



PRESS STATEMENT
CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA
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Centre for Human Rights calls for more reflection on ICC withdrawal

The Centre for Human Rights, Faculty of Law, University of Pretoria, regrets the decision by the ANC's National General Council, this weekend, that South Africa should withdraw from the ICC Statute. Although this is a political decision, which still has to be converted into a legally binding format, decisions by the highest policy-making organ of the ruling party, the ANC, are highly influential. It calls on the ANC to engage in an inclusive and participatory process, involving all national and international stakeholders.

The ANC, through its spokespersons, contends that leaving the ICC does not amount to lowering the human rights flag. Unfortunately, in our view, it does. Massive scale human rights violations, such as genocide and crimes against humanity, can only be curbed by ensuring effective accountability at both the domestic and international levels. The ICC Statute calls for criminal prosecution of these crimes within states' domestic systems. Only when states are unable or unwilling to prosecute these crimes, does the ICC step in. These principles have been accepted by South Africa, and have been made part of our law, through the Rome Statute of the International Criminal Court Act 27 of 2002. Leaving the ICC and undoing this national law would significantly weaken the framework to hold accountable those responsible for massive human rights violations.

The ANC invokes two justifications in favour of withdrawal.



First, it seems to argue that the double standards applied by others, especially by 'powerful nations', would justify South Africa's withdrawal. While these 'double standards' certainly do exist, they do not make inevitable or compel the conclusion arrived at. The ANC is clearly making a choice, in which African solidarity is prioritised over human rights principles.

In its statements, the ANC is positioning itself as a leader on this issue in Africa. However, in actual fact, it is following the lead of the two states whose leaders have been indicted by the ICC, Sudan and Kenya. Sudan, which is not a state party to the ICC Statute, and Kenya, which is, have been at the forefront of putting this issue on the African Union's agenda. It should be noted that the Kenya is still a state party, despite its Parliament in 2013 taking a resolution to withdraw. By withdrawing from the ICC Statute, South Africa would be supporting these states in their quest to protect their implicated leaders from prosecution. By endeavouring to influence other African states to follow, South Africa would lead a charge for undermining accountability in parts of the continent where it is most needed.

Second, the ANC holds out the to-be-established African Court of Justice and Human and Peoples' Rights as an African alternative to the ICC. This Court would come into force if the 2014 Malabo Protocol is accepted by 15 AU member states. It would replace the current African Court on Human and Peoples' Rights, based in Arusha, which deals only with human rights cases. However, the to-be-established Court comes with a serious defect. Although it also calls for prosecution of international cases, it excludes from the jurisdiction of the African Court all sitting heads of state and all senior government officials.

South Africa ratified the ICC Statute in 2000. The reasons for doing so then are still in place today. We have, as a state, taken a principled position against impunity. By contrast, the ANC's decision elevates the knee-jerk reaction to an embarrassing situation of the governing party and *government* above the deep-seated commitments we have as a *state*. Circumstances surrounding the recent visit to South Africa of President Bashir make the conclusion inescapable that the ANC's decision has at least in part been taken in response to the High Court's judgment. As a result, its position on a matter with wide-ranging implications is guided by someone who undeniably is implicated in the massive human rights violations of his own people. President Bashir has astutely exploited anti-Western sentiment among African leaders to serve one of his principal personal aims, which is to preserve his own impunity.

It is crucial to distinguish between the interests of state and that of the government. The ICC Statute aims to protect the people of the state of South Africa as it does in respect of other states. When the government's interest is not aligned to that of the state, a parliamentary majority should not be the only ground on which to base a course of action.

Even if the ICC Statute allows state parties to withdraw from the ICC Statute, this should not be done lightly, and not without careful consideration of the implications for domestic law. Withdrawal from the ICC

would only make sense if the domestic legislation, the ICC Act, is also abolished. However, abolishing this Act may well be unconstitutional. In a case brought by the Southern African Litigation Centre (SALC) before the *Bashir* case, the Constitutional Court found that South Africa (through its police service) is required under international law, as part of our responsibilities as a member of the family of nations, and under domestic law, to investigate high priority crimes like torture as a crime against humanity (*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14)). Abolishing the ICC Act would jeopardise the duty on the SAPS, established under international law, to investigate allegations of torture, as required by the Constitutional Court.

In any event, a withdrawing state is not absolved from “the obligations arising from this Statute while it was a Party to the Statute”, including the obligation to arrest, if that obligation arose before the withdrawal becomes effective. Withdrawal may also not prejudice the “continued consideration of any matter which was already under consideration” by the Court before the withdrawal becomes effective. In other words, withdrawal will not change the applicable legal yardstick applicable to President Bashir’s past (and possible future) visits to South Africa.

The ANC National General Council’s decision does not as such change our ICC membership or amend our national legislation. Complicated processes and potential challenges to parliamentary autonomy lie ahead. We call on the ANC to ensure that the process towards implementing the decision is as participatory and inclusive as possible, allowing for reasoned engagement with opposing views. The ANC’s decision to withdraw need not actually lead to withdrawal, but may be a forceful factor in a serious international and national dialogue and debate to figure out how the different interests and commitments should be balanced, and, to the greatest extent possible, be reconciled.

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