



Original: **English**

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

Date: **14/09/2015**

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 disclosure (2)

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

Fatou Bensouda, Prosecutor

James Stewart, Deputy-Prosecutor

Jean-Jacques Badibanga, Senior Trial Lawyer

Counsel for the Defence

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**

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Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”), Pre-Trial Chamber II is hereby respectfully requested to order the Office of the Prosecutor (“the OTP”) to disclose information which is material to the preparation of the defence of Walter Osapiri Barasa (“the Suspect”).

Factual Background

1. On 2 August 2013, His Honour Judge Cuno Tarfusser issued, under seal, the “Warrant of Arrest for Walter Osapiri Barasa” (“the Arrest Warrant”).¹ According to the Arrest Warrant, the Suspect allegedly attempted to corrupt witnesses in the case against William Samoei Ruto and Joshua Arap Sang (“*the Sang/Ruto case*”).

2. On 2 October 2013, Pre-Trial Chamber II unsealed the Arrest Warrant.

3. On 8 October 2013, the Suspect initiated a judicial review process in Kenya seeking protection from arrest and surrender to the International Criminal Court (“ICC”). Among other forms of relief, the Suspect requested that “[a] mandatory order of injunction be issued to compel the Inspector General of Police ... to provide ... such security as may be necessary to protect the [Suspect] from arrest by investigators or Agents of the International Criminal Court ...”.

4. On 31 January 2014, the Suspect was granted the aforementioned “order of injunction” until further directions in the case brought by the Kenyan authorities seeking his arrest.² Appeals litigation continues to this day with the Suspect exhausting, as is his constitutional right, all legal recourses available to him under Kenyan law.

¹ ICC-01/09-01/13-1-Red2.

² <http://kenyalaw.org/caselaw/cases/view/93955/>

5. On 10 March 2015, Her Honour Judge Ekaterina Trendafilova issued a warrant for the arrest of Paul Gicheru and Philip Kipkoech Bett ("the Gicheru/Bett Arrest Warrant") for offences against the administration of justice – also in connection with the Ruto/Sang case.

6. On 30 July 2015, Paul Gicheru and Philip Kipkoech Bett were, reportedly, presented to a judge of the High Court of Kenya³ and, presumably, released on bail.

7. On 21 August 2015, the Suspect filed a challenge to the validity of the Arrest Warrant pursuant to Rule 117(3) ("the Challenge").⁴

8. On 10 September 2015, Pre-Trial Chamber II unsealed the Gicheru/Bett Arrest Warrant.

9. On the very same day, Pre-Trial Chamber II rejected the Challenge.⁵

10. On 11 September 2015, Counsel for the Suspect wrote to the OTP requesting that it disclose all communications in its possession between any organ of the Court and the authorities of the Republic of Kenya concerning the arrest and apparent release of Gicheru and Bett.⁶

11. On the same day, and responding to the urgency of the request, the OTP informed Counsel as follows: *"it is the Prosecution's position that according to the ICC legal framework and jurisprudence, persons whose arrest or appearance is sought do not*

³ ICC-01/09-01/15-11.

⁴ ICC-01/09-01/13-31.

⁵ ICC-01/09-01/13-35.

⁶ The Suspect cannot and should not have to obtain this information in Kenya. The domestic proceedings are surrounded in secrecy and the first the Suspect learned of them was when the Pre-Trial Chamber issued its decision ICC-01/09-01/15-11 on 10 September 2015.

have any standing before the Court. Mr. Barasa is therefore not entitled to request inter partes disclosure at this stage".

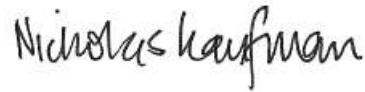
Submission

12. The Suspect respectfully submits that the OTP's position, as set out in paragraph 11 above, contradicts a previous ruling of this very Pre-Trial Chamber. In ICC-01/09-01/13-23, Judge Cuno Tarfusser ruled as follows: "*... whilst having no "unfettered right to full disclosure in the abstract", 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 proceedings before the Court". Accordingly, whenever required by the effective exercise of those functions and the pursuance of those interests, a Chamber can legitimately order disclosure of relevant material, irrespective of the fact that the suspect has or has not already appeared before the Court*".

13. In its decision ICC-01/09-01/13-35, the Pre-Trial Chamber decided as follows: "*should he genuinely wish to appear before the Court as he maintains, Walter Osapiri Barasa, who is not currently in detention in Kenya, may travel to the seat of the Court to voluntarily appear, as envisaged in article 60(1) of the Statute. In accordance with the warrant of the arrest issued against him, he will then be detained unless and until any interim release is granted*". Assuming that the Suspect should be able to obtain a visa and fund a trip to The Hague, he would need to be able to request interim release immediately upon arrival. Accordingly, the domestic bail conditions afforded to two other suspects in the purported "witness interference scheme" would be extremely material to the preparation of Walter Barasa's defence. The Suspect would seek to argue that the Gicheru and Bett bail decision(s) of the highly respected Kenyan judiciary should be of persuasive value at the ICC.

Relief Sought

14. In light of all the aforementioned, the Suspect requests that the learned Pre-Trial Chamber order the disclosure of the information mentioned in paragraph 10 above.

A handwritten signature in black ink that reads "Nicholas Kaufman". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

Nicholas Kaufman

Counsel for Walter Osapiri Barasa

Jerusalem, Israel
14 September 2015