

CHAPTER 7: ENSURING COOPERATION WITH THE ICC

The most serious threat to the credibility, and indeed the very essence, of the Tribunals [ICTY and ICTR] has come from politically inspired delays in the arrest of indicted war criminals.

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The arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials; no development of the law by the courts; and ultimately, no international justice.

GAVIN RUXTON²

Introduction

The late Judge Antonio Cassese – the first president of the ICTY – described that court as “**a giant without arms and legs – it needs artificial limbs to walk and work**”.³ He was referring to the Tribunal’s lack of direct enforcement mechanisms which meant it had to rely on the cooperation of states in order to investigate, arrest, try and sentence individuals who committed international crimes.⁴ Despite some states’ wishes, that metaphor remains as relevant for the ICC, if not more so. The ICC must also rely on the cooperation of states to “walk and work” and, unless the Security Council explicitly states otherwise in a referral to the ICC (which it has not done to date), the basis for the obligation on states to cooperate is a normal treaty obligation under the Rome Statute, not an elevated UN Charter obligation. This, in fact, makes the ICC even less mobile than the ICTY – which was established by a resolution of the UN Security Council, under Chapter VII of the Charter.⁵

As a result, states that ratify the Rome Statute accept a number of cooperation obligations. First of all, states are under a general obligation under article 86 to “cooperate fully with the Court”. In order to facilitate the cooperation of states, the Rome Statute requires states parties to “ensure that there are procedures available under their national law for all of the forms of cooperation”⁶ which are specified under the Rome Statute. All states parties are required to carry out arrest warrants issued by the ICC should the suspect be in their territory.⁷ In addition, the Rome Statute requires states parties to provide the following other forms of cooperation to the ICC in relation to its investigation and prosecution of crimes within its jurisdiction:

- The identification and whereabouts of persons or the location of items;
- The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;
- The questioning of any person being investigated or prosecuted;
- The service of documents, including judicial documents;
- Facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
- The examination of places or sites, including the exhumation and examination of grave sites;
- The execution of searches and seizures;
- The protection of victims and witnesses and the preservation of evidence; and
- The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.

“Tanzania offers both to receive convicts of the International Criminal Court (ICC) to serve their jail terms in Tanzania prisons and to accommodate an ICC regional office in Arusha.”

**Richard Shilamba
Children Education Society (CHESO),
Tanzania**

Finally, after convicting and sentencing an offender, the ICC will designate the state where the term is to be served and states are requested under the Statute to “share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution”.⁸

In the event of non-compliance by a state party with a request to cooperate from the ICC, the Court may “make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”.⁹

Unfortunately, African states parties have not always been forthcoming in their cooperation with the ICC, partly as a result of domestic political considerations, as well as because of the AU’s hostility towards the ICC. In this environment, African CSOs have had to come up with innovative measures to pressure these states to comply with their Rome Statute obligations.

If states remain the limbs of the ICC, then CSOs have become its central nervous system – spurring these sometimes lethargic limbs into action.

The Cooperation Record of African States

African states’ record of cooperation with the ICC has been mixed, particularly in respect of the surrender of individuals wanted by the ICC. On the positive side, the DRC handed over Germain Katanga and Mathieu Ngudjolo Chui to the ICC in October 2007 and February 2008 respectively, and in November 2011, the Ivory Coast surrendered Laurent Gbagbo. In an unexpected turn of events, three rebels from the Sudanese Justice and Equality Movement – Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus – voluntarily surrendered to the ICC.¹⁰ These rebels appeared pursuant to a summons issued by the ICC in respect of the attack in September 2007

against the AU peacekeeping mission in Sudan at the Haskanita Military, in which ten peacekeepers were killed and a number were wounded.

However, a number of suspects remain at large with the active or passive support of African states, including ICC signatories. Two cases stand out in this regard.

First, Sudanese President Bashir is subject to an arrest warrant in respect of alleged genocide, war crimes and crimes against humanity committed in Darfur.¹¹ Since a warrant for his arrest and surrender to the ICC was issued in 2009, Bashir has visited Kenya, Chad, Malawi and Djibouti (sometimes repeatedly), all of which have ratified the Rome Statute.

Rebel leader Bosco Ntaganda, who had evaded capture (allegedly with the support of Rwanda and Uganda – a Rome Statute state party) since the ICC issued an arrest warrant in August 2006, surprisingly handed himself over to the United States Embassy in Rwanda in March 2013, and appeared before the ICC later that month.¹² Ntaganda is accused of seven counts of war crimes (including the enlistment or conscription of children under the age of fifteen, murder, attacks against the civilian population, rape and sexual slavery, and pillaging) and three counts of crimes against humanity (including murder, rape and sexual slavery, and persecution).

The Role of Civil Society: The Bashir Example

On 1 March 2009, Pre-Trial Chamber I issued an arrest warrant for Bashir in relation to war crimes and crimes against humanity committed in Darfur. Following a successful appeal, genocide counts were added to the list of crimes for which the prosecutor alleges Bashir bears individual criminal responsibility.¹⁴ Bashir thus became the first sitting head of state to be indicted by the ICC since its establishment in 2002. The Bashir case presents a number of difficulties for the ICC.

First, the difficulty with the arrest warrant is that Sudan is not a state party to the Rome Statute but was brought within the remit of the ICC by way of the Security Council. While the Council decided that “the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court”, it did not extend that obligation to other states, merely urging them to do so.¹⁵ What is more, the Council has not followed up on its edict that Sudan must cooperate with the ICC.

Second, and related, is the question of immunity Bashir as a head of state has under customary international law. The Rome Statute has prima facie conflicting provisions on immunity. Article 27(2) states: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” The difficulty comes in trying to reconcile article 27(2) with article 98(1), which states that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. A number of approaches have been adopted in an attempt to reconcile this contradiction, with varying consequences for the integrity of the two provisions.¹⁶ While the Pre-Trial Chamber of the ICC finally pronounced on this question in its non-cooperation decision in respect of Chad and Malawi – finding that head of state immunity was not applicable in the case of Bashir – its reasoning has been heavily criticised. Following the decision, the AU launched an initiative seeking an advisory opinion from the ICJ on this question. Needless to say, this uncertainty complicates the issue of Bashir’s apprehension, and African states (and the AU) continue to raise Bashir’s immunity as the basis for non-cooperation.

Third and perhaps most difficult to resolve, is the question of the effect the arrest warrant for Bashir could have on the on-going, fragile peace processes in Darfur and with the newly established Republic of South Sudan. This has raised the “peace versus justice dilemma”, as Bashir is integral to both processes and his arrest could throw the already delicate negotiations off course.

These first three challenges – to varying degrees – have culminated in the fourth challenge: the AU backlash against the arrest warrant. (See Textbox.)

These challenges have made cooperation in the case of Bashir difficult, with states taking differing and sometimes contradictory positions when Bashir has visited their territory, or planned to do so. There are both positive and negative examples of behaviour by African ICC states parties in this regard, and the distinguishing factor appears to be the involvement of CSOs which disseminated information about the travel plans of Bashir, and put legal and political pressure on their governments to comply with their obligations under the Rome Statute to arrest him.

Addressing Non-Compliance

Article 87(7) of the Rome Statute provides that where a:

“State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [ASP] or, where the Security Council referred the matter to the Court, to the Security Council.”²⁹

The ICC can therefore refer a recalcitrant state’s non-cooperation to the ASP or the Security Council (where it referred a matter to the ICC in the first place). The Security Council and the ASP can then take any “any measure they deem appropriate”. The Rome Statute unfortunately does not go any further than this.

Chad, Djibouti and Kenya have all been referred to the ASP and the Security Council. However, these institutions did not take the non-compliance any further.

The inability of the ICC to enforce compliance with arrest warrants is one of its biggest challenges and underscores the importance of securing cooperation at the domestic level, as evidenced in South Africa and Kenya.

The AU Non-Cooperation Decisions

From the outset, the majority of African states, acting primarily through the AU, have opposed the ICC proceedings in respect of Bashir. Only one week after the prosecutor requested that the Pre-Trial Chamber issue an arrest warrant for Bashir in July 2008, the regional body's Peace and Security Council requested that the ICC proceedings in respect of Bashir be suspended under article 16 of the Rome Statute. Thereafter, in what was undoubtedly the low-point in ICC-Africa relations, South Africa joined ranks with others at an AU meeting in Sirte, Libya in July 2009, to support an AU resolution calling on its members to defy the international arrest warrant issued by the ICC for Bashir. This position has been repeated by the AU – in modified forms – on a number of occasions since then.

Merits aside, this position places African ICC states parties in a difficult position as they are under competing (and apparently equal) international obligations in respect of Bashir: the obligation to cooperate under Part 9 of the Rome Statute, and the obligation to abide by the AU's decision not to cooperate under article 23 of the AU Constitutive Act. In its ruling on the non-cooperation decisions of Chad and Malawi, the Pre-Trial Chamber addressed the AU decisions but its reasons were less than compelling, nor is it clear that it even has the mandate to pronounce on these competing obligations. For its part, the AU has welcomed the decisions by African states not to arrest Bashir pursuant to its non-cooperation decisions.

Notably, the Security Council could break the deadlock in respect of these obligations, as the basis for the ICC's investigations and prosecutions in Darfur was a Security Council resolution (SCR 1593). However, the Council has elected not to upgrade the obligations on states to cooperate with the ICC – simply “urging them to do so”. Furthermore, despite the referral of instances of non-cooperation by Chad and Kenya by the Pre-Trial Chamber, and the ICC prosecutor's exhortations, the Council is yet to use its powers to force states to cooperate with the ICC where Bashir is concerned. As such, for the time being the ICC has to secure the presence of Bashir using the “normal” cooperation procedures.¹⁶

BASHIR TRAVEL MAP THE BAD



CHAD

In July 2010, Chad earned the “shameful distinction”¹⁸ of being the first ICC state party to host Bashir on its territory without arresting him pursuant to the 2009 warrant. The Sudanese president was attending a meeting of the Community of Sahel-Saharan States.¹⁹ There was little doubt that Bashir would be permitted to attend the meeting unchecked as Chad’s interior minister declared beforehand that “Bashir will not be arrested in Chad”.²⁰ According to the interior minister, Chad was “not obliged to arrest ... al-Bashir” as he “is a sitting president”²¹ – ostensibly raising Bashir’s immunity as a bar to cooperating with the Court. Notably, at this point the ICC had not issued a decision on the question of immunity.

In August 2011, Bashir again visited Chad, and again was not arrested. A third visit to Chad in February 2013 has been reported.²²

KENYA 2010 VISIT

In August 2010, Bashir was invited by the government of Kenya to attend the celebrations for the promulgation of the new Kenyan Constitution. Bashir attended despite an outcry from local and international CSOs. The Kenyan government was unrepentant; Foreign Minister Moses Wetangula stated that Kenya had “no apologies to make about anybody we invited to this function”.²³ According to the minister, “[Bashir] was here today because we invited all neighbours and he is a neighbour”.²⁴

Bashir’s visit to Kenya was all the more disappointing as it was the first to an ICC State Party that had adopted domestic legislation to give effect to its obligations to cooperate with the ICC in these exact circumstances. That legislation, the International Crimes Act (2008), specifically addresses the relevance of immunity in relation to cooperation requests. Section 27(1) thereof – titled “Official capacity of person no bar to request” – states that “[t]he existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC”. The Kenyan government did not offer an explanation for its refusal to arrest Bashir, and it appears that its own implementing legislation would preclude it from raising immunity as a reason in any event.

DJIBOUTI 2011 VISIT

In May 2011, Djibouti became the third African ICC State Party to violate its obligations under the Rome Statute by allowing Bashir to attend the inauguration of Ismail Omar Guelleh as its president.²⁵

MALAWI 2011 VISIT

Bashir visited Malawi in October 2011 to attend a summit of the Common Market for Eastern and Southern Africa. As noted above, in December 2011 Pre-Trial Chamber I rendered its decision on the refusal of Malawi to arrest Bashir. The Chamber found that Malawi failed to comply with its obligations to consult with the Chamber by not bringing the issue of Bashir’s immunity to it for its determination, and failed to cooperate with the ICC by not arresting and surrendering Bashir to the Court, which prevented it from exercising its functions and powers.

BASHIR TRAVEL MAP THE GOOD



SOUTH AFRICA ARREST WARRANT

In May 2009, it was reported that Bashir – then sought by the ICC – had been invited to President Jacob Zuma’s inauguration. CSOs quickly mobilised in an attempt to prevent Bashir’s attendance and advocates were briefed to prepare urgent court papers to compel the South African authorities to arrest Bashir in the event of his attending the inauguration. On the eve of the inauguration, the government clarified that although the Sudanese government had been invited, Bashir had not. Ultimately, Bashir chose not to visit South Africa at that time.

But the full extent of South Africa’s manoeuvring to ensure Bashir’s non-attendance was not disclosed until South Africa was seen to support the AU’s Sirte resolution of non-cooperation with the ICC. South Africa was quickly singled out for severe criticism both at home and abroad. Virtually all of its leading human rights organisations, including the South African Human Rights Commission, united around the call for the country to respect its own law and Constitution and to disassociate itself from the AU decision. On 31 July 2009, Dr Ayanda Ntsaluba, the director general of the Department of International Relations and Cooperation (DIRCO) disclosed at a press conference that an international arrest warrant for Bashir had “been received” (presumably from the ICC) and “endorsed by a [South African] magistrate”. Ntsaluba explained that “[t]his means that if President El Bashir arrives on South African territory, he will be liable for arrest”. In an unprecedented disclosure, DIRCO published together with the press statement, a legal opinion it had obtained making it clear its obligations to arrest and surrender Bashir.²⁶

KENYA ARREST WARRANT

See Case Study 1 below: Cooperation in the Court Room.

MALAWI, BOTSWANA AND THE AU SUMMIT

A second example of good practice – and an indication of how quickly progress might be made given that Malawi also inhabits the “bad” column – is Malawi’s decision to refuse to host the recent AU Summit in July 2012 after the body insisted that Bashir be invited. As noted above, following his visit in October 2011, Malawi was found to have violated its obligations under the Rome Statute by failing to arrest him. The AU Commission had instructed the Malawian government that as host it was required to invite all sitting African heads of state and government. In response, Vice-President Khumbo Kachali announced that “[a]fter considering the interests of Malawians, I want to inform Malawians that the cabinet met today and decided it was not interested to accept the conditions by the African Union, therefore Malawi is not hosting the summit”.²⁷ The push-back against the AU Commission was led by newly elected Malawian President Joyce Banda.

Even more encouraging in this instance was the show of support Malawi received from the government of Botswana in a public statement applauding Malawi’s decision and condemning the move of the summit to Ethiopia.

“Botswana therefore condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds. It is our considered view that Malawi as a sovereign state has the right to make decisions it may deem necessary, in fulfilment of her obligations under both the Rome Statute and the AU.”²⁸