



Original: **English**

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

Date: **21/08/2015**

PRE-TRIAL CHAMBER II

**Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Judge Chang-ho Chung**

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

Public Document

Defence challenge to the warrant for the arrest of Walter Osapiri Barasa

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Esteban Peralta-Losilla

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Pursuant to Rule 117(3) of the Rules of Procedure and Evidence (“Rules”), Pre-Trial Chamber II is hereby respectfully requested to revoke the warrant issued for the arrest of Walter Osapiri Barasa (“the Suspect”) and to issue, in its place, a summons to appear, with or without conditions, pursuant to Article 58(7) of the Rome Statute.

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
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
5. Appeals litigation continues to this date 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/>

Clarification

6. For the avoidance of any doubt, nothing in the present application should be interpreted as a waiver of the Suspect's desire and right to safeguard his current liberty in Kenya. While the essence of the Suspect's present application is, for all intents and purposes, a waiver of a contested ICC surrender process under Kenyan law – it is most definitely not a waiver of his right to enjoy interim release pending surrender to the ICC pursuant to Article 59(3) of the Rome Statute.

Submission

7. The Suspect vigorously maintains his innocence and is confident that the Office of the Prosecutor lacks the evidence to satisfy the Pre-Trial Chamber that “substantial grounds” exist to believe that he committed the crimes with which he is charged.

8. As mentioned above, by way of his various petitions in Kenya, the Suspect is challenging, *inter alia*, the justification for seeking the deprivation of his liberty. Rule 117(3) of the Rules of Procedure and Evidence, however, also permits the Suspect to petition the Pre-Trial Chamber with a “*challenge as to whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)*”. As will be submitted below, the arrest warrant fails to satisfy the criteria set out in Article 58(1) of the Rome Statute.

Article 58(1)(a)

9. On the basis of allegations presented to Principal Judge Mr. Justice R. M. Mwangi in the High Court of Kenya, the Suspect suggests that the evidence against him has now deteriorated to the extent that even the “reasonable

grounds” standard may no longer be satisfied. The Pre-Trial Chamber is referred to paragraph 11 of the Decision on Constitutional Petition 488 of 2013 delivered in the High Court of Kenya³ where the Hon. Mr. Justice Mwongo stated as follows: “...Mr. Barasa filed supplementary affidavits in support of his petition, and in particular regarding the ICC’s alleged subversion of administration of justice. These included affidavits by [REDACTED], [REDACTED] and ICC Witness KWN (P-0336 or K-0336) whose depositions attest to manipulation and coercion by the ICC investigators and prosecution team”.⁴

10. In these circumstances, it is not unreasonable to presume that P-336, whose evidence is central to Counts 1 and 3 of the charges against the Suspect, will be deemed an unreliable witness at confirmation. As the Appeals Chamber has held in the *Mbarushimana* case: “[i]n determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses”.⁵ Accordingly, without denying the potential for the Pre-Trial Chamber to resolve the inconsistencies in P-336’s evidence in favour of the Prosecution, it would be unfair for the Suspect to be deprived of his liberty while the matter is debated during confirmation proceedings.

11. From the language of the Arrest Warrant it would appear that the Suspect’s alleged criminality comprised the offer but not the actual transfer of money. Put otherwise, the Arrest Warrant does not allege that the Suspect succeeded in perverting the course of justice. This subtle distinction is of relevance to the sentence which the Suspect could possibly receive should he be convicted at trial. It is not unreasonable to assume that such a sentence, if custodial, would be more lenient than the sentence for a successful attempt to pervert the course of justice.

³ <http://kenyalaw.org/caselaw/cases/view/93955/> .

⁴ *c.f.*; also ICC-01/09-01/11-1120-Red2-Corr at paras. 30-37 incl.

⁵ ICC-01/04-01/10-514 at paragraph 46.

12. Furthermore, perusal of transcripts made available in the *Ruto/Sang* case suggest that with respect to at least one witness said to have been corruptly contacted by the Suspect,⁶ the Prosecution's investigative technique employed a certain degree of entrapment:

"...Yes, 540, sorry. And those correspondence[s] were on 3 August, 9 August, 16 August, 25 August, 28 August, 29 August, and then again on 2, 4, 5, 6, and 7 September. And in virtually every single day it was the Prosecution who initiated the correspondence with that intermediary. In each instance the initiative is by the Prosecution asking witness number 536 to call that gentleman [i.e. Barasa – emphasis added]. Now, there is a lot of significance in what is reflected at paragraph 21 of that material that has just been supplied. At paragraph 21 this is what is contained. This is a conversation of 28 August 2013: "P-536 told Barasa that he was not happy with the people, ICC -- "... 'people' ...", in commas, "... ICC." "Barasa told P-536 that he wants to come there and take her back." So 536 is saying: Please come take me back. Paragraph 25 is very telling. It says this: "P-536 asked Barasa what would happen if my company, that is ICC, decided to prosecute her for withdrawing from the process. Barasa told P-536 there is no problem, they, that is ICC, cannot prosecute me. P-536 reminded Barasa that he was the one who introduced her to the company. Barasa told 536 nobody would prosecute her and said that there were -- there are so many people who have withdrawn and nobody prosecuted them."⁷

13. With the evidentiary issues raised above in mind, the Suspect notes the recent decision in the *Bemba et al.* Article 70 case where the Appeals Chamber held that "[t]he potential penalty for the offence charged" considered in conjunction

⁶ P-536.

⁷ ICC-01/09-01/11-T-34-Red2-ENG WT 20-09-2013 75/78.

with the “*risk assessment*” necessitated by Article 58(1)(b) “*may be a factor to take into account in assessing whether the time in detention is reasonable*”.⁸ Based on sentencing precedent in contempt cases before other international criminal tribunals, the slow-grinding wheels of justice at the ICC and the specific circumstances of the present case, it is clear that the Suspect’s potential sentence – if convicted and if custodial – will be far less than the period of time required to complete his trial.

Article 58(1)(b)(i)

14. Rule 117(5) specifically permits a suspect to seek and to be granted bail by the competent domestic authority. Kenya, furthermore, only permits the extradition of its citizens in accordance with the law and due process. Accordingly, the Suspect’s enthusiastic pursuit of domestic litigation, which is designed to preserve his liberty and to test the legality of the surrender process, should not be interpreted as an attempt to evade justice. The Suspect’s resolute and eager attendance at the Kenyan court sessions suggests that he is anything but a flight risk. Indeed, the Suspect’s full cooperation with the Kenyan legal authorities is positively indicative of his lack of propensity to flee.

15. Moreover, and in stark contrast to other cases at the ICC, it is, for once, possible to argue that the Suspect is truly unable to seek the assistance of an “international network of supporters”. The Suspect is not a wealthy individual nor is he in the best of health having suffered from bouts of malaria and pneumonia in recent years. He is wholly unable and totally unwilling to flee his place of residence in Kenya.

16. The Suspect has initiated this challenge to the Arrest Warrant in the knowledge that should he succeed, he will then be delivered with a "summons

⁸ ICC-01/05-01/13-969 at paragraph 45.

to appear" with which he will fully cooperate. There is no reason to doubt the Suspect's sincerity in this matter given that failure to comply with such a summons to appear would strengthen the Prosecution's present demand for him to be arrested and detained. His attendance at the seat of the Court would occur as soon as the necessary logistical arrangements can be concluded between the Republic of Kenya and the Registry of the ICC.

Article 58(1)(b)(ii)

17. The very fact that the Suspect is charged with offences against the administration of justice cannot, *per se*, constitute a ground for arrest. If that were the case, then no suspect charged with such offences could ever be granted interim release. The Prosecution's investigation into the allegations pertinent to this case (after two years or more) should be complete and the current whereabouts of the principal witnesses are unknown to the Suspect. As a consequence, the Suspect cannot "*obstruct or endanger the investigation or the court proceedings*".

Article 58(1)(b)(iii)

18. It will be recalled that the Prosecution previously justified its desire for the Suspect to be arrested "*on an urgent basis*" by reference to contemporaneous attempts to corrupt witnesses which had "*escalated both in frequency and seriousness*" in the period between 20 May and 25 July 2013".⁹ The Prosecution's investigation and presentation of evidence in the *Ruto/Sang* trial, however, has now all but terminated and the prior recorded testimony of recalcitrant witnesses has, in the last few days,¹⁰ been admitted into evidence. The Suspect cannot thus present an ongoing threat to the *Ruto/Sang* trial and, as such, cannot commit a "*related crime*" which "*arises out of the same circumstances*".

⁹ ICC-01/09-01/13-1-Red2 at paragraph 7.

¹⁰ ICC-01/09-01/11-1938.

19. Although entrapment is normally an issue for sentencing, it is also relevant, in the present instance, when it comes to assessing the Suspect's purported propensity to commit similar offences against the administration of justice. In other words, assuming that the allegations against the Suspect are true – which is wholly denied – it may very well be argued that he would not have committed the alleged offences were it not at the instigation of investigators as suggested in paragraph 12 above of this application.

Relief Sought

20. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to revoke the warrant for the arrest of the Suspect and to substitute in its place a summons to appear, with or without conditions, pursuant to Article 58(7) of the Rome Statute.

21. The Suspect reiterates his readiness to cooperate with the ICC at the shortest notice while stressing that such cooperation is fully achievable without his pre-trial detention.

Regulation 35(2) of the Regulations of the Court

22. Rule 117(3) stipulates that the Pre-Trial Chamber will decide on a challenge to the validity of the Arrest Warrant “without delay”. Consequently, good cause exists to radically reduce the time limit for a Prosecution response.



Nicholas Kaufman

Counsel for Walter Osapiri Barasa

Jerusalem, Israel
21 August 2015