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No.: **ICC-01/09-01/13**

Date: **15/09/2015**

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

Defence request for leave to appeal decision ICC-01/09-01/13-35

Source: Counsel for Walter Osapiri Barasa

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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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Pursuant to Article 82(1)(d) of the Rome Statute, Walter Osapiri Barasa ("the Suspect") hereby seeks leave to appeal decision ICC-01/09-01/13-35 issued by Pre-Trial Chamber II on 10 September 2015 ("the Impugned Decision").

The Rationale for the Impugned Decision

1. Pre-Trial Chamber II held that the Suspect was not entitled to challenge the validity of the warrant for his arrest ("the Arrest Warrant") under Rule 117(3) of the Rules of Procedure and Evidence ("the Rules") because the said rule *"does not become applicable until the person for whom a warrant of arrest has been issued is arrested by the requested State, i.e. until the person is detained in the custodial State"*.

The Issues for Appeal

2. The Suspect requests that the learned Pre-Trial Chamber certify the following issues for appeal:

- a. Whether Rule 117(3) only becomes applicable when a Suspect is physically detained by a State Party when the judicial authorities of the same State Party have assented to a stay of execution of an ICC arrest warrant;
- b. Whether a suspect may challenge the validity of an ICC arrest warrant prior to his surrender to the Court when he is being investigated for offences against the administration of justice, and;
- c. Whether, in light of judicial developments in Kenya, namely the arrest and apparent release of two other suspects charged with Article 70 offences, the Pre-Trial Chamber should have used its inherent power to reconsider its decision to issue a warrant for the arrest of the Suspect and substituting, in its place, a summons to appear with or without conditions.

Submission

3. The issues which the Suspect presents for certification arise directly out of the Impugned Decision and are "*essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion*".¹

4. Although the Pre-Trial Chamber dismissed the challenge to the validity of the Arrest Warrant for the reasons stated in paragraph 1 above, it was also clearly implied that Rule 165(2) would not allow the Suspect to present a challenge pursuant to Rule 117(3). If it is indeed accepted that Rule 165(2) would prevent the application of Article 59 and, as a consequence, Rule 117(3), then it would appear that an individual suspected of offences against the administration of justice would be at a serious procedural disadvantage in comparison to an individual suspected of the indisputably more serious crimes set out in Article 5 of the Rome Statute. A decision of the Appeals Chamber is thus necessary to resolve this apparent legal anomaly.

5. Assuming, however, that Rule 117(3) does apply to the present scenario, it will be argued that the plain text of the rule itself does not require the actual physical detention of the Suspect in order for it to be applicable.

6. Furthermore, the Pre-Trial Chamber was possessed of knowledge concerning judicial developments in Kenya which was not factored into the Impugned Decision. The Appeals Chamber should now be allowed to determine whether the apparent release on bail of Paul Gicheru and Philip Kipkoech Bett in Kenya is new information which ought to have caused Pre-Trial Chamber II to reconsider the necessity for the Suspect's physical detention


¹ ICC-01/04-168.

pending his initial appearance.² As held in the *Lubanga* case: "*it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information*".³

7. If the envisaged appeal should be resolved in the Suspect's favour, he will immediately waive his challenge to the domestic surrender process which, it should be stressed, the Kenyan judiciary and the other parties to the proceedings have agreed that he may presently pursue as a free man.⁴ The Suspect will then attend the ICC as soon as arrangements can be finalised with the Registry thereby ensuring "*the fair and expeditious conduct of the proceedings or the outcome of the trial*" and that the proceedings against him are "*materially advanced*".

Relief Sought

8. In light of the aforementioned, the Suspect respectfully requests that the learned Pre-Trial Chamber grant leave to appeal the issues identified in paragraph 2 above.



Nicholas Kaufman

Counsel for Walter Osapiri Barasa

Jerusalem, Israel
15 September 2015

² The Suspect was not aware of the case against Gicheru and Bett at the time that he originally petitioned the Pre-Trial Chamber and has sought disclosure of information pertinent to their arrest and apparent release on bail (ICC-01/09-01/13-36).

³ ICC-01/04-01/06-2705 at paragraphs 15 and 18.

⁴ <http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/>

"When asked for their submissions on the ordering suspending the arrest warrant, none of the respondents challenged the suspension. Nderitu and Deputy Director of Public Prosecutions Kioko Kamula, however, did ask the court to set two conditions when suspending the arrest warrant. They asked the court to order Barasa to remain in Kenya for the duration of the case and that he also sign a recognizance that he will follow whatever orders the court issues".