

## CASE STUDY 1: KENYA – THE BASHIR ARREST WARRANT: COOPERATION IN THE COURT ROOM

**Organisation:** International Commission of Jurists – Kenya Section (ICJ - Kenya)

**Country:** Kenya

**Initiative:**  
Approach to the Kenya High Court to issue a provisional arrest warrant for Bashir

**Issues Addressed:**  
Kenya's obligation to cooperate with the ICC in respect of the arrest of indicted suspects

**Status:**  
The case has been taken on appeal

### **Background**

Following the ignominious appearance of Bashir at Kenya's constitutional celebrations in August 2010, the Sudanese president was again scheduled to visit the country in October to attend an Inter-Governmental Authority on Development (IGAD) summit. This time Kenyan civil society was prepared and wrote to President Mwai Kibaki and Prime Minister Raila Odinga demanding that Kenya make good on its obligations to the ICC by arresting Bashir should he visit Kenya.<sup>30</sup>

In addition to publically calling on the government of Kenya to live up to its obligations under the Rome Statute, civil society organisations also decided to approach the courts for legal relief compelling the state to do so. To this end, on 18 October 2010, ICJ-Kenya

asked the Nairobi High Court to issue a provisional warrant of arrest against Bashir, and to order the minister of state for provincial administration to effect the warrant of arrest if and when Bashir set foot in the territory of the Republic of Kenya.

At the same time, the ICC itself was putting pressure on the Kenyan government to arrest Bashir if he attended the IGAD summit. On 25 October, Pre-Trial Chamber 1 of the ICC sent a request to the Kenyan government that it inform the Chamber, not later than 29 October, of any problem that would impede or prevent the arrest and surrender of Bashir in the event that he attended the summit.

This multi-pronged strategy was successful as just days before the IGAD summit was scheduled to start it was hastily moved to Addis Ababa.

Furthermore, although the Kenyan High Court was slow in ruling, in November 2011 it issued an order to the attorney general to secure an arrest warrant for Bashir under the International Crimes Act.<sup>31</sup> The High Court decision is important in a number of respects.

### **Kenya Section of The International Commission of Jurists v Attorney General & Another:<sup>32</sup> The Judgment's Significance and Key Findings**

#### **The Rome Statute is Part of Kenyan Law**

First and foremost, the judgment is an endorsement of international criminal justice generally and the ICC in particular. Before the judge addressed the arguments raised for and against the issuing of the arrest warrant, Judge Ombija undertook a general discussion of the applicable international and domestic law. In so doing he found that under the new Constitution of Kenya, "[t]he general rules of international law ... [are] part of the law of Kenya",<sup>33</sup> and this included the Rome Statute. He concluded that, "the Constitution of Kenya, 2010 does not in any way reject the role of the International Institutions such as the ICC".<sup>34</sup>

*"[T]he Constitution ... requires those exercising Judicial authority or functions to be guided inter-alia, by the principles of the Constitution ... [h]uman-dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.*

*Such values, I am persuaded, cannot be given fulfillment by Kenya acting in isolation of the community of nations. I am convinced that it is essential to recognize and facilitate the role of the International Criminal Court [ICC] operating within the frame-work of the Rome-Statute in the framework of the Kenyan Legal System."<sup>35</sup>*

The Court's endorsement of the Rome Statute and very progressive interpretation of the reach of its obligations may well prove significant for litigation in respect of Kenya's obligations under the Statute.

The Court went even further, addressing the principle of universal jurisdiction in some detail. It found that "under the principle of universality, any State is empowered to bring to trial persons accused of international crimes regardless of the place of the commission of the crime, or the nationality of the offender".<sup>36</sup> In such circumstances, "any State is authorised to substitute itself for the national judicial forum, namely the territorial or national States, should neither of them bring proceedings against the alleged author of an international crime".<sup>37</sup> What is more, according to the Court, the principle of universal jurisdiction is a jus cogens obligation "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".<sup>38</sup> Furthermore, prosecution of "international crimes has developed into jus-cogens and customary international law, thus delegating States to prosecute perpetrators wherever they may be found".<sup>39</sup>

These findings, while not immediately relevant for the case at hand, certainly (if unchallenged) lay the foundation for future prosecutions of international crimes in Kenya, or CSO litigation if none are forthcoming.

In addition to these general findings, the Court made the following specific findings:

### ***Civil Society may Apply for a Provisional Arrest Warrant under the International Crimes Act***

The Kenyan government's primary argument was that the ICJ-Kenya did not have standing under the International Crimes Act to bring the application for a provisional arrest warrant. ICJ-Kenya based its application on section 32 of the International Crimes Act which, it argued, empowered private persons or CSOs to approach a High Court directly to issue a domestic provisional arrest warrant for a person wanted by the ICC when the government reneged on its duty to do so. This procedure, ICJ-Kenya argued, would serve the purpose of "reminding the Government of its international and domestic obligations ... and demanding that the Government honours its obligations".

Section 32 (1) of the International Crimes Act states:

*"A Judge of the High Court may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him that—*

- '(a) a warrant for the arrest of a person has been issued by the ICC or, in the case of a convicted person, a judgment of conviction has been given in relation to an international crime;*
- (b) the person named in the warrant or judgment is or is suspected of being in Kenya or may come to Kenya; and*
- (c) it is necessary or desirable for an arrest warrant to be issued urgently.'*

Notably, section 32(2) provides that a provisional warrant can be issued "even though no request for surrender has yet been made or received from the ICC".

Further, in terms of section 33 of the International Crimes Act, if a judge issues a provisional arrest warrant, the applicant has to inform the minister in charge of Internal Security, and provide him or her with supporting documents.

The Kenyan government disputed this interpretation. It argued that a request for a "provisional warrant" under the International Crimes Act could only be made by the ICC itself. In doing so it relied on the Rome Statute's article relating to provisional arrest (on which section 32 of the International Crimes Act is based), which provides that in urgent cases "the Court may request the provisional arrest of the person sought, pending presentations of the request for surrender and the documents supporting the request".<sup>40</sup> As the Rome Statute provision grants the ICC the exclusive power to request such an arrest it followed – according to the government – that only the ICC could request a provisional arrest under the International Crimes Act.<sup>41</sup> What is more, the request must be directed to the Kenyan government – more specifically the minister in charge of internal security of the sovereign Republic of Kenya – who would then approach the High Court to issue the warrant. On this version, the reference to the "applicant" in

the International Crimes Act's provisions relating to arrest warrants refers to the state, and not a private individual or CSO. As a result, the government argued, not only did ICJ-Kenya lack locus standi to bring the case, but – in the absence of a request for a provisional warrant directed to the Kenyan government by the ICC – the High Court lacked jurisdiction to consider its application.

In considering the issue of standing, the Court held that “three aspects must be considered when public interest standing is sought: (i) is there a serious issues (sic) raised by the applicant? (ii) has it been established by evidence that the applicant is directly affected by the issue raised? In other words, is it within the mandate of the applicant?, (iii) does the applicant have a genuine interest in the matter at hand?”<sup>42</sup> The Court found that ICJ-Kenya met these requirements and had “a genuine interest in the development, strengthening and protection of the rule of law and human rights”.<sup>43</sup>

The Court went on to consider the approaches that other common law jurisdictions (namely the United Kingdom, Australia and Canada) have adopted to the question of standing in similar cases, concluding:

*“In the disclosed circumstances of this case and having taken into consideration the various approaches taken in other common law jurisdictions to grant parties leave to bring action, I have decided to adopt the open ended approach. In my considered judgment based on the authorities, the ICJ – Kenya Chapter, the Applicant, has the necessary locus – standi to bring this application. In my judgment the matters raised by the Applicant and by extension the orders sought by the Applicant are justiciable. The application is thus tenable in law. The application thus succeeds to that extent.”<sup>44</sup>*

The Court proceeded to consider whether anyone other than the state could apply for an arrest warrant to be issued under the International Crimes Act when the ICC had issued a warrant and the minister for internal security failed, neglected or refused to execute it (that is, who could approach a High Court to issue a domestic arrest warrant). The Court found that “any legal person – ICJ Kenya Chapter included – who has the requisite mandate and capacity to enforce and/or to execute the warrant may be at liberty to do so”.<sup>45</sup>

Thus the Court granted ICJ-Kenya's request to issue a provisional arrest warrant for Bashir, and ordered the minister of state for provincial administration to arrest Bashir if he set foot within the territory of the Republic of Kenya. Notably, the Court added that even if ICJ-Kenya was not able to apply for an arrest warrant directly, it could nevertheless approach the Court to order the minister in charge of Internal Security to arrest Bashir should he be present in Kenya in future.

Although the Court did not consider their merits in detail, it also rejected three further arguments raised by the government and an intervening party.

### ***The Relevance of Immunity***

The Court accepted ICJ-Kenya's submission that “the International Crimes Act 2008, like the Rome Statute, does not recognise immunity on the basis of official capacity”. In doing so, the Judge decided that “the High Court in Kenya clearly has jurisdiction not only to issue warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the International Criminal Court issue one”.<sup>46</sup>

This finding is relevant not only to future requests for cooperation with the ICC in respect of someone who lays claim to immunity, but also to prosecution brought in Kenya under the International Crimes Act where immunity is raised.

## **The Relevance of the AU Decisions and Regional Stability**

During the course of the proceedings a CSO – Kenyans for Justice and Development (KJD) – joined the proceedings on the side of the government of Kenya. KJD argued that the AU’s non-cooperation decision of July 2009, which directed all AU member states to withhold cooperation with the ICC in respect of the arrest and surrender of Bashir, was binding on Kenya and its people. Furthermore, as Sudan had labeled the warrant of arrest against Bashir an act of aggression, “the execution of the warrants ... [would] jeopardise or risk the lives and property of an estimated 500 000 Kenyans in the Sudan”.<sup>47</sup> Finally, given Kenya’s role in the 2005 Comprehensive Peace Agreement that ended the civil war in Sudan, Kenya “should not take action that will precipitate instability in Sudan”.

While the Court did not deem it necessary to address these arguments directly, by implication it was not persuaded that they were relevant to the issuing of the arrest warrant.

### **LESSONS LEARNT**

Information sharing is crucial. Civil society was successfully mobilised in Kenya and South Africa in advance of Bashir’s proposed visits to those countries based on information that was not within the public sphere. The ANICJ was crucial to this process.

Domestic courts can be useful allies in ensuring that local authorities respect their obligations under the Rome Statute.

- This is particularly true when states have adopted implementing legislation as this creates an additional, domestic obligation to comply with requests. It also means that there are political consequences of non-compliance.
- While litigation can be costly and lengthy, and (as was the case in Kenya) decisions might be rendered “after the fact”, the authoritative determination of domestic obligations is itself an important exercise.
- The next time a suspect wanted by the ICC visits Kenya the government will have fewer opportunities for justifying its non-compliance and the process to be followed has been clarified.
- This is highlighted by the fact that because the matter was settled before litigation was launched in South Africa such clarity remains elusive insofar as the procedure to be followed is concerned.

More broadly, these instances underline the importance of getting implementing legislation adopted in other African states parties.

Raising public awareness of and support for the Court within African states is the best means of guaranteeing cooperation in the long term. In 2010, as part of a stocktaking exercise, the president of the ICC set out areas where cooperation could be improved through increasing knowledge, awareness and support for the Court, noting:

*“[I]ncreasing knowledge, awareness and support would, in the long term, contribute to building a culture of respect for the Court and its decisions and requests.”<sup>48</sup>*

## Endnotes

1. R Goldstone "The Role of the United Nations in the Prosecution of International War Criminals" (2001) *Journal of Law & Policy* vol. 5:119, 124.
2. G Ruxton "Present and Future Record of Arrest War Criminals: the View of the Public Prosecutor of the ICTY" in WAM van Dijk & JL Hovens (eds) *Arresting War Criminals* (2001) 19.
3. A Cassese "On Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) *European Journal of International Law* I, 13.
4. *Id.* The Judge continued: "And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it."
5. The issue of state cooperation was a controversial one when the Court's statute was drafted in Rome in 1998, the final text striking a delicate balance that both recognises the constraints of the Court as a treaty-based mechanism (contra ICTY/R) but also creates a progressive cooperation regime that enables the Court to operate effectively. The resultant cooperation regime, contained in Part 9 of the Rome Statute, is a hybrid between a horizontal model and a vertical model of cooperation: the former involving the relatively weaker form of inter-state cooperation, the latter used to describe the "supra-State model" which is a more robust system of cooperation between the ad hoc Tribunals and states. This classification was noted by the ICTY Appeals Chamber in *Prosecutor v Blaskic*, UIT-95-14-T (3 March 2000), and further developed by Cassese. It has been generally accepted by other scholars since. See A Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" 10 *EJIL* (1999) 144, 164-165 and B Swart, "General Problems" in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary Vol. II*, (2002), 1590 and 1594-1598.
6. Article 88, Rome Statute.
7. Article 89(1), Rome Statute.
8. See article 103(3)(a), Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.
9. Article 87(7), Rome Statute.
10. Bahar Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I on 18 May 2009, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus appeared voluntarily before the Court on 17 June 2010.
11. The ICC was seized with the Darfur situation by UN Security Council Resolution 1593 (2005).
12. See "DR Congo: Bosco Ntaganda appears before ICC" *BBC News* (26 March 2013) available at <http://www.bbc.co.uk/news/world-africa-21933569>.
13. Further charges were added in July 2012.
14. In their original ruling, the judges of the ICC's Pre-Trial Chamber I issued an arrest warrant against Bashir for a total of five counts of war crimes and crimes against humanity, but the panel threw out charges of genocide that had also been requested by prosecutor Luis Moreno-Ocampo. The prosecutor appealed this decision, and on 3 February 2010, the Appeals Chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.
15. UN Security Council Resolution 1593 (2005) referring situation in Darfur to the ICC, at para. 2.
16. Prosaically, this apparent contradiction can be explained by the fact that article 27 and article 98 were drafted by different committees in Rome. O Triffterer "Article 27" in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999).
17. For more information see E Keppler "Managing Setbacks for the International Criminal Court in Africa" (2011) *Journal of African Law, 1* and Human Rights Watch "Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court" (November 2010).
18. "Human Rights Watch Calls on Chad to Arrest Sudan's President" *Globe and Mail* (21 July 2010) available at <http://www.theglobeandmail.com/news/world/human-rights-watch-calls-on-chad-to-arrest-sudan-president/article1387444/>.
19. "Sudan's President Bashir Defies Arrest Warrant in Chad" *BBC News* (21 July 2010) available at [www.bbc.co.uk/news/world-africa-10718399](http://www.bbc.co.uk/news/world-africa-10718399).
20. *Id.*
21. Moumine Ngarmbassa "Sudan's al-Bashir Defies ICC with Chad Trip" *Mail and Guardian* (22 July 2010) available at <http://mg.co.za/print/2010-07-22-sudans-albashir-defies-icc-with-chad-trip>.
22. S Lamoney "Chad Hosts Wanted Al-Bashir as Côte d'Ivoire Joins ICC" *African Arguments* (20 February 2013) available at <http://africanarguments.org/2013/02/20/chad-hosts-wanted-al-bashir-as-cote-d%E2%80%99ivoire-joins-icc-%E2%80%93-by-stephen-lamoney/>.

23. X Rice "Omar al-Bashir Tarnishes Kenya's Landmark Day" *The Guardian* (27 August 2010) available at <http://www.guardian.co.uk/world/2010/aug/27/omar-al-bashir-war-crimes-kenya>.
24. *Id.*
25. "Sudan's Bashir Attends Djibouti President's Inauguration" *VOA News* (7 May 2011) available at <http://www.voanews.com/content/sudans-bashir-attends-djibouti-presidents-inauguration-121463729/139121.html>.
26. Notes following the briefing of Department of International Relations and Cooperation's Director General, Ayanda Ntsaluba (31 July 2009) available at <http://www.info.gov.za/speeches/2009/09073110451001.htm>.
27. "Malawi Cancels AU Summit over Sudan's Bashir" *Al-Jazeera* (9 June 2012), available at <http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>.
28. Botswana Ministry of Foreign Affairs Press Statement (13 June 2012).
29. Pre-trial Chamber decisions in: *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Recent Visit to Chad ICC-02/05-01/09* (27 August 2010); *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Presence in the Republic of Kenya ICC-02/05-01/09* (27 August 2010); *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir's Recent Visit to Djibouti ICC-02/05-01/09* (12 May 2011); *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09* (13 December 2011); *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09* (11 December 2012); *The Prosecutor v Omar Hassan Ahmed Al Bashir Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad ICC-02/05-01/09* (22 February 2013). All decisions are available on the ICC website <http://www.icc-cpi.int>.
30. "Kenyan Government Bows To Pressure As IGAD Summit Is Moved" *ICJ-Kenya Press Release* (29 October 2010) available at <http://www.icj-kenya.org/index.php/media-centre/news/329-kenyan-government-bows-to-pressure-as-igad-summit-is-moved>.
31. "Sudan's Omar al-Bashir: Kenya Issues Arrest Warrant" *BBC News* (28 November 2011) available at <http://www.bbc.co.uk/news/world-africa-15918027>.
32. *Kenya Section of The International Commission of Jurists v Attorney General & Another* [2011] eKLR (ICJ-Kenya v Attorney General).
33. This is established in article 2(5) of the Constitution of Kenya, 2010. The Judge noted that this "position is further fortified by the enactment of the International Crimes Act, 2008 [Act No. 16 of 2008], Section 4[1] of which provides; "The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya." See further Article 2(6) of the Constitution of Kenya.
34. *ICJ-Kenya v Attorney General supra note 32, 14.*
35. *Id.* 15.
36. *Id.* 16.
37. *Id.* 16.
38. *Id.* 17.
39. *Id.*
40. Article 92(1), Rome Statute.
41. The government argued that "Section 32 and 33 of the International Crimes Act, 2008 derive directly from Article 92 of the Rome Statute. Hence section 32 and 33 of the International Crimes Act, 2008, should be read together with Article 92 of the Rome Statute for their full tenor and effect. A reading of the aforesaid Sections and the said Article leaves no doubt that the request can only be made by the ICC in urgent cases." *ICJ-Kenya v Attorney General, supra note 32, 11.*
42. *Id.* 21.
43. *Id.*
44. *Id.* 24.
45. *Id.* 24.
46. *Id.* 19.
47. *Id.* 12.
48. Statement made at "Roundtable on Stocktaking of International Criminal Justice" at the 8th Assembly of States Parties to the ICC, *RC/ST/CP/1/Rev.1. para 24.*