



Original: English

No.: ICC-01/09-01/13
Date: 29 October 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

Decision on the "Defence request for leave to appeal decision ICC-01/09-01/13-35"

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Jean-Jacques Badibanga

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the 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

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II issues this decision on the “Defence request for leave to appeal decision ICC-01/09-01/13-35” submitted by Nicholas Kaufman as counsel for Walter Barasa on 15 September 2015 ([ICC-01/09-01/13-37](#), “Request”).

1. On 21 August 2015, counsel for Walter Barasa filed the “Defence challenge to the warrant for the arrest of Walter Osapiri Barasa” ([ICC-01/09-01/13-31](#)), requesting the Chamber to “revoke the warrant of arrest of the Suspect and to substitute in its place a summons to appear, with or without conditions”.

2. On 10 September 2015, the Chamber issued the “Decision on the ‘Defence challenge to the warrant for the arrest of Walter Osapiri Barasa’” ([ICC-01/09-01/13-35](#), “Decision”), dismissing the request of the Defence.

3. Walter Barasa requests leave to appeal the Decision with respect to the following issues: (i) “[w]hether 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”; (ii) “[w]hether 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 (iii) “[w]hether, 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” (Request, para. 2).

4. The Prosecutor responded to the Request on 18 September 2015 ([ICC-01/09-01/13-38](#), “Response”), submitting that the Request should be rejected *in*

limine because the Defence has no standing until Walter Barasa is detained in the custodial State.

5. The Chamber notes article 82(1)(d) of the Rome Statute (“Statute”), rule 155 of the Rules of Procedure and Evidence (“Rules”), and regulation 65 of the Regulations of the Court, as well as the established case law of the Court in the matter of interlocutory appeals pursuant to article 82(1)(d) of the Statute.

6. The Chamber notes the Prosecutor’s argument that Walter Barasa should be denied standing to bring the Request, but considers that, as the Request aims to obtain leave to appeal precisely the Chamber’s ruling on the applicability of rule 117 to the present proceedings, it is warranted to examine the merits of the Request.

7. Article 82(1)(d) of the Statute regulates interlocutory appeals. This means that its object and purpose is not to regulate which decisions are as such appealable but rather to create a procedure by which appellate intervention on a certain issue can be anticipated to an intermediate stage of proceedings when it is determined that to have that issue decided only in the final appeal at the conclusion of the said proceedings would mean to risk that large parts or the entire proceedings may be invalidated. This is evidenced most clearly by the requirement of article 82(1)(d) that the Chamber assess whether “an immediate resolution [of the issue proposed for appeal] by the Appeals Chamber may materially advance the proceedings”, but also by the incorporation of the impact on the fair and expeditious conduct of the proceedings or the outcome of the trial into the criteria for certifying appeal. Indeed, as held by the Appeals Chamber, “[a] wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal

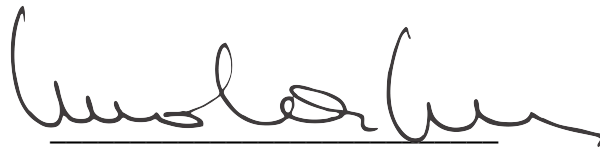
will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process".¹

8. However, the Chamber notes that proceedings under rule 117 are not intermediate in the sense of ultimately leading to a decision or judgment which would be appealable pursuant to articles 81 or 82 of the Statute. Indeed, a decision of the Chamber on a challenge to the warrant of arrest under rule 117 of the Rules constitutes the outcome of a separate, distinct proceeding under that rule. In this sense, it cannot be said that issues raised with respect to these proceedings have a significant impact on the fairness and expeditiousness of the proceedings, or on the outcome of trial, or that appeal on this matter would materially advance the proceedings. Leave to bring an interlocutory appeal against the Decision must therefore be rejected.


FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

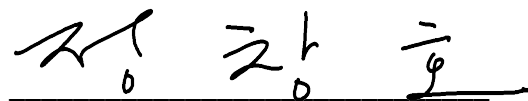
Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this 29 October 2015

At The Hague, The Netherlands

¹ *Situation in the Democratic Republic of the Congo*, [ICC-01/04-168](#), 13 July 2006, para. 16.