

Under Seal, *Ex Parte*
Prosecution and Registry
Only

Annex A

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 August 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*

Under seal *ex parte*, only available to the Prosecutor and the Registrar

Warrant of arrest for Walter Osapiri Barasa

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

The Office of the Prosecutor	Counsel for the Defence
Fatou Bensouda	
James Stewart	
Anton Steynberg	

Legal Representatives of Victims	Legal Representatives of Applicants
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Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
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The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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States Representatives	<i>Amicus Curiae</i>
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REGISTRY

Registrar and Deputy Registrar	Detention Section
Herman von Hebel	
Didier Preira	

Victims and Witnesses Unit	Others
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Victims Participation and Reparations Section

I, Judge Cuno Tarfusser, having been designated¹ 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 2013,² render this decision on the “Prosecution’s Application under Article 58” (“Prosecutor’s Application”) dated 30 July 2013,³ whereby the Prosecutor seeks the issuance of a warrant of arrest for:

Walter Osapiri BARASA

born in Kenya in 1972

living in Eldoret Town (Kenya), Old Ugandu Road, plot number 1740

allegedly criminally responsible for several offences against the administration of justice, as described by the Prosecutor in the following counts:

COUNT 1

Corruptly influencing a witness – Article 70(1)(c) read with Article 25(3)(a)

Walter Osapiri BARASA is criminally responsible under Article 25(3)(a), as direct perpetrator, for the crime of corruptly influencing a witness, ██████████ (P-0336), by offering to pay him between one million and one and a half million Kenyan Shillings (KES 1,000,000 – 1,500,000) in order to influence him to withdraw as a Prosecution witness, committed during the period 20 May to 21 July 2013 and at or near Kampala, Uganda.

Alternatively

¹ ICC-01/09-114-Conf-Exp.

² ICC-01/09-113-Conf-Exp.

³ ICC-01/09-117-US-Exp with under seal ex parte annexes 1-9.

Attempting to corruptly influence a witness – Article 70(1)(c) read with Article 25(3)(f)

Walter Osapiri BARASA is criminally responsible under Article 25(3)(f) for the crime of attempting to corruptly influence a witness, [REDACTED] (P-0336), by offering to pay him between one million and one and a half million Kenyan Shillings (KES 1,000,000 – 1,500,000) in an attempt to influence him to withdraw as a Prosecution witness, committed during the period 20 May to 21 July 2013 and at or near Kampala, Uganda.

COUNT 2

Corruptly influencing a witness – Article 70(1)(c) read with Article 25(3)(a)

Walter Osapiri BARASA is criminally responsible under Article 25(3)(a), as direct perpetrator, for the crime of corruptly influencing a witness, [REDACTED] [REDACTED] (P-0536), by offering to pay her and her husband a total of one million four hundred thousand Kenyan Shillings (KES 1,400,000) in order to influence her to withdraw as a Prosecution witness, committed during the period 20 May to 25 July 2013 and at or near Kampala, Uganda.

Alternatively

Attempting to corruptly influence a witness – Article 70(1)(c) read with Article 25(3)(f)

Walter Osapiri BARASA is criminally responsible under Article 25(3)(f), for the crime of attempting to corruptly influence a witness, [REDACTED] [REDACTED] (P-0536), by offering to pay her and her husband a total of one million four hundred thousand Kenyan Shillings (KES 1,400,000) in an attempt to influence her to withdraw as a Prosecution witness, and/or by inducing and/or by inducing [REDACTED] to meet with him for the purposes of offering her a bribe in an attempt to influence her to withdraw as a Prosecution witness, and/or by corruptly inducing [REDACTED]

(P-0336) to influence ██████████ to withdraw as a witness, committed during the period 20 May to 25 July 2013 and at or near Kampala, Uganda.

COUNT 3

Attempting to corruptly influence a witness – Article 70(1)(c) read with Article 25(3)(f)

Walter Osapiri BARASA is criminally responsible under Article 25(3)(f), for the crime of attempting to corruptly influence a witness, ██████████ ██████████ (P-0256), by inducing her to meet with ██████████ (P-0336) for the purpose of offering her a bribe in an attempt to influence her to withdraw as a Prosecution witness, and/or by corruptly inducing ██████████ ██████████ (P-0336) to influence ██████████ to withdraw as a witness, committed during the period 21 to 22 July 2013 and at or near Kampala, Uganda.

I. Appropriateness for the Court to exercise its jurisdiction over the Prosecutor's Application under rule 162 of the Rules

1. Rule 162(1) of the Rules states that the Chamber, before deciding whether to exercise jurisdiction over offences under article 70 of the Statute, may consult with State Parties that may have jurisdiction over the offence. Rule 162(2) of the Rules further enumerates a number of additional aspects that the Chamber may consider in making a decision whether or not to exercise its jurisdiction.

2. The Prosecutor submits that the relevant circumstances make it undesirable and inappropriate for the Court to consult with States Parties which may have (concurrent) jurisdiction over the alleged offences pursuant to rule 162(1) of the Rules, as this may result in information being unduly leaked and the chances for arrest being thwarted.

3. Based upon the Prosecutor allegations,⁴ the Single Judge is indeed satisfied that there are good reasons for the Court to proceed to exercise its jurisdiction without engaging in prior consultations with any State Party. Additional reasons univocally militating in favour of this conclusion are to be found in the unlikelihood that effective prosecution over the facts alleged in the Prosecutor's Application be promptly undertaken by a State Party, especially in light of the apparent urgency of the matter⁵ and the ensuing need to act with the utmost expeditiousness. Furthermore, the Single Judge takes the view that, in light of the seriousness of the Prosecutor's allegations, it is important that the Court itself promptly and efficiently addresses a matter which appears of critical importance for the prospects of her investigation in Kenya and ensuing prosecutions.

II. Concise statement of relevant facts

4. Article 58(3) of the Rome Statute ("Statute") requires that a warrant of arrest shall contain (i) "[t]he name of the person and any other relevant identifying information", (ii) "[a] specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed", as well as (iii) "a concise statement of the facts which are alleged to constitute those crimes".

5. The Single Judge is aware that article 58(3) of the Statute lists the reference to the "crimes [...] for which the person's arrest is sought" before the "concise statement of facts" as necessary contents of a warrant of arrest. However, he is of the view that, for the purposes of clarity and as a matter of proper reasoning, it is

⁴ Prosecutor's Application, paras 72-88.

⁵ See Prosecutor's Application, para. 40.

appropriate first to provide a concise statement of the relevant material facts, on the basis of the evidence provided in support thereof, and then to address their legal characterisation by making reference to the crimes allegedly committed by the person whose arrest is sought.

6. The Single Judge will summarise the relevant facts of the case as alleged by the Prosecutor and supported by the evidence annexed to her Application.

7. The Prosecutor submits that the investigation triggering her request dated 18 July 2013⁶ “has now progressed to the stage that requires the urgent arrest [REDACTED]

[REDACTED] More specifically, she submits being in possession of evidence demonstrating reasonable grounds to believe that Walter Osapiri Barasa (“Walter Barasa”), a former intermediary for the Prosecutor in the context of the investigation on the situation in Kenya, [REDACTED]

[REDACTED] aimed at corruptly influencing current, former or potential Prosecution witnesses, with a view to having them withdrawing from their status or recanting their statements as witnesses, [REDACTED]

[REDACTED] with a view to corruptly influencing them for the same purposes. It is the Prosecutor’s submission that attempts to interfere with prosecution witnesses in furtherance of the abovementioned scheme “have escalated both in frequency and seriousness”⁹ in the period between 20 May¹⁰ and 25 July¹¹ 2013, making it necessary to proceed to the arrest of Walter Barasa on an urgent basis.

⁶ ICC-01/09-113-Conf-Exp.

⁷ Prosecutor’s Application, para. 3.

⁸ Prosecutor’s Application, para. 11.

⁹ Prosecutor’s Application, para. 12.

¹⁰ Prosecutor’s Application, para. 5.

¹¹ Prosecutor’s Application, para. 6.

[REDACTED]

10. As regards Witness P-0536, the Prosecutor submits,²³ and provides evidence indicating,²⁴ that, on 24 May 2013, P-0536 confirmed to OTP investigators that she had been contacted by Walter Barasa [REDACTED] [REDACTED] and that, during such contact, Walter Barasa told her that he would like to visit her in [REDACTED]²⁵ [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] and are narrated in a second statement by P-0536 dated 23 July 2013.²⁹ Although during those contacts no offer in exchange for withdrawing or recanting emerged, the fact that P-0536 had also been identified as the potential addressee of an offer similar in nature, content and purpose to that made to P-0336 came to light on 25 July 2013. As stated by P-0536 in her statement [REDACTED]

²¹ Prosecutor's Application, Annex 4.5, paras 35-55.
²² Prosecutor's Application, para. 30; Prosecutor's Application, Annex 4.5, para. 54.
²³ Prosecutor's Application, paras 32-33.
²⁴ Prosecutor's Application, Annex 5.1.
²⁵ Prosecutor's Application, Annex 5.1, para. 23.
²⁶ Prosecutor's Application, Annex 5.1.
²⁷ Prosecutor's Application, para. 35; Prosecutor's Application, Annex 8.3.
²⁸ Prosecutor's Application, para. 36.
²⁹ Prosecutor's Application, Annex 5.2, paras 17-24.

[REDACTED]

11. As regards Witness P-0256, the Prosecutor submits, and provides evidence showing, that – as narrated above³³ – Walter Barasa had requested P-0336 to call and look for P-0256 with a view to persuading her to recant. Furthermore, [REDACTED]

[REDACTED]

[REDACTED] *inter alia* mentioning the benefits he had obtained by withdrawing from his position as an ICC witness and urging her to contact P-0336, whom would have information for her for which he himself (i.e., Walter Barasa) was “responsible”.³⁶

12. The Single Judge notes that most of the relevant evidence attached to the Application [REDACTED]

[REDACTED]

³⁰ Prosecutor’s Application, Annex 5.3, paras 15-27.
³¹ Prosecutor’s Application, Annex 5.3, para. 22.
³² Prosecutor’s Application, Annex 5.3, para. 25.
³³ See above, para. 6.
³⁴ Prosecutor’s Application, Annex 3.3, paras 52-54.
³⁵ Prosecutor’s Application, Annex 3.3.
³⁶ Prosecutor’s Application, para. 46; Prosecutor’s Application, Annex 3.3, para. 53.
³⁷ Prosecutor’s Application, Annex 3.3; Prosecutor’s Application, Annex 4.2; Prosecutor’s Application, Annex 4.3; Prosecutor’s Application, Annex 4.4; Prosecutor’s Application, Annex 4.5; Prosecutor’s Application, Annex 5.1; Prosecutor’s Application, Annex 5.2; Prosecutor’s Application, Annex 5.3.
³⁸ Prosecutor’s Application, Annexes A to M to Annex 3.3; Prosecutor’s Application, Annex A to Annex 4.4; Prosecutor’s Application, Annex B, C, E, F and G to Annex 4.5; Prosecutor’s

[REDACTED]

[REDACTED] The available evidentiary record provides a sizeable amount of specific, objective elements, details and circumstances of direct and precise relevance to the Prosecutor's factual allegations and as such appears reliable.

13. Accordingly, based on the evidence submitted by the Prosecutor, the Single Judge is satisfied that the material facts of the case, as described in the counts presented by the Prosecutor and further elaborated in her Application, are proven to the requisite threshold of "reasonable grounds" to believe, in accordance with article 58(1)(a) of the Statute.

III. Specific reference to the crimes within the jurisdiction of the Court

14. In terms of legal characterisation of the relevant material facts, the Prosecutor alleges reasonable grounds to believe that, within the context of the events summarised above, "Walter Barasa has committed the offences of (i) corruptly influencing witnesses P-0336 and P-0536 in contravention of Article 70(1)(c) and 25(3)(a) of the Statute and (ii) attempting to corruptly influencing witness P-0256, in contravention of Article 70(1)(c) and Article 25(3)(f)".⁴²

Application, Annexes A, B, C and D to Annex 5.2; Prosecutor's Application, Annexes A, B and C to Annex 5.3; Prosecutor's Application, Annex 8.1; Prosecutor's Application, Annex 8.2; Prosecutor's Application, Annex 8.3.

³⁹ Prosecutor's Application, Annex A to Annex 4.4; Prosecutor's Application, Annex 6.1; Prosecutor's Application, Annex 6.2; Prosecutor's Application, Annex 6.3; Prosecutor's Application, Annex 6.4; Prosecutor's Application, Annex 6.5; Prosecutor's Application, Annex 6.6; Prosecutor's Application, Annex 6.7; Prosecutor's Application, Annex 6.8.

⁴⁰ Prosecutor's Application, Annexure A to C to Annex 4.3; Prosecutor's Application, Annexes A, B and D to Annex 4.5.

⁴¹ Prosecutor's Application, Annex H to Annex 4.5.

⁴² Prosecutor's Application, para. 8.

15. Article 70(1)(c) of the Statute vests the Court with jurisdiction over the offence of “corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence”.

16. The Prosecutor submits that “once the offer of the bribe is communicated to the witness with the requisite intent, the crime is completed, whether or not the offer is accepted, the witness is subjectively influenced thereby, or any money changes hands”⁴³. Accordingly, the offers explicitly addressed to P-0336 and P-0536 would make Walter Barasa responsible, as direct perpetrator, for committing the offence of “corruptly influencing a witness” in respect of both of them, whereas his initiatives and actions targeting P-0256 (in particular, by first requesting P-0336 to call and persuade her to withdraw and then by calling her directly) would qualify as “substantial steps” commencing the execution of the crime within the meaning of article 25(3)(f) of the Statute and trigger his responsibility for attempting the commission of such crime.⁴⁴

17. In the alternative, the Prosecution submits that Walter Barasa’s initiatives and actions targeting P-0336 and P-0536 would at least make him responsible for attempting to commit the offence of “corruptly influencing a witness” within the meaning of articles 70(1)(c) and 25(3)(f) of the Statute.⁴⁵

18. The Single Judge notes that the “offering” of a bribe is explicitly mentioned as one particular behaviour constituting the offence of “contempt” in the statutory instruments of the International Criminal Tribunal for the former

⁴³ Prosecutor’s Application, para. 51.

⁴⁴ Prosecutor’s Application, para. 54.

⁴⁵ Prosecutor’s Application, paras 51 and 53.

Yugoslavia,⁴⁶ the International Criminal Tribunal for Rwanda,⁴⁷ the Special Court for Sierra Leone⁴⁸ and the Special Tribunal for Lebanon⁴⁹; and that Trial Chamber II of the Special Court for Sierra Leone held that, for the offence of contempt to exist, “it is immaterial that no money was actually provided, so long as the offer of a bribe was made”.⁵⁰ It seems indeed reasonable to hold that, once evoked, the mere prospect of obtaining (or failing to obtain) a significant advantage depending on the decision to appearing (or failing to appear) as a witness may *per se* play a role in the decision-making process of the addressee of the offer (and hence “influence” such process, irrespective of its outcome), and that neither the acceptance of the offer on the part of the witness nor the actual provision of the offered advantage qualify as constitutive elements of the offence at issue.

19. Considering the relevant facts of the case as emerging from the available evidence, the Single Judge considers it however unnecessary to take at this stage a definite position on these interpretative issues or the precise scope of article 70(1)(c) of the Statute, and, accordingly, on the specific form of individual responsibility incurred by Walter Barasa in respect of the actions targeting P-0336 and P-0536 (i.e., whether those actions would trigger his responsibility under article 25(3)(a) or under article 25(3)(f) of the Statute). First, the Single Judge observes that the scenario evoked in the Prosecutor’s Application is still ongoing, as is the Prosecutor’s investigation into the matter. Second, the Single Judge finds it more appropriate that a definite position on those issues be taken within the context of proper adversarial proceedings.

⁴⁶ Rule 77(A)(iv).

⁴⁷ Rule 77(A)(iv).

⁴⁸ Rule 77(A)(iv).

⁴⁹ Rule 60bis(A)(v).

⁵⁰ Special Court for Sierra Leone, Trial Chamber II, SCSL-03-1-T, Decision 17 March 2011, para. 39.

20. Conversely, at this stage, and for the purposes of this warrant, it is sufficient to highlight that the provision of article 70 of the Statute appears aimed at preserving the integrity of judicial proceedings before the Court, and at proscribing behaviours suitable to jeopardising such integrity. The material facts of the case may in any case be subsumed under the offence of “corruptly influencing a witness” within the meaning of article 70(1)(c) of the Statute, whether attempted or committed, and both scenarios may equally give rise to individual criminal responsibility, whether under article 25(3)(a) or (f) of the Statute.

21. On the basis of the above, the Single Judge is satisfied that the evidence presented by the Prosecutor provides reasonable grounds to believe that Walter Barasa 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.

IV. Necessity of the arrest

22. According to article 58(1)(b) of the Statute, a Chamber may only issue a warrant of arrest when it is satisfied that the arrest of the person appears necessary: (i) to ensure his appearance at trial; or (ii) to ensure that he does not obstruct or endanger the investigation or the proceedings; or (iii) to prevent him from continuing with the commission of the crime.

23. The Prosecutor submits that the arrest of Walter Barasa appears necessary for all of the three reasons listed in article 58(1)(b) of the Statute.⁵¹

⁵¹ Prosecutor’s Application, paras 93-97.

24. Based upon the evidence and information submitted by the Prosecutor, the Single Judge is satisfied that the arrest of Walter Barasa is necessary for all of the reasons alleged by the Prosecutor. [REDACTED]

[REDACTED]

[REDACTED] Walter Barasa himself seems to have envisaged and evoked some of the subsequent steps and phases for the implementation of this scheme in his conversations with the relevant witnesses, in particular P-0256.

V. Additional requests by the Prosecutor

25. The Prosecutor requests, pursuant to regulation 23*bis* of the Regulations, that the Application and its annexes be received by the Chamber as “under seal, ex parte Prosecution and Registry only”, and provides a number of reasons in support thereof.⁵²

26. In light of the information submitted by the Prosecutor, the Single Judge is persuaded that the publication of the Application at this stage would defeat or significantly hinder the execution of the present warrant of arrest, and that divulging details contained therein might result in both undermining the Prosecutor’s ongoing investigation and creating security risks for victims and witnesses. Under these circumstances, the Single Judge considers that the current

⁵² Prosecutor’s Application, para. 100.

level of confidentiality applied to the Prosecutor's Application is at present warranted and that the same level of confidentiality should apply to this warrant of arrest, which is for these reasons issued "under seal *ex parte*, only available to the Prosecutor and the Registrar".

27. The Single Judge considers that the Prosecutor request to authorise the Registrar to transmit a request for provisional arrest under article 92 of the Statute⁵³ is rendered moot by the warrant of arrest hereby issued.

28. In addition, the Prosecutor requests that the Single Judge issue an order requesting the arresting State to proceed to the search of Walter Barasa's person and any pertinent location and seize and transmit to the Court any relevant evidence.⁵⁴ More specifically, the Prosecutor identifies those measures as follows: (i) "the search of BARASA's person and any premises where BARASA may be arrested or where he resided at the time of his arrest"; and (ii) "the seizure of any relevant evidence, such as cell phones, computers or PDAs, diaries, address books, notes or records of meetings or conversations, financial or banking records and/or cash which is/are on reasonable grounds believed to be used in, connected with, or to, provide evidence of, the crime described in th[e] application".⁵⁵

29. The Single Judge, in accordance with article 57(3)(a) of the Statute, is satisfied that the requested investigative measures may be of assistance to the Prosecutor's compliance with her investigative obligations under article 54(1)(a) of the Statute. Furthermore, as requested by the Prosecutor, the Single Judge is of the view that the arresting State must equally be requested to permit that an

⁵³ Prosecutor's Application, para. 105.

⁵⁴ Prosecutor's Application, para. 107.

⁵⁵ Prosecutor's Application, para. 107.

investigator from the OTP be present during the execution of the search(es), as well as to promptly transmit to the Court any seized evidence.

30. Finally, the Single Judge, in granting the Prosecutors' well-grounded request to this effect,⁵⁶ instructs that the request for arrest and surrender to the relevant State(s) be prepared by the Registrar in consultation and coordination with the Prosecutor for both the identification of States to which the request is to be transmitted and the determination of the timing for such transmission. Indeed, the Prosecutor, in general and in this specific case, is normally in possession of significant information which may be relevant not only for identifying the State(s) on the territory of which the person may be found, but also for determining which occasions may or may not represent a suitable opportunity to execute the arrest.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

ORDERS THE ARREST OF

WALTER OSAPIRI BARASA, as better identified above, for his alleged criminal responsibility for the offences identified under Counts 1, 2 and 3 listed above;

ORDERS

the Registrar:

- (i) to promptly liaise with the Prosecutor for the purposes of identifying the countries to which a request for cooperation seeking the arrest and surrender of Walter Osapiri Barasa should be transmitted and of determining the exact timing and circumstances of such transmission;

⁵⁶ Prosecutor's Application, para. 110.

- (ii) to prepare one or more requests for cooperation, in accordance with the results of such consultations;

ORDERS

the Registrar to promptly liaise with the Prosecutor with a view to following the movements of Walter Osapiri Barasa and to identifying the most appropriate circumstances, as to timing and place, for transmitting the relevant request(s) for cooperation to the competent authorities pursuant to rule 176(2) of the Rules and serving the warrant of arrest on him;

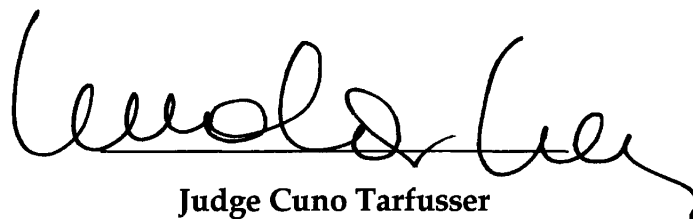
ORDERS

the Registrar to prepare, in consultation and coordination with the Prosecutor, a request for cooperation, to be transmitted at the appropriate time, to the relevant State(s), requesting any such State(s) to take appropriate measures for:

- (i) the search of Walter BARASA's person and any premises where Walter BARASA may be arrested or where he resided at the time of his arrest;
- (ii) "the seizure of any relevant evidence, such as cell phones, computers or PDAs, diaries, address books, notes or records of meetings or conversations, financial or banking records and/or cash which is/are on reasonable grounds believed to be used in, connected with, or to, provide evidence of", the offence described in the present warrant of arrest;
- (iii) the permission for an investigator from the Office of the Prosecutor to be present during the execution of any such searches; and

(iv) the prompt transmission of any such seized evidence to the Court.

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



Judge Cuno Tarfusser

Single Judge

Dated this Friday 2 August 2013

The Hague, The Netherlands