para. 4, p. 83.

itself”, given that it is “unrealistic” for the Assembly to find consensus on complex legal issues debated for the first time.³⁴ This reasoning, it is respectfully submitted, wrongly prioritises foreseeable pragmatic issues over the intent of the drafters. Far from being unforeseen, the *Commentary* had anticipated that the Assembly might not achieve consensus or the majority required to obtain a positive decision, in which case it assumed that this is equivalent to a “[r]ejection”.³⁵ The *Commentary* also puts forward a pragmatic resolution in case 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 that aims to address the problem identified while taking into account the factors that led to the Assembly’s rejection of the previous version*”.³⁶ Such a course allows Judges to ensure the “stability and continuity of judicial proceedings”³⁷ while staying within the legal framework envisaged by the drafters of the Statute.

20. The erroneous conclusion that Provisional Rule 165 continued to apply past the 15th ASP Session materially affected the Impugned Decision because it led the Pre-Trial Chamber to incorrectly conclude that this provisional rule, and the corresponding Regulation 66*bis*, provided a lawful basis for the constitution of Pre-Trial Chamber A. The correct finding should have been that Provisional Rule 165 ceased being applicable after the 15th ASP Session and that the unamended version of Rule 165 has therefore since been in force. The consequence is that there was no lawful basis to constitute Pre-Trial Chamber A and that the *Gicheru & Bett* case reverts back to Pre-Trial Chamber II, as if Pre-Trial Chamber A was never constituted.

³⁴ Impugned Decision, para. 42.

³⁵ *Triffterer & Ambos*, p. 1342. See also Yvonne McDermott, ‘Article 51(3)’, in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, (FICHL Publication Series No. 29, 2017) p. 383, fn. 411.

³⁶ *Triffterer & Ambos*, pp. 1342–1343.

³⁷ Impugned Decision, para. 42.

Issue 2: Whether the Chamber erred in law in finding that a new procedural regime commences at the Initial Appearance Hearing and that the Provisional Rule only came into effect at that time

21. The OPCD submits that PTC A committed error in determining that Provisional Rule 165, if applicable at all, came into effect only at the Initial Appearance Hearing owing to commencement of a new procedural regime at that time. However, (i) Provisional Rule 165(2), as well as RoC 66*bis*, clearly state that a Chamber must be constituted “from the moment of receipt of an application under article 58”; (ii) a suspect is a party to the proceedings from the issuance of an arrest warrant or summons with a full battery of rights assured by the Rome Statute; and, therefore, (iii) Provisional Rule 165 would apply from the moment a Chamber considers the arrest warrant application.
22. As held by the ICC Appeals Chamber in *Ruto & Sang*, in its seminal ruling on Article 51(4) non-retroactivity, “amendments to the Rules shall enter into force upon adoption; however, they shall not be applied retroactively to the detriment of the person that is being investigated or prosecuted”.³⁸ In its assessment, PTC A correctly relied on this guiding jurisprudence relating to retroactive application of rules, in particular, in the following:

*In 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.*³⁹

23. However, PTC A erred in finding that the ‘point in time’ in which Provisional Rule 165 became applicable in the case was at the Initial Appearance hearing, entirely bypassing the plain text of Provisional Rule 165 itself which states:

³⁸ *Prosecutor v. Ruto & 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”, 12 February 2016, [ICC-01/09-01/11-2024](#), [*Ruto & Sang* Retroactivity Decision], para. 74.

³⁹ Impugned Decision, para. 47 citing [Ruto & Sang Retroactivity Decision](#), para. 79.

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".⁴⁰ [Emphasis added.]

The newly minted, correlative RoC 66bis also reflects such timing as "from the moment of receipt of an application under article 58 with respect to offences defined in article 70".⁴¹ As such, the Impugned Decision erred in finding that the Provisional Rule only came into effect at the moment of the Initial Appearance Hearing rather than at the issuance of arrest warrant. As the Rule is intended to be utilised from the point of consideration of the arrest warrant or summons, it is clear that it is at that point at which this procedural regime begins to apply.

24. Beyond plain reading, such timing is incompatible with the intent of Judges in its Plenary Report, which recognises that Article 51(4) of the Statute bars retroactivity to the detriment of a suspect/accused.⁴² The Report itself notes the early timeline triggering use of Provisional Rule 165:

"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."⁴³ [Emphasis added.]

25. In the present case, the timing of the retroactivity cannot be any clearer. The texts of both Provisional Rule 165 and RoC 66bis, as well as the Plenary Report, require the one-Judge Chamber to be constituted at the time of Article 58 application. This was impossible in this case because the arrest warrant

⁴⁰ Rule 165(2) of the Rules [Emphasis added].

⁴¹ [Emphasis added.]

⁴² Plenary Report, para. 21.

⁴³ *Ibid.*, para. 18. The matter of detriment and retroactivity was raised by civil society even in the discussions of Provisional Rule 165. Amnesty International, [International Criminal Court: Initial Recommendations to the 16th Session of the Assembly of States Parties \(4 to 14 December 2017\)](#), p. 7.

against Mr. Gicheru and Mr. Bett had already been issued in early 2015⁴⁴ when the Plenary drew up Provisional Rule 165 in February 2016. Moreover, when the Honourable Judge Trendafilova issued the arrest warrant in 2015, she did so on behalf of a three-Judge Chamber constituted by Article 57(2)(b). Original Rule 165 was clearly operative at that time, as Provisional Rule 165 would otherwise disapply Article 57(2). To impose Provisional Rule 165 after the original Rule 165 had already been utilised in the case plainly amounts to a retroactive application.

26. Furthermore, the Chamber erred in finding that “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” such that “the suspect acquires rights that s/he was deprived of until this point in time, and s/he becomes a *party* to the proceedings”.⁴⁵ First, as recently recalled by the Honourable Judge Alapini-Gansou herself, fair trial rights are held throughout the entirety of a judicial process for the named defendant, writing:

*In addition, I recall that the Appeals Chamber has previously found that a ‘breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial’ and, therefore, the ‘principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime’.*⁴⁶

⁴⁴ Certainly, upon promulgation of the Provisional Rule, a Single Judge could have been assigned by the President of the Pre-Trial Division; for some reason, that didn’t happen and the case remained with PTC II – a full bench of three only until Mr Gicheru surrendered himself to the Court. Complicating the matter is that the PTC A has considered a ‘reversion’ of Mr. Bett’s case to PTC II following severance.

⁴⁵ Impugned Decision, para. 47 [Emphasis in original.]

⁴⁶ *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Comoros”’, Partially Dissenting Opinion of Judge Alapini-Gansou, 21 December 2020, [ICC-01/13-115-Anx](#), para. 16.

Second, while the Appeals Chamber has outlined a ‘threshold’ crossed by a defendant in an initial appearance,⁴⁷ it does not define when an individual becomes a ‘party’ to the proceedings. To the contrary, once a person is named in the arrest warrant or summons, the ICC Chambers have routinely acknowledged a suspect’s standing to submit on those initial issues such as admissibility and jurisdiction; some provisions are expressly guaranteed to a suspect before appearance at the ICC, such as Article 19(2)(a).⁴⁸ Furthermore, defendants are afforded the Rome Statute’s fair trial rights even at these earliest stages of the proceedings.⁴⁹ This guarantee applies equally to procedural rights.⁵⁰

27. In light of the above, the OPCD submits that PTC A erred in law in determining that the ‘point in time’ for considering whether Provisional Rule 165 was applied retroactively is the Initial Appearance Hearing. The correct point in time is at the moment of receipt of an application under Article 58. This error materially affected the Impugned Decision for if PTC A had applied the correct law it would have found that Provisional Rule 165 was retroactively applied. PTC A would consequently have had to consider whether the retroactive application caused ‘detriment’ to the suspect/accused,

⁴⁷ See Impugned Decision, fn. 95 *referencing Prosecutor v Gbagbo & 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, 28 May 2020, [ICC-02/11-01/15-1355-Red](#), para. 68.

⁴⁸ See also Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’, 23 December 2020, [ICC-01/09-01/20-68](#), para. 27: “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”.

⁴⁹ *Situation in the DRC*, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, [ICC-01/04-135-tEN](#), para. 36 (“It is the Chamber’s view nonetheless that the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase.”)

⁵⁰ *Ibid.*, para. 38.

which it did not do.⁵¹ The OPCD respectfully submits that, in applying the correct law, it is for the Appeals Chamber to make this detriment assessment in its Judgment on this appeal.

28. While it is to be taken on a case-by-case basis, the Appeals Chamber has held that ‘detriment’ “should be interpreted broadly and not be limited to prejudice to the rights of the person who is being prosecuted”; it requires only that “the overall position of the accused in the proceedings be negatively affected by the disadvantage”.⁵² The application of Provisional Rule 165, rather than the original Rule 165, negatively affects the defendants in the proceedings by denying certain provisions of the Rome Statute afforded to other defendants before the Court. In fact, it denies the defendants provisions they themselves held at the time of issuance of their arrest warrant – a pre-trial (and trial) bench of three with potential interlocutory appellate review (by a bench of five for any kind of appeal), and the assurance of a bifurcated sentencing hearing, if one is necessary, allowing any mitigating factors to be fully considered only after finding of guilt. All of these things were available to them on 10 March 2015 and cease to be by retroactive application of Provisional Rule 165 to this case.

29. The OPCD respectfully submits that, in applying the correct law, the Appeals Chamber should find that Provisional Rule 165 was applied retroactively to the detriment of the suspects. As a consequence, the original Rule 165 – as utilised at the time of the arrest warrant – must continue to be employed in this case as operative. The constitution of PTC A to hear this case, which was premised on RoC 66*bis*, which is itself dependent on Provisional Rule 165, was without lawful basis, and the case must revert back to PTC II.

⁵¹ Impugned Decision, para. 49.

⁵² [Ruto & Sang Retroactivity Decision](#), para. 78.

Issue 3: Whether the Chamber erred in finding that Provisional Rule 165 is not incompatible with the Statute on the grounds that article 70(2) of the Statute stipulates that “[t]he principles and procedures governing the Court’s exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence” and, in addition, that Provisional Rule 165 does not restrict any of the fundamental rights enshrined in article 67 of the Statute

30. The OPCD submits that the PTC erred in finding that Provisional Rule 165 is not incompatible with the Statute and that it does not restrict any of the fundamental rights enshrined in Article 67.⁵³ Noting that there are two elements of the reformulated issue, the following will first address the purpose of Article 70(2) in delegating principles and procedures, not derogation of rights, to the RPE and, second, will discuss the alleged error of finding that Provisional Rule 165 created no restriction of Article 67(1) fair trial rights.
31. First, while Article 70(2) of the Statute does stipulate 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”, such provisions of the RPE cannot be in contradiction to the rights and principles enshrined in the Rome Statute. The RPE outline their own purpose, in Explanatory Note preamble, stating that they “are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases” and “should be read in conjunction with and subject to the provisions of the Statute”. This is further emphasised by the provision of Article 51(4) which states that any amendments “shall be consistent with the Statute” and 51(5) which creates a hierarchical norm of rendering the Statute as having primacy over any conflict with the RPE. Commentary further highlights this gradation in noting that “*the Statute takes precedence over the Elements of Crimes and Rules. The relationship is further clarified*

⁵³ Impugned Decision, paras 51-53.

*in an explanatory note to the Rules, which provides that the Rules are ‘subordinate in all cases’ to the Statute”.*⁵⁴ In short, “*the Rules supply the detail which the Statute cannot realistically incorporate and will become a repository for those standards and working methods which only experience will clarify*”⁵⁵ indicating “*an awareness of the seamless gradient extending between the ‘fundamental’ or ‘substantial’, to be contained in the Statute, and the ‘technical’ or ‘procedural’, suitable for the Rules*”.⁵⁶ This is consistent with the jurisprudence of *Ruto & Sang* in holding that rules should be applied ‘in the manner that it considers to be most consistent with the norms indicated’ in the Statute.⁵⁷ As much has been recognised by the ICC Appeals Chamber.⁵⁸ According to the *Commentary*:

*This consistency requirement also (and possibly primarily) serves to reassure potentially dissenting States that provisions to which they are likely to have agreed (in the Statute) will predominate over ones with which they may disagree (in the Rules, if they were ever to find themselves within a dissenting minority).*⁵⁹

32. Article 70(2) assigns the principles and procedures to be used in cases of offences against the administration of justice to the RPE due to “the complexity of devising an appropriate procedure for prosecuting these offences and the little time available in Rome to resolve these issues”; therefore, “the conference decided as a general matter to leave elaboration of more detailed standards to the [RPE]”.⁶⁰ Indeed, the ICC Judges’ Plenary Report indicated Article 70(2) as the basis for allowing such differing

⁵⁴ *Triffterer & Ambos*, p. 937.

⁵⁵ *Triffterer & Ambos*, p. 1335.

⁵⁶ *Triffterer & Ambos*, p. 1333.

⁵⁷ *Prosecutor v. Ruto & Sang*, Decision on victims’ representation and participation, 3 October 2012, [ICC-01/09-01/11-460](#), para. 22.

⁵⁸ *Prosecutor v. Lubanga*, Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, 14 December 2012, [ICC-01/04-01/06-2953](#), para. 52. See also *Prosecutor v. Ruto & Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quarter*, 18 February 2014, [ICC-01/09-01/11-1186](#), para. 56.

⁵⁹ *Triffterer & Ambos*, p. 1343.

⁶⁰ *Triffterer & Ambos*, p. 1755.

procedural regime in passing the Provisional Rule in February 2016.⁶¹ However, any amendment of RPE – especially those which truncate use of Rome Statute provisions – is not meant to be done outside of a process which includes review and assent by the ASP through a full framework outlined in Article 51. This is explained in the *Commentary* which highlights that “[t]he recognition [...] that elaboration and amendment of the Rules of Procedure and Evidence would be a rigorous process requiring approval of States Parties, provided comfort in arriving at agreement on the article” deferring Article 70 procedures to the RPE.⁶² Further, when the States did set up these separate principles and procedures under the original Rule 165, they 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.⁶³ Thus, while the procedures for Offences Against the Administration of Justice are delegated to RPE, States did this intending that: 1) they would dictate the regime for such proceedings normally having control, themselves, over the RPE, and 2) the core provisions of the Rome Statute, unless entirely incompatible, remain in use.

33. On the second part of the reformulated issue, the OPCD submits that the PTC erred in finding that Provisional Rule 165 did not restrict Article 67 rights in that fundamental rights are imbued within the provisions of the treaty itself and found throughout the entirety of the Rome Statute, anchored by the fairness provisions of Article 67. As noted by Honourable Judge Alapini-Gansou herself in a contemporaneous Dissenting Opinion: “[t]he principle of

⁶¹ Plenary Report, para. 9.

⁶² *Triffterer & Ambos*, p. 1755.

⁶³ See Rules of Procedure and Evidence, Chapter 9, §1. Where rights were contained in excised chapters of the Statute, the drafters ensured their presence in the Rule. See, e.g. Rule 163(2) removing application of all of Chapter 2 (save the provision of applicable law) which includes the right of *ne bis in idem*, which they otherwise preserved by necessary rewording in Rule 168.

fairness of proceedings is a fundamental element in criminal proceedings and it is incorporated in the Statute in many relevant provisions".⁶⁴

34. Perhaps the most glaring example of Provisional Rule 165's incompatibility with fair trial rights is the disallowance of a party's ability to seek leave for interlocutory appeal under Article 82(1)(d). The unfairness of a lack of request for interlocutory appeal was summarised best in the grant of this very appeal, with Pre-Trial Chamber A finding:

*In the event that the Provisional Rule 165 Decision would not be susceptible to leave to appeal, the very basis of these proceedings could only undergo appellate scrutiny if the Chamber would confirm the charges and once a decision under article 74 of the Statute and rule 165(2) of the Rules is rendered by a Trial Chamber. Such an approach would run 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.*⁶⁵

As has been held by the Appeals Chamber, "[b]reach of or deviation from the rules of a fair trial at the pretrial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial" with Article 82(1)(d) being a "safeguard for the integrity of the proceedings".⁶⁶ Provisional Rule 165 is therefore incompatible with the Statute in at least that it denies legal certainty of fairness in the course of a trial by denying the mechanism to seek review until it may be too late.

⁶⁴ See *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the Request for Leave to Appeal the 'Decision on the "Application for Judicial Review by the Government of the Comoros"', Partially Dissenting Opinion of Judge Alapini-Gansou, 21 December 2020, [ICC-01/13-115-Anx](#), para. 17; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, [ICC-01/05-01/08-75](#), para. 13. See also William A. Schabas, "Article 67 – Rights of the Accused" in Otto Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, (Nomos, Baden Baden, 1999), pp. 845-868.

⁶⁵ Decision on the 'Request for leave to appeal the Decision on the Applicability of Provisional Rule 165', 23 December 2020, [ICC-01/09-01/20-68](#), para. 32.

⁶⁶ *Situation in the DRC*, 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](#), para. 11. See also Amnesty International, [International Criminal Court: Recommendations to the 15th Session of the Assembly of States Parties \(16 to 24 November 2016\)](#), p. 5.

35. At stake here are at least three rights that are embedded in other parts of the Statute, but are inexorably tied to the Article 67(1) right to a fair trial. In going over the deep legislative history of this Provisional Rule post-amendment, one can easily divine that the reason for inaction of the States is exactly the unease raised in this ground. Voices of the Judges in Plenary,⁶⁷ ASP States,⁶⁸ and civil society⁶⁹ harmonise with the arguments made here to sing a chorus of concern about how the totality of Provisional Rule 165 can align with the core tenets of the Rome Statute. In absence of any action to adopt by the ASP for other reasons, then, Provisional Rule 165 stands to pit resources over rights in that it was created, in urgency, to economize. When tested judicially, it was error to find such provision not incompatible with the principles of the Rome Statute overall. This is especially so considering the general rule that, “the rights of the accused have primacy ‘over any other conflicting interest’”.⁷⁰
36. The error identified in Issue 3 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). This could have only

⁶⁷ Plenary Report, fn. 5. “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.”

⁶⁸ Assembly of States Parties, Fifteenth Session, The Hague, 16-24 November 2016, [ICC-ASP/15/7](#), 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, para. 8; *see also* Annex III, Letter from the Attorney General of Kenya to the President of the Assembly, 17 March 2016. A Non-Paper, submitted by France and Germany removed provisions relating to appeals and sentencing leaving the stripped-back proposal as one only relating to the number of judges on a panel of an Article 70 case and, for that matter, changed the text to ‘at least’ one judge allowing for larger panels where circumstances warranted. [Non-paper submitted by France and Germany: Proposed amendments to provisional rule 165 of the Rules of Procedure and Evidence. Report of the Working Group on Amendments](#), 15 November 2017, ICC-ASP/16/22, Anx V. The Rome Statute drafting history also indicates such concern, *see* Hakan Friman, “Offences and Misconduct Against the Court”, in Roy S. Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* 605 (Transntl Pub. 2001), p. 615.

⁶⁹ *See* Amnesty International, [International Criminal Court: Recommendations to the 15th Session of the Assembly of States Parties \(16 to 24 November 2016\)](#); Amnesty International, [International Criminal Court: Initial Recommendations to the 16th Session of the Assembly of States Parties \(4 to 14 December 2017\)](#).

⁷⁰ Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’, *Journal of International Criminal Justice*, Vol.8(1), March 2010, pp.137-164.

warranted the requested relief, a finding that "Provisional Rule 165 is in conflict with the Statute and that the relevant provisions of the Statute must prevail". Otherwise allowing such error to stand could open the door to further use of provisional amendments that are in contradiction to the Rome Statute itself, a procedural regime for Article 70 that could disallow any other fundamental rights contained in the Rome Statute. This would be inconsistent, then, even with Article 21(3) guarantees of all internationally recognized human rights which encompass "first and foremost [...] the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".⁷¹

V. RELIEF REQUESTED

37. For the foregoing, the OPCD respectfully requests that the three grounds of appeal be granted and the Decision on the Applicability of Provisional Rule 165 be reversed finding original Rule 165 as the operative rule in this case.



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Dated this, 8th Day of January 2021
at Dakar, Senegal

⁷¹ *Prosecutor v. Lubanga*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, [ICC-01/04-01/06-772](#), para. 37.