

SA formally withdrawing from ICC

South Africa has formally requested to withdraw from the Rome Statute, a treaty that established the International Criminal Court (ICC).



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On Wednesday, 19 October 2016, after Cabinet approval, the South African government sent an 'instrument of withdrawal' letter to the United Nations Secretary-General explaining its intention, Justice and Correctional Services Minister Michael Masutha confirmed on Friday.

"Written notice to withdraw from the Rome Statute of the International Criminal Court has been submitted to the Secretary-General of the United Nations, in accordance with Article 127(1) of the Rome Statute of the International Criminal Court.

"The withdrawal will take effect one year after the Secretary-General has received the notification. South Africa will remain obligated under the Rome Statute for the duration of the 12 months' notice period," Minister Masutha said.

The Justice and Correctional Services Ministry has already informed in writing the Speaker of the National Assembly and the Chairperson of the NCOP of this executive decision.

Minister Masutha said the decision to withdraw was an executive one.

“Authority to negotiate and enter into agreements is up to executive. But until Parliament withdraws from the Rome Statute, our legal obligations will remain.”

The ICC, which opened in July 2002, has 124 member states. It was set up as a means to try war criminals and perpetrators of genocide, who were never tried in their home countries.

South Africa was the first African country to assent to the ICC and adopted the court's founding Rome Statute into domestic law.

However, Minister Masutha said the South African government has found its obligations, with respect to the peaceful resolution of conflicts, at times incompatible with the interpretation given by the ICC.

'Targeted'

Other African Union member states have accused the ICC of unfairness in servicing its mandate. They claim the court is targeting African states over other members.

Since its inception, the ICC has opened probes involving eight nations - all of which are African. These are Kenya, Ivory Coast, Libya, Sudan, Democratic Republic of Congo, Central African Republic, Uganda and Mali.

Minister Masutha explained that last year's legal arguments around the failure to detain Sudanese President Omar Al-Bashir pinpointed Pretoria's main problem with the ICC obligation to arrest heads of state.

Bashir is wanted by the ICC in connection with alleged war crimes and crimes against humanity over atrocities committed in the Darfur conflict.

Bashir was attending an African Union summit in Johannesburg last year. He was allowed to leave South Africa, even though the High Court in Pretoria had ordered authorities to prevent him from doing so. The Supreme Court of Appeal also dismissed the State's appeal against the high court ruling.

Minister Masutha said an application for leave to appeal the decision of the Supreme Court of Appeal, set down for hearing at the Constitutional Court on 22 November 2016, will now be withdrawn.

“This is so, especially as the Supreme Court of Appeal has removed the uncertainty around customary international law in relation to diplomatic immunity, in so far as it affects heads of states and others who may be wanted for serious violations of human rights and other serious crimes but who enjoy diplomatic immunity under international customary law.”

SA's diplomatic mission

Elaborating on the reasons behind South Africa's exit from the ICC, Minister Masutha said in exercising its international relations with foreign countries, particularly with countries in which serious conflicts occur, South Africa has been hindered by the Implementation of the Rome Statute of the ICC Act, 2 (Act No 27 of 2002).

“This act and the Rome Statute compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the court.

“South Africa has had to do so, even under circumstances where we are actively involved in promoting peace, stability and dialogue in those countries,” said the Minister.

He said the implementation of the Rome Statute of the ICC Act, 2002, is “in conflict and inconsistent” with the provisions of

the Diplomatic Immunities and Privileges Act, 2001, which provides for the immunities and privileges of diplomatic missions and consular posts and their members, heads of states, special envoys and certain representatives.

“We wish to give effect to the rule of customary international law, which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, particularly on the African continent,” the Minister said.

Quizzed about South Africa’s rationale of choosing the Diplomatic Immunities and Privileges Act over the ICC obligations, Minister Masutha said South Africa’s wish is to remain a key player in conflict resolution in Africa.

“What may need to happen is that we host conflicting parties, thus our international legal obligations may hinder our efforts to remain a key player in conflict resolution in Africa.”

Aligning international and local law obligations

In order to ensure South Africa’s continued ability to conduct active diplomatic relations, a bill proposing the repeal of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 will soon be tabled in Parliament.

The focus, Minister Masutha said, is on ensuring that South Africa’s international law obligations are fully aligned with local law obligations, without contradiction.

Despite sending an instrument of withdrawal letter, Minister Masutha stressed that South Africa remains committed to the fight against impunity and to hold accountable those who have committed crimes against humanity and other serious crimes.

“Our unwavering commitment to the promotion and protection of human rights throughout Africa and elsewhere in the world is further demonstrated by our continued participation in various international and continental human rights instruments.”

The Minister said South Africa will work closely with the African Union and with other countries in Africa to strengthen continental bodies, such as the African Court on Human and People’s Rights, created to deal with such crimes and to prosecute the perpetrators.

South Africa will continue to actively promote dialogue and the peaceful resolution of conflicts on the African continent and elsewhere.

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