

BAR VIEWS SA DECISION TO WITHDRAW FROM ICC AS REGRETTABLE AND DEEPLY CONCERNING

Media Statement of the General Council of the Bar of South Africa on South Africa's withdrawal from the International Criminal Court



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The world, including the African continent, has borne witness to numerous unspeakable acts of cruelty, brutality, and resultant human misery. There are many reasons why human rights abusers get away with genocide, torture, disappearances and other related abuses of human rights. Two reasons stand out: The first is a lack of political will on the part of governments to investigate and prosecute people suspected of committing the abuses; and the second is weak domestic criminal justice systems in the countries where the abuses occur.

In an effort to deal with human rights abusers, a number of States, including South Africa, worked together to create the International Criminal Court (ICC). It was established in 2002 by an international treaty called the Rome Statute which gave it jurisdiction over four main crimes. The first is genocide which is characterized by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group. The second are crimes against humanity which usually form part of a large-scale government sanctioned attack against a civilian population and include offences such as murder, rape, imprisonment, forced disappearances, enslavement, torture and apartheid. The third is war crimes which are breaches of the Geneva Convention and include the use of child soldiers, the killing or torture of civilians and prisoners of war, and intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charities. The fourth is the crime of aggression which is the use of armed force by one State against the sovereignty, integrity or independence of another.

The ICC does not have its own police force or enforcement body and therefore relies on the co-operation of countries across the globe. Signatory States, like South Africa, when they sign the Rome Statute, agree to assist the international community by arresting those responsible for committing offences that fall under the ICC's jurisdiction. Signatory States are also obliged to transfer persons that have been arrested to the ICC Detention Centre at The Hague. The world's commitment to ridding the planet of these grave abuses of human rights depends upon the active participation of countries and their governments.

South Africa's position

Approximately 123 States have ratified the Rome Statute and are part of the ICC. Of those signatory States, 34 are African. South Africa was one of the African States to join the ICC. In

doing so South Africa demonstrated its commitment to bringing to justice those who commit genocide, crimes against humanity, war crimes and crimes of aggression. South Africa, in doing so, also became an important part of a new system of international criminal law and governance designed to make the world a safer place.

In 1993, President Nelson Mandela, in outlining what was to become South Africa's foreign policy, said that "South Africa's future 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".

Now, under the current government of President Jacob Zuma, South Africa has elected to withdraw from the Rome Statute and the ICC. On 19 October 2016, the South African government formally submitted its Instrument of Withdrawal to the United Nations Secretary General. In so doing, South Africa is abandoning its role as a champion of international human rights and justice. The GCB views South Africa's decision to withdraw from the ICC as regrettable and deeply concerning.

The catalyst for South Africa's decision to leave

For its withdrawal, the South African government points to a perceived conflict between the manner in which the ICC interprets two provisions of the Rome Statute, on the one hand, and the government's peace-keeping endeavours in the continent on the other. It is difficult to accept that as the true basis for such drastic a measure, especially since matters of interpretation are usually resolved by persuasion.

The real catalyst for South Africa's withdrawal from the ICC appears to be linked to the Omar al Bashir incident. Sudanese President al Bashir is wanted by the Hague for war crimes, genocide and crimes against humanity committed in Darfur. There are currently two international arrest warrants relating to him. The first was issued in 2009 and the second in 2010. Notwithstanding those arrest warrants and notwithstanding South Africa's commitment given to the international community and its concomitant international law obligation to arrest him should he visit our country, when he did visit our government not only welcomed him but even allowed him to leave with impunity.

South Africa has been heavily criticized by the international community over the Omar al Bashir incident. The South African government, in responding to the incident, has made various statements that demonstrate its growing discontent with the ICC's perceived anti-African bias. The media is full of reports from government officials representing this view. One such statement, made by the Chairperson of the Portfolio Committee on International Relations and Co-operation, said that the ICC was an anti-African institution that provided opportunists with the means to "pit African leaders against each other in the name of international law".

The GCB regards such statements as unfortunate. Whilst there is some merit to the perception that the ICC has dedicated most of its resources to pursuing human rights abusers responsible for atrocities on the African continent, it is difficult to understand why those efforts are perceived as anti-African. The GCB welcomes the initiative by the ICC to allocate significant resources to improving the conditions of hundreds of millions of people on our continent. The ICC was created for the victims of atrocities and, viewed from the perspective of victims, what matters is that human rights violators should not be able to act with impunity - whether it be on the African continent or anywhere else.

That being said, the GCB recognizes the legitimate view held by some that a disproportionate amount of the ICC's attention is focused on Africa. However, the perception that African leaders are being targeted needs to be placed in its proper context. Cases can reach the ICC in one of three ways (a) a State party to the Rome Statute may itself submit a situation to the ICC for investigation and possible prosecution; (b) the United Nations Security Council may, in the exercise of its mandate to maintain international peace and security, mandate an ICC investigation and prosecution; and (c) the ICC Prosecutor may initiate a prosecution. Currently there are eight situations that are being formally investigated which involve Africans. Four of these situations were referred to the ICC by the African State parties themselves (Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali); another two African situations were initiated by the UN Security Council (Sudan and Libya) and the last two were initiated by the ICC Prosecutor (Kenya and Côte d'Ivoire). The perception that the West has an anti-African agenda is thus to be approached with caution.

The GCB's concerns

The GCB is concerned that South Africa was once a leader in championing international human rights. It did this by actively promoting the need for the ICC. That underlying need has not changed. The world, Africa included, perhaps now more than ever, needs an international criminal court to assist in combating genocide, crimes against humanity, war crimes and crimes of aggression. These human rights violations should not go unpunished. They will, however, go unpunished if States do not demonstrate a political commitment to eradicating them. International criminal law can only work with all State parties co-operating and honouring their international law obligations to the community of nations.

The GCB is concerned that South Africa's withdrawal from the ICC sends a signal to the international community that we, as a State, are unwilling to participate in a system designed to rid the world of human rights abuses. That is particularly regrettable given South Africa's own past which was characterized by considerable human misery and suffering. Apartheid, itself a human rights atrocity, has been characterized by the ICC as a crime against humanity.

Moreover, the GCB is concerned that South Africa's withdrawal from the ICC is unconstitutional. The Preamble to South Africa's Constitution states that "we, the people of South Africa, adopt this Constitution as the supreme law of the Republic so as to... build a united and democratic South Africa that is able to take its rightful place as sovereign State in the family of nations". Part of South Africa's international commitments to the international community, as required by international law, is a duty to investigate and prosecute crimes like torture and other crimes against humanity. When South Africa ratified the Rome Statute, it simultaneously incorporated the provisions of the Rome Statute into our own domestic legal order by enacting a statute known as the ICC Act. South Africa's withdrawal from the ICC will necessitate it abolishing the ICC Act as well. The GCB is concerned that if the ICC Act is abolished, this may jeopardize or undermine South Africa's constitutionally mandated ability to act against international crimes that may occur domestically such as torture, racial discrimination and crimes related to xenophobia.

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