

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/13
Date: 23 October 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

Decision on the “Defence request for disclosure (2)”

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Jean-Jacques Badibanga

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the 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

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II issues this decision on the “Defence request for disclosure (2)” submitted by Nicholas Kaufman as counsel for Walter Osapiri Barasa on 14 September 2015 ([ICC-01/09-01/13-36](#), “Request”).

1. Walter Barasa requests the Chamber to order the Prosecutor to disclose “all communications in [her] 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”. According to Walter Barasa this information is material to the preparation of the defence, within the meaning of rule 77 of the Rules of Procedure and Evidence, as “the Gicheru and Bett bail decision(s) of the of the highly respected Kenyan judiciary should be of persuasive value at the ICC” in the context of an application for interim release that Walter Barasa would file, “[a]ssuming that he would be able to obtain a visa and fund a trip to The Hague”, immediately upon arrival.

2. On 24 September 2015, the Prosecutor responded to the Request ([ICC-01/09-01/13-39](#)). The Prosecutor argues that according to the jurisprudence of the Court, including by this Chamber in the present case, a suspect, prior to his or her arrest or appearance before the Court, is only entitled to such disclosure which is instrumental to the adequate exercise of a specific procedural right in a specific procedural context and that, in the current circumstances no such procedural right justifying the disclosure of the material sought exists.

3. As recalled by the Prosecutor, this Chamber ([ICC-01/09-01/13-23](#) of 29 October 2013) as well as Pre-Trial Chamber I,¹ held that, in exceptional circumstances, a suspect may obtain disclosure of material for the preparation of the defence within the meaning of rule 77 of the Rules even prior to his or her surrender to the Court when the material sought is instrumental to the

¹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [ICC-01/11-01/11-392-Red-Corr](#), 1 August 2013.

exercise of any procedural right that the person is statutorily entitled to exercise already before his appearance before the Court.

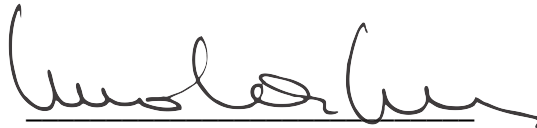
4. The Request does not satisfy this requirement. Walter Barasa argues that the material sought is essential for the preparation of an application for interim release. However, a suspect against whom a warrant of arrest has been issued cannot apply for interim release until he is in custody of the Court. Walter Barasa is not in custody of the Court; indeed he is not even in detention in Kenya. As at this moment he cannot exercise this procedural right, he is not entitled to receive disclosure of material or information claimed to be instrumental to requesting interim release. The argument that obtaining this material already now would allow Walter Barasa to apply for interim release immediately upon arrival is equally unpersuasive, as any such purely hypothetical scenario does not justify providing him with access to information which is, legitimately, withheld from the public.

5. If and when Walter Barasa appears before the Court, and, as such, is entitled to apply for interim release, he may request the Prosecutor to disclose any necessary material to substantiate his application. In case of controversy, the Chamber will decide at that point. Indeed, the Chamber considers it irrelevant to determine, at this particular point, whether the communications between the Court and the Government of Kenya that are currently sought by Walter Barasa under rule 77 of the Rules would be “material” to any potential application for interim release.

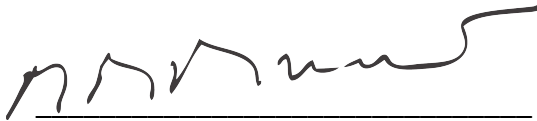
FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

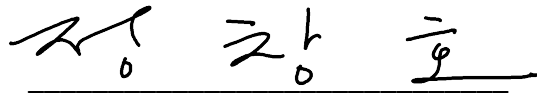
Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this 23 October 2015

At The Hague, The Netherlands