

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/13
Date: **24 September 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

Prosecution's Response to Defence Request for Disclosure (2)

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") herewith files its response to the second request for disclosure ("Request") submitted by the Defence of Walter Opasiri Barasa ("Barasa").¹ Barasa requested that Pre-Trial Chamber II ("Pre-Trial Chamber") order the Prosecution to disclose any communication in its possession between organs of the International Criminal Court ("Court") and the authorities of the Republic of Kenya regarding the arrest of Paul Gicheru ("Gicheru") and Philip Kipkoech Bett ("Bett") pursuant to a Court's arrest warrant for offences against the administration of justice, and their apparent release ("material sought").²

2. According to the jurisprudence of the Court,³ a suspect is entitled to obtain disclosure of information that he or she considers material for defence preparation, prior to his or her arrest or appearance before the Court, if disclosure is required by the effective exercise by the defence of its functions. Disclosure must be instrumental to the adequate exercise of a specific procedural right in a specific procedural context. The Request does not meet these requirements and should therefore be rejected.

II. Procedural Background

3. On 2 August 2013, the Single Judge of the Pre-Trial Chamber issued the "Warrant of Arrest for Walter Osapiri Barasa" ("Arrest Warrant") for offences against the administration of justice.⁴

¹ ICC-01/09-01/13-36, Defence request for disclosure (2), 14 September 2015.

² *Ibid.*, paras. 10-14.

³ ICC-01/11-01/11-392-Red-Corr, Corrigendum to Decision on the "Defence request for an order of disclosure", 1 August 2013, para. 38. ICC-01/09-01/13-23, Decision on the "Defence request for disclosure (1)", 29 October 2013, paras. 12, 13, 17.

⁴ ICC-01/09-01/13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa, 2 August 2013.

4. On 2 October 2013, the Pre-Trial Chamber unsealed the Arrest Warrant.
5. On 10 March 2015, the Single Judge of the Pre-Trial Chamber issued a warrant for the arrest of Gicheru and Bett for offences against the administration of justice.⁵
6. On 21 August 2015, Barasa filed a challenge to the Arrest Warrant under rule 117(3) of the Rules of Procedure and Evidence (“Rules”).⁶
7. On 10 September 2015, the Pre-Trial Chamber ordered the unsealing of the arrest warrant issued against Gicheru and Bett.⁷
8. On that same day, the Pre-Trial Chamber rejected Barasa’s challenge under rule 117(3) of the Rules.⁸

III. Prosecution’s Submissions

9. In an attempt to substantiate the Request, Barasa makes reference to Decision ICC-01/09-01/13-35 recently issued by the Pre-Trial Chamber wherein it observed that, should Barasa genuinely wish to appear before the Court, he may travel to the seat of the Court to voluntarily appear.⁹ He would then be detained, unless and until granted interim release.¹⁰
10. Further to this mere observation, made by the Pre-Trial Chamber out of any specific and concrete procedural context, Barasa asserts that, should he travel to the

⁵ ICC-01/09-01/15-I-US-Exp, Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, 10 March 2015.

⁶ ICC-01/09-01/13-31, Defence challenge to the warrant for the arrest of Walter Opasiri Barasa, 21 August 2015.

⁷ ICC-01/09-01/15-11, Order unsealing the warrant of arrest and other documents, 10 September 2015.

⁸ ICC-01/09-01/13-35, Decision on the “Defence challenge to the warrant for the arrest of Walter Opasiri Barasa”, 10 September 2015.

⁹ ICC-01/09-01/13-36, para. 13 referring to ICC-01/09-01/13-35, para. 3.

¹⁰ *Ibid.*, para. 13 referring to ICC-01/09-01/13-35, para. 3.

seat of the Court, he should be enabled to request interim release upon arrival. Barasa argues that the material sought “would be extremely material” to his defence preparation and quotes a previous ruling of the Pre-Trial Chamber to request disclosure of that material.¹¹

11. The jurisprudence relied upon by Barasa ¹² does not support the Request. A Chamber can, in fact, legitimately order disclosure of relevant material, regardless of whether or not a suspect has already appeared before the Court, but only in light of the specific and concrete circumstances of a case. ¹³ Disclosure must be required by the effective exercise by the defence of its functions.¹⁴ As further clarified by the Single Judge of the Pre-Trial Chamber, “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.”¹⁵ The requested disclosure must be instrumental to the adequate exercise of a specific procedural right within the context of proceedings before the Court. ¹⁶

12. Barasa’s Request does not meet the requirements set out above. Barasa seeks disclosure in the hypothetical context of an application for interim release under article 60(2) of the Rome Statute. He was not arrested by the Kenyan authorities pursuant to the Arrest Warrant. He did not travel to the seat of the Court to voluntarily appear. Barasa may never appear before the Court. Under the current circumstances, his application for interim release before a Chamber of the Court is a mere hypothesis.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, para. 12.

¹³ ICC-01/09-01/13-23, paras. 11, 13; ICC-01/11-01/11-392-Red-Corr, para. 38.

¹⁴ ICC-01/09-01/13-23, para. 11.

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 17.

13. Barasa's Request is therefore not required by the effective exercise of defence functions. A request for disclosure of the material sought is now premature and unfounded. If and once Barasa will be within the authority and control of the Court, he will then have the right to seek disclosure of that material, regardless of the merits of such a request. At this stage the Request fails to show a specific procedural context in which the Defence has rights to exercise and obligations to discharge.

14. Likewise, the Defence fails to demonstrate that Barasa's Request aims at adequately exercising any specific procedural right. The Prosecution argument is confirmed by the Pre-Trial Chamber's recent ruling whereby a challenge under rule 117(3) of the Rules as to whether the Arrest Warrant was properly issued is not admissible, as Barasa has not been arrested by the requested State pursuant to the Arrest Warrant.¹⁷ Under Barasa's current circumstances, no specific procedural right arises regarding a challenge to the Arrest Warrant.

15. That being the case, no specific procedural right can be identified within the procedural context of interim release that also presupposes Barasa's arrest. In light of the specific circumstances of the case, the disclosure of the material sought is therefore not instrumental to the adequate exercise of any specific procedural right in proceedings before the Court. By consequence, Barasa is not entitled to obtain the requested disclosure.

¹⁷ ICC-01/09-01/13-35, para. 2.

IV. Relief sought

16. In light of the above submissions, the Prosecution respectfully requests that the Pre-Trial Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 24th Day of September 2015
At The Hague, The Netherlands