

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-01/09-01/13  
Date: **18 September 2015**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Chang-ho Chung

**SITUATION IN THE REPUBLIC OF KENYA**

***IN THE CASE OF  
THE PROSECUTOR v. WALTER OSAPIRI BARASA***

**Public Document**

**Prosecution Response to the Defence Request for Leave to Appeal the “Decision on the ‘Defence challenge to the warrant for the arrest of Walter Osapiri Barasa’”**

**Source:** The Office of the Prosecutor

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

**The Office of the Prosecutor**

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Mr James Stewart

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**Counsel for the Defence of Walter**

**Osapiri Barasa**

Mr Nicholas Kaufman

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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Mr Herman von Hebel

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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**Other**

1. The Defence request for leave to appeal (“Application”)<sup>1</sup> the “Decision on the ‘Defence challenge to the warrant for the arrest of Walter Osapiri Barasa’” (“Decision”)<sup>2</sup> should be rejected *in limine* because the Defence has no standing to file this Application.

2. The Application is an extension of the Defence’s efforts to challenge the warrant of arrest against Mr Barasa that the Pre-Trial Chamber issued pursuant to article 58 of the Rome Statute. According to the consistent jurisprudence of this Court, proceedings under article 58 are *ex parte* and the suspect has no right to make submissions until he is detained in the custodial State, which is not the case with Mr Barasa.<sup>3</sup> Pre-Trial Chamber II in the *Kenya* situation held that “there is no legal basis for a person under the Prosecutor’s investigation to submit observations at the [article 58] stage of proceedings”.<sup>4</sup>

3. In a separate decision in the *Kenya* situation, Pre-Trial Chamber II further found as follows:<sup>5</sup>

[H]ad the drafters intended that the proceedings under article 58 of the Statute be conducted on an adversarial basis, they would have *expressis verbis* provided for it (*ubi lex voluit dixit, ubi noluit tacuit*), alongside the other instances wherein the voices of parties or participants shall or may be heard by a Chamber. On the contrary, the wording of article 58 of the Statute clearly indicates that the decision as to whether a warrant of arrest or a summons to appear should be issued is to be based upon an examination of ‘the application and the evidence or other information submitted by the Prosecutor’ only. No role, actual or potential, is provided or anticipated for the person named in the Prosecutor’s application under article 58 of the Statute.

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<sup>1</sup> ICC-01/09-01/13-37.

<sup>2</sup> ICC-01/09-01/13-35.

<sup>3</sup> Decision, para.2.

<sup>4</sup> ICC-01/09-35, para.10.

<sup>5</sup> ICC-01/09-42, para.18.

4. As a result of this consistent jurisprudence, the recent Pre-Trial Practice Manual, which identified the “best practices” of the Court’s activities over the past ten years,<sup>6</sup> affirmed that proceedings under article 58 are *ex parte*. Even if they are public, the person whose arrest is sought does not have standing to make submissions on the merits of the Prosecution’s application or a Pre-Trial Chamber’s decision under article 58.<sup>7</sup> It necessarily follows that the person also lacks standing to challenge other related rulings made by a Chamber of the Court, including by lodging an application for leave to appeal.

5. For the above reasons, the Pre-Trial Chamber should dismiss the Application in *limine*.



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**Fatou Bensouda, Prosecutor**

Dated this 18<sup>th</sup> day of September 2015  
At The Hague, The Netherlands

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<sup>6</sup> Pre-Trial Practice Manual, September 2015, p.4. see [http://www.icc-cpi.int/iccdocs/other/Pre-Trial\\_practice\\_manual\\_%28September\\_2015%29.pdf](http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_%28September_2015%29.pdf).

<sup>7</sup> Pre-Trial Practice Manual, September 2015, Section I.1, p.5.