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23 February 2017

South Africa: Keep genocide a crime, stay with the ICC

Defeating ICC repeal bill now critical as high court finds Rome Statute withdrawal bid unconstitutional, says civil society

Benin/New York – South African parliamentarians should strongly oppose the introduction of legislation to withdraw from the Rome Statute of the International Criminal Court (ICC) and to repeal national laws outlawing genocide, crimes against humanity and war crimes, the Coalition for the ICC said today.

On 22 February 2017, Pretoria's high court placed a constitutional roadblock on South Africa's path to withdrawal from the ICC, ordering President Jacob Zuma to revoke the country's October 2016 ICC withdrawal notice to the United Nations over a failure to obtain prior parliamentary approval.

Judges ruled the move was "hasty, irrational and unconstitutional." South African and international civil society have welcomed the decision as a victory for the rule of law, but warned that continuing domestic efforts to repeal ICC legislation must be strongly opposed.

South Africa has an ongoing parallel parliamentary process to adopt a law, the ICC Repeal Bill, to repeal the country's Rome Statute implementing legislation.

"The decision of the high court should make South African parliamentarians considering the adoption of the ICC Repeal Bill think twice," said **Clément Capo-Chichi, Africa Coordinator for the Coalition for the ICC**. "Withdrawing from the ICC also means removing all domestic protections against the commission of war crimes, crimes against humanity and genocide. How can that be a good idea? Civil society across Africa urges parliamentarians in South Africa to set an example by standing up for the rule of law, keeping genocide a crime and staying with the ICC."

"There are millions of African victims crying for justice and only the ICC can address their pleas. The South African Government and Parliament should use the High Court judgment as an opportunity to reconsider the over-hasty and unconstitutional action by the Executive in giving notice to withdraw from the Rome Statute," said **Richard Goldstone, former South Africa Constitutional Court Justice and Chair of the Coalition's Advisory Board**. "The norms and principles that underlie the South African Constitution should provide the South African Government and Parliament with the incentive to continue, as in the past, to fully support the efforts of the ICC, to recognise the plight of victims and to seek reforms from within the structure of the Rome Statute."

"The ICC Repeal Bill before parliament represents a significant regression in the fight against impunity for international crimes in South Africa and the African continent. South African courts have previously held that the basis of investigation and prosecution of torture allegations by Zimbabwean officials against Zimbabwe citizens now living in South Africa, is the ICC Implementation law. Without this law, the impunity gap for international crimes is unfortunately widened," said **Allan Ngari Senior Researcher at the Institute for Security Studies**.

The Portfolio Committee on Justice and Correctional Services of the South African Parliament, currently tasked with making recommendations to parliament on the Implementation of the Rome Statute of the ICC Repeal Bill, has set a deadline of 8 March 2016 for comments.

CONTACTS

In Pretoria, South Africa:

Allan Ngari
Senior Researcher
Transnational Threats
& International Crime Division
Institute for Security Studies
Tel: +27 12 346 9500
angari@issafrica.org

In Cotonou, Benin:

Mr. Clément Capo-Chichi
Africa Coordinator
Coalition for the ICC
Tel: +229 95 990 707
Tel: +1 646 465 8542
capo-chichi@coalitionfortheicc.org

In New York, USA:

William R. Pace
Convenor
Coalition for the ICC
Tel: +1 646 465-8510
pace@coalitionfortheicc.org



The Coalition for the ICC, in conjunction with local partners, has launched a [campaign](#) to collect signatures of those opposed to the Repeal Bill for submission to the Committee.

Parliament must approve any ICC withdrawal say judges

“The absence of a (specific) provision in the Constitution for the executive to terminate any international agreement is confirmation of the fact that such power does not exist until Parliament legislates for it,” said **Judge Phineas Mojapelo** in delivering the unanimous judgment. He also called the withdrawal “hasty, irrational and unconstitutional.”

The judgment stems from an executive action by the South African government last October by which it notified the UN Secretary-General – the depositary of the Rome Statute, the ICC founding treaty – of its intention to withdraw from the ICC.

The Democratic Alliance (DA), an opposition political party, initiated the constitutional challenge late last year after the African National Congress’ (ANC) withdrawal move under President Zuma. The DA argued South African parliament was not consulted as the country’s constitution requires – and the high court now agrees.

A victory for rule of law says civil society

“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 **Kaajal Ramjathan-Keogh, Executive Director of the Southern Africa Litigation Centre (SALC)**.

“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,” continued **Ramjathan-Keogh**. “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.”

“The Coalition greatly welcomes the decision of the South African high court as another example of the extraordinary impact that the Rome Statute and the new system of international criminal law for war crimes, crimes against humanity and genocide continues to have in Africa and throughout the entire international legal order. The decision reflects the *rule of law* trumping the *rule by law*,” said **William Pace, convenor of the Coalition**.

Withdrawal stalled, but questions abound

The judgment has raised a number of questions for South Africa, the ICC and the international law community at large.

According to the Rome Statute, withdrawal from the ICC would not take effect until one year after the date of the original withdrawal notice. The original withdrawal effect date of 19 October 2017 may now have been thrown into the air with the high court judgment.

It remains to be seen whether a government appeal would forestall the judge's order to revoke the ICC withdrawal notice to the UN.

The South African government may nevertheless re-submit an ICC withdrawal notification to the UN if



parliament gives the go ahead, including by repealing national ICC legislation which many argue should have preceded the initial withdrawal notification.

If parliament postpones consideration of the ICC Repeal Bill until appeals of the high court decision have been exhausted, any ICC withdrawal may be pushed even further down the line.

Will the judgment impact the ICC repeal bill process?

While the judgment today has no definite impact on the ICC repeal bill process, the timelines may be affected by the South African government appeal of the high court decision, and should raise important questions for parliamentarians considering the bill.

Background: Failure to arrest Sudanese president at heart of crisis

South Africa's notification to the UN last year is linked to its failure to arrest and surrender ICC suspect and Sudanese President Omar al-Bashir in June 2015 when he attended the African Union (AU) Summit in the country, despite treaty obligations and ICC requests. The ANC government has repeatedly claimed head-of-state immunity under customary international law is in conflict with its Rome Statute obligations, and that it had not been properly consulted on this matter.

The issue of South Africa's compliance, as well as its complaints, will be taken up by ICC judges on 7 April 2017 in a public hearing.

South Africa remains obliged to investigate and prosecute crimes against humanity, war crimes and genocide and to cooperate with the ICC. Any withdrawal would have no impact on its prior legal obligations as an ICC member state.

About the ICC

The ICC is the world's first permanent international court to have jurisdiction over war crimes, crimes against humanity, and genocide. Central to the Court's mandate is the principle of complementarity, which holds that the Court will only intervene if national legal systems are unable or unwilling to investigate and prosecute perpetrators of genocide, crimes against humanity and war crimes. As one of the most historic advances in the protection of global human rights, the innovative system established by the Rome Statute is designed to punish perpetrators, bring justice to victims and contribute to stable, peaceful societies. The Court has already made significant progress in holding those most responsible for atrocities to account. Victims are already receiving help to rebuild their lives. But global access to justice remains uneven, and many governments continue to deny the ICC jurisdiction where it is most needed.

There are currently ten active investigations before the ICC: the Central African Republic I & II; Democratic Republic of Congo; Darfur, Sudan; Kenya; Libya; Uganda; Côte d'Ivoire; Mali and Georgia. The ICC has publicly issued 33 arrest warrants and nine summonses to appear. Four trials are ongoing. There have been two convictions and one acquittal. Ten preliminary examinations are currently ongoing, including into situations in Afghanistan, Burundi, Colombia, Guinea, Palestine, Iraq/UK, Nigeria, Ukraine, Gabon and the Registered Vessels of Comoros, Greece and Cambodia. The OTP has concluded preliminary examinations relating to Honduras, Venezuela, Palestine and the Republic of Korea, declining in each case to open an investigation.



About us

The Coalition for the ICC is a network of 2,500 civil society organizations, small and big, in 150 countries fighting for global justice for war crimes, crimes against humanity and genocide for over 20 years. We made international justice happen; now we're making it work.
<http://www.coalitionfortheicc.org/>

Experts from human rights organizations members of the Coalition are available for background information and comment. Contact: communications@coalitionfortheicc.org