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**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**

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I. Introduction

1. On 10 February 2016 the judges, acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence (“Rules”) under article 51(3) of the Rome Statute (“Statute”). The adoption of the provisional amendments was communicated to the President of the Assembly of States Parties (the Assembly) by the letter from the President of the ICC dated 29 February 2016 (annex I). That letter included the attached report entitled “Report on the Adoption by the judges of provisional amendments to rule 165 of the Rules of Procedure and Evidence” (annex II).

2. Article 51(3) of the Statute provides as follows:

“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.”

3. As this was the first time the procedure in article 51(3) of the Statute had been exercised, the Bureau considered the matter and in its meeting on 1 April 2016 determined that the provisional amendments would be discussed in the framework of the Study Group on Governance (“SGG”) in The Hague and then continue to be discussed in the Working Group on Amendments (“WGA”) in New York, as that process would allow States Parties to prepare themselves for consideration of the amendments at the fifteenth session of the Assembly.

II. Informal consultations

4. The SGG met in Cluster I on three occasions for informal consultations regarding the provisional amendments. The consultations took place on 3 May, 19 May, and 21 June. At these consultations States Parties had the opportunity to express their views on the provisional amendments. States Parties were also invited to provide written comments to the co-chairs of the SGG or the co-focal points of Cluster I. The Principal Legal Adviser to the Presidency of the Court, Mr. Hiram Abtahi, was invited to attend the consultations to provide the background to the Judges’ decision and to answer questions from States. At the meeting on 19 May, in addition to the Court’s report, States Parties also had before them a letter, dated 17 March 2016, from the Attorney General of Kenya to the President of the Assembly regarding the provisional amendment (annex III).

5. The representative of the Presidency set out the rationale for and substance of the amendments as outlined in the President’s letter and the Court’s report. As set out in the report, the amendments were made to rule 165, which governs the investigation, prosecution and trial of “offences against the administration of justice” pursuant to article 70 of the Statute. The amendments sought to simplify and expedite article 70 proceedings by allowing for the respective functions of the Pre-Trial and the Trial Chamber to be exercised by a chamber of one judge instead of a chamber of three judges, and allowing for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber. The report noted that the judges had adopted the provisional amendments under article 51(3) due to the urgency created by resource constraints facing the judiciary.

6. The discussions during the informal consultations focused on three areas:

- (a) whether the criteria under article 51(3) had been met;
- (b) the conformity of the amendments with the Statute; and
- (c) the implications of the provisional application of the amended rule.

7. The majority of States Parties who spoke during the consultations expressed their support for the provisional amendments and considered that they had met the article 51(3) criteria. These States generally concurred with the rationale behind the amendments and considered the amendments to be in conformity with the Statute. Some States expressed their confidence in the conformity of the rule with the Statute because the Court’s Advisory Committee on Legal Texts (ACLT) and the judges had unanimously so concluded. The amendments were also welcomed by some States as an effort by the judges to enhance the

efficiency and effectiveness of the proceedings, to the benefit of the victims and the accused, making best use of the limited resources, and thereby contributing to the Court's credibility.

8. Other States expressed concerns with the adoption of the provisional amendments by the judges. 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). One State considered the amendments to be ultra vires. 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.

9. Delegations stressed the importance of structured dialogue between States Parties and the Court in matters related to amendments. Some delegations suggested that the Court make efforts, whenever possible, to submit amendment proposals to States Parties before provisional adoption.

A. Responses from the Court

1. The article 51(3) criteria

10. In response to questions about the application of the criteria in article 51(3), the representative of the Presidency indicated that the judges considered article 51(3) to be applicable in these circumstances because the Rules did not provide for a specific situation, i.e. the situation of an extensive drain on judicial resources caused by the allocation of judicial resources to peripheral article 70 proceedings at the same time as the Court's workload on article 5 core crimes trials was continuing to increase. The representative of the Presidency also noted that the judges considered that the article 51(3) requirement of "urgency" was met in the circumstances. The representative observed that there were at least two types of urgent situations that might be envisaged:

(a) an urgency which exists at the outset, necessitating an almost immediate response; and

(b) an urgency which becomes apparent over time in view of relevant contextual elements. It was this second scenario that had led the judges to adopt provisional rule 165.

11. By way of elaboration, the representative noted that as a result of recent experiences (for example the *Bemba et al* case under article 70, where the pre-trial phase had taken the same amount of time as article 5 core crimes proceedings, and the trial phase had, thus far, taken 18 months) it had become evident to the Court that such a commitment of judicial resources to article 70 proceedings was not commensurate to the relationship between article 5 core crimes proceedings (which the Court was established to address) and article 70 proceedings (which were ancillary in nature). Therefore, the representative noted, the Court had felt that the Rules should provide for the possibility of addressing article 70 cases in a manner commensurate to their ancillary nature. On the timing of the adoption of the amendments, the representative of the Presidency recalled that, as set out in the report of the Working Group on Lessons Learnt to the fourteenth session of the Assembly,¹ the ACLT had finalized its work on this issue at the end of September 2015, at which point it had been considered too late to submit the proposals to the Assembly for consideration at its fourteenth session. On the other hand, it had also not been considered appropriate to wait for the fifteenth session of the Assembly. The representative of the Presidency noted that as of February 2016, when they adopted provisional rule 165, the overwhelming majority of the judges were sitting in two or more Chambers. Given the limitations on judges sitting in multiple Chambers, as well as the mounting number of trials, the judges had considered it necessary to adopt provisional rule 165 under article 51(3).

¹ ICC-ASP/14/30, annex II.

2. Conformity with the Rome Statute

12. In response to the concerns regarding the conformity of the amendments with the Statute, the representative of the Presidency stressed that the Statute and the Rules expressly envision a difference in nature between article 5 core crimes and article 70 proceedings. He noted that article 70(2) states that the “principles and procedures” governing the Court’s exercise of jurisdiction over article 70 cases shall be those provided by the Rules. Unlike for article 5 core crimes, the drafters of the Statute had clearly not considered it necessary to address these principles and procedures in the Statute itself. In addition, article 70(3), which provides for more limited sanctions for article 70 offences than for article 5 crimes, also distinguishes between articles 5 and 70 offences. Finally, article 70(4)(b) grants express power for the Court to request that a State Party submit an article 70 case to its national competent authorities. The representative of the Presidency highlighted that these provisions clearly marked article 70 proceedings as being ancillary in nature and thus distinguished between the procedures and principles governing article 5 core crimes and those governing article 70 offences.

13. In addition, the representative of the Presidency noted that the Rules themselves expressly foresee the possibility that the rules applicable to article 70 proceedings may differ from those applicable to article 5 core crime proceedings. The Rules’ chapter 9 (“Offences and misconduct against the Court”) already excludes and/or varies the application of specific provisions of the Statute. In particular, according to rule 163(1), the Statute and the Rules shall apply *mutatis mutandis*, “unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169”. Accordingly, the other provisions of the Statute and Rules apply by default only in the absence of more specific rules. Furthermore, rule 165 itself departed quite substantively from the Statute even prior to its provisional amendment. For example, rule 165(3) provided that confirmation of charges occurred through written submission, thus departing from article 61 of the Statute. rule 165(2) provided that articles 53 (“Initiation of an investigation”) and 59 (“Arrest proceedings in the custodial State”) of the Statute did not apply; rule 164 provided for a five year period of limitation to initiate investigation/prosecution; and rule 163(2)-(3) provided that Parts 2 (“Jurisdiction, admissibility and applicable law”) and 10 (“Enforcement”) of the Statute would, largely, not apply. A practical consequence, for example, was that there is no review concerning reduction of sentences (article 110) conducted in respect of article 70 proceedings. Accordingly, the regime already established in the Rules was one in which article 70 proceedings were ancillary and the procedures which applied differed from those applicable in article 5 core crime proceedings.

14. The representative of the Presidency further noted that the Statute and the Rules were also consistent with the notion of legal functions being performed by one judge. 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”. rule 132 *bis*, as adopted by the Assembly in 2012, provides for a single judge to assume certain functions for the preparation of trial.

15. In response to a query regarding the links between judicial decisions on legal aid in the *Bemba* case for article 5 crimes and article 70 offences, the representative of the Presidency noted that the question of the number of judges who would sit at different stages of the proceedings was an institutional issue, whereas the decisions on legal aid for article 5 and article 70 trials were of a judicial nature. He recalled that the Assembly had invited the Court to explore policy options for the quantum of legal aid for article 70 offences in the context of its current legal aid policy.

3. Implications of the provisional application of the amended rule

16. With regards to the issue of the implications of the provisional operation of the amended rule, and in particular what would happen if the amended rule was applied before the Assembly considered it and the Assembly subsequently decided to amend or reject it, the representative of the Presidency noted that any such questions would be addressed judicially in accordance with the Court’s legal texts. He recalled that, recently, on the question of any retroactive application of amended rule 68 (as adopted by the Assembly at

its twelfth session) in the Ruto case, the accused were granted leave to appeal by the Trial Chamber, and the Appeals Chamber duly rendered a decision. Accordingly, the question of retroactive application of provisional rule 165 was a matter which would be subject to judicial determination, on a case-by-case basis. It would also be open to the Assembly to discuss this issue when it considered the provisional amendments.

B. Outcome of consultations

17. At the last of the three series of informal consultations there was one State that had a significant objection to the amendments and one State which had concerns that were still under consideration. It was therefore clear that although the majority of States Parties supported the adoption of the amended rule by the Assembly, there was no final view on the matter at this stage.

III. Conclusion

18. As no final view could be reached by the SGG, it was not in a position to make a concrete recommendation to the WGA. The SGG therefore decided to refer the provisional amendments to the WGA, together with the views expressed and the responses from the representative of the Presidency. The WGA could then pursue the discussion with a view to making an appropriate recommendation to the Assembly.

Annex I

Letter from the President of the International Criminal Court to the President of the Assembly, dated 29 February 2016

Dear President Kaba,

I have the honour to inform you that, on 10 February 2016, the judges of the Court, acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence (“Rules”), which governs the investigation, prosecution and trial of “offences against the administration of justice pursuant to article 70 of the Rome Statute (“Statute”). The provisionally amended rule 165 simplifies and expedites article 70 proceedings by allowing for the respective functions of the Pre - Trial and the Trial Chamber to be exercised by a chamber of one judge instead of a chamber of three judges. The provisionally amended rule 165 further allows for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber. The provisional amendments reflect the outcome of Court-wide consultations through the Advisory Committee on Legal Texts.

This provisional amendment was adopted in accordance with article 51(3) of the Statute which provides that, in urgent cases where the Rules do not provide for a specific situation before the Court, a two-thirds majority of the judges may draw up a provisional rule to be applied until adopted, amended or rejected by the Assembly of States Parties. The judges acted under article 51(3) to adopt the provisional amendments due to the urgency created by current resource constraints facing the judiciary.

Pursuant to article 51(3) of the Statute, you are requested to arrange for the Assembly of States Parties to consider whether to adopt, amend or reject this provisional amendment at the next ordinary or special session of the Assembly of States Parties.

The provisional amendments to rule 165 are also accompanied by a related amendment to the Regulations of the Court, regulation 66 *bis*, which was adopted by the judges at the same plenary session. In the event that provisional rule 165 is either amended or rejected by the Assembly of States Parties, the judges of the Court will promptly amend or annul regulation 66 *bis*, as appropriate.

I attach, for transmittal to all States Parties, a “Report on the Adoption by the Judges of Provisional Amendments to rule 165 of the Rules of Procedure and Evidence which details the amendments and outlines the procedural steps taken in this process.

Please accept, President Kaba, the assurances of my highest consideration.

[Signed]

Silvia Fernandez de Gurmendi

Annex II

Report on the adoption by the judges of provisional amendments to rule 165 of the Rules of Procedure and Evidence, dated 29 February 2016

A. Introduction

1. This report is presented to the Assembly of States Parties in order to inform States Parties that, on 10 February 2016, the judges of the International Criminal Court ("Court"), acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence ("Rules"), which governs the investigation, prosecution and trial of "offences against the administration of justice" pursuant to article 70 of the Rome Statute ("Statute"). This provisional amendment was adopted in accordance with article 51(3) of the Statute which provides that, in urgent cases where the Rules do not provide for a specific situation before the Court, a two-thirds majority of the judges may draw up a provisional rule to be applied until adopted, amended or rejected by the Assembly of States Parties. At the same time, the judges also adopted a related amendment to the Regulations of the Court ("Regulations").

2. The provisional amendments to rule 165 reflect Court-wide consultation, having been recommended by the Advisory Committee on Legal Texts ("ACLT"). As provided in regulation 4(1) of the Regulations, the ACLT is composed of three judges (one from each Division), one representative from the Office of the Prosecutor ("OTP"), one representative from the Registry and one representative of counsel included in the list of counsel.

3. The provisionally amended rule 165 simplifies and expedites article 70 proceedings by allowing for the respective functions of the Pre-Trial and the Trial Chamber, including the confirmation of charges and the trial, to be exercised by a chamber of one judge instead of a chamber of three judges. The provisionally amended rule 165 further allows for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber.

B. The legal framework for article 70 proceedings

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

5. The drafting history of article 70 indicates that "many delegations" were concerned "that various principles and procedures in the Statute were not appropriate for non-core crimes."¹ However, "[g]iven the complexity of devising an appropriate procedure for prosecuting these offences and the little time available in Rome to resolve these issues, the conference decided as a general matter to leave elaboration of more detailed standards to the Rules."² The resulting language of paragraph 2 is "the general delegation of authority given to the drafters of the Rules" to devise procedures relating to article 70 offences.³

6. Rules 162-169 elaborate the principles and procedures governing article 70 offences. Rule 163 explains the relationship between the Statute and the Rules with respect to article 70 offences and provides, in paragraph 1, that "[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in Article 70."⁴

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

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

³ *Id.* at 1757.

⁴ See also Hakan Friman, "Offences and Misconduct Against the Court", in THE INTERNATIONAL CRIMINAL

This principle is subject to paragraphs 2 and 3, which exclude the application of Parts 2 ("Jurisdiction, admissibility and applicable law") and 10 ("Enforcement") of the Statute, with some limited exceptions, to article 70 offences.

7. The drafting history of the Rules reveals that during the discussions regarding the procedure for article 70 offences, "it was suggested that in dealing with such offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber."⁵

C. Provisionally amended rule 165

8. The provisional amendments to rule 165 stem from the recognition that the nature and gravity of offences under article 70 differ markedly from those under article 5 and that the procedure governing article 70 proceedings should reflect that difference. Jurisdiction over article 70 offences should be exercised in an expeditious and simple manner. In particular, it does not appear necessary for the confirmation of charges and trial for such offences to be respectively carried out by three judges, along with five judges to review decisions on appeal. Following the examples of other criminal tribunals, in particular the Special Court of Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL),⁶ rule 165 has been provisionally amended so that the confirmation of charges hearing and the trial be respectively conducted by one judge and the appeals by a panel of three judges. I

9. The legal basis for the provisional amendment is clear. As noted at paragraph 4 above, the plain language of article 70(2) of the Statute indicates that a distinct procedural regime for article 70 offences may be provided for in the Rules. This reading of article 70(2) is further buttressed by the drafting history of article 70(2) as described in Part II of this Report.

10. In accordance with the clear mandate in article 70(2) to include further principles and procedures in the Rules, the provisional amendments introduced by the judges to rule 165 are as follows:

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

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

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

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

Original rule 165

Provisional rule 165

Rule 165**Investigation, prosecution and trial**

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.

2. Articles 53 and 59, and any rules thereunder, shall not apply.

3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.

4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.

Rule 165**Investigation, prosecution, trial and appeal**

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.

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

3. For purposes of article 61, the Pre-Trial Chamber, as constituted under sub-rule 2, may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.

4. The Trial Chamber seized of the case from which the article 70 proceedings originate may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.

11. Provisional rule 165 is consistent with the other rules contained in section 1 of chapter 9 of the Rules. Rule 163(1) provides that "[u]nless otherwise provided in [...] rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70." In other words, rule 163(1) provides that relevant provisions of the Statute apply by default unless otherwise displaced by the rules governing article 70 offences. A plain reading of this provision fails to indicate any tension with the provisional amendments. Rather, rule 163(1) reinforces the principle set forth in article 70(2) that the Rules will govern article 70 proceedings and clarifies that to the extent that there are any gaps in procedure, those gaps will be filled by the relevant provisions of the Statute.

12. It is further noted that the concept of a judge taking certain decisions alone is not new to the legal framework of the Court. Article 57(2)(b) of the Statute provides that "a single judge of the Pre-trial Chamber may exercise" a range of functions and powers of the Pre-Trial Chamber. With respect to trial proceedings, rule 132 *bis* provides that "a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial." In addition, pursuant to article 64(8)(b), the presiding judge of a Trial Chamber may also "give directions for the conduct of proceedings". With regard to the procedure in provisionally amended rule 165(2), constituting Pre-Trial and Trial Chambers composed of one judge is distinct from the procedure for the designation of a Single Judge.

13. The ACLT, as well as the judges of the Court, when analysing the proposal for amendment to rule 165, discussed the possible tension created between article 39 of the Statute and any proposal to reduce the number of judges hearing article 70 proceedings. It was agreed that article 70(2) allowed for certain Rules amendments for article 70 proceedings which derogate from the procedures set out in the Statute. The original rule already derogated from the procedures set out in the Statute by removing the requirement for holding a confirmation hearing. It was considered that reducing the number of judges required to hear article 70 proceedings was possible if both articles 39(2)(b) and 57(2) of the Statute were added to rule 165(2) of the Rules.

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

D. Amendment to the Regulations of the Court

15. The second paragraph of provisional rule 165 provides that "[t]he procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations".

16. The judges of the Court considered that it was prudent to propose changes to the Rules only to the extent that such changes were strictly necessary. Accordingly, it was considered that the details of the modalities for the composition of Chambers of one judge and the panel of three judges in article 70 proceedings should be included in the Regulations.

17. The judges have, accordingly, added a section 5, entitled "Offences against the administration of justice" to Chapter 3 of the Regulations, which deals with "Proceedings before the Court". Within this section, the judges have added regulation 66 *bis*, which provides:

Regulation 66 *bis*

Constitution of Chambers and the panel of three judges

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

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

18. Consistently with the Presidency's responsibility for the proper administration of the Court, set out in article 38(3)(a) of the Statute,⁷ the Presidency is responsible for constituting a Trial Chamber composed of one judge and a panel of three judges to decide appeals for article 70 proceedings. However, as regards pre-trial proceedings, it was noted that the Presidency does not assign cases - only situations - to Pre-Trial Chambers. Additionally, since the pre-trial judges will be the first to be aware of the initial stages of an article 70 investigation (which may occur under seal), for pre-trial proceedings, the President of the Pre-Trial Division will constitute a Pre-Trial Chamber composed of one judge to issue a warrant of arrest or summons to appear and hear the entire confirmation phase of the proceedings.

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

E. Urgency of the amendments

19. The judges have adopted provisional rule 165 in accordance with the provision in article 51(3) of the Statute that: "[a]fter the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties".

20. Considering that the Court has now been called upon to exercise its jurisdiction over offences against the administration of justice under article 70, the judges considered that the current resource constraints facing the judiciary rendered it urgent that the amendment to rule 165 be provisionally adopted. The pool of judges available to deal with all situations and cases before the Court is limited and as the Court proceeds with an increased number of active trials in article 5 proceedings, it is no longer sustainable for article 70 proceedings to demand the same resource commitment as article 5 proceedings. Current financial constraints call for a procedural framework allowing for a more flexible and efficient allocation of judicial resources. Such increased flexibility must be immediately available, as the Court has already reached the critical juncture at which it will be unable to allocate the required judicial resources to article 70 proceedings.

21. Accordingly, the judges considered that the necessary conditions of urgency existed to warrant recourse to the procedure outlined in article 51(3) of the Statute. Therefore, they decided to draw up this provisional rule and apply it in accordance with that provision, as well as article 51 (4) of the Statute.

F. Conclusion

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

Annex III

Letter from the Attorney General of Kenya to the President of the Assembly, dated 17 March 2016

Your Excellency,

The Government of the Republic of Kenya ("GoK") has the honour to address this letter to you regarding the recent provisional amendments made to rule 165 of the Rules of Procedure and Evidence ("Rules") by the judges of the International Criminal Court ("ICC" or "Court"), purportedly acting in plenary and under the powers set out in article 51 (3) of the Rome Statute ("Statute"). The GoK respectfully submits that these provisional amendments are *ultra vires* and wishes to notify the Court of its formal and principled objection thereto.

As is apparent from the terms of article 51 of the Statute, the drafters intended that, in contrast to the position at the *ad hoc* tribunals, legislative power at the ICC remain primarily with States. To give effect to this intention but, at the same time, to ensure a measure of flexibility, article 51 (3) of the Statute provides that judges may only draw up provisional rules in: (i) "urgent cases"; and (ii) "where the Rules do not provide for a specific situation before the Court". Further, article 51 (4) requires that provisional rules be consistent with the Statute. As explained more fully below, the GoK respectfully submits that these three conditions were not satisfied when the judges provisionally amended rule 165 on 10 February 2016.

First, the GoK submits that the provisional amendments were not necessitated by urgency. The GoK understands that the proposal for a reduced number of judges to address article 70 offences at each of the pre-trial, trial and appeal phases was discussed by the judges at the Nuremberg retreat in June 2015 and, thereafter, sent to the Advisory Committee on Legal Texts in July 2015. Therefore, the fact that the issue was known and the proposed solution identified, at the latest, in June last year but was not considered sufficiently urgent to warrant a proposal being submitted to the session of the Assembly of States Parties ("ASP") held in November 2015 demonstrates that the urgency condition has not been satisfied. This is particularly so when, according to the information publicly available, there has been no change in circumstance between November 2015 and February 2016 which would require the judges to exercise their exceptional legislative power, *e.g.*, no new cases or Situations have come before the Court in this limited period. In these circumstances, the GoK submits that the proposed amendments should have been submitted in the normal manner to the Court's primary legislative body, the ASP, for consideration at its next session.

Second, the GoK submits that recourse should not have been made to article 51 (3) to provisionally amend rule 165 because the Rules do provide for the specific situation before the Court.

Chapter 9 of the Rules deals with "Offences and misconduct against the Court". Rule 163(1), which forms part of Chapter 9, states that "[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* the Court's investigation, prosecution and punishment of offences defined in article 70." This Rule is important because it clarifies that, to the extent there are any perceived gaps in the procedure to be followed in article 70 proceedings as laid out in the Rules, those gaps should be filled in the first instance by the relevant provision of the Statute. This is common sense given that the Statute has primacy in the Court's legal framework.

Therefore, while the Rules are silent on the number of judges required to conduct article 70 proceedings, this purported gap is addressed by article 39 (Chambers) of the Statute. Therefore, the Rules and the Statute read in combination do provide for the specific situation, namely the composition of the bench at all stages of article 70 proceedings.

Applying the same logic, removing the separate sentencing hearing procedure under article 76 and the leave to appeal procedures under article 82(1) (d) from article 70

proceedings is clearly not addressing any "gap" in the Rules. Therefore, dis-applying these statutory articles via provisional rule amendments cannot be said to fall within the second condition which must be satisfied for the judges to exercise their exceptional article 51 (3) powers.

Third, the provisional amendments to rule 165 are inconsistent with the new articles added to rule 165(2) and, thus, fail to satisfy article 51 (4) of the Statute. Of particular concern is the inclusion of articles 39(2) (b) of the Statute (except in relation to the Pre-trial Chamber), 76(2) and 82(1) (d). The inconsistency between the amendments and the Statute is expressly recognized in the provisional rule because one of the amendments states that, *inter alia*, articles 39(2) (b), 76(2) and 82(1) (d) shall not apply. As a matter of principle, the GoK submits that action which seeks to circumvent statutory articles *via* secondary legislation is problematic, particularly when the action is not taken by the Court's primary legislature - States. The GoK recognizes that various provisions in Chapter 9 of the Rules state that certain articles of the Statute shall not apply to article 70 proceedings (e.g. rule 163(2) and (3) and rule 165(2)). However, these Rules were drafted and adopted by the States Parties.

Of added concern regarding the provisional amendments at issue is the fact that the drafting history of the Rules reveals that it was suggested during the discussions on the procedure for article 70 offences that in dealing with such offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber.¹ However, this proposal was challenged and eventually rejected by State Parties. Specifically, "[s]ome 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."²

Finally, while the provisional amendments to rule 165 are procedural in nature, they still set, what the GoK asserts, is a problematic precedent which gives rise to the concern that this procedure could be used in future to circumvent substantive rights enshrined in the Statute such as those set out in article 67. It is, therefore, necessary, that the judges' purported exercise of the exceptional powers set out in article 51 (3) be properly scrutinized.

Please accept, Your Excellency, the assurance of the GoK's highest consideration.

Yours sincerely,

[Signed]

Githu Muigai, EGH, SC
Attorney General

Copy to:
Sylvia Fernandez De Gurmendi
President of the International Criminal Court

¹ Hakan Fri man, "Offences and Misconduct Against the Court", Roy S. Lee (ed), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, p. 614.

² *Ibid*, p. 615.