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**No. ICC-01/09-01/20  
Date: 23 December 2020**

**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***

**Public**

Decision on the 'Request for leave to appeal the Decision on the Applicability of  
Provisional Rule 165'

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart

**Counsel for the Defence**

Mr Michael G. Karnavas

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

**The Office of Public Counsel  
for the Defence**

Mr Xavier-Jean Keïta  
Ms Marie O’Leary

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

Pre-Trial Chamber II

**PRE-TRIAL CHAMBER A (ARTICLE 70)** of the International Criminal Court issues this Decision on the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’.

## **I. PROCEDURAL HISTORY**

1. On 10 March 2015, Pre-Trial Chamber II, in its then composition, issued warrants of arrest against Mr Gicheru and Mr Bett for their alleged responsibility for offences against the administration of justice under article 70(1)(c) of the Rome Statute (the ‘Statute’).<sup>1</sup>

2. On 2 November 2020, Mr Gicheru surrendered himself to the authorities of the Kingdom of the Netherlands (‘the Netherlands’).

3. On 2 November 2020, Pre-Trial Chamber II requested the President of the Pre-Trial Division to constitute a chamber composed of one judge to exercise the functions and powers of the Pre-Trial Chamber in the present case in accordance with rule 165(2) of the Rules of Procedure and Evidence (the ‘Rules’), as drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016 (‘Provisional Rule 165’), and regulation 66*bis*(1) of the Regulations of the Court (the ‘Regulations’), which was adopted and entered into force on the same day.<sup>2</sup>

4. On 2 November 2020, the President of the Pre-Trial Division constituted the present Chamber pursuant to the aforementioned provisions.<sup>3</sup>

5. On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court and arrived at the Court’s Detention Centre.

6. On 6 November 2020, in accordance with the Chamber’s order dated 4 November 2020,<sup>4</sup> Mr Gicheru appeared before the Chamber pursuant to article 60(1) of the Statute and rules 121(1) and 163(1) of the Rules.

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<sup>1</sup> Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, ICC-01/09-01/20-1-Conf-Exp; a public redacted version was notified on the same day, *see* ICC-01/09-01/20-1-Red.

<sup>2</sup> Request to the President of the Pre-Trial Division to constitute a Chamber for the purposes of conducting proceedings under article 70 of the Rome Statute, ICC-01/09-01/20-31-US-Exp.

<sup>3</sup> Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case, ICC-01/09-01/20-32.

7. On 11 November 2020, the Chamber received the ‘OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165’ on behalf of the Office of the Public Counsel for the Defence (the ‘OPCD’).<sup>5</sup>
8. On 12 November 2020, the Chamber issued the ‘Decision on the Request to Submit Observations on behalf of the Office of the Public Counsel for the Defence’ (the ‘12 November 2020 Decision’).<sup>6</sup> The Chamber granted leave to the OPCD to submit the observations set out in its request dated 11 November 2020.<sup>7</sup>
9. On 17 November 2020, the Chamber received the ‘OPCD Submissions on the Inapplicability of Provisional Rule 165’.<sup>8</sup>
10. On 20 November 2020, the Chamber received the ‘Prosecution’s Response to “OPCD’s Submissions on the Inapplicability of Provisional Rule 165”’.<sup>9</sup>
11. On 25 November 2020, the Chamber received ‘Paul Gicheru’s Observations and Response to OPCD Submissions on the Inapplicability of Provisional Rule 165’.<sup>10</sup>
12. On 10 December 2020, the Chamber issued the ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’ (the ‘Provisional Rule 165 Decision’).<sup>11</sup>
13. On 11 December 2020, the Chamber issued the ‘Decision Severing the Case against Mr Gicheru’.<sup>12</sup>
14. On 17 December 2020, the Chamber received the ‘Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’ on behalf of the OPCD (the ‘OPCD Request’).<sup>13</sup>

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<sup>4</sup> Order Setting the Date for the Initial Appearance of Mr Gicheru, ICC-01/09-01/20-34.

<sup>5</sup> ICC-01/09-01/20-40.

<sup>6</sup> ICC-01/09-01/20-43.

<sup>7</sup> ICC-01/09-01/20-43, para. 9.

<sup>8</sup> ICC-01/09-01/20-47.

<sup>9</sup> ICC-01/09-01/20-52.

<sup>10</sup> ICC-01/09-01/20-53. On 20 November 2020, the Chamber granted the Defence a one-week extension of time to respond to the OPCD Submissions on the Inapplicability of Provisional Rule 165: *see* Decision on Request for Extension of Time and Varying Other Time Limits, ICC-01/09-01/20-51-Conf; a public redacted version was notified on the same day, *see* ICC-01/09-01/20-51-Red.

<sup>11</sup> ICC-01/09-01/20-61.

<sup>12</sup> ICC-01/09-01/20-62.

<sup>13</sup> [ICC-01/09-01/20-63](#) (submitted on 16 December 2020, notified on 17 December 2020).

15. On 18 December 2020, the Chamber received ‘Paul Gicheru’s Response to OPCD’s Request for Leave to Appeal the Decision on the Applicability of Provisional Rule 165’ (the ‘Defence Response’).<sup>14</sup>

16. On 21 December 2020, the Chamber received the ‘Prosecution’s Response to OPCD’s “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165’ (the ‘Prosecutor’s Response’).<sup>15</sup>

## II. SUBMISSIONS RECEIVED BY THE CHAMBER

### A. The OPCD Request

17. The OPCD raises three preliminary issues. First, the OPCD submits that, ‘[a]s a party to the proceedings, it is Mr. Bett who would have the right to seek leave to appeal under Article 82(1)(d), but, as he is absent, it falls on the OPCD to continue the standing it has already been granted to represent and protect Mr. Bett’s interests and exercise this right to seek leave to appeal the Impugned Decision’.<sup>16</sup> Second, the OPCD avers that ‘it is right that Pre-Trial Chamber A is seized of this request because the Rules state that a request for leave to appeal must [sic] made “to the Chamber that gave the decision”’.<sup>17</sup> In this regard, it further notes that ‘the implication that Pre-Trial Chamber II “shall remain seized” of Mr Bett’s case – suggesting it was always with that Chamber and never with Pre-Trial Chamber A – highlights the potential procedural confusion that can be caused by Provisional Rule 165 and its use which further emphasises the need for the Appeals Chamber’s resolution of the issues presented for appeal’.<sup>18</sup> Lastly, the OPCD contends that ‘the result of the Impugned Decision is that Provisional Rule 165 ostensibly applies which foregoes any ability to make [sic] request for interlocutory appeal pursuant to Article 82(1)(d)’ but that ‘Pre-Trial Chamber A can grant such request for leave to appeal in the interests of the right of a review which keeps the matter “live” through any final decision’.<sup>19</sup>

18. The OPCD seeks leave to appeal the following three issues:

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<sup>14</sup> [ICC-01/09-01/20-64](#).

<sup>15</sup> [ICC-01/09-01/20-66](#).

<sup>16</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 9.

<sup>17</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 10 (emphasis in original).

<sup>18</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 10.

<sup>19</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 11.

- a. *Whether the Chamber erred in law in inconsistent interpretation of Article 51(3) by holding that the text requires a positive action “until adopted, amended or rejected” by the direct language, but not applying the same reasoning to the language relating to the temporal element of “at the next ordinary or special session of the Assembly of States Parties” (the ‘First Issue’);*
- 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 (the ‘Second Issue’);*
- c. *Whether the Chamber erred in law in finding that the procedural regime under Provisional Rule 165 does not restrict any fundamental rights afforded in the Rome Statute by impermissibly limiting such consideration to Article 67 (the ‘Third Issue’ and collectively the ‘Three Issues’).<sup>20</sup>*

19. According to the OPCD, the First Issue ‘is an appealable issue and not mere disagreement, as it raises a discrete legal question on the proper statutory interpretation of Article 51(3) of the Statute’.<sup>21</sup> In this regard, the OPCD submits that ‘[i]nferring that a provisional rule applies until the “positive action” contemplated in [article 51(3) of the Statute], while giving less weight to the express temporal limitation, invites the reasonable legal question whether such an interpretation is the correct one’.<sup>22</sup> The OPCD further argues that the Second Issue ‘is an appealable issue as it raises a critical legal question of the timeline of a case and at what point a defendant can expect a permissible change of the pertinent rules, in this case Provisional Rule 165’.<sup>23</sup> In addition, in the view of the OPCD, the Third Issue ‘constitutes an appealable issue’ as ‘the OPCD was not alleging error only pursuant to Article 67, but that the other rights contained in the Rome Statute were being abridged by employment of the amendments contained in Provisional Rule 165, making it inconsistent with the core texts’.<sup>24</sup>

20. Furthermore, the OPCD asserts that the Three Issues ‘significantly affect the fairness of proceedings as all three identify how the rights of suspects and accused in Article 70 proceedings can be curtailed by decisions labelled as purely

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<sup>20</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 2 (emphasis in original).

<sup>21</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 12.

<sup>22</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 12.

<sup>23</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 15.

<sup>24</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 19.

“procedural”<sup>25</sup> Lastly, the OPCD avows that ‘[i]mmediate resolution of these issues is imperative to ensure the correct Pre-Trial Chamber can be properly assigned to prevent delay’.<sup>26</sup> In this regard, it maintains that ‘[t]he implications of these grounds of appeal have far-reaching consequences and no review by the Appeals Chamber will leave litigation open on these matters’, in particular because ‘the Impugned Decision, itself, has the power to foreclose any interlocutory appeal of any decision under Article 82(1)(d) in this case or any other Article 70 case to come before the Court’.<sup>27</sup>

## **B. The Defence Response**

21. The Defence submits as follows:

The OPCD lacks standing. Moreover, Article 82(1)(d) of the Rome Statute provides no room for declaratory relief. Mr. Philip Kipkoech Bett, on whose behalf the OPCD seeks to make submissions, is no longer a Party to the present case. Mr. Gicheru, who is represented by Counsel and not by the OPCD, resolutely agrees with the Single Judge that Provisional Rule 165 applies in the Article 70 proceedings against *him*. No appreciable justice [sic] will be suffered by Mr. Bett or others who may be charged with Article 70 offences since the Single Judge’s decision does not preclude further challenges on the applicability of Provisional Rule 165 in future cases. However meritorious the OPCD’s arguments may appear in favor of granting interlocutory appeal, the present circumstances provide no other option to the Single Judge than to deny the OPCD’s Request for lack of standing (emphasis in original, footnotes omitted).<sup>28</sup>

## **C. The Prosecutor’s Response**

22. The Prosecutor submits that the OPCD lacks standing to seek leave to appeal the Provisional Rule 165 Decision. In this regard, the Prosecutor is of the view that the OPCD ‘does not – and cannot – argue that the [Provisional Rule 165 Decision] fell under any of the special procedures which vary the ordinary meaning of the term “party”, for the purpose of article 82(1)(d)’ as it ‘was taken in the ordinary exercise of the Chamber’s functions in charge of the pre-confirmation and confirmation proceedings in this case’.<sup>29</sup> The Prosecutor adds that, ‘while OPCD sought leave to file observations before the Chamber under regulation 77(4)(a) and/or (d), this was not clearly the basis upon which their request was granted’ and that ‘[n]either

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<sup>25</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 22.

<sup>26</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 25.

<sup>27</sup> [OPCD Request](#), ICC-01/09-01/20-63, para. 26.

<sup>28</sup> [Defence Response](#), ICC-01/09-01/20-64, p. 3.

<sup>29</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, para. 6.

provision is directly apposite to this case—especially when Mr Gicheru is independently represented by professional counsel’.<sup>30</sup> The Prosecutor is of the view that, ‘[i]nstead, the Chamber appears to have granted OPCD leave to file observations on a *sui generis* basis’.<sup>31</sup> The Prosecutor further contends that, ‘[w]hatever the procedural basis for granting the OPCD a limited right of intervention, it did not make them a “party” in the meaning of article 82(1)(d)’.<sup>32</sup> The Prosecutor also avers that, ‘[a]t most, OPCD contends that it was granted leave to make submissions in order to represent Mr Bett and/or other potential article 70 suspects’, whereas ‘even this was not clearly accepted by the Chamber when granting OPCD leave to appear; rather, it stressed the consequences for *this* case’.<sup>33</sup> Lastly, the Prosecutor asserts that, ‘since OPCD is not counsel for Mr Bett and is not instructed by him, Mr Bett cannot be prejudiced by the Chamber’s ruling on provisional rule 165 in this case’ as ‘he will be able to litigate all the matters pertinent to his defence—including, if necessary, the application of provisional rule 165 in the proceedings against him’.<sup>34</sup>

23. In any event, in the view of the Prosecutor, the OPCD Request ‘does not show that intervention by the Appeals Chamber will materially advance these proceedings’ as ‘there is every sign that certifying any part of the [Provisional Rule 165 Decision] for appeal will retard the proceedings, to the detriment of Mr Gicheru’s interest in expeditious resolution of his case’.<sup>35</sup>

### III. DETERMINATION BY THE CHAMBER

#### A. Preliminary Issues

##### 1. *The Standing of the OPCD*

24. The Appeals Chamber has previously held that ‘who qualifies as a “party” in terms of article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal’.<sup>36</sup>

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<sup>30</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, para. 7.

<sup>31</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, para. 7.

<sup>32</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, para. 8.

<sup>33</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, para. 9 (emphasis in original).

<sup>34</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, paras 10, 12.

<sup>35</sup> [Prosecutor’s Response](#), ICC-01/09-01/20-66, paras 13, 14.

<sup>36</sup> Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, [Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting](#)



25. It is recalled that, besides its mandate to represent and protect the rights of Mr Bett, the OPCD was also granted leave to submit its observations regarding Provisional Rule 165 on the basis of its mandate to represent and protect the rights of any other potential suspects in these proceedings.<sup>37</sup> The latter aspect of the OPCD's mandate falls within regulation 77(4)(a) of the Regulations and is, in any event, based on regulation 77(4)(c) of the Regulations following the 12 November 2020 Decision.

26. Considering that Provisional Rule 165 has been invoked for the first time in the present proceedings, the Provisional Rule 165 Decision constitutes a significant precedent for any future proceedings to be conducted on this basis. For this reason, the Chamber considers that it is essential that the Provisional Rule 165 Decision be reviewed by the Appeals Chamber with a view to ensuring legal certainty regarding the basis of such proceedings. The Prosecutor's argument that 'it is neither necessary nor appropriate to certify any part of the [Provisional Rule 165] for appeal on the sole basis that similar issues may arise in other future cases' is, thus, unpersuasive.<sup>38</sup> This is all the more so considering that other Pre-Trial Chambers have avoided a restrictive reading of the reference to 'party' in the *chapeau* of article 82(1) of the Statute in the context of requests for leave to appeal under subparagraph (d) of this provision.<sup>39</sup>

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[the authorisation of an investigation into the situation in Afghanistan](#), 4 March 2020, ICC-02/17-137, para. 14.

<sup>37</sup> 12 November 2020 Decision, ICC-01/09-01/20-43, paras 7, 9.

<sup>38</sup> [Prosecutor's Response](#), ICC-01/09-01/20-66, para. 12.

<sup>39</sup> Most significantly, the OPCD has been granted leave to appeal decisions at the situation stage and the Appeals Chamber has not found that it had been improperly seized: *see* Pre-Trial Chamber I, *Situation in Darfur, Sudan*, [Decision on Request for leave to appeal the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86\(2\)\(e\) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor'](#), 23 January 2008, ICC-02/05-118; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on Request for leave to appeal the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86\(2\)\(e\) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor'](#), 23 January 2008, ICC-01/04-438; Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#); 19 December 2008, ICC-01/04-556; Appeals Chamber, *Situation in Darfur, Sudan*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007](#), 2 February 2009, ICC-02/05-177. Similarly, Pre-Trial Chamber II has granted leave to appeal a decision to a State and the Appeals Chamber subsequently reviewed that decision on the merits: *see* Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on Jordan's request for leave to appeal](#), 21 February 2018, ICC-02/05-01/09-319; Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Judgment in the Jordan Referral re Al-Bashir Appeal](#), 6 May 2019, ICC-02/05-01/09-397-Corr.

27. It follows that, in view of the importance of making early appellate review available to ensure legal certainty for these and future proceedings, the term ‘party’ in the *chapeau* of article 82(1) of the Statute should be interpreted as encompassing all those having a particular interest in the outcome of the proceedings for the purposes of requests for leave to appeal under article 82(1)(d) of the Statute.

28. Accordingly, the Chamber finds that the OPCD has standing to seize the Chamber of the OPCD Request by virtue of the 12 November 2020 Decision recognising its mandate to protect the rights of any other potential suspects in these proceedings in so far as the application of Provisional Rule 165 is concerned.

29. In any event, the Chamber recalls that, ‘[b]y the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify [...] a decision on its own accord’.<sup>40</sup> The Chamber considers that the power to *proprio motu* certify a decision under article 82(1)(d) of the Statute necessarily includes the authority to grant leave to appeal a decision on the application of any party or participant notwithstanding the formal standing of that party or participant. Otherwise, the Chamber’s *proprio motu* power could be limited on account of the absence of formal standing of a party or participant in contravention of the plain wording of article 82(1)(d) of the Statute.

## *2. The Competence of the Chamber regarding the OPCD Request*

30. The Chamber agrees with the OPCD that it has been properly seized of the OPCD Request pursuant to rule 155 of the Rules, which provides, in the relevant part, that a party wishing to appeal a decision under article 82(1)(d) of the Statute shall ‘make a written application to *the Chamber that gave the decision*’ (emphasis added).

31. In addition, it is recalled that the Provisional Rule 165 Decision was issued before the Decision Severing the Case against Mr Gicheru. Therefore, the latter decision does not, in any event, affect the competence of the Chamber to deal with any residual matters pertaining to the Provisional Rule 165 Decision, including a request for leave to appeal under article 82(1)(d) of the Statute.

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<sup>40</sup> Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 20 (the ‘13 July 2006 Judgment’).

### 3. *The Disapplication of Article 82(1)(d) of the Statute*

32. In the view of the Chamber, while Provisional Rule 165 renders article 82(1)(d) of the Statute inapplicable, the Provisional Rule 165 Decision itself must be seen as preserving the possibility of seeking leave to appeal. This decision marks the first time that proceedings concerning offences under article 70 of the Statute will be conducted on the basis of Provisional Rule 165. This procedural basis has not been previously reviewed by the Appeals Chamber. 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.

33. At any rate, the Chamber may, as mentioned, certify a decision of its own accord under article 82(1)(d) of the Statute, which means that it may also grant leave to appeal a decision irrespective of the subject-matter of that decision.

#### **B. The OPCD Request**

34. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations.

35. In relation to the first criterion concerning a request for leave to appeal, the Appeals Chamber has determined that '[o]nly an "issue" may form the subject-matter of an appealable decision'.<sup>41</sup> Such an issue has been defined as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>42</sup>

36. The Chamber is of the view that the Three Issues arise out of the Provisional Rule 165 Decision. The reason is that these issues seek to contest the three main findings underpinning the Chamber's conclusion that Provisional Rule 165 is applicable and that, on that basis, the Chamber has been properly constituted. These

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<sup>41</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 9.

<sup>42</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 9.

findings are the following: (i) Provisional Rule 165 remains in force until such time as it is ‘adopted, amended or rejected’ by the Assembly of States Parties in accordance with the terms of article 51(3) of the Statute;<sup>43</sup> (ii) Provisional Rule 165 has not been applied retroactively in view of the fact that the initial appearance of Mr Gicheru constituted a new stage in the proceedings;<sup>44</sup> and (iii) Provisional Rule 165 is not incompatible with the Statute as article 70(2) of the Statute permits that the principles and procedures governing the Court’s exercise of jurisdiction over offences under article 70 of the Statute be regulated in the Rules and, in addition, Provisional Rule 165 does not restrict any of the rights enshrined in article 67 of the Statute.<sup>45</sup>

37. In addition, the Chamber considers that the OPCD is not merely expressing its disagreement with the Chamber’s findings. The Three Issues, taken together, challenge the very basis of the current proceedings and any other proceedings that would be conducted on the basis of Provisional Rule 165. Therefore, they call for a resolution so that any doubt as to the underlying procedure is removed.

38. Under article 82(1)(d) of the Statute, the Chamber has the discretion to determine which issues are appealable and which are not.<sup>46</sup> The Chamber finds it appropriate to reformulate the First and Third Issue in order to more accurately reflect the Chamber’s determinations and to encapsulate all matters arising from the Provisional Rule 165 Decision. Accordingly, the First and Third Issue are to be reformulated as follows: ‘*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*’ and ‘*whether the Chamber erred in finding that Provisional Rule 165 is not incompatible with the Statute on the*

<sup>43</sup> Provisional Rule 165 Decision, ICC-01/09-01/20-61, paras 41-43.

<sup>44</sup> Provisional Rule 165 Decision, ICC-01/09-01/20-61, para. 47.

<sup>45</sup> Provisional Rule 165 Decision, ICC-01/09-01/20-61, paras 51-52.

<sup>46</sup> Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the ‘Defence Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts’](#), 18 September 2018, ICC-01/12-01/18-130-tENG, para. 30. *See also* Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 18 December 2015, ICC-02/11-01/15-369, para. 18; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)’](#), 1 November 2016, ICC-02/11-01/15-744, para. 13.

*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’, respectively.*

39. The Chamber turns to the next criterion relating to a request for leave to appeal. An appealable issue ‘must be one apt to “significantly affect”, i.e. in a material way, either a) “the fair and expeditious conduct of the proceedings” or b) “the outcome of the trial”’.<sup>47</sup> As evidenced by the reference to ‘or’, this criterion is disjunctive.

40. The Appeals Chamber has specified that ‘[t]he term ‘fair’ in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial’ and that ‘[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial’.<sup>48</sup> The Three Issues, with the First Issue and the Third Issue as reformulated by the Chamber, implicate the fair and expeditious conduct of the current and any future proceedings relating to offences under article 70 of the Statute and Provisional Rule 165 in a material way. These issues relate to the application of a procedure that diverges from the procedure for crimes under article 5 of the Statute. By granting leave to appeal, the Appeals Chamber will be in a position to establish parameters regarding the fairness of such proceedings. At the same time, an authoritative ruling by the Appeals Chamber will avert the need for further litigation on this matter and will, thus, contribute to the expeditious conduct of such proceedings. Having found that the first prong has been established, the Chamber finds that it is not necessary to assess the second prong.

41. The final criterion pertaining to a request for leave to appeal is that an issue meeting the aforementioned criteria must also ‘be one “for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”’.<sup>49</sup> According to the Appeals Chamber, ‘[t]he meaning conveyed by “advance” in the latter part of sub-paragraph (d) is “move forward”; by ensuring that the proceedings follow the right course’ and providing ‘a

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<sup>47</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 10.

<sup>48</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 11.

<sup>49</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 14.

safety net for the integrity of the proceedings'.<sup>50</sup> This criterion has been interpreted as establishing the need to ensure 'legal certainty' in the proceedings.<sup>51</sup>

42. In the view of the Chamber, the Three Issues, with the First Issue and the Third Issue as reformulated by the Chamber, comply with this criterion. Granting leave to appeal will enable the Appeals Chamber to determine whether the basis for the current proceedings, as well as any future proceedings based on article 70 of the Statute and Provisional Rule 165, is legally sound. This will provide legal certainty as to the legal framework of such proceedings and will avoid the need to divert resources to this question in the context of fast-paced proceedings. The Chamber is not persuaded by the argument of the Prosecutor that granting leave to appeal will delay the proceedings to the detriment of Mr Gicheru. The schedule for the confirmation of charges procedure, which will be conducted on the basis of written submissions,<sup>52</sup> leaves sufficient time to the Appeals Chamber to issue its judgment.<sup>53</sup> In any event, the Chamber is responsible for the fair conduct of the proceedings regarding Mr Gicheru and considers that the possibility of a limited delay cannot trump the need to ensure legal certainty in respect of the very basis of these proceedings.

43. In view of the foregoing, the Chamber finds that the criteria for granting leave to appeal have been satisfied and, thus, grants the OPCD Request in relation to the Three Issues with the First Issue and the Third Issue as reformulated by the Chamber.

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<sup>50</sup> [13 July 2006 Appeals Judgment](#), ICC-01/04-168, para. 15.

<sup>51</sup> Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Defence Request for Leave to Appeal the Order Setting a Deadline for the Filing of the Applications](#), 10 May 2019, ICC-01/12-01/18-342-Red-t-ENG, para.27.

<sup>52</sup> More specifically, the parties' written submissions are due on 15 March 2021, the Prosecutor may respond by 22 March 2021 and the Defence may reply by 29 March 2021. See ICC-01/09-01/20-T-001-CONF-ENG p. 11. The 60-day deadline for the Chamber to issue its decision will commence to run subsequently.

<sup>53</sup> In this regard, the Chamber notes that the Chambers Practice Manual specifies that '[i]n respect of interlocutory appeals filed under Article 82(1)(a), (c) and (d) and Article 82(2), the Appeals Chamber shall render its judgments within four months from the date of the filing of the response to the appeal brief'. See ICC, [Chambers Practice Manual](#), 29 November 2019, para. 92.

**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **GRANTS** the OPCD Request in relation to the Three Issues with the First Issue and the Third Issue as reformulated by the Chamber; and
- b) **ORDERS** the Registrar to also register the present decision, the OPCD Request (ICC-01/09-01/20-63), the Defence Response (ICC-01/09-01/20-64) and the Prosecutor's Response (ICC-01/09-01/20-66) in the case record of *The Prosecutor v. Phillip Kipkoech Bett* (ICC-01/09-01/15).

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



**Judge Reine Adélaïde Sophie Alapini-Gansou**

Dated this Wednesday, 23 December 2020

At The Hague, The Netherlands