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

Date: 14/10/2013

PRE-TRIAL CHAMBER II

**Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser**

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF
THE PROSECUTOR V. WALTER OSAPIRI BARASA**

**Public Document
URGENT**

Defence Request for Disclosure (1)

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

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart, Deputy-Prosecutor

Mr. Kweku Vanderpuye, Senior Trial Lawyer

Counsel for the Defence

Mr. Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Pre-Trial Chamber II is hereby respectfully requested to order the disclosure of all information materially relevant to attempts made by the Office of the Prosecutor ("OTP") and its agents to enforce the warrant for the arrest of Walter Barasa ("the Suspect") and to recruit him as an incriminating witness against Deputy-President William Ruto.

Factual Background

1. On 2 August 2013, the learned Single Judge of Pre-Trial Chamber II issued, under seal, the "Warrant of Arrest for Walter Osapiri Barasa" ("the Arrest Warrant").¹ Among other directions, the Single Judge ordered *"the Registrar to promptly liaise with the Prosecutor with a view to following the movements of Walter Osapiri Barasa and to identifying the most appropriate circumstances, as to timing and place, for transmitting the relevant request(s) for cooperation to the competent authorities pursuant to rule 176(2) of the Rules and serving the warrant of arrest on him"*.

2. On 19 September 2013, the Suspect – a former OTP intermediary - initiated contact with herein undersigned Counsel ("Counsel") voicing a concern that he was being harassed by members of the OTP.

3. On 20 September 2013, the Suspect gave Counsel a written power of attorney and requested that Counsel represent him before all organs of the International Criminal Court ("ICC").²

¹ ICC-01/09-01/13-1-Red2.

² The power of attorney has been accepted by the OTP and has been submitted to the Registry.

4. On 22 September 2013, the Suspect released a press statement in which he alleged that, on 13th September 2013, an OTP investigator had contacted him informing him that his personal security was at risk and that he should leave Kenya with the support of the OTP.

5. On 2 October 2013, Pre-Trial Chamber II unsealed the Arrest Warrant. On the very same day, the Prosecutor – Ms. Fatou Bensouda gave a press conference at which she stated, *inter alia*, that an unsuccessful attempt had been made to arrest the Suspect in a third country.³

6. On 2 October 2013, Counsel wrote to the OTP asking to know what, if any, disclosure it was prepared to make.

7. On 3 October 2013, the OTP responded to Counsel as follows: "*the Prosecution is not inclined to discuss disclosure prior to your client's arrest and surrender to the Court, whether voluntary or not. However, once this occurs, the Prosecution is prepared to sit down with you to address any immediate concerns you may have at such time*".

8. On 4 October 2013, Counsel wrote, once more, to the OTP asking to know whether its blanket refusal to disclose evidence would include information pertaining to steps taken by the OTP to facilitate the Suspect's arrest after the issuance of the arrest warrant on 2 August 2013. More specifically, Counsel made a request for the disclosure of investigators' notes documenting the reported attempt to execute the Arrest Warrant in a third country.

9. On 4 October 2013, the OTP replied to Counsel reiterating its earlier refusal to effect any disclosure whatsoever prior to the Suspect's surrender to the ICC.

³ <http://www.youtube.com/watch?v=LC5mrzIdCPA&list=UU183T5VoMh5wISSdKPaMgRw> at 6:42.

10. On 7 October 2013, the Arrest Warrant was presented to the High Court of Kenya for enforcement pursuant to Section 29(1) of the Kenyan International Crimes Act, 2008.

11. On 8 October 2013, the Suspect submitted a petition for judicial review to the Kenyan High Court arguing, *inter alia*, that the administrative procedures adopted by the Kenyan government to enforce the Arrest Warrant were unconstitutional.

Submission

12. Under the Kenyan International Crimes Act, 2008, the process for certifying the surrender of a suspect to the ICC, at first instance, comprises several procedural steps. Firstly, the competent Kenyan minister is required to present the ICC arrest warrant to a judge of the High Court.⁴ Secondly, the judge of the High Court is required to issue a Kenyan arrest warrant.⁵ Thirdly, the suspect is entitled to apply for bail.⁶ Fourthly, the High Court is required to consider the eligibility of a suspect for surrender.⁷ Fifthly, the competent Kenyan minister is required, formally, to make a surrender order with respect to the person that the High Court has declared eligible for surrender.⁸ The disclosure sought by way of the present petition is designed to assist the Suspect at the fourth stage of the process described above.

13. At the present moment in time, the Kenyan High Court is due to hear submissions on the constitutionality of administrative procedures initiated by

⁴ Article 29 of the International Crimes Act.

⁵ Article 30 of the International Crimes Act.

⁶ Article 36 of the International Crimes Act.

⁷ Article 39 of the International Crimes Act.

⁸ Article 43 of the International Crimes Act.

Kenya to enforce the Arrest Warrant and on the substance of the competent Kenyan minister's request for the issuance of a Kenyan arrest warrant.

14. Nevertheless, should his constitutional challenge fail, the Suspect will, at a later date, challenge the propriety of the OTP's handling of the Arrest Warrant in the context of Section 39(3)(d) of the International Crimes Act, 2008. This provision requires the Kenyan High Court, in considering eligibility for surrender, to be satisfied that the Suspect's rights "*were respected as provided in paragraph 2(c) of article 59 of the Rome Statute*".

15. In issuing the Arrest Warrant, the learned Single Judge ordered the Registrar to liaise with the Prosecution for the purpose of following the movements of the Suspect. The Single Judge did not, however, give the Prosecution a mandate to entrap the Suspect by hoodwinking him into travelling to a jurisdiction where his arrest could be effected by prior arrangement. Nor did the Single Judge intend that the OTP should extract a self-incriminating admission from the Suspect without the Suspect knowing that he was already subject to an arrest warrant.

16. The Suspect has reason to believe that the OTP attempted to lure him out of Kenya on the false pretext of a threat to his personal security with intent to have him arrested in a third country. This belief is based on the Prosecutor's above cited admission at her press conference on 2 October 2013. It is also based on the general tenor of an OTP investigator's correspondence with the Suspect on 13 September 2013. This correspondence was deposited in the drafts box of an email account created specifically for streamlining communication between the Suspect and his ICC handlers and has since been handed to the Kenyan police.

17. The Suspect's belief that moves were afoot to entice him out of Kenya is now corroborated with the benefit of hindsight. Firstly, it is an established fact

that the Arrest Warrant had already been issued at the time that the OTP investigator informed the Suspect that his security and that of his family was at risk. Secondly, the Suspect alleges that at meeting with the same OTP investigator in Nairobi, on 15 September 2013, an oral attempt was made to enlist him as a witness for the Prosecution against Deputy-President William Ruto. In a nutshell, the OTP investigator attempted to extort collaboration from the Suspect by informing him that he could either testify to witness tampering at the behest of Deputy-President William Ruto or be arrested himself. Such a demand – if true – is particularly egregious since it was made in the knowledge that the Suspect's fate was no longer under the control of the OTP but of the Court.

18. Moreover, the aforementioned conduct, if it took place, could, *prima facie*, constitute an attempt to commit the offences of abduction and extortion under the Kenyan Penal Code.⁹ It could also be seen as an attempt to breach State sovereignty given that the strategy was designed to deprive the Suspect, as a Kenyan citizen, of the statutory safeguards which Kenyan law would normally afford him when an application is made to surrender him to another jurisdiction. Put more simply, the scheme, if it existed, was most likely an attempt to procure an arrest in a jurisdiction where the OTP felt its "chances of success" were greater.

19. Kenya is a common law country which respects British jurisprudential precedent. In *Bennett v. Horseferry Road Magistrates' Court*,¹⁰ the House of Lords held that it was an abuse of process for a person to be forcibly brought into the jurisdiction of a court in disregard of extradition procedures. Such an abuse of

⁹ **Abduction:** Section 256: Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.

Extortion: Section 300: (1) Any person who, with intent to extort or gain anything from any person - (a) accuses or threatens to accuse any person of committing any felony or misdemeanour, or of offering or making any solicitation or threat to any person as an inducement to commit or permit the commission of any felony or misdemeanour; or (b) threatens that any person shall be accused by any other person of any felony or misdemeanour, or of any such act; or (c) knowing the contents of the writing, causes any person to receive any writing containing any such accusation or threat as aforesaid, is guilty of a felony,

¹⁰ http://www.iilj.org/courses/documents/Rv.Horseferry_edit.pdf.

process would, so it is argued, arise even where a Suspect is enticed, by deceit, into the jurisdiction of a requesting State or, as in the present case, a State from where transfer to the ICC may be facilitated more conveniently.

20. The Suspect submits that the means employed by the OTP to enforce the Arrest Warrant are of direct relevance to the test stipulated under Section 39(3)(d) of the International Crimes Act, 2008. In any event, the correct interpretation of this provision of Kenyan law and whether or not a Kenyan arrest warrant should be denied on the basis of the OTP's alleged "outrageous" conduct is not a question for the ICC but for the Kenyan High Court. This is, in fact, recognized by Article 59(2) of the Rome Statute which states that whether or not a suspect's rights have been respected will be determined "*in accordance with the law of that State*"; namely, the law of the State required to enforce the ICC arrest warrant.

21. The Pre-Trial Chamber should not, so it is submitted, prevent the Suspect from pleading this argument to its full extent by denying him evidence of such "outrageous" conduct where it exists. Rule 77 of the Rules of Procedure and Evidence permits the Suspect "*to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial...*". This right of inspection is not limited to incriminating evidence and it may be exercised prior to a Suspect's surrender to the ICC.¹¹ For the latter assertion, the learned Pre-Trial Chamber is referred to the case of Callixte Mbarushimana where Pre-Trial Chamber I ordered the pre-surrender disclosure of intercepted electronic

¹¹ ICC-02/05-03/09-501 (The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus) at paragraph 38 where the Appeals Chamber reviewed the scope of Rule 77 reiterating its findings in an earlier Lubanga appeal: "*Regarding the application of Rule 77 in general, the Appeals Chamber recalls that in its Lubanga OA 11 judgment, it held that 'the term 'material to the preparation of the defence' must be interpreted broadly'. It found that documents that were 'not directly linked to exonerating or incriminating evidence' were nevertheless material to the preparation of the accused's defence in that case. The overarching consideration is whether the objects are 'material to the preparation of the defence', which was found in that judgment to 'be understood as referring to all objects that are relevant for the preparation of the defence'.*"

communications in order for the Defence to contest their legality in the context of a Rule 117 challenge to the validity of an arrest warrant.¹²

22. The information sought, even if it be investigators' memoranda, is of direct relevance to the argument which the Suspect will seek to raise before the Kenyan High Court. The Suspect fully anticipates that the OTP will seek to prevent disclosure of some of this information, if it exists, pursuant to Rule 81(1) of the Rules of Procedure and Evidence. The substantive case against the Suspect, however, concerns allegations of witness tampering. For this reason, the relevant memoranda – if they exist – cannot be viewed as collected "*in connection with the investigation or preparation of the case*". It should not be forgotten that the "defence" to a case prosecuted at the ICC can, and often does, involve an examination of prosecutorial conduct under the general heading of "abuse of process". Adopting, therefore, the necessary broad interpretation of "materiality" under Rule 77, evidence pertaining to "outrageous" prosecutorial conduct must not be excluded by virtue of Rule 81(1).

Urgency

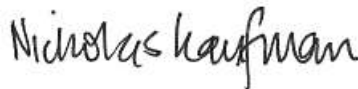
23. This application for disclosure is marked urgent since the proceedings underway in Kenya are moving at a fast pace. The Prosecutor, furthermore, has made it known that she expects Kenya to immediately comply with the Arrest Warrant. Accordingly, the learned Pre-Trial Chamber is requested to exercise its powers under Regulation 35 of the Regulations of the Court to substantially reduce the time limit for a Prosecution response to this application.

¹² ICC-01/04-01/10-47.

Relief Sought

24. In light of all the aforementioned, the learned Pre-Trial Chamber is hereby requested as follows:

- 1) Pursuant to Rule 77, to order the OTP to disclose all information in its possession pertaining to measures taken by its agents to enforce the Arrest Warrant and to elicit collaboration from the Suspect with respect to the allegation that he was involved in witness-tampering at the behest of Deputy-President William Ruto, and;
- 2) Pursuant to Regulation 23*bis* of the Regulations of the Court, to reclassify as public or confidential, *ex parte* Prosecution and Defence only,¹³ any Court Document which pertains to measures taken to enforce the Arrest Warrant.



Nicholas Kaufman

Counsel for Walter Osapiri Barasa

Done this 14th Day of October 2013

Jerusalem, Israel

¹³ In such an eventuality, Counsel for the Defence would request the ability to submit the said documentation confidentially to the Kenyan High Court or any national appellate jurisdiction.