

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 21 October 2013

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Presiding Judge**

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public Document**

**Prosecution's Response to *Urgent* "Defence Request for Disclosure (1)"**

**Source: Office of the Prosecutor**

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

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

### *Introduction*

1. The Prosecution hereby responds to the *Urgent* “Defence Request for Disclosure (1)” filed, 14 October 2013 (“Request”).<sup>1</sup> As explained below, the Request should be dismissed because Mr. Barasa (“Barasa”) is not entitled to disclosure under the Statute and Rules at this stage. Alternatively, the Chamber should withhold disclosure until Barasa is brought under the authority of the Court and within its control.

### *Background*

2. On 2 August 2013, the Single Judge of Pre-Trial Chamber II issued, under seal, the “Arrest Warrant for Walter Osapiri Barasa.”<sup>2</sup>

3. On 18 September 2013 the Arrest Warrant for Walter Osapiri Barasa was served on the Kenyan authorities in The Hague.

4. On 2 October 2013 the Arrest Warrant was unsealed and became public.

5. On 15 October 2013 the Registrar notified Pre-Trial Chamber II of the receipt of an email from Nicholas Kaufman dated 20 September 2013 to which a Power of Attorney signed by Barasa and a copy of a Kenyan ID document in the name of Walter Osapiri Barasa were appended.<sup>3</sup>

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<sup>1</sup> ICC-01/09-01/13-18, para. 10 (“Request”).

<sup>2</sup> ICC-01/09-01/13-1-Red2.

<sup>3</sup> ICC-01/09-01/13-20.

6. The Arrest Warrant was presented to the High Court of Kenya on 7 October 2013<sup>4</sup> to consider the request for surrender based on the ICC Warrant of Arrest to issue a warrant of arrest pursuant to Kenyan Law against Barasa.<sup>5</sup>

7. Barasa submitted on 8 October 2013 a petition for judicial review to the Kenya High Court arguing that the administrative procedures to enforce the Arrest Warrant were unconstitutional.<sup>6</sup> The Defence filed on 14 October 2013 the “Defence Request for Disclosure (1)” in which it seeks the disclosure of investigators notes documenting the reported attempt to execute the arrest warrant on 2 August 2013<sup>7</sup> in case his constitutional challenge fails.

### *Submissions*

#### *I. Barasa is not entitled to disclosure at this stage*

##### *a. No right to disclosure arises, as the material sought has no bearing on any proceeding before this Court or any attendant procedural rights*

8. The Request seeks disclosure in two respects, pursuant to Rule 77: (a) material pertaining to any measures taken by the Office of the Prosecutor (“OTP”) to enforce the 2 August 2013 Arrest Warrant against Barasa, and (b), material regarding any subsequent OTP efforts to secure Barasa’s cooperation concerning its on-going investigation of the alleged witness-tampering scheme in violation of Article 70 (“material sought”).<sup>8</sup> However, the Request fails to demonstrate any legitimate forensic

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<sup>4</sup> Request, para. 10.

<sup>5</sup> International Crimes Act 2008, Section 29.

<sup>6</sup> Request, para. 11.

<sup>7</sup> Request, para. 8.

<sup>8</sup> Request, para. 24.

nexus between the material sought and any proceeding before the Court or attendant defence rights. As such, the Request should be dismissed in its entirety.

9. Although the Statute and the Rules are silent on a suspect's right to disclosure prior to surrendering to the Court,<sup>9</sup> they do not contemplate disclosure in the abstract.<sup>10</sup> Rather, the right to disclosure is strictly informed by the extent of defence procedural rights in the concrete circumstances of a case.<sup>11</sup>

10. Thus, in *Gaddafi*, Pre-Trial Chamber I ordered the disclosure of material which according to the Defence pertained to the preservation of evidence and the protection of a witness.<sup>12</sup> In doing so, the Chamber held that "the Defence has the right and the duty to exercise its functions in an effective manner and reasonably pursue its legitimate interests *within the context of the proceedings before the Court*".<sup>13</sup> Likewise, Chambers have required disclosure concerning challenges to the lawfulness of detention before the Court in the context of petitions for interim release.<sup>14</sup>

11. Here, the Request does not identify any proceeding before this Court or attendant defence rights to which the material sought pertains. To the contrary, it positively seeks disclosure to assist Barasa in his litigation efforts before the Kenyan High Court.<sup>15</sup> Specifically, the Request asserts that the material sought is relevant to Barasa's constitutional challenge to the procedures under the Kenyan International Crimes Act

<sup>9</sup> See Articles 60 and 61 of the Rome Statute ("Statute") and Rule 121(1) and (2) of the Rules of Procedure and Evidence ("Rules").

<sup>10</sup> ICC-01/11-01/11-392-Red-Corr, ("Gaddafi Disclosure Decision"), para 38.

<sup>11</sup> Gaddafi Disclosure Decision, para. 38.

<sup>12</sup> *Ibid.*, para. 13.

<sup>13</sup> *Ibid.*, para. 36 (emphasis added).

<sup>14</sup> See ICC-01/05-01/08-323 Appeals Chamber 'Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III entitled "Decision on application for interim release"', paras. 32-35.

<sup>15</sup> Request, para. 12.

(ICA).<sup>16</sup> Additionally, the Request contends that the material sought is relevant to Barasa's intended challenge of the OTP's handling of the Arrest Warrant, again domestically under the ICA.<sup>17</sup> However, on their face neither scenario establishes any connection between the material sought and proceedings before this Court or any attendant rights.

*b. Rule 77 does not extend a general right to disclosure to suspects prior to their surrender to the Court*

12. As Pre-Trial Chamber I has recently ruled, nothing in the Rules or Statute compels a Chamber to organise disclosure of materials related to the merits of the case in advance of a suspect's appearance before the Court.<sup>18</sup>

13. The Request's reliance on *Mbarushimana* for the proposition that Rule 77 disclosure extends generally to suspects prior to their surrender to the Court is erroneous.<sup>19</sup> *Mbarushimana* is inapposite. First, Mr. Mbarushimana was under arrest in France pursuant to an ICC warrant when he applied to the Pre-Trial Chamber for disclosure.<sup>20</sup> His procedural rights before this Court were therefore directly at issue, as he was being held under the auspices of the ICC arrest warrant. By contrast, Barasa is yet to be summoned before the Kenyan courts in relation to the pending Arrest Warrant. Kenyan authorities have yet to take any action adverse to Barasa's liberty interests.<sup>21</sup> Additionally, and contrary to any suggestion in the Request, Barasa's unsolicited

<sup>16</sup> Kenyan International Crimes Act, 2008 (ICA).

<sup>17</sup> Request, para. 14.

<sup>18</sup> ICC-01/11-01/11-440, para. 27.

<sup>19</sup> Request, para. 21.

<sup>20</sup> ICC-01/04-01/10-47, paras. 1 and 2.

<sup>21</sup> On 19 October 2013, High Court Justice Richard Mwongo stated, "[f]or the avoidance of doubt, I must commence by indicating that no steps towards making a decision on the notice and request for arrest have yet been taken by this court pursuant to Section 29 or 30 of the International Crimes Act (ICA)" *see* The People, <<http://www.thepeople.co.ke/27218/file-barasa-extradition-suit-court-tells-lenku/>>; *see also* The Star, <<http://www.the-star.co.ke/news/article-140223/barasa-petition-be-heard-november>>.

petition challenging the ICA's constitutionality - patently, a domestic issue - has no impact on his status before this Court; nor does it confer, let alone expand, any procedural rights or obligations inuring to him under the Rules or Statute.

14. Second, in *Mbarushimana*, the disclosure requested was directly related to proceedings before the Court.<sup>22</sup> Pre-Trial Chamber I thus ordered the disclosure of documents to enable the defence effectively to exercise its right to challenge before the Court the admissibility of the case or the jurisdiction of the Court.<sup>23</sup>

*c. Even if Rule 77 applies the Request fails to meet the 'materiality' threshold*

15. The Request fails to meet the materiality threshold for disclosure under Rule 77. The Request argues in summary, that: (1), since the allegedly 'outrageous' manner in which the OTP sought to effect the Arrest Warrant is relevant for the Kenyan courts' determination of whether Barasa is eligible for surrender under the ICA Section 39(3)(d) and; (2), as that section refers to Article 59(2), which requires a determination of whether the law of the custodial state (Kenya) has been observed in the execution of the Arrest Warrant; then (3), disclosure in order to challenge the domestic proceeding satisfies the materiality requirement of Rule 77.<sup>24</sup> However, this clearly strained analysis is insufficient to salvage the Request.

16. Contrary to the Request,<sup>25</sup> the Prosecution has engaged in no impropriety with respect to its interactions with or concerning Barasa. The Request's allegations of the Prosecution's 'outrageous', 'egregious' 'entrapping', or 'sovereignty breaching' conduct

<sup>22</sup> ICC-01/04-01/10-47, para. 4 (referring to, *inter alia*, to admissibility).

<sup>23</sup> ICC-01/4-01/10-47, para. 13.

<sup>24</sup> See Response, paras. 20-21 and accompanying fn.11.

<sup>25</sup> Request, paras. 15-19.

are wholly untrue. Tellingly, these spurious accusations underscore Barasa's desperation in avoiding his surrender. That said, the allegations do not entitle Barasa to the requested disclosure at this stage, as the issue is not yet before this Court.

17. In addition, a domestic court could never rule on the legality of the Court's conduct – including that of the Office of the Prosecutor. In the instant case, the Prosecution acted at all times in accordance with the Court's legal framework and sought judicial authorization for specific investigative steps whenever such authorization was required. As a result of its investigative efforts, and on the basis of the evidence collected, a warrant of arrest was issued by the Single Judge. A challenge to the legality of this warrant, be it on the basis of alleged unlawful conduct during the investigation or otherwise, can only be made before the Chamber of the Court seized with the case. Underlying Barasa's litigation strategy lays an inappropriate effort to substitute the High Court's jurisdiction for that of the Pre-Trial Chamber and to challenge locally the legality of the Arrest Warrant. This is plainly incompatible with the Statute and cannot constitute a proper basis for disclosure.

18. As concerns the materiality of the material sought, there are two salient deficiencies in the Request: (1), Barasa has not been arrested on the warrant. Thus, insofar as Article 59(2) concerns an evaluation of the process by which the subject of the warrant has been arrested, it does not apply. ICA Section 39(3)(d) cannot be read to expand the application of Article 59(2)(c) beyond its statutory context (which is, limited to "a person arrested"<sup>26</sup>). In fact, Section 39 does not apply here, since it is also predicated on an actual arrest;<sup>27</sup> and (2), even ICA Section 39 applied, it cannot reasonably be read to create a right to disclosure from this Court in relation to wholly

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<sup>26</sup> Article 59(2).

<sup>27</sup> See ICA Section 39(3)(c).



separate and independent domestic proceedings, as the Request suggests.<sup>28</sup> Finally, Rule 165 (2) expressly states that Article 59 does not apply to the investigation and prosecution of Article 70 offences, which indicates that the local procedure should be a summary one aimed at prompt transfer. The Request therefore plainly fails to meet the materiality threshold of Rule 77.

***II. If Barasa is entitled to the material sought disclosure should nevertheless be withheld until he is within the Court's authority and control***

19. The material sought contains highly sensitive information. If revealed, this would potentially jeopardize the Prosecution's continuing investigation into the alleged witness interference scheme and compromise the security of related witnesses. Admittedly, Barasa is aware of certain information which he now seeks, such as the contents of his interview with OTP investigators regarding his possible cooperation with the Article 70 investigation (which is audio recorded and documented). Nevertheless, the Chamber should not place this sensitive material at his disposal when it is not able directly to exercise any degree of control over him in Kenya. Barasa remains at liberty, and has appeared in the Kenyan media in open defiance of the Court's authority and knowingly discussing sensitive details about Prosecution witnesses. Should disclosure be ordered, there is no reason to believe that Barasa will abide by any accompanying terms or conditions the Chamber may justifiably impose.

20. The Chamber should similarly protect from disclosure information regarding the efforts to apprehend Barasa, particularly as they involve the interests of a third country. Disclosure at this stage would adversely impact future efforts to secure cooperation from the relevant State since it is highly likely Barasa would attempt to exploit this

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<sup>28</sup> See Request, paras. 14, 20-21.

information publicly (as he has sought to do) to avoid his surrender to the Court on the Arrest Warrant. The knock-on effect would be detrimental to the future cooperation of other States with the Court.

21. Further, as things stand, there is no certainty that Barasa will appear before this Court pursuant to the Arrest Warrant. Bearing in mind the nature of the crimes for which the Single Judge has found reasonable cause to believe Barasa committed, the requested disclosure should be precluded until he is brought within the Court's authority and control. A lesser intrusive compromise creates an unwarranted risk to the integrity of the continuing Article 70 investigation and security of witnesses, given that Barasa's initial appearance before the Court is far from imminent.<sup>29</sup>

22. Further, withholding the requested material until Barasa's appearance causes no unfair prejudice to his procedural rights under the Statute and Rules, or to any future proceedings before the Court. Once within the control and authority of the Court, he will have the right to avail himself of such disclosure as may facilitate the exercise of his procedural rights in respect of relevant proceedings before the Court.

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<sup>29</sup> Barasa's hearing on his constitutional challenge before the Kenyan High Court is now scheduled to be heard on 11 November 2013. <http://www.thepeople.co.ke/27218/file-barasa-extradition-suit-court-tells-lenku/>

*Relief*

23. For the foregoing reasons, the Prosecution submits that Request should be denied.



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**Fatou Bensouda, Prosecutor**

Dated this 21<sup>st</sup> day of October 2013

At The Hague, The Netherlands