11-28-2011

Kenya Litigation - Miscellaneous Criminal Application 685 of 2010

Truth, Justice, and Reconciliation Commission

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Criminal Application 685 of 2010

THE KENYA SECTION OF THE INTERNATIONAL

COMMISSION OF JURISTS……APPLICANT

-VERSUS-

ATTORNEY GENERAL……1ST RESPONDENT

MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY.....2ND RESPONDENT

R U L I N G

The parties to this application

1. The Kenya Section of the International Commission of Jurists [ICJ Kenya] is the Applicant.

2. The Hon. The Attorney General is the 1st Respondent.

3. The Minister of State for Provincial Administration and Internal Security is the 2nd Respondent.

4. The Kenyans for Justice and Development Trust is the 3rd Respondent. [Through its Trustees

Andrew Okiya Omtatah Okoiti and Oyugi Neto Augustinho]

The Subject matter

5. President Omar Ahmad Hassan Al Bashir [Omar Al Bashir]. The name Omar Ahmad Hassan Al Bashir is used interchangeably with Omar Al Bashir.

Factual and Legal Background

It is axiomatic that the Kenyan State has no autonomous existence outside the framework of the community of nations, and that on this account, its regime of law and Constitutional order ***inter-face*** with the other states under the auspices of international law. That one of the beacons of ***international law*** is ***multilateral treaties***, to which Kenya and other states are parties. The Rome Statute [ICC] is one such treaty. It establishes the International Criminal Court [ICC], which prosecutes and judge, in the event of the commission of certain named categories of offences referred to in ***Article 5*** thereof. These are ***crimes of genocide, crimes against humanity, war crimes, and crime of aggression.***

In relation to such crimes, state parties, such as Kenya, has agreed to cede some of their jurisdiction of crime.

Kenya's International Crimes Act [2008] bears a ***tell-tale*** preamble which is couched in the following terms;

" An Act of Parliament to make provisions for the punishment of certain International Crimes, namely, genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court [ICC] established by the Rome Statute in the performance of its functions".

The International Crimes Act entered into force on 1st January, 2009. Indeed the Constitution of Kenya, 2010, which was promulgated on 27th August, 2010 carries a transitional clause [sixth schedule, clause 7(1)] which stipulates:

" All the law in force immediately before the effective date [read 27th August, 2010] continues in force and should be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with the Constitution"

Kenyan state organs had their positions defined in Article 12(1) of the Rome Statute which provide;

"A state which becomes a party to this statute thereby accepts the jurisdiction of the Court with respect to the Crimes referred to in Article 5"

Against that backdrop of legal grounding the International Criminal Court [ICC] in fact issued two sets of

warrants. ***One***, on 4th March, 2009 with five counts of Crime against humanity, against President Omar Ahmed Hassan Al Bashir [Omar Al Bashir] ***Two***, on 12th July, 2010 with three counts of genocide also against President Omar Ahmad Hassan Al Bashir ***[Omar Al Bashir]*** the President of the sovereign Republic of Sudan.

The said warrants were issued pursuant to ***Article 91*** as read together with ***Article 92*** of the Rome Statute.

Pursuant to the aforesaid warrants the Registrar of the International Criminal Court [ICC] sent initial request on 6th March, 2009 for co-operation to all states parties for arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he set foot on their respective territory. Subsequent to the issuance of the second warrant, the Registrar of the International Criminal Court [ICC] sent a supplementary request on 21st July, 2010 couched on the said terms as the first one.

It is common knowledge that President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] set foot in Kenya on 27th August, 2010 when the Constitution of Kenya, 2010 was promulgated reportedly on the invitation of the Kenyan Government. The Kenyan Government as the host failed, neglected or refused to arrest and surrender him to the International Criminal Court. Hence this application by the Applicant to force the Government of Kenya to comply with its international obligations under the Constitution of Kenya, 2010 the International Crimes Act, 2008 and the Rome Statute[ICC].

The Application

By a Chamber Summons application dated 18th November 2010, pursuant to Articles 2 and 3 of the Constitution, Section 32 of the International Crimes Act, and all other enabling provisions of the law, the Applicant seeks orders:-

1. That this honourable Court be pleased to issue a provisional warrant of arrest against one Omar Ahmad Hassan Al Bashir [Omar Al Bashir] the President of Sudan.

2. That there be issued orders to the 2nd Respondent, the Minister of State for Provincial Administration, to effect the said warrant of arrest, if and when, the said President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] sets foot within the territory of the Republic of Kenya.

3. That the honourable Court be pleased to issue such further orders, writ, or direction as the honourable Court shall deem fit and just in the circumstances.

The application is predicated upon the affidavit of, ***George Kegoro,*** the Executive Director – ICJ Kenya, sworn on the 18th day of November 2010.

The application is based on the grounds:-

1. That the Constitution of Kenya at Article 2 (5) applies all treaties and conventions that have been ratified by Kenya to be part of the Laws of Kenya.

2. That Kenya ratified the Rome Statute on the 15th March 2005 and followed up on that act by domesticating the Statute vide the International Crimes Act, 2008.

3. That the Constitution of Kenya, 2010 at Article 3 puts an obligation on every person to respect, uphold and defend the Constitution.

4. That there are two outstanding warrants of arrest against President Omar Ahmad Hassan Albashir [Omar Al Bashir] issued by the International Criminal Court [ICC] on 4th March, 2009 and 12th July 2010 respectively.

5. That there are also two requests for co-operation in the arrest and surrender of President Omar Ahmad Albashir [Omar Al Bashir] issued by the International Criminal Court [ICC] on 6th March, 2009 and 21st July, 2010 to States that are parties to the Rome Statute.

6. That President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] came to Kenya, on the 27th August, 2010, However, despite the existence of the said warrants of arrest, the Respondents in utter disregard of their obligations, under international law and the Laws of Kenya, failed to enforce the said warrants of arrest.

7. That the Applicant is apprehensive that President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] will again in the near future be coming into Kenya to attend a meeting convened by Kenya through the Intergovernmental Authority on Development (IGAD).

8. That previously when President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] **came to Kenya on the 27th August 2010, the Respondents failed and refused to effect arrest on him despite the existence of the said warrants of arrest against him which fact was within their knowledge.**

9. That the Applicant is apprehensive that should President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] **come to Kenya, the Respondents in total disregard of the law will once again fail to effect an arrest against him as they previously did.**

10.That it is in this premise, that the Applicant is making this application.

The Applicant's Case

On behalf of the Applicant, I was urged that the objectives of the Applicant are ***inter-alia,*** the development, strengthening and protection of the rule of law; and in particular to keep under review all aspects of the rule of law and human rights within the Republic of Kenya and take such action as will be of assistance in promoting or ensuring the enjoyment of these rights.

That the Applicant is aware of the existence of the warrants of arrest against President Omar Ahmad Hassan Al Bashir [Omar Al Bashir], the President of the Sovereign Republic of Sudan. The copies of the two aforesaid warrants are exhibited as **"GK 1"** and **"GK 2"** respectively.

That the said arrest warrants were issued by the Pre-Trial Chamber of the International Criminal Court [ICC] respectively on 4th March, 2009 with five counts of crime against humanity and two of war crimes and on 12th July, 2010 with three counts of genocide for allegedly orchestrating atrocities in the Western Province of Dafur in Sudan. This was pursuant to Article 91 as read together with Article 92 of the Rome Statute which provides;

"1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1(a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

b) A copy of the warrant of arrest; and

c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by;

a) A copy of any warrant of arrest for that person;

b) A copy of the judgment of conviction;

c) Information to demonstrate that the person sought is the one referred to in the judgment of conviction; and

d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4) Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advice the Court of the specific requirements of its national law".

Article 92 provides;

"1. 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 as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain;

a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

c) A statement of the existence of a warrant of arrest or a judgment of conviction against the person sought; and

d) A statement that a request for surrender or the person sought will follow

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the

person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date".

Subsequent to the issuance of the second warrant of arrest, the Registrar of the International Criminal Court [ICC] sent a supplementary request on 21st July, 2010 for co-operation to all State Parties to the Rome Statute for the arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he set foot on their respective territory. A copy of the said request for co-operation is exhibited and marked as **"GK 4"**.

It is common knowledge that Kenya is a state party to the Rome Statute having signed the same on 11th August, 2005 and ratified the same on 15th March 2005, becoming the 98th State Party.

Kenya enhanced its commitment to the fight against impunity in 2008 by domesticating the Rome Statute in its domestic laws through the enactment of the ***International Crimes, Act 2008*** which entered into fore on 1st January, 2009. In this regard section 29 and 30 of the ***International Crimes Act, 2005*** is in point.

Section 29 provides:

"S.29. (1) If a request for surrender, other than a request for provisional arrest referred to in Section 28

(2). The Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a Judge of the High Court in writing that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought.

(2) If a notice is sent to a Judge under subsection (1) the Minister shall also send to the Judge a copy of the request and supporting documents".

Section 30 provides:

"***S.30. (1) after receiving a request under Section 29, the Judge – may issue a warrant in the prescribed form for the arrest of the person if the Judge is satisfied on the basis of information presented to him that –***

(a) The person is or is suspected of being in Kenya or may come to Kenya; and

(b) There are reasonable grounds to believe that that person is the person to whom the request

for surrender from the ICC relates.

(2) The Judge shall give reasons for the issue or refusal to issue a warrant under subsection (1)".

The International Crimes Act, 2008 brings into the purview of domestic law the crimes of genocide, crimes against humanity and war crimes which are recognized under the Rome Statute and also provides for procedures for the arrest and surrender of persons indicted by the International Criminal Court [ICC] should they be within Kenya's territory.

It was the Applicant's case that the International Crimes Act 2008, like the Rome Statute, does not recognize immunity on the basis of official capacity. That is to say, all persons are treated equally before the law irrespective of their official capacity.

Despite Kenya Government being averse and/or aware of its commitments and obligations under international law and municipal law President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] was invited and hosted by the good Government of Kenya on 27th August, 2010 during the promulgation of the country's new Constitution.

It was the Applicant's further case that the presence of the said President in the Kenyan territory was in violation of Kenya's obligations under the Rome Statute, the International Crimes Act, 2008 and the new Constitution of Kenya, 2010. That the failure, neglect or refusal to arrest the said President violates the basic tenets of International law.

The hosting of the said President in Kenya in violation of Kenya's obligations under the Rome Statute [ICC] and the International Crimes Act, 2008, and the Constitution of Kenya, 2010 raises serious concern over Kenya's commitment to combating impunity for the most serious crimes against humanity.

On the 23rd day of September, 2010 at the sidelines of the 65th Session of the United Nations General Assembly held in New York, His Excellency President Mwai Kibaki, pronounced that he would convene a second Intergovernmental Authority on Development (IGAD) Special Summit in Sudan in November, 2010, to ***inter-alia*** discuss the up-coming South Sudan Referendum. On learning of the impending possible visit by the said President, the Pre-Trial Chamber of the International Criminal Court [ICC] on 25th October, 2010 requested the Republic of Kenya to furnish it with reasons, if any, which would impede or prevent the arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] in the event he visits Kenya. A copy of the said request is exhibited and marked as **"GK 6".**

In response the Government of Kenya through the Hon. The Attorney General's office sent a response to the ICC stating that IGAD meeting would not be held in Kenya and hence President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] would not be coming to Kenya. A copy of the report from the Registrar of the ICC transmitting the response is exhibited and marked as **"GK 7".**

The Applicant on 19th October 2010 wrote two letters. ***One,*** to His Excellency the President and ***another,*** to the Right Honourable the Prime-Minister of Kenya, Raila Amolo Odinga, raising concerns over the possibility of a second visit by President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] and calling on the two principals to take their international and domestic obligations seriously. Copies of the two letters are exhibited and marked **"GK 9"** and **"GK 10"** respectively.

On 9th November 2010, the Applicant received a response from the Prime-Minister's office exhibited and marked as "**GK 11**" indicating that the IGAD meeting had been moved from Nairobi to Addis-Ababa. The said letter also pointed out that the presence of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] in Kenyan's territory on 27th August, 2010 was not a matter of mutual agreement with the Grand Coalition.

It was the Applicant's last and final position, that the disjointed approach in responding to requests from the International Criminal Court [ICC] is a testimony of the different interests that are at play in the Grand Coalition Government, when it comes to issues touching on the Rome Statute. Hence the Applicant's interest in prosecuting this application in line with its objectives and mandate.

The International Crimes Act, 2008 anticipates a situation where the state may acquiesce or renege on its obligations and makes provisions for other persons other than the Government to seek for a provisional arrest warrant from the High Court, and serve it on the Minister in charge of Internal Security, thereby reminding the Government of its international and domestic obligations, under the Rome Statute and the International Crimes Act, 2008 and demanding that the Government honours its obligations.

The 1st and 2nd Respondent's Case

The application was opposed by the 1st Respondent vide the replying affidavit of ***Victor Mule***, a State counsel in the State Law Office, Department of Public Prosecutions sworn on the 7th day of December 2010.

On behalf of the 1st and 2nd Respondents, it was urged that the request for a provisional warrant can only be made by the ICC. That it is the ICC to demonstrate the reasons and the urgency. In this regard reliance was placed on Article 92 of the Rome Statute ***[Supra]***

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. In the premises, the Applicant (ICJ-Kenya Chapter) therefore lacks ***locus-standi*** as it has not stated its (ICJ-Kenya Chapter), interest in the case. Moreso in the absence of any indication that it has been instructed to act on behalf of the ICC.

By its very nature a provisional warrant can therefore be sought/applied for and issued where a formal request for arrest and surrender has been made.

Ordinarily, in matters of mutual legal assistance and extradition, foreign requests are channeled to the Hon. The Attorney General. If the Attorney General is satisfied as to the authenticity of the request he will then move the High Court for issuance of a warrant and conduct the proceedings on behalf of the requesting party. This process is not done by an individual or any authority. The Applicant envisaged under Section 29 of the International Crimes Act, 2008 is the Minister, in charge of Internal Security, of the Sovereign Republic of Kenya. Thus the Applicant under both sections should be the State as opposed to the Applicant herein or any other legal person.

An application for a provisional warrant of arrest under Section 32 of International Crimes Act, 2008 can only be made upon receipt of a request from the ICC courtesy of Article 92 of the Rome Statute. Since, there is no evidence that such a request for a provisional warrant has been made to the Kenya Government by the ICC, the High Court lacks jurisdiction to hear, determine or give orders sought in this application.

Last but not least, that the application is moot. It is moribund and fruitless since the IGAD Summit meeting which could provide an opportunity for President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] was held in Addis Ababa in November 2010. Hence the argument that the said President might come to Kenya is speculative and cannot be a basis upon which the court can issue warrant even if the right procedure had been followed.

During the pendency of the proceedings M/S Kenyans for Justice and Development Trust [KEJUDE] through its Trustees, Andrew Okiya Omtatah Okoiti and Augustinho Neto Oyugi, applied to be enjoined in these proceedings by a Notice of Motion dated 8th December, 2010. By consent of the parties herein the application by way of Notice of Motion aforesaid [for enjoinment] was conceded to thereby making KEJUDE the 3rd Respondent in this application.

The 3rd Respondent's case

On behalf of the 3rd Respondent, it was urged that the Vienna Convection on Diplomatic Relations Treaty is in conflict with the International Crimes Act, 2008.

The African Union's decision adopted in July, 2009 at a Summit in Sirte Libya, under the auspices of the Assembly of heads of States, the AU's highest decision making organ, directed all AU member States to withhold co-operation with the ICC in respect of arrest and surrender of President Omar

Hassan Ahmad Al Bashir.

The African Union has repeatedly called for the United Nations Security Council to invoke ***Article 16*** of the Rome Statute to suspend the warrant of arrest against President Omar Ahmad Hassan Al Bashir [Omar Al Bashir]. That Kenya is a member of the African Union and decisions and resolutions of the AU are binding on Kenya and its people. That Kenya is a neighbour to Sudan which has declared the warrant of arrest against Omar Ahmad Hassan Al Bashir [Omar Al Bashir] as an act of aggression. Hence the execution of the warrants shall jeopardize or risk the lives and property of an estimated 500,000 Kenyans [***Statistics not exhibited]*** in the Sudan.

The issuance of warrant of arrest issued by the Kenyan Courts may lead to a deterioration of the relations between the two States. That Kenya is a guarantor to the comprehensive peace agreement that ended the civil war in Sudan. As such Kenya should not take action that will precipitate instability in Sudan.

Issues Arising

I am grateful to all counsel for their assistance and in put in this application.

I have carefully considered the issues raised by the application and the evidence ***vis-à-vis*** the law. I have equally taken into due consideration all the authorities cited before me even though I have not taken the liberty to quote them in ***extenso***. Having done so, I now take the following view of the issues raised by this application.

Article 2(5) of the Constitution of Kenya, 2010 provides:

“ The general rules of international law shall form part of the law of Kenya”

In the premises, it is clear to me that the said Constitution incorporates the general rules of International Law in the Courts of Kenya. The Rome Statute is an International treaty and hence embodies rules of International law.

Article 1 of the Rome Statute provides that;

“An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”.

In the premises the ICC [Rome Statute] forms part of the laws of Kenya. Such a 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 in relation to the following matters;

(a)The making of requests by the ICC to Kenya for assistance and the method of dealing with those requests;

(b)The conduct of an investigation by the Prosecutor or the ICC;

(c)The bringing and determination of proceedings before the ICC;

(d)The enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters;

(e)The making of requests by Kenya to the ICC for assistance and the method of dealing with those requests".

In my judgment, therefore, the Rome Statute is in conformity with the Constitution of Kenya, 2010.

To buttress this position further ***Article 2(6)*** of the Constitution of Kenya, 2010 provides;

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

The Rome Statute is one such treaty ratified by Kenya. Accordingly, the Constitution of Kenya, 2010 does not in any way reject the role of the International Institutions such as the ICC.

I posit that the Constitution of Kenya, 2010 require those exercising Judicial authority or functions to be guided ***inter-alia,*** by the principles of the Constitution of ***[Article 159(2)(e)]*** and such principles are defined in ***Article[10(2) (b)] as:***

"Human-dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized"

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 frameworkof the Kenyan Legal System.

In this regard, Article 165(3)(d) of the Constitution of Kenya gives the High Court Jurisdiction to hear any questions in respect of the interpretation of the Constitution including the determination of:

"Article 165 (3)(d)

(i)the question whether any law is inconsistent with or in contravention of this Constitution;

(ii)the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii)any matter relating to Constitutional powers of State organs in respect of country government and any matter relating to the Constitutional relationship between the levels of government; and

(iv)a question relating to conflict of law under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation".

Further, in the context of Kenya, the High Court shall exercise any jurisdiction, original or appellate, conferred on it by legislation. In this regard the Constitution of Kenya, 2010 and the International Crimes Act 2008 confers jurisdiction on the High Court to enforce the Rome Statute.

The foregoing apart, in the realm of International Law, 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.

This principle was first proclaimed in customary international law in the 17th Century, with regard to piracy. Any State was authorized to arrest and bring to justice persons suspected of engaging in piracy, whatever the nationality and the place of the commission of the crime.

The rationale behind the exceptional authorization to States to depart from this classic principle of territoriality or nationality was the need to fight jointly against a form of criminality that affected all States. Each State knew that by bringing to justice suspected pirates it was acting to protect at the same time its own interests and those of other States. Subsequently the same jurisdictional ground was included in the Geneva ***Conventions on War Crimes, the 1984 Convention Against Torture*** and a string of international treaties on terrorism.

With regard to the 1984 ***Convention Against Torture and German Convention on War Victims***, the ***rationale*** was different from the one of piracy. The ***rationale*** was to authorize the States to prosecute and punish, on behalf of the whole international community, persons responsible for special cases of war crime ***[or grave breaches of the 1948 Geneva Conventions],*** torture, terrorism with a view to safeguarding universal values. Thus any State is authorized 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. Universal jurisdiction has been recognized in the US for a long time. American Courts have endorsed the principle in numerous occasions

For example in ***the case of Yunis,*** the defendant was ***a*** citizen of Lebanon accused in participating in the hijacking of a Jordanian airline that resulted in the passengers (including several Americans) being held hostage. He was brought on trial in the United States after being arrested at sea by US authorities. Yunis challenged the jurisdiction of the US courts, arguing that there was no nexus between the hijacking and the US territory (the aircraft did not fly over the US airspace or have contact with the US territory). In its judgment of 12th February 1988, the District Court of Columbia dismissed the defendants motion and affirmed the US jurisdiction. It held, ***inter-alia,***that;

"Not only is the United States acting on behalf of the world order, but the United States has its own interest in protecting its nationals [See 681.F Supp.896 (DDC) at 903]".

Universal jurisdiction is the ***jus cogens*** obligation under international law. ***Jus cogens*** is defined as "***a pre-emptory norm of general international law"*** accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. They render void any other ***pre-emptory*** rules which come in conflict with them.

Genocide, war crimes, and crimes against humanity are regarded under international law as ***deliciti jus gentium***. They constitute a ***corpus*** of crimes that are an affront to humanity and its existence. Keeping these crimes in check is important and fundamental to the international public order. The Rome statute has jurisdiction over the said crimes. The Rome Statute is therefore binding on the parties that are interested in the maintenance of that public order whether they are signatories or not. There is no gainsaying that Kenya belongs to this category of state.

I subscribe to the view that the Rome Statute obligations are in any case **customary international law** which a State cannot contravene. Violating customary international law is intentionally violating fundamental rules of international public policy. This would be detrimental to the international legal system and how that system and the society it serves defines itself.

I further subscribe to the view that the duty to prosecute international crimes has developed into **jus-cogens and customary international law**, thus delegating States to prosecute perpetrators wherever they may be found. The State parties to the ICC are under a duty to prosecute or extradite perpetrators to the ICC for prosecution.

The universality principle has been upheld in the different versions; both predicated upon the notion that the Judge asserting universal jurisdiction so acts to substitute for the defaulting territorial or national State;

A State may prosecute persons accused of international crimes regardless of their nationality, the place of the commission of the crime, the nationality of the victim and even whether or not the accused is in custody or at any rate present in the forum State. A classic case is the ***Pinochet*** one***.***

Pinochet regime was characterized by human rights violations. He was arrested on ***16th October, 1998*** during a visit to the UK, based on a Spanish provisional arrest (issued by Judge Balthazar Garson) because of the alleged responsibility of the murder of Spanish citizens in Chamber during the reign. The Pinochet case is significant for international law and the principle of universal jurisdiction mainly because for the first time ever, the British House of Lords decided that former heads of State accused of torture did not enjoy immunity.

Yet another classic case is that of ***Eichmann, [see ILR,36,at 304]*** where the Supreme Court of Israel in its concluding remarks held as follows;

"Not only do all crimes attributed to the appellant bear an international character, but their harmful and murderers effects were so embracing and widespread as to shake the international community to its very foundation. The State of Israel was therefore entitled, pursuant to the principle of universal jurisdiction and its capacity as guardian of international law and an agent for its enforcement, to try the appellant. That being the case no importance attaches to the fact that the state of Israel did not exist when the offences were committed".

Under ***German Penal Code*** pronounced by the German Supreme Court (Bundesgerichtsho) in a judgment of 21/2/2001 ***3 STR 372/00*** in ***Sokolovic*** it was held that the same principle should apply in Germany, at least whenever the obligation to prosecute is provided for in an international treaty binding upon Germany.

In Italy, Article 7.5 of the Italian Criminal Code prescribes for prosecution of authors of International Crimes even if they do not find themselves on Italian territory provided;

i) the crimes are provided in international treaties ratified by Italy.

ii) under these treaties Italian courts may exercise jurisdiction.

Application of International law principles to this case.

Applying the foregoing International Law, principles to the facts of this case, 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.

In respect of this particular case, two warrants of arrest were issued against President Omar Ahmad Hassan Al Bashir [Omar Al Bashir], the sitting President of the sovereign Republic of Sudan on 4th March 2009 with five counts of crime against humanity and two of war crimes on 12th July, 2010 with three counts of genocide for allegedly orchestrating atrocities in the Western Province of Dafur in Sudan. It is in evidence, that subsequent to the issuance, the Registrar of the International Criminal Court [ICC] sent a supplementary request to ask the State parties to the Rome Statute to effect the arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he come to the respective territory.

It is common ground that Kenya is a State party to the Rome Statute. That State parties are under a duty to execute or extradite the perpetrators of International Crimes to the ICC for prosecution. However the point of dispute is this: ***who should implement the instructions of the Pre-trial Chamber***. ***On the one hand***, the Applicant contends that it has the necessary ***locus standi*** by reason of its objectives to seek for the implementation of the request of the Pre-trial Chamber since the good Government of Kenya has neglected its duty under the Rome Statute. ***On the other hand*** the Hon. the Attorney General of Kenya [for 1st and 2nd Respondents], contends that it has the exclusive authority or mandate to petition; If he is satisfied, to move the High Court for issuance of warrant and conduct the proceedings on behalf of the requesting party, That process is done, in this context, by dint of ***section 29*** of the International Crimes Act, 2008, by the Minister in-charge of Internal Security of the sovereign Republic of Kenya. Hence the Applicant under both sections should be the State as opposed to the individual such as the Applicant.

In any event an application for a provisional warrant of arrest under section 32 of the International Criminal Act, 2008 can only be made upon receipt of a request from the ICC courtesy of Article 92 of the Rome Statute. Since the request has been made to the Kenya Government by the ICC, the Applicant lacks the requisite ***locus standi*** to prosecute this application. Even if they do [Which is denied] they lack the requisite capacity to execute the warrants should the same be issued.

The Applicants objectives include and is not limited to the development, strengthening and protection of the rule of law; and in particular to keep under review all aspects of the rule of law and honour rights within the Republic of Kenya and to take action as will be of assistance in promoting or ensuring the enjoyment of these rights.

Pursuant to the said objectives, the Applicant has expressed its concerns about the human rights record of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir]. Towards that end, the Applicant is aware of the existence of two warrants of arrest against the said President for human rights violation in the Western Province of Dafur in Sudan.

The Applicant, therefore, seeks an order for issuance of a Provisional warrant of arrest against the said President. That such warrant upon issuance be served upon the 2nd Respondents herein, the Minister of State for Provincial Administration, to effect the said warrants of arrest, if and when the said President

sets foot in the territory of the Republic of Kenya.

At issue is whether the Applicant should be granted the orders sought.

In my considered view three aspects must be considered when public interest standing is sought.

i) Is there a serious issues 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?

A close scrutiny of the evidence on record, and the mandate disclose, in my judgment, that the Applicant has a genuine interest in the development, strengthening and protection of the rule of law and human rights.

There is also ample evidence that the Pre-Trial chamber of the ICC has issued two warrants on the 4th March 2009 with five counts of Crimes against humanity and two of war crimes on 12th July 2010 with three counts of orchestrating atrocities in the Western Province of Dafur in Sudan against President Omar Ahmad Hassan Al Bashir [Omar Al Bashir].

A request for arrest and surrender has been made to Kenya as a State party to the Rome Statute pursuant to Article 91 as read together with Article 92 of the said Statute.

Subsequent to the issuance of the second warrant of arrest, the Registrar of the International Criminal Court [ICC] sent a supplementary request on 21st July, 2010 for co-operation to all State Parties to the Rome Statute for the arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he set foot in Kenya. The good Government of Kenya has refused, neglected and/ or ignored to comply with the ICC request even when the said President was in Kenya on 27th August, 2010. What should the High Court do in the face of this impasse? In this regard, it is prudent to compare the approaches that other common law jurisdictions have taken to grant status to bring action.

Comparison of various approaches taken in other common law jurisdictions to grant parties status to bring action.

By way of comparison, various jurisdictions have taken various approaches on the issue of standing.

United Kingdom

The English Courts have developed three exceptions to the rule that only the Attorney General can represent the interest of the public. ***First***, an individual may have standing to litigate a question of public right if the impugned activity simultaneously affects the individuals private rights***. Second***, an individual may bring an action claiming a violation of a public right if that individual suffered special damages as a result of impugned activity. ***Thirdly,*** a local authority may bring an action where it considers it necessary to protect or promote the interests of the citizens within its borders.

It is noteworthy that these exceptions were affirmed in celebrated authority of ***GOURIET-V-UNION OF POST OFFICE WORKERS,[1998]A.C 435, at P.506.*** In that case the plaintiff sought standing to obtain an injunction against a postal union. It was argued that the union's announced plan that it would not process any mail for South Africa for a period of one week would violate the Criminal Law. The Attorney General refused to bring an action against the Union. ***Yet***, the House of Lords refused to grant standing to ***Gouriet***. It held that he could only litigate the issue in ***a relator*** action brought by the Attorney General.

At the moment, however, there are various statutes in the United Kingdom which provide that a Court may in certain circumstances grant an applicant leave to bring an action. Recent cases have turned upon the wordings of the particular statutory provisions.

Australia

The Australian Law Reform Commission published a paper on the question of public interest standing in 1977, ***[Access to the Courts–I Standing; Public Interest suits (No.4, 1977].***

The report reviewed circumstances which had resulted in demand for increased access to the Courts in common law jurisdictions. It identified the ***first*** as the introduction of legal aid which permitted disadvantaged citizens to assert their private legal rights. The ***second*** was the provision of legal representations for ***"diffuse"*** interest groups in areas such as consumers and environmental protection. It noted that these organizations often raise issues that are not connected with the private rights or interest in property which would provide the traditional common law base for standing. The commission put forward three alternative solutions to the question of when standing should be granted. They were as follows;

i) **Open Door Policy.** This would allow any person to take any proceedings in the public law area and reliance would be placed in the discipline of costs to limit the number of these cases.

ii) **United States Method.** The so called United States Method would enable the Courts to screen the proposed plaintiffs as part of the determination of the particular case.

iii) **Preliminary Screening**. This method would institute a preliminary screening procedure which would be undertaken by the Court before the substantive issue would be considered.

It suffices to say the Commission recommended the ***open-ended*** approach.

Subsequent to the publication of the law reform report, the High Court of Australia considered the problem in **Australian Conservation Foundation Incorporated V. Commonwealth of Australia [1980], 28 ALR 257[HC]** . The foundation was an environmental group very active in Australia. It challenged the decision made by the Government of Australia to establish a resort area. The challenge was based upon environmental legislation which, the majority of the High Court concluded, did not create any private rights. It determined the only duty the legislation imposed was a public one cast upon the Minster, which was not owed to any one individual. The application of the Conservation Foundation as a party was therefore rejected.

Canada

In Canada the question of standing was reviewed in more recent case of ***Finlay V. Canada (Minister of Finance), [1986] 2 S.C.R 607.*** In that case ***Le Dain J***. speaking for the Court, extended the scope of the ***orilogy*** and held that Courts have discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as recognition of the public interest in maintaining respect for ***"the limit of statutory authority".***

Given the plethora of authorities in respect of ***locus-standi*** as enumerated above, the question which now begs answer is this: Are the issues raised by the Applicant and the orders sought justiciable? Put in another way, does the Applicant have the necessary ***locus-standi*** to warrant the Court to give it the orders sought?

Justiciability: is the Application tenable in law?

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.

The next pertinent question which this Court ought to grapple or contend with is this: ***What happens when the warrants are issued and the Minister for Internal Security fails neglects or refuses to execute the same?***

The answer to that is 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.

Accordingly, I grant the application in terms of prayer 1,2 of the Chamber Summons dated 18th November, 2010.

In the event, however, the Applicant [ICJ-Kenya Chapter] has no capacity , it will be at liberty, should it deem fit, to bring an application for the ***prerogative order of mandamus,*** for an order directed at the Minister in-charge of Internal Security to arrest President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he set foot in Kenya in future. The fate of the ***mandamus*** application shall be decided at another forum – Judicial Review.

Those are the orders I am capable of making considering the purview of this application.

DATED and **DELIVERED** at Nairobi this 28th day of November, 2011.

N.R.O. OMBIJA

JUDGE