



**South Africa should not withdraw from the
International Criminal Court**

**Briefing submitted to the Portfolio Committee on Justice
and Correctional Services**

**By the International Commission of Jurists
In collaboration with the undersigned leading jurists**

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Submitted to: Dr. Mathole Seroho Motshekga
Chairperson of the Committee

Introduction

The following is a briefing, submitted to the Portfolio Committee on Justice and Correctional Services, by the International Commission of Jurists (ICJ) in collaboration with the undersigned leading Jurists. This submission recalls certain basic information about the framework in which the International Criminal Court (ICC) operates and aims to clarify some commonly misunderstood facts about the Court. It also identifies certain current challenges facing the Court and contains recommendations for South Africa's participation at the court. The overall purpose of this briefing is to:

- a. recall for parliamentarians' consideration, the scope of the Court's jurisdiction, its limits, and correct some frequently asserted misstatements regarding the court and its jurisdiction;
- b. assist parliamentarians in properly evaluating the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [B23-2016]; and to
- c. identify the rationale for South Africa to remain a party to the Rome Statute of the International Criminal Court (the Rome Statute), namely to ensure accountability domestically, and if necessary internationally, for a range of serious crimes under international law.

While these points could benefit from more in-depth treatment, the present submission is intentionally brief in order to provide Parliamentarians with concise information in summary form that may be valuable for the deliberations that are to follow.

Background

South Africa is one of the founding members of the ICC. It signed the Rome Statute on the day it was adopted, 17 July 1998, and ratified it on 27 November, 2000. Both during the negotiations preceding the Rome Conference that established the Court in 1998, and at the Conference itself, South Africa played a leading role. South Africa acted as a global leader committed to the promotion of international justice and an advocate for the role the ICC could play in achieving that goal. Dullah Omar, then the South African Justice Minister, expressed the view at the conference, on behalf of the SADC States, that,

"The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In

view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.”¹

Since joining the Court, South Africa has been a staunch supporter not only of the Court itself, but also of the pursuit of international criminal justice in general. However, the events of June 2015 surrounding the arrival of President Omar al Bashir of Sudan in South Africa appears to have engendered a shift in South Africa’s posture, leading many observers to call into question the country’s commitment to international justice. The failure by South African authorities to arrest and surrender President al Bashir to the ICC, although he had been indicted by the ICC for war crimes, crimes against humanity and genocide, led to the Southern Africa Litigation Centre (SALC) taking the government to court to compel it to fulfill its obligations both under the Rome Statute and the Implementation of the International Criminal Court Act 27 of 2002 (Implementation Act). SALC’s position was that South Africa had committed itself to the fight against impunity by assuming international obligations that involved the arrest and surrender of the visiting Sudanese President, and that his arrest and surrender were required by the Implementation Act. Both the High Court and the Supreme Court of Appeal held that government had breached its obligations under the Implementation Act by failing to arrest and surrender President al Bashir. The government’s appeal against the Supreme Court decision to the Constitutional Court was withdrawn before the hearing.

On 19 October 2016, the Minister of International Relations and Co-operation gave notice of South Africa’s intention to withdraw from the Rome Statute. Subsequently, the Minister of Justice and Correctional Services indicated that Cabinet had decided to withdraw from the Statute because, among other reasons, it considered that the Implementation Act and the Statute were interfering with the South African government’s “important role in resolving conflicts on the African continent and in encouraging the peaceful resolution of conflicts wherever they occur.”² The Minister also indicated that both the Statute and the Implementation Act compel the government “to arrest persons who may enjoy diplomatic immunity under customary international law.”³ The decision to withdraw was made to enable the government to give “effect to the rule of customary international law”.⁴ The High Court has now ruled that the government must revoke that decision as it was made without the authority of Parliament. As it stands therefore there is no lawful decision or valid notice to withdraw.

This briefing document, therefore, comes before the Portfolio Committee on Justice and Correctional Services, so as to remind Honourable Members of the manner in which the ICC operates, to acknowledge the challenges faced by the Court and to describe the implications that the withdrawal may have for the achievement of

¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998 Official Records, Volume II, United Nations, New York, 2002, p. 65. http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

² See The Minister of Justice and Correctional Services’s Announcement to Parliament, dated 20 October 2016

³ Ibid.

⁴ Ibid.

international criminal justice and accountability for gross human rights violations. The briefing document also identifies alternative means that Parliament could consider in order to address the government's concerns, which would require South Africa to continue to be a party to the Statute of Rome.

The role of the International Criminal Court

The ICJ reminds the Committee that for the first time in history in 1998, a large group of States undertook voluntarily to accept the jurisdiction of an international judicial body to prosecute perpetrators of the most serious crimes under international law, either committed on their territories or by their nationals. These crimes include genocide, war crimes, crimes against humanity, as well as the crime of aggression.⁵

The Statute is based on the principle of complementarity, namely that the ICC shall not usurp the function of national courts, but shall only exercise jurisdiction if member States lack the capacity or will to prosecute the crimes falling within the subject matter jurisdiction of the Rome Statute. Accordingly, under the Rome Statute, each State has the primary duty to exercise its criminal jurisdiction over those responsible for the crimes listed in the Statute. The ICC may only intervene where a State is unable or unwilling to carry out the investigation and prosecution of perpetrators of the listed crimes.

Honourable Members should note that what was agreed in the Rome Statute was that individual States, not the international community or the ICC, bear the primary responsibility of holding perpetrators of serious crimes under international law to account. The ICC is established only to complement the jurisdiction of States and its jurisdiction is limited to the circumstances where States are unable or unwilling to act.

How does a case come before the ICC?

The Rome Statute provides three ways in which a case may be brought to the court:

- a. When a State refers a case to the Court, (self-referral);
- b. When the Prosecutor exercises her/his powers to initiate an investigation into crimes that fall within the jurisdiction of the Court, committed on the territory or by a national of a State party, (*proprio motu* powers); and
- c. When the United Nations Security Council (UNSC) refers a situation to the Court.⁶

To date the ICC has 124 States Parties. International intergovernmental organizations are arranged, for certain purposes, into five regional groupings (Africa, Asia Pacific, Eastern Europe, Latin America and Caribbean, and Western European and others). Among the ICC States Parties, 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American

⁵ See Definitions of these crimes on the following provisions of the Rome Statute: article 6; article 8; article 7; article 8 bis.

⁶ See article 13 of the Rome Statute

and Caribbean States, and 25 are from Western European and other States. Africa is the region with the largest membership. It should be noted, however, that regional groupings do not always follow political groupings or alliances in international organizations. It is also notable that among the five Permanent Members of the UN Security Council, three are not party to the Rome Statute: the United States, China, and the Russian Federation.⁷

The ICJ considers that, as with most multilateral institutions or treaty bodies, the ICC could benefit from significant reform. The Rome Statute, and the various implementation agreements, emerged from a series of political compromises, and, although largely acceptable to most States are inevitably far from ideal. For instance, the Rome Statute gave the Security Council a crucial role to refer situations to the ICC. Given that three Permanent Members with veto power are not parties, these Permanent Members are uniquely placed to unilaterally shield many situations involving their own States and other States they might wish to protect, from ICC jurisdiction. Moreover, the power afforded to the Security Council gives States that are represented on the Security Council but who are not necessarily party to the Rome Statute, the power to partake of decisions that affect member States. However, it is important to note that while the Security Council does have the power to refer situations for investigation, it cannot compel the ICC to accept such a referral and it has no authority to issue an indictment. Only the independent Prosecutor, after a thorough and impartial investigation, and subject to the consent of a pre-trial chamber of the ICC, may issue an indictment.

While the ICC is no doubt imperfect, it is members of the ICC who may, by agreement, adopt reforms. Reform is therefore only possible if States parties like South Africa make recommendations for reform from within the ICC. South Africa's standing and influence within the Africa regional grouping, and indeed beyond, gives it the opportunity to propose remedies to the Statute. This opportunity will be lost should South Africa withdraw from the Rome Statute.

Whether the ICC is affecting South Africa's obligation in maintaining peace and security?

As indicated above there are only three ways in which a case can come before the ICC. To date the ICC has had on its docket 23 cases in 10 situations⁸ as follows:

- a. Five situations have been referred to the court by the States who are party to the Rome Statute themselves, namely: Uganda (in January 2004); the Democratic Republic of Congo (in April 2004); the Central African Republic (in December 2004 and in May 2014); and Mali (in July 2012). In all of these referrals the States voluntarily and on their own accord referred their situations to the ICC.

⁷ To see the status of state parties visit this link: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx Last visited on 2 february 2017.

⁸ For full details on cases and situations at the court, visit <https://www.icc-cpi.int>, last visited 2 February 2017

- b. Two cases, namely for Libya (2011) and Sudan (2005), were referred to the ICC by the UN Security Council.
- c. In three cases, Kenya and Cote d'Ivoire and Georgia, the Prosecutor used her powers under the Rome Statute to open investigation and eventually indict individual suspects including President Kenyatta and his deputy and former President of Cote d'Ivoire, Laurent Gbagbo. It should be noted that although Cote d'Ivoire had not ratified the Rome Statute when the Prosecutor opened the investigation, on 15 February 2013 it ratified the Statute and therefore accepted the jurisdiction of the Court.
- d. The Prosecutor is conducting preliminary investigations in Afghanistan, Burundi, Colombia, Guinea, Iraq/UK, Nigeria, the State of Palestine and Ukraine.

Accordingly, the majority of the cases before the ICC involving African States were referred to the court by African States themselves. African countries are thus approaching the ICC to address serious crimes under international law and fight against impunity. The use of the Court by African states illustrates that our region needs the court just as it did when the Statute came into force.

The absence of immunity for sitting heads of state, particularly in respect of non-party States, remains a contested issue. It is instructive, however, to recall that a majority of the cases concerning African sitting heads of state have been referred to the Court by African States that are State parties to the Rome Statute. These States made the referrals knowing the provisions of the Rome Statute including the absence of immunity for heads of State, at least in respect of those that are party to the Rome Statute.

It should be noted too that most of the cases under consideration by the ICC do not raise the question of the immunity of sitting heads of state. In those cases, the accused persons include, for example former rebel leaders and others, whom no doubt, South Africa does not wish to shield from prosecution.

As for the case concerning the President of Kenya, the vice-president and others, the question of immunity cannot and did not arise, as the accused voluntarily appeared before the Court. It should also be noted that both President Kenyatta and Vice-President Ruto were indicted before they assumed those positions.

For the case concerning the former President of Cote d'Ivoire, Laurent Gbagbo, that is currently proceeding, the issue of immunity also cannot arise as he is not a sitting President. Even those who take the view that sitting heads-of-State should enjoy immunity generally reject any notion that such immunity extends to former heads-of-State.

In the case of Libya, the accused are former government officials and the son of former President Gaddafi. The Libyan government has already informed the ICC that it intended to prosecute the suspects themselves and will not surrender them to the Court. In this case no issue of immunity arises.

It is only in the case of President Omar Hassan Ahmed Al Bashir that the issue of head-of state immunity arises.

Other developments in international human rights law have moved towards recognizing a principle that the immunity of heads of state should not extend to crimes under international law. For instance, the UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, which the UN Human Rights Commission commended to all States with South Africa's support in 2005, affirms that: "The official status of the perpetrator of a crime under international law - even if acting as head of State or Government - does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence." (Principle 27(c)).

It is important to note that the South African Supreme Court of Appeal held that South Africa could not invoke the customary law principle of immunity for its failure to arrest President Al Bashir, given the explicit provisions of the Implementation Act.⁹

It should also be noted that South Africa's obligations for the maintenance of international peace and security internationally in general and Africa, in particular, do not detract from South Africa's international law obligation to prosecute perpetrators of crimes under international law, in its own domestic courts.

It is also instructive to recall the extremely serious and grave nature of the criminal activity with which President Al Bashir stands accused. A pre-trial Chamber of the ICC determined that there were reasonable grounds to believe that President al Bashir had at the very least played an essential role in coordinating the design and implementation of the plan involving war crimes, acts of genocide and crimes against humanity. Security forces under his control are alleged to have carried out the murder and /or torture of thousands of civilians and subjected thousands of women to rape, among many other criminal acts.¹⁰

The role of South Africa in the affairs of the Court

⁹ *National Commissioner of the South African Police Service vs SALC and another* (CCT 02/14) [2014] zacc 30; See also *The Minister of Justice and Constitutional Development and others vs SALC* (27740/2015) [2015] zagpphc 402

¹⁰ <https://www.icc-cpi.int/darfur/albashir/pages/alleged-crimes.aspx>

The ICJ draws the attention of the Honourable Members to the fact that not only was South Africa one of the first countries to become party to the Rome Statute but it has also actively participated in the affairs of the Court both at the Assembly of State Parties and in the Security Council. South Africa has been instrumental in the adoption of the amendments to the Rome Statute that were recently adopted by the Assembly of State Parties in New York in 2014.

It is also significant to note that South Africa was a member of the Security Council when Resolution 1970 to refer the situation in Libya to the ICC was negotiated and adopted and it supported the resolution¹¹ Speaking during the debate, the South African Permanent Representative to the United Nations, Baso Sangqu, said that "The resolution adopted by the Security Council sent a clear and unambiguous message to Libya to stop the indiscriminate use of force in that country, and the measures it contained could contribute to the long-term objective of bringing peace and stability to the nation." One of these key measures was the ICC referral. The two other African States present, namely, Nigeria and Gabon also voted in favour of the resolution.¹² South Africa and these States rendered its support, not only to the wording of the resolutions, but also to the work of the ICC as the appropriate body to deal with the issues under consideration.

It is also significant that in the adoption of the resolution that referred the situation in Sudan to the ICC, Tanzania and Benin voted for the resolution.¹³

Responses to the allegations of selective justice by the ICC in favour of selected Western States

Crimes under international law may be committed anywhere in the world, including in those States that are not parties to the Rome Statute. These include powerful States, such as Permanent Security Council Members the United States of America, the Russian Federation and China. These States are also often involved in military or security interventions, for example, in Syria, Afghanistan, Yemen and elsewhere. In some or all of these interventions, there appear to be plausible allegations of the commission of crimes under international law. The existence of these allegations, coupled with the absence of prosecutions of any perpetrators, has led to allegations that the Prosecutor is selective in his or her choice of investigations, suggesting that some countries are favoured, which has fostered perceptions of bias against the ICC.

While there are no doubt many serious situations that have so far escaped the Prosecutor's purview, it is important to note that because the ICC functions within the jurisdictional limits of the Rome Statute, it cannot assume jurisdiction and commence investigations in respect of States that are not parties to the Rome Statute or nationals of such States. As noted above, in such situations, it is up to the Security Council, to decide whether to refer a situation to the Prosecutor, who will then decide whether to prosecute. The powers of the Security Council, including those concerning the use of the veto when referring situations to the ICC

¹¹<http://www.un.org/press/en/2011/sc10187.doc.htm> , last visited on 9 February 2017.

¹²Ibid.

¹³<http://www.un.org/press/en/2005/sc8351.doc.htm> , last visited on 9 February 2017.

for investigation, also require reconsideration and reform. Efforts toward reconsideration and reform could be led by South Africa and other African States.

The ICJ notes that most African States that are parties to the Rome Statute appear to remain committed to the Court. It is significant that the newly installed President of Gambia has decided to withdraw the notice of withdrawal that was issued by his predecessor.

The situation of Georgia, presently before the ICC potentially involves allegations of the commission of crimes under international law by nationals of the Russian Federation. The Statute of Rome would permit such investigations, even though the Russian Federation is not party to the Rome Statute. The reason for this is that the ICC may exercise jurisdiction over crimes committed on the territory of a State party irrespective of the nationality of the perpetrator. It is also important to note that the Prosecutor has opened preliminary investigations, in relation to situations in Iraq (involving nationals of the United Kingdom) Afghanistan (involving nationals of the United States of America and Gaza (involving nationals of Israel).

Implication for repealing the Implementation Act

The domestication of the Rome Statute represented a milestone in the fight against impunity. By enacting the Implementation Act, South Africa accepted the responsibility for undertaking domestic prosecutions of these crimes. South African courts have embraced the Act by providing groundbreaking jurisprudence in this area in the form of decisions like *the National Commissioner of the South African Police Service vs SALC and another*¹⁴ and *The Minister of Justice and Constitutional Development and others vs SALC*. Both these cases have placed the South African judiciary at the forefront of domestic implementation of international criminal jurisprudence thereby ensuring that the country does not become a safe haven for suspected perpetrators of these heinous crimes.

It is also significant to note that these cases have also provided hope that justice will be carried out for victims of egregious crimes across the continent. Withdrawal from the Rome Statute and repealing the Implementation Act would result in making South Africa a safe haven for perpetrators of international crimes. This cannot be the intention of South Africa Parliament or the Government administration.

Withdrawal from the Statute and repeal of the Implementation Act would add to the fear that South Africa is turning its back on an international rule of law.

It is also significant to note that at the regional level, there is no existing mechanism to try perpetrators of international crimes. The only court that can, regionally, handle these cases is the yet-to-be-established African Court of Justice and Human Rights. The protocol (the Malabo Protocol) that afforded the Court jurisdiction over crimes has also not entered into force. The Malabo Protocol has only received a few signatures with no ratifications to date and so is unlikely to enter into force soon. It should be noted that the Malabo Protocol also provides for

¹⁴ Ibid

immunity for sitting heads of state and senior officials, contrary to the Statute of Rome.

The ICJ notes therefore that although the South African government has suggested that accountability for crimes under international law will be handled by regional courts, there are currently no functional mechanisms in place to achieve this objective. While regional mechanisms could constitute a useful complement, there are none in place today and given the current status of both the African Court of Justice and Human Rights, and the Malabo Protocol, the prospect of a regional mechanism effectively operating in the short to medium term remains dim. As a result, should the Implementation Act be repealed, perpetrators of crimes under international law could enter South Africa without any consequences as there will be no laws to hold them to account. The ICJ submits that this is an undesirable situation and one which should be rejected by Parliament.

Recommendations

Honourable Parliamentarians should ensure that:

- a. The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [B23-2016] should not be passed;
- b. South Africa should remain a party to the Rome Statute of the International Criminal Court.
- c. South Africa should engage, where appropriate with other African States, in actively pursuing appropriate reforms within the Assembly of State Parties, with a view to making the ICC more effective in advancing the objectives of international justice.
- d. South Africa should actively encourage other African states to put in place legislation required to empower domestic courts with the ability to try genocide, war crimes and crimes against humanity.
- e. South Africa should continue to work constructively with civil society on the advancement of international criminal justice.

Conclusion

The ICC works within an imperfect framework. However leading nations like South Africa and its parliamentarians should spearhead initiatives to improve the Court. This is something that can only be done from within the system.

It is hoped that this briefing document has provided basic information which will assist in the understanding of the ICC, its mandate and its shortcomings. Should you require further information please feel free to contact the International Commission of Jurists. We are available to make an oral presentation should the Portfolio Committee request this.

Submitted by the International Commission of Jurists in collaboration with the leading jurists listed below:

- Retired Justice Laurie Ackermann, former Judge of the Constitutional Court of South Africa
- Retired Justice Richard Goldstone, former Judge of the Constitutional Court of South Africa
- Retired Justice Johann Kriegler, former Judge of the Constitutional Court of South Africa
- Retired Justice Yvonne Mokgoro, former Judge of the Constitutional Court of South Africa
- Retired Justice Kate O'Regan, former Judge of the Constitutional Court of South Africa
- Justice Navi Pillay, former United Nations High Commissioner for Human Rights, former judge of the ICC and former President of the ICTR
- Retired Justice Zak Yacoob, former Judge of the Constitutional Court of South Africa
- Wilder Tayler, Secretary General of the International Commission of Jurists

About the ICJ

The ICJ is a non-governmental organization headquartered in Geneva Switzerland working to advance the understanding of and respect for the rule of law, as well as the protection of human rights throughout the world. Established in 1952, it is made up of some 60 eminent jurists representing different justice systems throughout the world and has national sections and affiliated organizations in all regions of the world. The ICJ has had consultative status at the United Nations Economic and Social Council, the United Nations Education Scientific and Cultural Organization, the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. The ICJ promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. The ICJ Africa programme is headquartered in Johannesburg, in the Republic of South Africa.

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