

Reference: C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT  
ROME, 17 JULY 1998

SOUTH AFRICA: WITHDRAWAL <sup>1</sup>

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 19 October 2016, with:

(Original: English)

**“Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court**

South Africa is committed to protection of human rights and the fight against impunity which commitment was forged in the struggle for liberation against the inhumanity of colonialism and apartheid. We condemn in the strongest terms human rights violations and international crimes wherever they may occur and we call for the accountability of those responsible. This commitment is reflected in significant role that South Africa played in the international negotiations on the establishment of the International Criminal Court (ICC) and was one of the first signatories to the Rome Statute of the International Court (the Rome Statute). The Rome Statute was domesticated in South Africa with the adoption of the Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002, thus reaffirming South Africa's commitment to a system of international justice.

South Africa is also a proud member of the African Union that was established in 2001 with its strong focus on promoting human security, peace and stability on the continent and codifying in its Constitutive Act the principle of humanitarian intervention against war crimes, genocide and crimes against humanity.

South Africa does not view the ICC in isolation, but as an important element in a new system of international law and governance and in the context of the need for the fundamental reform of the system of global governance. Questions on the credibility of the ICC will persist so long as three of the five permanent members of the Security Council are not State Parties to the Statute. The Security Council has also not played its part in terms of Article 16 of the Rome Statute where the involvement of the ICC will pose a threat to peace and security on the African continent. There is also perceptions of

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<sup>1</sup> Refer to depositary notification C.N.1062.2000.TREATIES-43 of 27 November 2000 (Ratification: South Africa).

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inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others.

South Africa, from its own experience has always expressed the view that to keep peace one must first make peace. Thus, South Africa is involved in international peacekeeping missions in Africa and is diplomatically involved in inter-related peace processes on a bilateral basis as well as part of AU mandates.

In complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive. The reality is that in an imperfect world we cannot apply international law in an idealistic view that strives for justice and accountability and thus competing with the immediate objectives peace, security and stability.

In 2015, South Africa found itself in the unenviable position where it was faced with conflicting international law obligations which had to be interpreted within the realm of hard diplomatic realities and overlapping mandates when South Africa hosted the 30th Ordinary Session of the Permanent Representatives Committee, the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the African Union ('the AU Summit'), from 7 to 15 June 2015. South Africa was faced with the conflicting obligation to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state. Furthermore, there are no clarity on the nature and scope of the provisions of Article 98 of the Rome Statute and its relationship with Article 27, which is reflected by the inconsistencies in the findings of the Pre-Trial Chambers in the Malawi and Chad cases, on the one hand, and the DRC case on the other hand. Article 27 and Article 98 represent the intersection of the law on immunities applying to Heads of State and Government, and the cooperation obligation of States Parties to the Rome Statute. The relationship between State Parties and non-State Parties continue to be governed by customary international law that bestows on a Head of State immunity *ratione personae*. Arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary international law obligations.

In order to address this untenable position, South Africa used the mechanism of consultation available under Article 97 of the Rome Statute, the first State Party to do so, but to no avail. There are no procedures to guide Article 97 consultations, and South Africa is disappointed that the process, that in our view should clearly have been a diplomatic process was turned into a judicial process. As a result of the lack of clarity in the Rome Statutes and in the Rules of Procedure and Evidence, the experience with the ICC left South Africa with the sense that a violation of its fundamental right to be heard was violated.

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This is the background against which South Africa has requested the Assembly of State Parties to develop Rules and Procedures relating to Article 97 consultations in order for Parties that find themselves in a similar position in future, to have the confidence that they can do so on the basis of agreed procedures. South Africa also requested that Assembly of State Parties to clarify the nature and scope of the provisions of Article 98 of the Rome Statute and its relationship with Article 27. It is disconcerting that there was opposition to this proposal as there are fundamental differences on the issue of immunities of Heads of State.

Under these circumstances South Africa is of the view that to continue to be a State Party to the Rome Statute will compromise its efforts to promote peace and security on the African Continent. Also, there is an urgent need to assess whether the ICC is still reflective of the principles and values which guided its creation and its envisaged role as set out in the Rome Statute. The credibility and acceptability of the ICC to become the universally accepted institution for justice that will ensure the ideal of universality and equality before the law has not been realised and is under threat.

In withdrawing from the ICC, South Africa wishes to reiterate its commitment to human rights and the fight against impunity. Its history of fighting and defeating colonialism and apartheid affirms its commitment to continue to fight against any form of impunity for atrocities perpetrated anywhere in the world. Our commitment to justice and accountability remains unwavering, based on the foundational values of the South African nation, namely human rights, freedom and dignity enshrined in our Constitution.”

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The action shall take effect for South Africa on 19 October 2017 in accordance with article 127 (1) which reads as follows:

“A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.”

25 October 2016



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