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 Counsel for the Defence of Walter

Ms Fatou Bensouda Osapiri Barasa

Mr James Stewart Mr Nicholas Kaufman

Mr Jean-Jacques Badibanga

Legal Representatives of Victims Legal Representatives of Applicants

Unrepresented Victims Unrepresented Applicants for

Participation/Reparation

The Office of Public Counsel for The Office of Public Counsel for the

Victims Defence

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REGISTRY

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Victims and Witnesses Unit Detention Section

Victims Participation and Reparations Other

Section

1. The Defence request for leave to appeal ("Application")¹ the "Decision on the 'Defence challenge to the warrant for the arrest of Walter Osapiri Barasa'" ("Decision")² 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.³ 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".⁴

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

[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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¹ ICC-01/09-01/13-37.

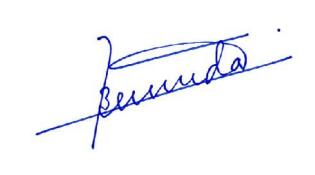
² ICC-01/09-01/13-35.

³ Decision, para.2.

⁴ ICC-01/09-35, para.10.

⁵ 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,⁶ 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 58.⁷ 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*.



Fatou Bensouda, Prosecutor

Dated this 18th day of September 2015 At The Hague, The Netherlands

⁶ Pre-Trial Practice Manual, September 2015, p.4. see http://www.icc-cpi.int/iccdocs/other/Pre-Trial practice_manual_%28September_2015%29.pdf.

⁷ Pre-Trial Practice Manual, September 2015, Section I.1, p.5.