



**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

**SUBMISSION ON THE IMPLEMENTA-
TION OF THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT
REPEAL BILL [B 23-2016]**

**For submission to the Portfolio Committee
on Justice and Correctional Services**

8 March 2017



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1. Introduction

The South African Human Rights Commission (SAHRC) welcomes the opportunity to comment on the *Implementation of the Rome Statute of the International Criminal Court Repeal Bill* [B23-2016].

In November 1993, President Nelson Mandela wrote an article on the values that will shape South Africa's new foreign policy in the dawn of a constitutional democracy.¹ Acknowledging South Africa's isolation from the world during the apartheid regime and the need to participate fully in world affairs, President Mandela argued for the centrality of human rights in South Africa's international relations, the primacy of access to justice and respect for international law, the peaceful resolution of conflicts and the prioritisation of African interests and concerns in policy making.² All these values are at the centre of the Bill tabled before Parliament to signal the withdrawal of the government from the International Criminal Court.

¹ <https://www.foreignaffairs.com/articles/south-africa/1993-12-01/south-africas-future-foreign-policy>

² <https://theconversation.com/south-africas-foreign-policy-has-been-at-sixes-and-sevens-heres-why-70089>

2. The centrality of human rights in foreign affairs

In response to the government's announcement in 2015 to withdraw from the ICC, the only permanent international criminal court in the world to provide justice for the perpetrators of international crimes, the SAHRC reminded the government of its commitments to human rights and the rule of law. President Mandela outlined the country's future international relations policy in the following terms "South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations ... The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources and the commitment that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future."

It was on this basis that South Africa ratified the Rome Statute and subjected itself to the jurisdiction of the ICC. In the instrument of withdrawal submitted to the United Nations in October 2016, the Minister of International Relations and Cooperation acknowledged South Africa's responsibility and commitment to promote international human rights and the peaceful resolution of conflicts which affirms the values of South Africa's foreign policy espoused by President Mandela. However, the Bill tabled before Parliament for the repeal of the implementation of the Rome Statute does not recognise this international responsibility for the promotion and protection of human rights.

South Africa has just stepped out of a recent history of crimes against humanity committed by the Apartheid government against the vast majority of South Africans. Recognising the role of international actors in fighting a repressive regime that routinely violated the human rights of its citizens, South Africa holds a moral and legal duty to ensure that our dark history does not play out in other countries across the world. To ensure the human rights of humanity is protected, access to justice is a crucial rule of law principle that must be safeguarded.

3. Access to Justice and respect for international law

As the SAHRC as stated earlier in its public submission to the Department of International Relations and Cooperation, in the absence of a viable alternative mechanism for holding African

perpetrators of human rights violations and international crimes accountable for their actions, an exit from the ICC will not bode well for the rule of law, a principle to which South Africa has committed to since 1993 both in our Constitution and our pledge to respect international law.

The SAHRC acknowledges the establishment of the African Court of Human and People's Rights and welcomes the Malabo Protocol (on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights) which seeks to extend the competence of the court to criminal prosecutions and to receive complaints from non-state parties and non-African Intergovernmental Organisations. However, the Protocol remains unratified and consequently, is not in force. Moreover, the Protocol grants immunity to sitting heads of states and other senior state officials which ensures that perpetrators of international crimes in government will not be held accountable for their actions, for as long as they remain in power.

The ICC's jurisdiction for the prosecution of international crimes is a complementary one. Consequently, the ICC's jurisdiction only operates in the absence of a decision by an affected state to prosecute a crime and grant victims access to justice. Therefore, the current structure respects the sovereignty of states and only applies where there is a global recognition through the UN, that victims of a state require access to justice that is not provided by their countries. The ICC remains essential in ensuring the rule of law and the upholding of human rights globally for victims of human rights violations. The ICC represents an important mechanism for victims of human rights violations to access justice and to end impunity in the particular situation where their family and loved ones have been killed and maimed.

As the SAHRC submitted in the past, in the absence of regional courts with criminal jurisdiction, the ICC provides justice internationally for those affected by egregious human rights violations, crimes against humanity, and for victims of genocide.

4. Diplomatic immunity and the peaceful resolution of conflicts

In the Bill tabled before Parliament, the government has provided two reasons for the proposed withdrawal from the ICC: respect for diplomatic immunity and the peaceful resolution of conflicts.

It should be emphasised that immunity has in the past been eroded by human rights norms, such as the responsibility to prevent genocide and to provide justice through specially established

international criminal justice mechanisms such as the case of the tribunals for Yugoslavia and Rwanda after the genocide that took place in these countries.³

In the decision of the Supreme Court of Appeal in the case of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*⁴, the court dealt with the decision by the government in failing to take steps to arrest and detain, for surrender to the ICC, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, in terms of South Africa's obligations according to the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

The court held that in terms of customary international law, there is no international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national courts.⁵ However, according to the court, the Implementation of the Rome Statute Act required the government to comply with its obligations in terms of the Rome Statute. The court held that “when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.”⁶

It is worth noting that the principal Act which the draft Bill intends to repeal, provides in its preamble, that “throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law.” The principal Act further commits South Africa to “bringing persons who commit such atrocities to justice” in South African courts or in terms of the principle of complementarity, in the ICC. The South African government has in the past implemented this obligation after the decision of the Constitutional Court in the Zimbabwe Torture Docket case that the South African Police Service should investigate acts of torture by high ranking Zimbabwe government officials.⁷

³ <https://theconversation.com/why-south-africas-withdrawal-is-not-a-death-knell-for-the-icc-67470>

⁴ [2016] ZASCA 17 (15 March 2016)

⁵ Paragraph 93.

⁶ Paragraph 103.

⁷ *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

It is these noble objectives that South Africa aims to absolve itself from through the intention to withdraw from the ICC. As the South African government acknowledges that it has an important role to play in the peaceful resolution of conflicts, the SAHRC respectfully submits that without access to justice, there can be no reconciliation and the peaceful resolution of conflict. Indeed, it is for this reason that a truth and reconciliation commission was established in the aftermath of apartheid and some people were prosecuted for their atrocities at the close of the TRC.

The government acknowledges the current conflict in Sudan and in the absence of an effective mechanism domestically to grant the victims of the state crimes an option for the redress of their violated human rights, South Africa fails in its purported duty to peacefully resolve the conflict in Sudan.

5. Prioritisation of African interests and concerns in policy making

One of the priorities of the South African government in its foreign policy, according to President Mandela and as restated by the Minister of International Relations and Cooperation, in announcing the decision to withdraw from the ICC is the prioritisation of African interests.⁸ The government's decision to withdraw from the ICC can therefore not be seen in isolation of developments in Africa. Indeed the African Union has called on its member states to withdraw from the statute. It is true that the majority of the current investigations before the ICC target African states. However, this fact must be interrogated a little closely. In all eight African countries currently under investigation (Central African Republic, Mali, Sudan, Democratic Republic of Congo, Kenya, Cote D'Ivoire, Libya, and Uganda), serious human rights atrocities and deaths of many have been alleged in the context of civil war and post-election violence. These allegations are matters that should concern South Africa as a leader in Africa.

It is important for the South African government to support international efforts for these alleged crimes to be investigated and for the perpetrators to be brought to justice. This is central to South Africa's constitutional and foreign policy commitment to uphold human rights and the rule of law domestically and internationally.

⁸ <http://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc>

6. Public Participation and Consistent Messaging

In the case of *Democratic Alliance v Minister of International Relations & Others*⁹, which addresses the validity of the government's notice of withdrawal from the ICC, the Court reminds us, as quoted in *Doctors for Life*¹⁰: the importance of public participation in the legislative process:

'[115] The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweights to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.'

The Court further emphasised the importance of South Africa adopting a consistent and determinative approach concerning the issue of South Africa's withdrawal from the ICC, both to the international community and the general South African public. This can only be achieved through following South Africa's legislative processes as provided for in the Constitution.¹¹ The SAHRC thus urges the government to strongly consider the impact of the matter being before the court system and Parliament for consideration simultaneously, and the perceived inconsistency of South Africa's views on the subject, should the government decide to appeal the outcomes of the Court's decision in the *Democratic Alliance* judgment.

While the SAHRC notes that the Bill is currently available to the public to comment, the SAHRC urges the government to take into account the views of members of the public on South Africa's proposed withdrawal from the ICC.

⁹ (83145/2016) [2017] ZAGPPHC 53 (22 February 2017), par 61.

¹⁰ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11; 2006(12) BCLR 1399 (CC)

¹¹ (83145/2016) [2017] ZAGPPHC 53, at par 70.

7. Conclusion

The Commission recommends that Parliament should exercise its oversight responsibility and halt the government's proposed withdrawal from the ICC, by not passing the Bill before it.

Conversely, should Parliament agree with the decision of the government to withdraw from the ICC, the Commission recommends that the legislature safeguard South Africa's international responsibility towards the protection of human rights, access to justice and respect for international law by ensuring that the government is given a mandate to urgently ratify the Malabo Protocol for the creation of a criminal jurisdiction for the African Court of Justice and Human Rights.