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PRE-TRIAL CHAMBER A (ARTICLE 70)

Before: **Judge Reine Adélaïde Sophie Alapini-Gansou**

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. PAUL GICHERU AND PHILIP KIPKOECH BETT

Public

OPCD Submissions on the Inapplicability 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. In late 2018, Slovak Ambassador H.E. Roman Bužak warned of 'dangerous legal uncertainty'[1] caused by the Assembly of States Parties' ("ASP") inaction on provisionally amended Rule 165 ("Provisional Rule 165"). The Office of Public Counsel for the Defence ("OPCD") agrees that the indecision by the States in reaction to the Judges' provisional amendment of Rule 165 is precisely that legal calamity that has necessitated its rare intervention in this case. The process taken with Provisional Rule 165 impacts not just this case, or defendants tried pursuant to this Rule (amended or otherwise), it impacts how the Rome Statute system itself makes law.
2. However, the OPCD submits that the matter is plain from the text of Article 51(3) in the event of indecision by States. If there was no action to adopt or amend Provisional Rule 165 at the 15th Assembly of States Parties, it was tacitly rejected. As no new provisional amendment has been brought by the judges pursuant to Article 51(3) nor even suggested pursuant to Article 51(2), there is no Rule to apply in this case save the version of Rule 165 that was in force prior to the provisional amendment.
3. Should this Chamber proceed to hear this case on the basis of a provisional amendment not adopted by the ASP, it would amount to a dramatic shift of the constitutional balance of the Court, arming the judicial branch with *de facto* rule-making powers it was not intended to have in the absence of the specific scenario foreseen in Article 51(3). It would create a precedent in that amended rules could be implemented outside of the framework of the Rome Statute.

[1] Statement by H. E. Roman Bužek, Ambassador Plenipotentiary and Extraordinary of the Slovak Republic to the Kingdom of the Netherlands, 17th Session of the Assembly of States Parties, 5 December 2018, p. 2 ("*It has already been two years we failed to adopt a decision on the provisional amendment of Rule 165. It should be of our utmost importance to abide strictly by the provisions of the Rome Statute. Thus, it is fundamental it is not us that impairs the Court. The way how we dealt with the amendment, created dangerous legal uncertainty and might be perceived as a wrong precedent. Therefore, we reiterate our strong call to the Assembly to rectify this situation and to clarify the status of the amendment.*") cited in Kritika Sharma, *The Curious Case of Rule 165 of the Rules of Procedure and Evidence: The Effect of Control Exercised by the Assembly of States Parties over the International Criminal Court*, 20 Int'l Crim. L. Rev. 285 (2020) 285, fn. 2 ("Sharma").

This is untenable and, aside from being outside of any good legislative practices, ignores the sanctity of the Rome Statute and its texts.

4. There is only one safe remedy to preserve the Court's proper law-making process and to safeguard a suspect's right to a Chamber established by law. This is to declare that Pre-Trial Chamber A was not constituted lawfully pursuant to Provisional Rule 165, as this amendment ceased to exist at the close of the 15th Assembly. The Pre-Trial Division ("PTD") President's Decision establishing this Chamber would, in other words, have no effect and it would result in a reversion of the case to the originally designated Pre-Trial Chamber II ("PTC II").[2] Should the States wish to properly adopt the suggested amendments of the 2016 Provisional Rule 165, it remains free to discuss and determine at any future ASP; the Judges are equally free to draw up Provisional Rule 165 again if urgency requires. However, Provisional Rule 165 is simply not a valid rule at this time.
5. Furthermore, by virtue of the equally important Article 51(4), Provisional Rule 165 cannot be applied retroactively to a case that was pending at the time it was passed, which includes the case of *Prosecutor v. Gicheru & Bett*. Aside from the textual bar, the jurisprudence of the ICC Appeals Chamber makes clear that any such amendment that creates 'detriment' to a suspect or accused, must not be applied retroactively.
6. Finally, the OPCD highlights Provisional Rule 165's incompatibility with the Rome Statute itself and the 'detriment' to the suspects tried by its provisions.

[2] PTC II may even wish to use the existing, properly adopted texts to assign a Single Judge of its bench to facilitate several matters in the case thereby finding some of the relief Provisional Rule 165 was suggested to provide, as explained by the Presidency representative: "Article 57(2)(b) already allows a Pre-Trial Chamber single judge to exercise a range of functions and powers. Article 64(8)(b) provides that the Presiding Judge of a Trial Chamber may "give directions for the conduct of proceedings". [R]ule 132 *bis*, as adopted by the Assembly in 2012, provides for a single judge to assume certain functions for the preparation of trial." Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, ICC-ASP/15/7, 21 September 2016, para. 14.

II. RELEVANT PROCEDURAL HISTORY

7. The arrest warrant against Mr Paul Gicheru and Mr Philip Kipkoech Bett was issued under seal on 10 March 2015 (and unsealed on 10 September 2015) for their alleged responsibility for offences against the administration of justice under Article 70(1)(c) of the Rome Statute.[3]

8. On 1 March 2016, the Court published the "Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence", dated 29 February 2016 (hereinafter, "Plenary Report"),[4] announcing a set of amendments affecting Article 70 proceedings. Specifically, the Plenary Report noted that the Judges of the Court had provisionally amended Rules of Procedure and Evidence ("RPE") Rule 165(2) through (4) and (provisionally) adopted Regulation of the Court ("RoC") 66*bis*.

9. At the Fifteenth 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]

10. Upon surrender of Mr. Gicheru on 2 November 2020, PTD President Judge Tomoko Akane ordered the constitution of the Pre-Trial Chamber A (Article 70), composed of a Single Judge, Judge Reine Adélaïde Sophie Alapini-Gansou, in accordance with Provisional Rule 165(2), to exercise the powers

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[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.].

and functions of the Pre-Trial Chamber in the case of *Prosecutor v. Gicheru & Bett* ("PTD President's Decision").[6]

11. The first appearance of Mr Gicheru took place on 6 November 2020, in accordance with the Chamber's order dated 4 November 2020.[7] During the hearing, the Chamber invited the parties to submit observations on the applicability of the Provisional Rule 165.[8]

12. On 11 November 2020, the OPCD filed a request for leave to appear before Pre-Trial Chamber A on the Applicability of Provisional Rule 165;[9] the request was granted the following day with submissions due on 17 November 2020.[10]

III. SUBMISSIONS

A. *THIS CHAMBER HAS NO COMPETENCE AS PROVISIONAL RULE 165 IS NOT IN FORCE AND THEREFORE THE CHAMBER IS NOT LAWFULLY CONSTITUTED*

13. As respectfully requested, the OPCD was granted standing to make submissions on the competence of this Chamber to exercise the powers and functions of the Pre-Trial Chamber under Provisional Rule 165 and Regulation 66*bis*(1). It does so, pursuant to RoC 77(4), on behalf of Mr Bett and all other unrepresented defendants who have no voice in their own proceedings yet are

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[6] 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, 2 November 2020, ICC-01/09-01/15-32.

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

[8] Initial appearance of Paul Gicheru , 6 November 2020, 39:40-49:00; 55:12-56:53. Public Transcript not yet available.

[9] OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 11 November 2020, ICC-01/09-01/15-40. On 6 November 2020, the OPCD had filed a request for standing before PTD President Judge Akane for the purpose of submitting such observations. OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165, 6 November 2020, ICC-01/09-01/15-36. However, the application was dismissed the same day, *in limine*, holding "that there are currently no proceedings concerning the case […] pending before the President of the Pre-Trial Division" and "therefore, that the President of the Pre-Trial Division has no power to rule on the substance of the Request". Decision Rejecting *in limine* the 'OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165', 6 November 2020, ICC-01/09-01/15-37 ("PTD President's Decision").

[10] 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.

impacted by the viability of Provisional Rule 165; such submissions are without consultation of any suspect and can only constitute representation of their general statutory rights until such time as they can make assertions before this Court of their own accord. As without indication of their direct will, this filing cannot constitute any specific defendant's admissibility or jurisdictional challenge.

14. The OPCD submits that this Chamber does not have the competence to exercise such powers and functions in this case because these provisions relied on to constitute the Chamber were not in force, and it was therefore not lawfully established.

i PROVISIONAL RULE 165 AND REGULATION 66BIS ARE INAPPLICABLE

15. As stated by the Appeals Chamber in *Ruto & Sang*, "[a]mendments to the Rules are adopted by the States Parties who, together, make up the Court's legislative body".[11] This is no less true for provisional amendments made pursuant to Article 51(3) as requiring action by the ASP to put into force. Here, the lack of express adoption by the States at the 15th ASP means that it cannot be validly used in the present case. The OPCD submits that, based on the plain text of the Rome Statute, inaction by the States equals rejection until, if and when, a provision is validly adopted. Any ambiguities or States' concerns further highlights that States have not yet agreed to Provisional Rule 165 making it unviable in ICC proceedings.

16. While the rule-making process is largely relegated to the ASP at the ICC,[12] Article 51(3) carves out an exception for judicial legislation of a provisional

[11] *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" ("ICC Non-retroactivity Decision") , 12 February 2016, ICC-01/09-01/11-2024, para. 41 *citing* Article 51(2) of the Statute.

[12] *See also* ICC-ASP/15/7, Annex III, Letter from the Attorney General of Kenya to the President of the Assembly, dated 17 March 2016, "in contrast to the position at the ad hoc Tribunals, legislative power at the ICC remain[s] primarily with the States".

nature that still requires the assent of the ASP as can be understood through the Commentary on the Rome Statute, recalling:

> *the relative infrequency of Assembly meetings and the inevitably cumbersome nature of that process made it appear wise to establish the sort of bridge that 'provisional Rules' might provide. Without such Rules, damage to the fairness and efficiency of Court process – and to the appearance thereof – appears possible. The alternative, of leaving it to the jurisprudence to develop the rules, sat uneasily both with the relatively rigid conception of the principle of legality favoured during ICC-related negotiations and the desire of the drafters of the Statute to leave final approval of the Rules to States Parties.*[13]

17. Article 51(3), as adopted, demonstrates not only that exception for judicial legislation – in urgency and where lacunae – but also highlights the oversight function granted to the States, as it reads:

> *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****.* [Emphasis added.]

18. A plain text reading makes this obvious from the words 'until […] the next', with the latter qualifier of 'the next' being the most significant to this litigation. While the States did consider Provisional Rule 165 at the 'next' ASP (the 15th), they did none of these three things. As noted by *Sharma*, "its decision 'not to decide' […] does not appear to have been catered for under the Rome Statute"[14] which leaves the Rule 'in a state of flux'.[15]
19. The Rome Statute makes clear that mere discussion by the States, even with some approval, is insufficient to adequately modify the provisions of the texts that remain in their power to amend – namely, the Rome Statute and the Rules of Procedure and Evidence. As example, there have been repeated discussions on amendment of Rule 76(3) in the Working Group on Amendments and it

[13] Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck 2016), pp. 1342, §28 ("*Triffterer & Ambos*").
[14] Sharma, p. 315.
[15] *Ibid.*, p. 314, 316.

has not been employed in the ICC courtrooms, to date, because such amendments have not been expressly adopted by the ASP.[16] In contrast, amended Rule 68 has been used extensively following the States' decision to amend in 2013 where adoption was clear from the ASP Resolution.[17] While the logic is pretty straightforward, these examples demonstrate that the Court cannot act on a new Rome Statute Article or RPE Rule until officially adopted. In the case of provisional amendments of Article 51(3), there is limited exception to allow for use 'in urgency', but this exists only until 'the next' ASP where official decision should be taken. Thus, the OPCD submits that following the inaction at the 15th ASP, the provisional amendments expired and the original text is in force until further action by the States or Plenary.

20. However, beyond an argument of 'expiry' at close of the 15th ASP, it can further be argued that the States have rejected Provisional Rule 165 by default. Rejection by non-adoption is explained in the Commentary to the Rome Statute as including failure to affirm explaining:

> *Rejection might be either by default (through inability to reach either consensus or the majority required to carry a vote) or by positive decision of the Assembly. Article 51 does not specify what judges are to do in case of rejection by the Assembly of a rule provisionally adopted; presumably, they 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.*[18]

This is especially significant when considering the history of discussion of textual amendments in *travaux préparatoires* which highlights that: "*[u]nlike the ILC and Zutphen texts, the final Statute requires positive approval by the Assembly of*

[16] Working Group on Amendments Report of 2014, para. 26, Working Group on Amendments Report of 2015, para. 26; Working Group on Amendments Report of 2016, paras 23, 26-28.
[17] Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Volume I, ICC-ASP/12/20.
[18] *Triffterer & Ambos*, pp. 1342-43, §§29-30. Noting, in the 2016 version, that "No provisional rule has yet been adopted by the judges. It may be that, rather than adopt provisional rules, judges will prefer to turn to the other sources of applicable law in article to deal with gaps in the Rules of Procedure and Evidence."

States Parties for any amendments to the Rules. Acquiescence or 'passive approval' is not enough".[19]

21. Further, while there were some States generally in approval of Provisional Rule 165, the OPCD submits that a fair amount of undecidedness or dissent also emerged for the following which can cast further doubt on the provisional amendments, notably: "some questioned whether the circumstances met the article 51(3) requirements of "urgency" and whether it could be said that the Rules did "not provide for a specific situation before the Court"; "some raised concerns regarding the conformity of the amended rule 165 with the Statute, in particular with regards to articles 39(2)(b), 51(5), 74(1) and 82(1)(d)"; and, "one State considered the amendments to be ultra vires".[20] Most significantly, "some also raised issues concerning the implications of the application of the provisional rule, and in particular what would happen if the amended rule was applied before the Assembly considered the matter and the Assembly subsequently rejected or amended the amendments".[21]
22. Even the recent Independent Expert Report references Provisional Rule 165 as one that is 'in limbo' and discusses it in conjunction with other Rules that have been proposed and not yet expressly adopted.[22] Indeed, sporadic discussions on Provisional Rule 165 continue to occur in the Working Group on Amendments to which Amnesty International laid caution in 2017, writing: "If it continues to consider the proposals, the Working Group on Amendments should clarify the basis for doing so and the procedures in Article 51 being

[19] *Ibid*., pp. 1341, §25.
[20] 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
[21] *Ibid.*
[22] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, para. 980. The IER has made several recommendations on the rules-making process; relevant to these discussions, any such amendment "would remain in force in the absence of objection from a majority of States Parties within six months", R384.

followed."[23] Regardless, continued discussions cannot do any more to validate Provisional Rule 165 than discussions on other texts not yet amended. To find so would render the time-sensitive gatekeeper function of Article 51(3) as having no significance.

23. The OPCD asserts that a lack of express action to amend, then, must be treated as a rejection of such provisional amendment made pursuant to Article 51(3). As succinctly stated by Amnesty International: "As the Assembly did not adopt, amend or reject the provisional amendments at its 15th session, a plain reading of Article 51(3) means that the provisional amendment is no longer in force."[24] The OPCD submits that lack of any concrete decision by the ASP has caused the provisional amendments to expire in November 2016, leaving the original Rule 165 as applicable thereafter.

24. As a result of the inaction by the ASP at the 15th session, or subsequently, concomitant RoC 66*bis* cannot be considered valid at this time. While amendments of the RoC are within the purview of the Plenary of Judges pursuant to Article 52, such provision must remain consistent with the Rome Statute pursuant to the texts. Therefore, if Provisional Rule 165 is not in effect, RoC 66*bis* no longer conforms to the guarantees of the Rome Statute itself. In short, when Provisional Rule 165 expired, so did RoC 66*bis*.

ii THIS CHAMBER IS NOT ESTABLISHED BY LAW

25. Suspects and accused are entitled to the fundamental fair trial right to appear before a tribunal established by law.[25] As an internationally recognised right, the interpretation and application of the Rome Statute must be consistent with

[23] Amnesty International, International Criminal Court: Initial Recommendations to the 16th Session of the Assembly of States Parties (4 to 14 December 2017), p. 8.
[24] *Ibid.* p. 7 citing Bruce Broomhall, 'Article 51' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd ed.), (CH Beck, Hart and Nomos, 2008), p. 1033.
[25] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 14(1); European Convention on Human Rights, Art. 6(1); American Convention on Human Rights, Art. 8(1).

this fair trial guarantee.[26] The phrase "established by law" covers not only the legal basis for the very existence of a tribunal, such as has been litigated before other international criminal tribunals,[27] but also the compliance by the tribunal to compose each judicial bench in accordance with its laws.[28]

26. The European Court of Human Rights ("ECtHR") has held that a court composed of judges who continued to decide cases although the law allowing them to do so had been repealed did not constitute a tribunal established by law, as there was no legal basis for their mandate.[29] Similarly, judges appointed in breach of the rules for judicial selection are also not tribunals established by law because "there existed no legal grounds for the participation [of those] judges".[30]

27. As discussed above, Provisional Rule 165, and the corresponding Regulation 66*bis* ceased to be in force after the 15th ASP. This, in turn, nullifies the legal basis for creating this Chamber on 2 November 2020. As constituted in breach of the legal framework of the Court, it is therefore not established by law.

28. As the first Chamber of such constitution, Pre-Trial Chamber A has a duty to ensure for itself that it is validly established by law. The ICC Appeals Chamber has held that "the Chamber in question is responsible for ensuring the fair trial of the accused".[31] This applies equally to Pre-Trial Chambers.[32] A

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[26] Rome Statute, Article 21(3).

[27] *See, e.g.*, *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012; *Prosecutor v. Kallon et al.*, SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.

[28] ECtHR, *Posokhov v. Russia*, Application no. 63486/00, 4 March 2003, para. 39 ("the phrase 'established by law' covers not only the legal basis for the very existence of a 'tribunal' but also the composition of the bench in each case"); ECtHR, *Fatullayev v. Azerbaijan*, Application no. 40984/07, 22 April 2010, para. 144.

[29] ECtHR, *Pandjikidze and Others v. Georgia*, Application no. 30323/02, 27 October 2009, paras 108–111.

[30] ECtHR, *Ilatovskiy v. Russia*, Application No. 6945/04, 9 July 2009, paras 40–42.

[31] *Prosecutor v Katanga*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, para. 61 (emphasis added).

breach of the right to a tribunal established by law is, by its very nature, also a breach of the right to a fair trial,[33] which "undermine[s] the fairness of the criminal proceedings" against a defendant.[34] The Grand Chamber of the European Court of Justice has confirmed that the right to a tribunal established by law "means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point".[35] The obligation to determine whether it was lawfully established therefore falls squarely on this Chamber as its duty to ensure a fair trial.

29. This proposition is supported by the principle that all judicial bodies have the power to examine the validity of their own establishment through the principle of "*la compétence de la compétence*".[36] It has been expressed as "the first obligation of the Court, as of any other judicial body [,] to ascertain its own competence",[37] which this Chamber is faithfully observing through inviting these submissions. By virtue of this principle, each court has "incidental" jurisdiction to determine its own jurisdiction,[38] which includes the power for a judicial body to examine whether its "creator" established it according to law.[39] Both Pre-Trial Chambers I and II have recognised that the principle of *la*

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[32] *See ibid.*

[33] *See, e.g.,* ECJ, Case C-542/18 RX-II and C-543/18 RX-II, *Erik Simpson v Counsel of the European Union and HG v European Commission* [2019] (Opinion of Advocate General Sharpston), para. 64 ("…in order to find that the right to a tribunal established by law has been breached – and through that breach (taken in isolation) *also* the right to a fair trial guaranteed by Article 6(1) of the ECHR…", emphasis in original).

[34] *See* ECtHR, *Ilatovskiy v. Russia*, Application No. 6945/04, 9 July 2009, para. 43.

[35] ECJ, Case C-542/18 RX-II and C-543/18 RX-II, *Erik Simpson v Council of the European Union and HG v European Commission* [2020] (Judgment of the Court (Grand Chamber)), para. 57.

[36] *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 17–18, referring to the Statute of the United Nations Administrative Tribunal, Art. 2, para. 3, and the Statute of the International Court of Justice, Art.36, para. 6.

[37] ICJ *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO. upon complaints made against the UNESCO.*, 1956 ICJ Reports, 77, 163 (Advisory Opinion of 23 October) (Cordova, J., dissenting).

[38] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18.

[39] *See ibid.* para. 22 ("…the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council"). *See also Prosecutor v. Kallon et al* SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-

compétence de la compétence is fundamental in international law and that any judicial body has the power and duty to determine the boundaries of its own jurisdiction and competence.[40] This power lies "exclusively with the relevant Chamber itself"[41] and, therefore, is this Chamber that must ask itself whether it was lawfully established to ensure that suspects appearing before it can have a fair trial.

30. The OPCD therefore respectfully requests that this Chamber find that Provisional Rule 165 and the corresponding RoC 66*bis* are not in force, and that the PTD President's Decision constituting this Chamber is without legal basis and therefore without legal effect. The consequence would be that the present case reverts back to Pre-Trial Chamber II, as if the PTD President's Decision of 2 November was never issued.

B. ALTERNATIVELY, THE ARREST WARRANT AGAINST MR. BETT WAS ISSUED PRIOR TO AMENDMENT OF PROVISIONAL RULE 165 AND ITS EFFECT IS BARRED BY THE PRINCIPLE OF NON-RETROACTIVITY

31. Beyond the general inapplicability of Provisional Rule 165, commentators have expressed concern in the event the ICC Chambers "would seek to apply the Rule to the detriment of the accused in future Article 70 proceedings,

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16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 34 ("It is beyond argument, therefore, that the Appeals Chamber of the Special Court has the competence to determine whether or not the Special Court has jurisdiction to decide on the lawfulness and validity of its creation"); ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ Reports 47, at 56 (Advisory Opinion of 13 July 1954) ("[t]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter [of the United Nations]").

[40] Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-37, 6 September 2018, paras 30–33; Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, ICC-02/04-01/05-147, 9 March 2006, paras 22–23.

[41] *Situation in Uganda*, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, ICC-02/04-01/05-147, 9 March 2006, para. 23.

contrary to Article 51(3)",[42] especially those with pending cases when it was discussed and adopted by the Plenary of Judges. As the case of *Gicheru & Bett* had already been established by arrest warrants issued before February 2016, the principle of non-retroactivity of new legislation prevents use of Provisional Rule 165 in this case.

32. As held by the 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".[43] While it is to be taken on a case-by-case basis, 'detriment' means that "the overall position of the accused in the proceedings be negatively affected by the disadvantage".[44] This ruling on Article 51(4) would have been fresh in the minds of the Judges when making its first provisional amendments pursuant to Article 51(3) as it was delivered just two days after the Plenary of Judges issued Provisional Rule 165.

33. Thus, even if it were somehow decided that Provisional Rule 165 remained valid law beyond the 15th ASP, the application of this rule causes 'detriment' to the defendants in this case by denying certain provisions of the Rome Statute afforded to other defendants before the Court. Defendants in this case would have their case heard by one judge instead of three, they would be denied the opportunity to make interlocutory appeals even when an issue requires immediate resolution by the Appeals Chamber, and they would not benefit from having sentencing proceedings separate to the trial proceedings. These issues, and why they would be detrimental to defendants, are further discussed below in Section C.

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[42] Amnesty International, International Criminal Court: Initial Recommendations to the 16th Session of the Assembly of States Parties (4 to 14 December 2017), p. 7.
[43] ICC Non-retroactivity Decision, para. 74.
[44] *Ibid.*, para. 78.

34. The OPCD therefore alternatively requests that this Chamber find that Provisional Rule 165 and the corresponding RoC 66*bis* cannot apply in this specific case because of the principle of non-retroactivity and, as above, that the case reverts to PTC II.

C. INCOMPATIBILITY OF THE PROVISIONAL AMENDMENTS WITH THE ROME STATUTE

35. Article 51(4) requires that "any provisional Rule shall be consistent with […] [the] Statute", which, it is submitted, it is clearly not. Under Article 51(5), in the event of a conflict between this provisional rule and the Statute, the Pre-Trial Chamber must apply the Statute.
36. This principle of legality should, alone, render provisional Rule 165 automatically inapplicable as it reduces the Rome Statute provisions for the number of sitting judges for each judicial stage of Article 70 proceedings, eliminates remedy of interlocutory appeal guaranteed in Article 82(1)(d), and denies a bifurcated sentencing proceeding envisaged in Article 76(2). These same factors are considerations in an Article 51(4) assessment of 'detriment' to a suspect or accused where retroactive application of amendment.

i Preliminary Issue: No lacunae in the RPE triggering Article 51(3)

37. As a preliminary issue, the OPCD takes note of the basis for "urgency" and "lacunae" discussed in 2016 in the issuance of Provisional Rule 165. According to the Plenary Report, the decision to amend Rule 165 in this "specific situation",[45] appears to be the ICC's "financial constraints" to constitute a full bench and need for efficient use of resources.[46] However, the Plenary Report's interpretation of the wording 'specific situation' contradicts authoritative commentary on Article 51(3), which refers only to "lacunae (…) in (…) areas of

[45] 'Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence', 29 February 2016, paras. 1, 19.
[46] *Ibid.*, para. 20.

procedure".[47] Indeed, Article 51(3) appears to relate only to procedural gaps, not financial ones.

38. Moreover, with respect to the elimination of Articles 82(1)(d) and 76(2), the notion of a purported lacunae is even harder to reconcile with the very aim of Article 51(3). In this regard, it would arguably be more logical to trigger Article 51(3) precisely for the opposite scenario, that is, providing for Article 82(1)(d) interlocutory appeals or Article 76(2) sentencing proceedings had the ICC texts not contemplated said procedures; however, since the Rome Statute already codifies Articles 82(1)(d) and 76(2), there is no "gap" to fill in.

ii Bench Reductions, even for Article 70, are contrary to the Rome Statute

39. Reducing the number of sitting judges at each level of Article 70 proceedings is contrary to the Rome Statute on its face. In this respect, the Statute notes, for example, that Pre-Trial Chambers' decisions on confirmation of charges "must be concurred in by a majority of its [three] judges" (articles 39(2)(b)(iii), 57(2)(a) and 61(7)). The Statute also states that "[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division" (article 39(2)(b)(ii)) and that "[t]he Appeals Chamber shall be composed of all the judges of the Appeals Division" (article 39(2)(b)(i)), that is, "the President and four other judges" (article 39(1)). In turn, article 74(1) provides, *inter alia*, that "[a]ll the Judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations."

40. Reducing the number of sitting judges is also contrary to the past and recent drafting history of the RPE. In this regard, States Parties have, over the years, consistently given priority to preserving the integrity of the Rome Statute, when drafting or amending the RPE. As *Friman* notes, when initially drafting the RPE "it was suggested that in dealing with [article 70] offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three

[47] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford University Press 2010), p. 647.

judges for the Appeals Chamber".[48] Nevertheless, such suggestion was not accepted, as *Friman* continues:

> *the proposal for reduced Chambers was challenged. Some delegations argued that the proposal was incompatible with the Statute (in particular article 39, paragraph 2(b)), except regarding the Pre-Trial Chamber. This opposition could not be overcome and the rule on reduced chambers had to be deleted.*[49]

41. With respect to more recent States Parties' debates on bench reductions, the significance of a full bench seems to have consistently been commended. For example, upon adoption of Rule 132*bis* to permit a Single Judge only to perform preparatory functions for trial, States also ensured that Single Judge alone -"[g]iven the terms of article 39, paragraph (2)(b), of the Statute"- would not take decisions "affect[ing] the outcome of the trial".[50] Moreover, in rejections of proposed Rule 140*bis*, which would have allowed trial proceedings to continue for a brief absence of a judge, "[s]ome delegations expressed concerns regarding the proposed amendment's consistency with the letter and spirit of the Rome Statute, in particular with article 39(2)(b)(ii) and article 74(1), and that while the expeditiousness of trial was of central concern, the integrity of the Rome Statute must be preserved".[51]
42. Further, opting for bench reductions entails a departure from the 'high international standards' initially borne in mind by the drafters of ICTY and ICC texts, when addressing bench compositions. For example, Article 12 of the ICTY Statute provided *inter alia* for 3 and 5 judges to sit in the Trial and Appeals Chambers, respectively. Commenting upon said norm, *Morris & Scharf* stated that "[t]he internal structure and composition of the Chambers

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[48] 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 (Transnational Publishers 2001), p. 614.
[49] *Ibid.*, p. 615.
[50] *Report of the Study Group on Governance on rule 132bis of the Rules of Procedure and Evidence*, ICC-ASP/11/41, 1 November 2012, para. 19.
[51] *Report of the Study Group on Governance Cluster I in relation to amendment proposals to the Rules of Procedure and Evidence put forward by the Court,* Annex I to Report of the Bureau on Study Group on Governance, ICC-ASP/13/28, 28 November 2014, p. 14, para. 15.

were designed to ensure: (1) full respect for the rights of the accused, (2) the effective performance of the judicial functions, (3) the international character of the institution, and (4) the efficient administration of justice".[52] Further, as *Fairlie* points out, "the ICTY's statutory requirement of a three-judge panel is consistent with the notion, shared by common law and continental systems, that 'three heads are better than one'".[53]

43. The commentary on Article 70 fair trial guarantees regard the cases – even as 'ancillary'[54] - as equal in need for procedural safeguards, applying "high international standards",[55] that is, the Rome Statute's standards. As noted in an IBA report of 2017, "Article 70(2) of the Statute makes clear that the same standards of procedural fairness apply to Article 5 and Article 70 proceedings".[56] Of note, too, is Amnesty International's 1999 commentary on the need to ensure that Article 70 proceedings are "fully consistent with international law and standards concerning the right to fair trial."[57] In sum, as *McDermott* states: "the fundaments of coherence require that individuals accused of offences against the integrity of proceedings (…) be given all of the due process standards that a 'regular' accused would be granted."[58]

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[52] Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, vol. 1 (Transnational Publishers 1995), p. 139.

[53] Megan A. Fairlie, "Alternate Judges as Sine Qua Nons for International Criminal Trials", 48 *Vanderbilt Journal of Transnational Law* 67 (2015), p. 81.

[54] *See* 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, p.3, para. 11.

[55] 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 (Transnational Publishers 2001), p. 615.

[56] IBA, Offences Against the Administration of Justice and Fair Trial Considerations before the International Criminal Court, August 2017, p. 18.

[57] Amnesty International, *International Criminal Court: Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review, Memorandum for participants at the Siracusa intersessional meeting, 22 to 26 June 1999*, 31 May 1999, p. 25.

[58] Yvonne McDermott, "General Duty to Ensure the Integrity of the Proceedings", in Sluiter *et al.*, *International Criminal Procedure, Principles and Rules* 743 (Oxford University Press 2013), p. 767.

iii Removal of Article 82(1)(d) applications denies right of review

44. Approximately one month before issuance of Provisional Rule 165, Judge Henderson, sitting in *Gbagbo & Blé Goudé*, recalled that "[t]he purpose of Article 82(1)(d) is to provide the parties with an exceptional appellate review when there is an issue raised at trial that carries with it the potential for irrevocably changing its course, affecting the fairness and expeditiousness of the trial proceedings or the outcome of the trial".[59]

45. In provisionally eliminating Article 82(1)(d), the Court dispensed with a norm which, according to the Appeals Chamber, is aimed at "pre-empt[ing] the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial."[60] Indeed, the provision is designed as a "safeguard for the integrity of the proceedings",[61] as *"unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process."*.[62]

46. Denial of such possibility of remedy denies a fundamental right of review preserved in the Rome Statute. This possibility for review is only exacerbated by the truncated benches also announced in Provisional Rule 165. The OPCD submits that there is absolutely no basis for such amendment that is in clear contravention of the Rome Statute's intent.

iv Removal of a bifurcated sentencing structure is 'a mistake'

47. Provisional Rule 165 also eliminates application of Article 76(2) of the Rome Statute with respect to Article 70 offences, but dispensing with sentencing proceedings could have a detrimental effect on fair trial rights, such as the right to remain silent, pursuant to Article 67(1)(g). Indeed, *Schabas* notes that

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[59] *Prosecutor v. Gbagbo and Blé Goudé*, Transcript, ICC-02/11-01/15-T-15-Red-ENG, 5 February 2016, T. 8, ll. 1-4.

[60] *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, ICC-01/04-168, 13 July 2006, para. 19.

[61] *Ibid.*, para. 11.

[62] *Ibid.*, para. 16.

the accused may be put at a "real disadvantage" since, without said hearing, "[t]he only way to introduce (…) evidence [in mitigation of sentence] may be for the accused to renounce the right to silence and the protection against self-incrimination".[63] The Prosecution is equally denied opportunity to highlight any aggravating factors it separates from the basis of evidence brought for the purpose of making a case 'beyond reasonable doubt'.

48. Moreover, while both the ICTY and the ICTR "abandoned sentencing hearings early in [their] existence based on considerations of expedience and cost",[64] such shift was subject to criticism. *Harmon & Gaynor* opined that "*the unitary trial-and-sentencing procedure […] at the ICTY should be abolished. The Tribunal should revert to the bifurcated procedure previously in use, in which a dedicated sentencing hearing took place sometime after a conviction had been entered*".[65] Most significantly, the late Judge Cassese called the merging of trial and sentencing proceedings at the *ad hoc* tribunals "a mistake", writing:

> *In short, hearing character witnesses at a stage where the Court has not yet formally decided whether to acquit or convict the defendant may prove to be a waste of time. Moreover, the accused and his counsel are often put in a difficult position in that they have to argue as to the accused's lack of responsibility for the crime, while at the same time putting forward evidence and arguments relevant to any sentence which may be imposed.* [66]

49. For the above, the bench reductions, the lack of interlocutory appeal, and fused trial and sentencing phases are all in conflict with Rome Statute Articles 39(2)(b)(iii), 57(2)(a) and 61(7); 82(1)(d); and 67(1)(g). The Statute is instructive that, in the event of such a conflict, its provisions must prevail. Any Chamber

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[63] William Schabas, "Article 76, Sentencing", in *Triffterer & Ambos*, p. 1873.
[64] Robert D. Sloane, "Sentencing for the Crime of Crimes. The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda", 5 *Journal of International Criminal Justice* 713 (2007), 734.
[65] Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes", 5 *Journal of International Criminal Justice* 683 (2007), 708.
[66] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rev.1 (as of 10 June 2009), *Explanatory Memorandum by the Tribunal's President*, para. 41.

in this situation must therefore apply the Statute rather than a conflicting rule of provisional character.

IV. RELIEF REQUESTED

50. For the foregoing, the OPCD respectfully requests Pre-Trial Chamber A to determine that it possesses the power to rule on this matter, and find:

    a. Provisional Rule 165 is no longer in effect by virtue of its 'rejection' at the Fifteenth ASP when the States did not adopt or amend the provisional amendment or, alternatively, that Provisional Rule 165 is not in effect in the present case given its retroactive application in the case to the detriment of Mr. Bett, or further in the alternative, that Provisional Rule 165 is in conflict with the Statute and that the relevant provisions of the Statute must prevail; and,

    b. The constitution of Pre-Trial Chamber A had no legal basis, and it is, accordingly, not established by law; and, consequently,

    c. The case of *Gicheru & Bett* reverts back to PTC II; and,

    d. Each future defendant may possess a reservation of right to make jurisdictional/admissibility challenges on this or related matters in their own cases when they come before the Court.

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Dated this, 17th day of November 2020
at The Hague, The Netherlands