

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/13  
Date: 29 October 2013

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

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

**Public document**

**Decision on the “Defence request for disclosure(1)”**

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

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

Kweku Vanderpuye

**Counsel for the Defence**

Nicholas Kaufman

**Legal Representatives of Victims**

**Legal Representatives of 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**

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**Registrar**

Herman von Hebel

**Detention Section**

**Victims and Witnesses Unit**

**Others**

**Victims Participation and  
Reparations Section**

**I, Judge Cuno Tarfusser**, having been designated<sup>1</sup> as Single Judge of Pre-Trial Chamber II (“Chamber”) of the International Criminal Court responsible for addressing and determining the issues arising in connection with the Prosecutor’s “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70” dated 18 July 2013,<sup>2</sup> render this decision on the “Defence request for disclosure(1)” dated 14 October 2013 (“Defence Request”).<sup>3</sup>

### **Procedural background**

1. On 2 August 2013, the Single Judge issued a Warrant of Arrest for Walter Osapiri Barasa (“Warrant of Arrest”), having found reasonable grounds to believe that he is criminally responsible for having intentionally committed as a direct perpetrator, or attempted to commit, the offence of “corruptly influencing a witness”, under article 70(1)(c) and article 25(3)(a) and/or (f) of the Statute, as detailed in Counts 1, 2 and 3 of the Prosecutor’s Application.<sup>4</sup> The Warrant of Arrest was unsealed on 2 October 2013.<sup>5</sup>

2. On 14 October 2013, the Defence of Walter Barasa<sup>6</sup> filed the Defence Request. On 21 October 2013, pursuant to an order of the Single Judge,<sup>7</sup> the Prosecutor submitted her “Prosecution’s response to urgent ‘Defence request for disclosure (1)’”.<sup>8</sup>

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<sup>1</sup> ICC-01/09-114-Conf-Exp.

<sup>2</sup> ICC-01/09-113-Conf-Exp.

<sup>3</sup> ICC-01/09-01/13-18.

<sup>4</sup> ICC-01/09-01/13-1-Red2.

<sup>5</sup> ICC-01/09-01/13-1-Red2.

<sup>6</sup> ICC-01/09-01/13-20.

<sup>7</sup> ICC-01/09-01/13-19.

<sup>8</sup> ICC-01/09-01/13-21.

### Defence submissions

3. In its Request, the Defence details contacts with its client and ensuing communications with the Office of the Prosecutor (“OTP”) having occurred since 19 September 2013, as well as ongoing developments before the judicial authorities of Kenya, and requests the Chamber “to order the disclosure of all information materially relevant to attempts made by the Office of the Prosecutor [...] and its agents to enforce the warrant for the arrest of Walter Barasa [...] and to recruit him as an incriminating witness against deputy-President William Ruto”.<sup>9</sup>

4. The Defence submits that the Kenyan High Court is currently “due to hear submissions on the constitutionality of administrative procedures initiated by Kenya to enforce the [Warrant of Arrest] and on the substance of the competent Kenyan minister’s request for the issuance of a Kenyan arrest warrant”.<sup>10</sup> It also submits that, should the constitutional challenge fail, Walter Barasa will, “at a later stage, 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”.<sup>11</sup> According to the Defence, Walter Barasa: (i) “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”;<sup>12</sup> and (ii) maintains having been the addressee of an attempt “to extort collaboration” from him by an OTP investigator, who would have informed him “that he could either testify to

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<sup>9</sup> Defence Request, p. 3.

<sup>10</sup> Defence Request, para. 13.

<sup>11</sup> Defence Request, para. 14.

<sup>12</sup> Defence Request, para. 16.

witness tampering [...] or be arrested himself” during a meeting in Nairobi, on 15 September 2013.<sup>13</sup>

5. The Defence argues that this alleged conduct, “if it took place”, could not only constitute an attempt to commit the offences of abduction and extortion under the Kenyan Penal Code, but also be “of direct relevance to the test stipulated under Section 39(3)(d) of the 2008 International Crimes Act of Kenya”.<sup>14</sup> The Defence, recalling that Kenya is a common law country which respects British jurisprudential precedents, makes specific reference to the doctrine of abuse of process elaborated in the English case-law, which, in the Defence submissions, “would [...] 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”.<sup>15</sup> Accordingly, the Defence requests the Chamber to order disclosure of “evidence of such ‘outrageous’ conduct, where it exists”, pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”);<sup>16</sup> more specifically, the Chamber is requested 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”.<sup>17</sup>

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<sup>13</sup> Defence Request, para. 17.

<sup>14</sup> Defence Request, para. 20.

<sup>15</sup> Defence Request, para. 19.

<sup>16</sup> Defence Request, para. 21.

<sup>17</sup> Defence Request, para. 24.

### **Prosecutor's submissions**

6. The Prosecutor requests the Chamber either: (i) to dismiss the Request, because Walter Barasa “is not entitled to disclosure under the Statute and the Rules at this stage”; or (ii) to withhold disclosure until Walter Barasa “is brought under the authority of the Court and within its control”.<sup>18</sup>

7. The Prosecutor develops three sets of arguments in support of her request for dismissal of the Defence Request. First, she argues that the Defence “fails to demonstrate any legitimate forensic nexus between the material sought and any proceeding before the Court or attendant defence rights”,<sup>19</sup> quotes decisions of other Pre-Trial Chambers of the Court establishing the principle that “the right of disclosure is strictly informed by the extent of defence procedural rights in the concrete circumstances of a case”<sup>20</sup> and points out that the material sought is relevant to domestic procedures under the Kenyan International Crimes Act.<sup>21</sup> Second, she submits that “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” and points out the differences between the situation of Walter Barasa and that of Callixte Mbarushimana at the time of the submission of a request for disclosure.<sup>22</sup> Third, the Prosecutor argues that the information sought by the Defence “fails to meet the materiality threshold for disclosure under Rule 77”: the proceedings currently underway in Kenya are of a domestic nature and it is not for a domestic court to rule on the legality of the conduct of an organ of the Court.<sup>23</sup>

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<sup>18</sup> Prosecutor’s Response, para. 1.

<sup>19</sup> Prosecutor’s Response, para. 8.

<sup>20</sup> Prosecutor’s Response, paras 9-10.

<sup>21</sup> Prosecutor’s Response, paras 8-11.

<sup>22</sup> Prosecutor’s Response, paras 12-14.

<sup>23</sup> Prosecutor’s Response, paras 15-18.

8. Alternatively, the Prosecutor submits that, in light of its highly sensitive nature, disclosure of the material sought by the Defence should be at least be withheld until Walter Barasa has come into the authority and control of the Court, since it might jeopardise ongoing investigations, the security of related witnesses and also adversely impact efforts to secure cooperation with States.<sup>24</sup>

### **Applicable law**

9. The Single Judge notes articles 59 and 70 of the Statute, and rules 77 and 165 of the Rules.

### **Single Judge's determinations**

10. The Defence Request raises an issue which has already come before the Chambers of the Court, namely the determination of whether, and to what extent, a suspect, who has yet to appear before the Court, is entitled to receive information which he or she considers material to his or her defence.

11. As recalled by the Prosecutor, Pre-Trial Chamber I has recently ruled on the matter, establishing that, whilst having no “unfettered right to full disclosure in the abstract”,<sup>25</sup> 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”.<sup>26</sup> 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.

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<sup>24</sup> Prosecutor's Response, paras 19-22.

<sup>25</sup> ICC-01/11-01/11-392-Red-Corr, para. 38.

<sup>26</sup> ICC-01/11-01/11-392-Red-Corr, para 36.

12. By the same token, the Single Judge underscores that the Defence right to disclosure is shaped and limited by the need to adequately exercise its rights and discharge its duties in the context of a specific procedural context, be it before the Court or before a domestic jurisdiction. Rule 77 of the Rules explicitly confines the defence's right to inspection of items in the possession or control of the Prosecutor to those items "which are material to the preparation of the defence". In so doing, it clearly encapsulates the principle that disclosure can, and must, be ordered or authorised whenever the circumstances lead to believe that such disclosure is instrumental to the adequate exercise of a specific procedural right.

13. Accordingly, it is only in light of the specific circumstances of any given case, and by considering the nature and subject matter of the proceedings which – in the submission of the defence – would benefit from the requested disclosure, that the question as to whether such disclosure is warranted can be answered.

14. The Single Judge notes that it is unclear, from the Defence submissions, to what purpose the requested material would be used in the context of the ongoing domestic proceedings in Kenya. The Defence submits that "should th[e] 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", which 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*'".<sup>27</sup>

15. Article 70(2) of the Statute provides that "the conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic State". It also states that "the principles

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<sup>27</sup> Defence Request, para. 14.



and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence". Rule 165(2) of the Rules provides that article 59 of the Statute "shall not apply" in the context of the investigation, prosecution and trial of offences against the administration of justice under article 70 of the Statute.

16. Against this background, it appears debatable whether a State's discretion in the implementation of the Statute into its domestic system can extend as far as making article 59 of the Statute applicable to surrenders of suspects sought by the Court for the offences under article 70 of the Statute. It appears likewise debatable whether the scope of the scrutiny carried out by the domestic court in respect of an arrest and surrender for offences under article 70 of the Statute can include matters pertaining to the conduct of the Prosecutor resulting in the arrest.

17. The Single Judge considers, however, that it is not necessary to determine any of these issues in the present case, in light of the relevant factual circumstances. It is beyond controversy, as a matter of law, that article 59 of the Statute applies prior to and for the purposes of the surrender to the Court of a person who *has been arrested* pursuant to a warrant issued by the Court (as revealed also by the heading of the provision, which refers to "Arrest proceedings in the *custodial* State" – emphasis added). It is also beyond controversy, as a matter of fact, that Walter Barasa was *not* arrested as a consequence of the behaviour which the Defence alleges and in respect of which it seeks an order for disclosure; indeed, Walter Barasa is yet to be arrested. Accordingly, at this point in time, and regardless of the determination of the issues identified at paragraph 16 above which have not arisen to date, the Single Judge takes the view that the requested disclosure is not instrumental to the

adequate exercise of Walter Barasa's procedural rights allegedly arising in the context of the ongoing proceedings in Kenya. The Defence Request is therefore rejected.

18. In any case, and with respect to the potential scenario arising if Walter Barasa were arrested at later stage, the Single Judge is mindful of the Defence position that the propriety and legitimacy of the circumstances evoked in the Defence Request might be raised as a matter of an alleged "abuse of process".<sup>28</sup> Nevertheless, and although it remains questionable whether such factual circumstances hold the potential to justify a termination of the proceedings on the grounds that they would give rise to an abuse of process, the Single Judge notes that the doctrine of abuse of process, as defined by the Appeals Chamber, applies to situations in which a court declines to exercise its jurisdiction in a judicial cause in the presence of a "derogation from the judicial process" that "would render the invocation of the jurisdiction of the court a misuse of the purpose for which it is intended or its use for purposes other than those for which it was established".<sup>29</sup> In this sense, it is only the court conducting and having jurisdiction over the judicial proceedings allegedly affected by the abuse of process that may address such allegations. Accordingly, Walter Barasa will only be able to raise this issue, once he has submitted to the jurisdiction of this Court, before the Chamber.

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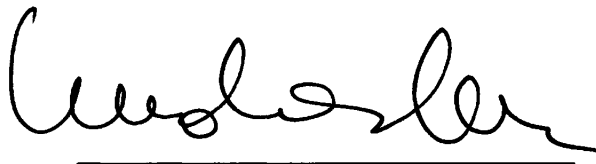
<sup>28</sup> Defence Request, para. 19.

<sup>29</sup> ICC-01/04-01/06-772 (OA4), para. 27.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Defence Request.

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

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a horizontal line.

**Judge Cuno Tarfusser**

**Single Judge**

Dated this Tuesday, 29 October 2013

The Hague, The Netherlands