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ICC PANEL CONFIRMS: SOUTH AFRICA LEGALLY REQUIRED TO ARREST AL-BASHIR

ICC Judges confirm South Africa government violated ICC treaty obligations, reinforce South Africa court decisions.

New York/The Hague – Judges of the International Criminal Court (ICC) today confirmed that the government of South Africa failed to comply with its obligations as a Rome Statute State Party by not arresting Sudanese President Omar al-Bashir, wanted for grave crimes in Darfur, during a visit to the country in 2015. In their decision, judges underlined the key Rome Statute principle that no one is above the law, the Coalition for the ICC said today.

The ruling may yet be appealed by both parties, opening the possibility for further judicial proceedings on the matter several months from now.

“Today’s ruling reinforces South Africa’s own court’s independent rulings on the government’s failure to arrest al-Bashir in 2015. The ICC judges lifted any ambiguity in understanding the Rome Statute’s founding principle: there will be no immunity for the worst crimes known in international law,” **said William Pace, Convenor of the Coalition for the ICC.** “South Africa leaders, in accordance with their obligations under the ICC treaty and domestic law, should not have allowed al-Bashir to avoid being arrested. They should have transferred him to The Hague, where he would receive a fair trial and justice.”

“The Southern Africa Litigation Centre is pleased with the ICC’s finding that South Africa [government] failed to comply with its obligations in terms of the Rome Statute,” **said Kaajal Ramjathan-Keogh, Executive Director of the Southern Africa Litigation Centre.** “The Court has also given due regard to the findings of the Supreme Court of South Africa which held that South Africa acted unlawfully in not arresting President Omar al-Bashir when he attended an African Union summit in June 2015. This is in line with the principle of complementarity which is an integral aspect of the ICC.”

“Today’s finding confirms what everyone, including South African authorities, knew all along. Al-Bashir does not have immunity from arrest and all States Parties to the Rome Statute must arrest him the minute he steps onto their territory and hand him over to the ICC,” **said Amnesty International’s Africa Director for Research and Advocacy, Netsanet Belay.** “It is shocking that other states parties such as Jordan are also failing in their obligations to arrest Al-Bashir and this decision makes it clear that they do so in flagrant violation of international law.”

Despite non-compliance finding, judges decline to refer South African matter

Judges today also ruled that they did not consider a referral on non-compliance to the Assembly of States Parties (ASP), the Court’s governing body made up of 124 member states, to be useful to obtain cooperation from South Africa. They found that as it has been “unequivocally established” by a South African domestic court and the ICC that South Africa should have arrested al-Bashir, a referral would be of “no consequence.” According to Judges, the South Africa government engaged actively and extensively with the Court in 2015 in determining how to interpret the Rome Statute.

CONTACTS**In New York:**

Mr. William R. Pace
Convenor
Coalition for the ICC
Tel: +1 (646) 465-8510
pace@wfm-igp.org

In The Hague:

Ms. Kirsten Meersschaert
Director of Programs
Coalition for the ICC
Tel: +31 (0) 70 3111087
meersschaert@coalitionfortheicc.org

Mr. Niall Matthews

Head of Communications
Coalition for the ICC
Tel: +31 (0) 70 3111085
matthews@coalitionfortheicc.org



The Pre-Trial Chamber Judges also decided against a referral of non-compliance to the UN Security Council, as the body that referred the situation in Darfur to the ICC in the first place, citing grave concerns over the lack of any effective follow-up in numerous past instances where the Court did refer matters of non-compliance to the Security Council.

“The ICC decision that South Africa should have arrested Sudanese President Omar al-Bashir is consistent with previous ICC rulings,” **said Dewa Mavhinga, Southern Africa Director at Human Rights Watch.** “Al-Bashir is a fugitive on genocide, war crimes, and crimes against humanity charges in Darfur, and the ICC relies on its members to enforce its warrants. The judges, however, decided not to issue a formal finding of non-cooperation this time given the factors surrounding the incident.”

“We are surprised that the ICC has not made a referral to either the ASP or the UNSC but do understand this in light of sensitivities around South Africa’s continued membership of the ICC,” **continued Ramjathan-Keogh.**

The Court referred the issue of non-cooperation of states in the arrest of al-Bashir six times to the UN Security Council, each time without any effective follow up. At today’s hearing in The Hague, Presiding Judge Cuno Tarfusser stated that this inaction was regrettable and “renders UNSC referrals [to the ICC] futile.”

“We’re glad to see South Africa was found noncompliant with their obligations under the Rome Statute, but disappointed that after pointing out past failures of the Security Council to act, that the Court does not challenge the Security Council or ASP to show their commitment to international justice going forward by taking action against South Africa for failing to arrest and surrender Bashir to the Court,” **said Wanda Akin and Raymond Brown, Legal Representatives of Victims in the Al-Bashir case and Co-founders of the International Justice Project (IJP).**

“While today’s decision is an important pronouncement against impunity and acknowledgment of the plight of victims, many members of the Darfurian community are disappointed that the Security Council will not be encouraged to act in an effort to deter future instances of non-cooperation, and ultimately, help bring an accused genocidaire to justice,” **echoed Monica Feltz, Executive Director of IJP.**

“The Coalition for the ICC supports the judges’ exasperation over the shameful failures of the UN Security Council to enforce its own referrals to the ICC,” **Pace added.** “Many members of the Coalition for the ICC believe that the 124 States Parties, nearly two-thirds of the international community of nations, need to address the failures to secure arrests, and the failures of the Security Council in its referrals. These issues cannot be left to the ICC. It is the governments that must enforce arrests.”

The Judges and other experts noted the right to appeal the decision by the Pre-Trial Chamber.

South Africa, al-Bashir and the ICC

In 2015, al-Bashir attended an AU summit hosted by South Africa in Johannesburg. Despite ICC requests, as well as domestic court orders to execute the arrest warrant against al-Bashir, petitioned by local civil society, South African authorities allowed him to make a hasty exit back to Sudan.



In subsequent litigation initiated by the Southern Africa Litigation Centre (SALC), both Pretoria's High Court and the country's Supreme Court of Appeal found that the failure to arrest al-Bashir was unlawful due to South Africa's Rome Statute membership, its domestic ICC Act, and the Statute's cornerstone provision on the irrelevance of official capacity. Rome Statute Article 27 prohibits immunities for heads-of-state and senior government officials.

In late 2016, ICC judges summoned South Africa to explain its failure to arrest al-Bashir. In making its case before ICC judges during a public hearing in April 2017, South Africa claimed diplomatic immunities relating to al-Bashir's status as a head of state and those afforded to attendees of the AU summit prevented it from making the arrest.

In May 2015, in light of al-Bashir's planned visit to the AU summit, the ICC Registrar notified South Africa of not only its obligation to arrest al-Bashir, but also its obligation to consult with the Court over foreseen challenges to executing the arrest warrants. South African authorities requested a meeting with ICC officials in June 2015, at the time of the AU summit, to discuss this very matter. In response, the Court convened a meeting on 12 June 2015 to hear their concerns.

The day after the meeting, the Court found that South Africa was indeed obliged to carry out al-Bashir's arrest. With the obligation deemed clear by ICC judges, on 14 June 2015 SALC filed a successful urgent application for the Pretoria High Court to block al-Bashir's departure pending its decision on the same matter. Violating the High Court order, South African authorities allowed al-Bashir to leave the country on 15 June amid ongoing domestic hearings to clarify South Africa's obligations.

With South Africa insisting that its 12 June 2015 meeting with ICC officials did not constitute an Article 97 consultation, the ASP in 2015 entertained South Africa's concerns that its right as a member state to be heard had not been honored. In response, the ASP Bureau in 2016 established a Working Group on the interpretation of Article 97's consultation procedures.

Background

The ICC is the world's first permanent international court to have jurisdiction over war crimes, crimes against humanity, and genocide. Central to the Court's mandate is the principle of complementarity, which holds that the Court will only intervene if national legal systems are unable or unwilling to investigate and prosecute perpetrators of genocide, crimes against humanity and war crimes.

There are currently ten active investigations before the Court: the Central African Republic I & II; the Democratic Republic of the Congo; Darfur, Sudan; Kenya; Libya; Uganda; Côte d'Ivoire; Mali; and Georgia. The ICC has publicly issued 33 arrest warrants and nine summonses to appear. Three trials are ongoing and three cases are at the reparations stage. The Office of the Prosecutor has made public that it is examining ten situations on four continents, including Afghanistan; Colombia; the registered vessels of the Comoros, Greece and Cambodia; Guinea; Iraq; Nigeria; Ukraine; Palestine; Burundi; and Gabon. The Office of the Prosecutor has concluded preliminary examinations relating to situations in Honduras, Venezuela, and the Republic of Korea, declining in each case to open an investigation.

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The Coalition for the International Criminal Court is a global network of civil society organizations in over 150 countries working in partnership to strengthen international

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cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide. www.coalitionfortheicc.org