



## **African civil society statement on South Africa's failure to arrest Omar al-Bashir**

On 13 June 2015, Sudanese President Omar al-Bashir arrived in South Africa to attend the 25<sup>th</sup> African Union (AU) Summit in Johannesburg.

Following a 2005 referral by the United Nations Security Council (UNSC) to the International Criminal Court (ICC) of the situation in Darfur, Sudan, the ICC issued two arrest warrants for Omar al-Bashir in 2009 and 2010 for several counts of crimes against humanity, genocide and war crimes he is alleged to have committed in Darfur from 2003.

South Africa is a state party to the Rome Statute and has domesticated the Rome Statute through the Implementation of the Rome Statute of the ICC Act 27 of 2002 (ICC Act). This ICC Act provides for the arrest of persons accused of having committed the crime of genocide, crimes against humanity and war crimes, and surrender to the ICC. As a state party to the Rome Statute of the ICC and in compliance with its national laws, the South African government was legally obliged to arrest al-Bashir upon his arrival in that country, but failed to do so.

On 14 June 2015, the Southern Africa Litigation Centre—a Coalition member based in South Africa—submitted an application to the North Gauteng High Court in Pretoria on the basis of the ICC Act, seeking an order to compel the South African government to comply with its obligations under both national and international law to arrest al-Bashir and transfer him to The Hague. An interim order was issued by the High Court requiring the government to ensure that al-Bashir did not leave its jurisdiction pending the determination of the application. The High Court issued an order allowing for al-Bashir's arrest the following day, 15 June, to further prevent al-Bashir leaving the territory until a decision was made on the original application.

Not only did the South African government fail to comply with the order preventing al-Bashir from leaving, it also believed to have facilitated the escape of the fugitive Omar al-Bashir from its military-controlled airport in Waterkloof, Pretoria. Coalition members from the African region meeting in Cotonou, Benin add their voices to local and international condemnation of the South African government's failure to abide by its national and international law obligations.

The obligations of states party Rome Statute are clear and a a state party South Africa is obliged to fully cooperate with the Court including requests for arrest and surrender. South Africa failed to do just that by refusing to arrest and hand over al-Bashir to the ICC.

South Africa also disregarded the decision of its own judiciary by violating the decision of a South African Court on 14 June that had ordered the Sudanese President not to leave South African soil until issues related to South Africa's obligations as per the Rome Statute were clarified.

We, African NGO's meeting in Benin under the canopy of the Coalition of the International Criminal Court condemn in the strongest of terms the South African Government's failure to arrest a ICC fugitive. This is not only inconsistent with its obligations under the Rome Statute and the United Nations Charter, but also with the Constitution of the Republic of South Africa.

We applaud and congratulate the South African Judiciary for its courage in not only ordering that al-Bashir should not leave South Africa before its decision on his arrest (which the government flouted), but also by ordering the government for a detailed explanation of the circumstances of al-Bashir's escape.

On 24 June 2015, The North Gauteng High Court found that “[i]n terms of the Implementation Act, South African authorities are enjoined to cooperate with the ICC, for example, to effect the arrest and provisional arrest of persons



suspected of war crimes, genocide and crimes against humanity. These crimes have been specifically created in the South African context in terms of section 4 of the Implementation Act.”

The court further stated that because the Implementation Act enjoys legislative authority, having passed through Parliament, “it cannot be displaced by a notice promulgated by a Minister nor by a Cabinet decision.”

The court emphasized that “a democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders [and] the departure of President Bashir from South Africa demonstrates non-compliance with the court's order.” The court invited the National Director of Public Prosecutions to consider whether criminal proceedings against the Respondent are appropriate in this matter.

We call for the sanctioning of those responsible for non-compliance with international and national court orders to send a clear message there will be consequences for inaction on international obligations. We call on African judiciaries to follow the South African example by taking their responsibilities and becoming a veritable, natural and independent arm of government for the enhancement of the rule of law both on a national and international scale.

We note the statements of condemnation by the President of the Assembly of States Parties (and Senegalese Minister of Justice) Sidiki Kaba, Botswana, Malawi, Liechtenstein, Costa Rica, Canada, the European Union, the United States, the UN Secretary General, Justice Richard Goldstone, among others. We call for more such statements and greater action from all actors in the international community, in particular UN Security Council members and ICC states parties.

It is vital that the ICC's governing body, the Assembly of States Parties (ASP), fully consider any finding of non-cooperation that may be made against South Africa by ICC judges on this matter. South Africa was made fully aware of its obligations to arrest al-Bashir in the days preceding the African Union summit by the ASP president and ICC judge Cuno Tarfusser among others. The ASP must take strong action to discourage such flagrant flouting of ICC decisions. It must also follow up on non-cooperation findings against Malawi, Chad (two filings were made against this state) and the Democratic Republic of Congo for allowing al-Bashir to visit these states and against Sudan for not cooperating with the Court.

We note that it is the responsibility of the UNSC to ensure cooperation and to follow-up on non-cooperation on decisions arising from its referrals to the ICC. We urge the UNSC to strongly condemn the visit of President al-Bashir to South Africa and for immediate steps to be taken to ensure his arrest.

The South African government's argument that al-Bashir had immunity because he was attending an AU summit as a head of state is fundamentally flawed. The UN Security Council, in its 31 March 2005 Resolution 1593 referring the situation in Darfur to the ICC, implicitly waived any immunity for al-Bashir. This follows the Rome Statute's core principle that explicitly precludes immunity regardless of government office. The AU Charter also contains significant anti-impunity measures.

We praise civil society in countries such as Malawi, Democratic Republic of Congo, Nigeria and Kenya others for mobilizing around the arrest of al-Bashir upon visits to their states. With governments too often unwilling to act on arrest warrants for al-Bashir and others sought by the ICC, actions by civil society through domestic courts are increasingly important to ensure state cooperation with the Court, underlining the crucial importance of universal ratification of the Rome Statute and its implementation into national law.

Finally, we stress that grave international crimes continue to be committed with impunity in Sudan in the Blue Nile and South Kordofan states under al-Bashir's presidency.



## Background

From 17-19 June 2015, civil society members of the Coalition for the International Criminal Court—a global network of non-governmental organizations celebrating its 20<sup>th</sup> anniversary—met in Cotonou, Benin for an Africa Regional Strategy Meeting to advance justice for war crimes, crimes against humanity and genocide through national, regional and international accountability mechanisms.

## List of organizations at meeting

Africa Legal Aid  
Amnesty International Togo  
Burundi National Coalition for the ICC  
Cameroon National Coalition for the ICC  
Central African Republic National Coalition for the ICC  
Centre for Human Rights and Rehabilitation, Malawi National Coalition for the ICC  
Children's Education Society, Tanzania National Coalition for the ICC  
Civil Resource Development and Documentation Centre, Nigeria National Coalition for the ICC  
Côte d'Ivoire National Coalition for the ICC  
Coalition for the ICC  
Club des Amis du Droit du Congo (DRC)  
Fondation Congolaise pour la Promotion des Droits humains et la Paix, DRC National Coalition for the ICC  
Ghana National Coalition for the ICC  
Groupe de Travail sur les Instruments Internationaux de l'ONU (GT2I)  
Human Rights First Rwanda  
Human Rights Watch  
HURINET Uganda National Coalition for the ICC  
International Crime in Africa Program of the Institute for Security Studies, South African National Coalition for the ICC  
Kenya Human Rights Commission  
Kenya Section of the International Commission of Jurists  
ACAT Madagascar National Coalition for the ICC  
Mali National Coalition for the ICC  
Rencontre Africaine Pour la Défense des Droits de l'Homme, Senegal National  
Réseau Equitas Côte d'Ivoire (REQCI)  
Zambia National Coalition for the ICC

***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 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](http://www.coalitionfortheicc.org).*