



Parliamentarians for Global Action
Parlamentarios para la Acción Global
Action Mondiale des Parlementaires
برلمانيون من أجل التحرك العالمي

MEMO

Date: 22 June 2015

Re: Background information for the parliamentary hearing, scheduled on 23 June, with respect to the recent state performance regarding Rome Statute (ICC) obligations on arrest and surrender of Omar Al Bashir

To: PGA Members Ms. Elizabeth Thabethe, Ms. Fatima Nagdee-Hajaig, Mrs. Denise Robinson

From: Parliamentarians for Global Action (PGA) Secretariat The Hague

INTRODUCTION

The Republic of South Africa has signed the Rome Statute, the legal basis for the International Criminal Court (ICC), on 17 July 1998 and ratified the Rome Statute on 27 November 2000. The Rome Statute was found to be compatible with the Constitution of South Africa and the Rome Statute was incorporated into its domestic law by means of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (ICC Act) on 26 June 2003.

In accordance with Article 86 of the Rome Statute States have a duty to “fully cooperate with the Court”. Thus, South Africa must provide the necessary law enforcement system to give effect to its orders, beginning with the request for arrested and surrender of persons charged with genocide, crimes against humanity, war crimes. What it is more important without full State Cooperation, as is currently the case in South Africa, the ICC cannot fulfil its mandate and the Rome Statute system risks collapse. Cooperation is necessary to ensure the integrity of the proceedings of the ICC.

The judges of the Court have the capacity to determine that a state has failed to meet the obligations under the Rome Statute. For instance, as of 1 December 2012, Chad and Malawi have been found to have **failed to meet their obligation of cooperating with the Court** with respect to the arrest and surrender of Omar Al Bashir. Part 9 of the Rome Statute establishes obligations for States Parties with respect to the Court. The Statute provides for an obligation to cooperate fully as well as to adopt internal procedures for cooperation.

ARREST WARRANTS OMAR AL-BASHIR

Two warrants of arrest for Omar Al Bashir are issued by the Pre-Trial Chamber I of the ICC: on 4 March 2009 and 12 July 2010. Mr. Al Bashir is allegedly criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including:

- **five counts of crimes against humanity:** murder - Article 7(1)(a); extermination - Article 7(1)(b); forcible transfer - Article 7(1)(d); torture - Article 7(1)(f); and rape - Article 7(1)(g);
- **two counts of war crimes:** intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2)(e)(i); and pillaging - Article 8(2)(e)(v).
- **three counts of genocide:** genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).

ARREST AND SURRENDER

The Rome Statute does not provide the possibility of holding trials in absentia. Thus, in order to ensure the commencement and integrity of trial proceedings, States Parties must abide to their statutory obligation of complying with the requests of the Court to arrest and surrender any individual sought for (cf. Article 89 of the Rome Statute).

In the ICC, arrest warrants are issued by the Judges, upon request by the Prosecutor, only after verification of evidence confirming reasonable grounds to believe that the person sought committed crimes under the jurisdiction of the Court. Arrest warrants may not be issued if summons to voluntarily appear are considered sufficient to ensure the presence of a suspect before the Court and to prevent the repetition of the alleged crimes.

As of December 2014, arrest warrants against 11 individuals publicly issued by the ICC have not been executed. These warrants concern individuals accused for allegedly committing genocide, crimes against humanity and war crimes: **These individuals are fugitives.**

One of the functions of the Assembly of States Parties (ASP) to the Rome Statute (Article 112, paragraph 2(f) Rome Statute) is “to consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation”. The Security Council is granted a similar prerogative for situations it has referred to the Court under Article 13(b) of the Statute.

In order to respond to instances of non-cooperation, in December 2011 the ASP adopted specific procedures to address instances on non-cooperation. This mechanism allows for numerous measures of a diplomatic character undertaken mainly by the President of the Assembly.

The procedure on non-cooperation was formally triggered in relation to the visit of ICC accused Omar Al Bashir to Malawi in 2011, where PGA members in Malawi contributed positively to ensure that **non-cooperation would not be repeated.**

SUGGESTED PARLIAMENTARY ACTION:

Parliamentarians from countries that have implemented the Statute in their national laws, like South-Africa, are encouraged to take initiatives to ensure that non-cooperation will not be repeated, such as:

- * create political will to respect and enforce the decisions of the Court by continuously call for the unconditional respect to, and implementation of, the decisions and orders of the ICC;
- * adopt internal procedures for cooperation;
- * demand their government to ensure that in its foreign and economic relations, non-essential contacts are severed with individuals subject to an arrest warrant by the ICC;
- * support political consultations taking place at the ASP and the United Nations and other international organizations such as INTERPOL to strengthen the international framework of cooperation;
- * remain vigilant to the presence of ICC indictees in their territory, and to alert their government of the consequences of failing to comply with the Rome Statute;
- * facilitate policies to increase the training and capacity of state officials to respond to diplomatic incidents where compliance with the Rome Statute is at risk; and
- * provide political support to reward states that comply with ICC decisions.

For more information please contact:

Marieke van Doorn
ICC Campaign Manager / Director International Law & Human Rights Programme
Parliamentarians for Global Action
The Hague office: Laan van Meerdervoort 70, 2517 AN Den Haag
T: +31 70 360 4433 | M: +31 6 1404 1204
Marieke.vandoorn@pgaction.org | www.pgaction.org
[Facebook](#) | [Twitter](#)