

SOUTHERN AFRICA LITIGATION CENTRE

Re: **MEDIA RELEASE FROM THE SOUTHERN AFRICA LITIGATION CENTRE: (The North Gauteng High Court Delivers Judgment on ICC Withdrawal Challenge)**

Date: 22 February 2017

Johannesburg- On the 22nd February 2017 the North Gauteng High Court in Pretoria (HC) delivered its judgment on the case commenced by the Democratic Alliance (DA), a South African political party against the South African government's decision to withdraw from the Rome Statute of the International Criminal Court (the ICC withdrawal case). In the case, the DA cited the Southern Africa Litigation Centre (SALC) as a supporting respondent for its involvement in the President Al Bashir indictment case which was brought by SALC in 2015.

In this case, SALC challenged government's decision to withdraw as well as the submission of a notice of withdrawal from the Rome Statute of the International Criminal Court to the Secretary General of the United Nations, without the prior parliamentary approval required by the constitution. The constitution, among other things, imposes an obligation on government to obtain prior parliamentary approval before withdrawing from any international agreement. SALC also argued against government's decision to withdraw from the Statute without establishing a legal framework to deal with pending or ongoing cases and investigations. Finally, SALC challenged the attempted withdrawal as being irrational and having been taken in bad faith.

Since government's notice of withdrawal did not follow the constitutionally mandated procedure and was substantively flawed, SALC also requested the court to compel government to revoke the notice of withdrawal from the United Nations Secretary General.

The court made the following significant findings:

- i. The notice of withdrawal from the Rome Statute without prior parliamentary approval is unconstitutional and invalid;
- ii. The cabinet decision to deliver the notice of withdrawal to the UN Secretary General without prior parliamentary approval is unconstitutional and invalid;
- iii. The President together with the Ministers of Justice and Correctional Services and International Relations and Cooperation are ordered to revoke the notice of withdrawal.

The implication of this judgment is that South Africa's withdrawal from the ICC has been declared invalid and if they wish to continue to leave the ICC, they will need to start the process afresh.

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According to SALC's Executive Director, Kaajal Ramjathan-Keogh, "We are delighted that the Court has recognized and corrected this failing on the part of government. Unilateral executive action which is not in line with the constitution will not be tolerated. While we are mindful that it is the prerogative of the state to enter into international agreements, it is also important to realise the supremacy of the constitution. The executive cannot simply exit an international agreement in our constitutional democracy because, as the court has rightly held, such a process requires prior parliamentary approval."

This is a sound judgment and it would be unfortunate if government decides to appeal. "This decision confirms that our courts, while recognising and respecting the separation of powers doctrine, are willing to take bold steps to ensure that the executive does not overstep its role", said Ramjathan-Keogh.

Parliament has already issued a call for written submissions on the ICC Repeal Bill. SALC encourages individuals and organisations to participate in this process so that concerns about the potential withdrawal and international criminal justice can be properly expressed before parliamentarians. These important deliberations on whether South Africa should leave the ICC requires parliamentary scrutiny before this decision is made.

SALC's mandate is to ensure that all persons charged with or suspected of committing international crimes of genocide, crimes against humanity and war crimes, among others, face accountability and are arrested and tried before competent tribunals. This was the motivating factor behind SALC's decision to pursue the arrest of Sudanese President Omar al Bashir when he visited the country in June 2015, and continues to be the impetus behind SALC's dedication to challenging government's attempts at withdrawal.

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