

*DEMOCRATIC ALLIANCE V MINISTER
OF INTERNATIONAL RELATIONS AND
COOPERATION 2017 (3) SA 212 (GP)*

HENDRIK JOHANNES LUBBE *

1 Introduction

The relationship between South African law and public international law — with specific reference to international agreements, such as the 1998 Rome Statute of the International Criminal Court (Rome Statute) — is primarily regulated by section 231 of the Constitution of the Republic of South Africa, 1996. South Africa ratified the Rome Statute on 27 November 2000 and incorporated it into its domestic law on 16 August 2002 by means of the Rome Statute Implementation Act (Implementation Act).¹

South Africa's relationship with the International Criminal Court (ICC) has deteriorated significantly since June 2015, when the government refused to arrest and surrender to the ICC the Sudanese President, Omar Hassan Ahmad Al Bashir (Al Bashir), who attended the African Union (AU) Summit hosted in Johannesburg and against whom the ICC had issued two warrants of arrest on several charges of war crimes, crimes against humanity² and genocide.³

After the South African courts had determined that the government had failed in its duty to arrest Al Bashir,⁴ the executive unilaterally

* LLB (NWU), LLM (UP), LLD (Tilburg University, The Netherlands). Senior lecturer, North-West University, Potchefstroom Campus. Email: hein.lubbe@nwu.ac.za.

¹ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

² 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir' (Pre-trial Chamber I 4 March 2009) ICC-02/05-01/09-1 available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-1> (accessed 6 April 2017).

³ 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir' (Pre-trial Chamber I 12 July 2010) ICC-02/05-01/09-95 available at <https://www.icc-cpi.int/pages/record.aspx?uri=907140> (accessed 6 April 2017).

⁴ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2015 (5) SA 1 (GP); and *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA). For a discussion of this case, see MJ Ventura 'Escape from Johannesburg? Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of *Al-Jedda*' (2015) 13 *Journal of International Criminal Justice* 995; D Tladi 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International

withdrew from the Rome Statute without parliament's approval. This issue lies at the heart of the dispute in *Democratic Alliance v Minister of International Relations and Cooperation (DA v Minister of International Relations case)*.⁵ In this case the court decided that, procedurally, the decision by the executive to deliver the notice of withdrawal of South Africa from the Rome Statute without prior parliamentary approval and without it being preceded by the repeal of the Implementation Act was unconstitutional and invalid.⁶

The aim of this paper is to review the high court's judgement, to determine how it reached this conclusion and to establish the consequence of this judgement for the relationship between the legislative and executive organs of the state in the treaty-making process, as envisaged by section 231 of the Constitution. This judgement is significant, first, because it determines the effect of this constitutional provision on the process for South Africa's withdrawal from an international agreement, as there is no provision in the Constitution or in any other legislation dealing with the matter and, secondly, because our courts had not had the opportunity to decide on the matter prior to this decision.

2 Facts

On 15 March 2016 the Supreme Court of Appeal⁷ confirmed the high court's earlier judgement,⁸ in which it had held that the government had breached its obligations under the Rome Statute and the Implementation Act by failing to arrest and surrender Al Bashir to the ICC. Adamant that both courts had erred, and that another court would rule differently, the government persisted with the matter and took it on appeal to the Constitutional Court. The matter was scheduled to be heard on 22 November 2016. However, on 19 October 2016 the executive took a decision to withdraw from the Rome Statute; on the same day, the Minister of International Relations signed a notice of withdrawal to give effect to this decision and deposited it with the Secretary-General

Law' (2015) 13 *Journal of International Criminal Justice* 1027; E de Wet 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 *Journal of International Criminal Justice* 1049. On the Supreme Court of Appeal decision, see, D Tladi 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 *African Human Rights Law Journal* 310.

⁵ *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP).

⁶ *Id* para 77.

⁷ *Minister of Justice case* (2016) (note 4 above).

⁸ *Southern Africa Litigation Centre case* (2015) (note 4 above).

of the United Nations (UN).⁹ On 21 October the Minister of Justice and Correctional Services, Michael Masutha, announced to the media that the state intended to withdraw the appeal to the Constitutional Court. However, by the time he made this announcement, the procedures as set out in the rules of the Constitutional Court had not been followed.¹⁰

Also on 20 and 21 October 2016, Minister Masutha wrote to the houses of parliament advising them of cabinet's decision to withdraw from the Rome Statute and informing them of the government's intention to table the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23-2016 (Repeal Bill). This led the Democratic Alliance to launch its application¹¹ seeking an order declaring the withdrawal from the Rome Statute as unconstitutional and invalid.

3 Issues

The court first dealt with four preliminary issues, namely urgency and ripeness; an application to intervene by the Council for the Advancement of the South African Constitution; applications for condonation by the Southern Africa Litigation Centre and the Centre for Human Rights; and the Democratic Alliance's joinder of the supporting respondents. The only issue of interest for purposes of this paper is the government's argument that the application was not ripe for judicial intervention, because, at the time of the court date, 'unlawfulness ha[d] not yet manifested in a form which [could not] be corrected'.¹² The government gave the reassurance that, should parliament not give its approval of the withdrawal, the notice would be withdrawn or its date of effectiveness deferred before the termination took effect in October 2017. It was also argued that any judicial intervention where a parliamentary process is underway, would infringe the doctrine of the separation of powers.¹³

For the court, the question of ripeness depended on the constitutionality of the notice of withdrawal. With reference to *Doctors for Life*,¹⁴ the court

⁹ *DA v Minister of International Relations* case (note 5 above) paras 4 and 5.

¹⁰ Rule 27: 'Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn...the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter'. See the Rules of the Constitutional Court, promulgated under GN R1675 in *Government Gazette* 25726 of 31 October 2003.

¹¹ It also launched an application for direct access to the Constitutional Court, which failed. *Democratic Alliance v Minister of International Relations* (CC) 11 November 2016 255/16 and (CC) 256/16.

¹² *DA v Minister of International Relations* case (note 5 above) para 13.

¹³ *Id* para 13.

¹⁴ *Doctors for Life International v Speaker of the National Assembly and Others*

correctly held that if the notice of withdrawal was unconstitutional, that would be the end of the matter, as it must be declared unlawful. Based on the contention that the executive had already breached the separation of powers, and thus acted unconstitutionally, by deciding upon and giving the notice of withdrawal in the manner it had, the court considered itself entitled and constitutionally enjoined to enquire into the conduct of the executive.¹⁵ The court further pointed out that as long as the notice of withdrawal had not been withdrawn or deferred, the matter was properly before it.¹⁶

Turning to the merits of the application, the court divided the issues into process-based grounds relating to the procedure by which the notice of withdrawal had been prepared and handled, and substantive grounds concerning the question whether or not it was at all constitutionally permissible for South Africa to withdraw from the Rome Statute. The court did not deal with the latter, as it held that the decision to exit the ICC was policy-laden and one residing in the executive in the exercise of foreign policy, international relations and treaty-making.¹⁷ The court also noted that (at the time) there was a parliamentary process pending to consider the Repeal Bill.¹⁸ The court indicated that should the executive follow proper process and should parliament pass the Repeal Bill, the executive would not be at fault.¹⁹ However, should the complaint be that the Repeal Bill was unconstitutional, that complaint would be against parliament.²⁰

4 Merits on Process-based Grounds

In line with the judgement, this paper focuses on the process-based grounds and not on the substantive merits. The process-based grounds include, first, the so-called section 231 arguments on whether or not prior parliamentary approval and the repeal of the Implementation Act were required before a notice of withdrawal was given and, secondly, the issue of the procedural (ir)rationality of the notice of withdrawal.

4.1 Section 231 Arguments

Section 231(1) places the responsibility to negotiate and sign international agreements on the executive. In the court's view this is,

2006 (6) SA 416 (CC).

¹⁵ *DA v Minister of International Relations* case (note 5 above) para 15.

¹⁶ *Id* para 16.

¹⁷ *Id* para 77.

¹⁸ *Id* para 75.

¹⁹ *Ibid*.

²⁰ *Ibid*.

in effect, exploratory work.²¹ Under section 231(2), these agreements will bind the Republic only after both the National Assembly and the National Council of Provinces have approved thereof. Section 231(4) determines that, before such an agreement becomes law in the Republic and its provisions can be enforced in a South African court, it must first be enacted into national law by way of legislation. The only power the executive has to bind the country to international agreements without parliamentary involvement, is when an international agreement is of a technical, administrative or executive nature, or if the agreement itself does not require either ratification or accession.²²

After thorough interpretation of section 231 with specific reference to the *Glenister* case²³ regarding the separation of powers between the executive and parliament, the court found that there was no uncertainty about the structure and effect of this section as far as treaty-making is concerned.²⁴ The uncertainty concerned the reverse process, namely when South Africa wished to withdraw from an international agreement.

The Democratic Alliance, the applicant in the case, argued that since it is parliament that must approve an international agreement before it may bind South Africa, it follows that it must be parliament that decides whether a process under international law should be initiated with a view to withdraw from a particular international agreement *before* the executive may deliver a notice of withdrawal. The government, on the other hand, argued that prior parliamentary approval is not required for the notice of withdrawal to be given, because section 231 contains no such provision; further, that the reading-in to this effect, as suggested by the applicant, was unwarranted. The government based this argument on four grounds. First, that treaty-making is the 'exclusive competency' of the executive. Secondly, that parliamentary approval is required only in order for a concluded treaty to become binding and, since treaties are not concluded by parliament, it cannot exit from a treaty. Thirdly, that in international law²⁵ a notice of withdrawal from an international agreement does not require approval, but merely a signature by a duly authorised senior state official. Lastly, that parliamentary approval under section 231 is required for an international agreement and that a withdrawal, being a unilateral act, does not qualify as an international agreement.

²¹ *Id* para 55.

²² S 231(3) of the Constitution of the Republic of South Africa, 1996.

²³ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras 89, 90 and 181.

²⁴ *DA v Minister of International Relations* case (note 5 above) para 36.

²⁵ Art 56 of the 1969 Vienna Convention on the Law of Treaties, on which art 127 of the Rome Statute is based.

The government's argument, as summarised by the court, is that a notice of withdrawal from an international treaty is comparable to the conclusion and signature during the making of an international treaty. The effect hereof, as government sees it, is that neither acts require prior parliamentary approval, but can be subsequently ratified. In contrast, the applicants were of the opinion that the act of signing a treaty and the act of delivering a notice of withdrawal are different in their respective effects. According to the applicant '[t]he former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects as it terminates treaty obligations ...'.²⁶ The court agreed with the applicants and held that a notice of withdrawal is the equivalent of ratification, and therefore requires prior parliamentary approval.²⁷

It is trite that where a constitutional or statutory provision confers power to do something, that provision necessarily confers the power to undo it as well.²⁸ 'If it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can terminate such an agreement without parliament's approval.'²⁹ Based on a textual construction of section 231(2), the court ultimately found that South Africa can withdraw from the Rome Statute only with the approval of parliament and after the repeal of the Implementation Act. According to the court, this interpretation is the most constitutionally compliant, giving effect to the doctrine of separation of powers.³⁰

The court went on to explain why, based on the principle of legality and the rule of law, there is no provision, in the Constitution or in any other legislation, specifically dealing with the withdrawal from international treaties.³¹ This is because the executive needs authority to act, which authority flows from the Constitution or from an act of parliament. 'The national executive can therefore only exercise those powers and perform those functions conferred upon it by the Constitution, or by law which is consistent with the Constitution.'³² The court also found that '[t]he absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless

²⁶ *DA v Minister of International Relations* case (note 5 above) para 47.

²⁷ *Ibid.*

²⁸ *Id* para 53, with reference to *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 68.

²⁹ *DA v Minister of International Relations* case (note 5 above) para 51.

³⁰ *Id* para 53.

³¹ *Id* para 54.

³² *Ibid.*

and until parliament legislates for it'.³³

In conclusion, the court opined that '[i]t would have been unwise if the Constitution had given power to the executive to terminate international agreements...without first obtaining the authority of parliament'.³⁴ That, the court foresees, would have conferred legislative powers on the executive, amounting to a clear breach of the separation of powers and the rule of law. On this basis, too, the court reiterated that the executive 'does not have and was never intended to have the power to terminate existing international agreements without prior approval of parliament'.³⁵ The court also made it clear that the exercise of all public power, including the conduct of international relations and treaty-making as an executive act, must comply with the principle of legality and is subject to constitutional control.³⁶

On the issue of international law not requiring prior approval for a notice of withdrawal from an international agreement, the court agreed, but added that this is only intended to assure the Secretary-General of the UN and the ICC that the letter communicated is authentic.³⁷ Neither Article 56 of the 1969 Vienna Convention on the Law of Treaties nor article 127 of the Rome Statute relied on by government, seek to dictate to member states as to how and by whom the decision to withdraw must be taken.

Government's alternative argument was that, if indeed parliamentary approval is required, the executive has complied with that requirement since parliament was (at the time) still vested with such a decision by virtue of the fact that the request to approve the notice of withdrawal and the Repeal Bill were pending before parliament. This raised the question whether or not the withdrawal could be approved *ex post facto*. The court swiftly dealt with this matter by referring to Hoexter, who states that '[a]n invalid act, being a nullity, cannot be ratified, "validated" or amended'.³⁸ Constitutionally speaking, the executive's conduct was invalid and had no

³³ Ibid.

³⁴ Id para 56.

³⁵ Ibid.

³⁶ Id para 36, with reference to *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 20; *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 78–80, 178, 191 and 228; *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 69; and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 64.

³⁷ *DA v Minister of International Relations* case (note 5 above) para 48.

³⁸ C Hoexter *Administrative Law in South Africa* 2 ed (2012) 547. See, also, *S v Cebekulu* 1963 (1) SA 482 (T) 483; *Montshioa and Another v Motshegare* 2001 (8) BCLR 833 (B) para 24.

effect in law, because it had purported to exercise power it constitutionally did not have. On a practical level, had prior parliamentary approval been obtained, the process would have taken much longer for the notice of withdrawal to be validly delivered, which would have pushed the exit date beyond October 2017.

4.2 *Procedural (Ir)rationality*

The requirement for rationality, as determined in the *Pharmaceutical Manufacturers* case,³⁹ is that government action must be rationally linked to a legitimate government purpose, and the principle of legality requires that both the process by which the decision is made and the decision itself, must be rational. To determine whether or not the requirement for rationality has been met, the process must be evaluated in its entirety and it must be determined whether the steps that were followed during the process were rationally related to the intended outcome.⁴⁰ If this is answered in the negative, the next question is whether the absence of a connection between a particular step and the intended purpose is such as to taint the whole process with irrationality.⁴¹ The court correctly found that the procedural irrationality lay in the finding that the executive did not consult parliament, as it was obliged to, before delivering the notice of withdrawal.⁴²

The court further reminded government that withdrawing from the Rome Statue will not enable it to freely pursue its claimed 'peacemaker role on the continent without the obligation to arrest the indicted heads of state',⁴³ as the Implementation Act (for as long as it applies) still creates obligations which bind government on their own terms, independent of its international obligations.

The court was not convinced by government's reassurance that the Repeal Bill had been tabled and that, by the time the notice of withdrawal would take effect, the Implementation Act would have been repealed. The court reminded government of the elaborate legislative process set out in sections 73 to 82 of the Constitution, as well as the different possible outcomes thereof, each with its own time frame. In addition, the court reminded government of the strong possibility of a constitutional challenge should the Repeal Bill be signed into law and that this would

³⁹ *Pharmaceutical Manufacturers* case (note 36 above) para 85.

⁴⁰ *DA v Minister of International Relations* case (note 5 above) para 64, with reference to *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) para 37.

⁴¹ *DA v Minister of International Relations* (note 5 above) para 64.

⁴² *Ibid.*

⁴³ *Id* para 65.

further influence the time frame.⁴⁴ In the court's view, a 'united, final and determinative voice from South Africa'⁴⁵ on this aspect was preferable. The court concluded that the unexplained haste of the withdrawal notice itself constituted procedural irrationality.⁴⁶

5 Analysis

It could be insightful to take a few steps back and to place South Africa's change of attitude towards the ICC in context. During the negotiations at the Rome Conference in the late 1990s that led to the adoption of the 1998 Rome Statute, South Africa showed its support for and eventual commitment to the ICC, by being one of the first African states to sign and domesticate the Rome Statute.⁴⁷ Later, during the inauguration of President Zuma in 2009 and the FIFA World Cup in 2010, South Africa still regarded itself bound by the provisions of the Rome Statute. This meant that South Africa was required to co-operate with the ICC in arresting and surrendering Al Bashir; for this reason, and despite his official capacity as a head of state, Al Bashir was not welcome in South Africa at the time.⁴⁸

The change of attitude towards the ICC is in line with the AU's negative sentiment towards the ICC. This, in turn, can be traced back to the UN Security Council's referral of the events in the Darfur region of Sudan (a non-signatory of the Rome Statute) to the ICC⁴⁹ and, more specifically, its unsuccessful request for the deferral of prosecutions.⁵⁰ Another reason for the AU's cooling stance is the ICC prosecutor's exercising of his *proprio motu* powers to open an investigation into the Kenyan situation relating to the violence that followed its flawed 2007 general election and the crimes against humanity committed between 1 June 2005 and 26 November 2009.⁵¹ The AU has backed Kenyan proposals to prevent the prosecution of the Kenyan president and deputy president.

As a result, in 2013 the AU adopted a decision⁵² on Africa's relationship

⁴⁴ Id para 69.

⁴⁵ Id para 70.

⁴⁶ Ibid.

⁴⁷ For the status of the ratifications by African states, see https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed 14 June 2017).

⁴⁸ *Southern Africa Litigation Centre case* (2015) (note 4 above) para 12.

⁴⁹ S/RES/1593 (31 March 2005) regarding violations of international humanitarian law and human-rights law in Darfur, Sudan.

⁵⁰ Art 16 of the Rome Statute.

⁵¹ See <https://www.icc-cpi.int/kenya> (accessed 14 June 2017).

⁵² Ext/Assembly/AU/Dec.1(Oct.2013), Assembly of the African Union, 12 October 2013.

with the ICC, which held that no serving head of state shall be required to appear before any international court or tribunal during their term of office. After this, and as a further means to side-step the ICC, the AU adopted the 2014 Malabo Protocol,⁵³ which confers international criminal jurisdiction on the African Court of Justice and Human Rights, but not over sitting heads of state. To date, nine African states, excluding South Africa, have signed this protocol, but there has not been the required number of ratifications (fifteen) to establish this court. More recently, at the end of January 2017, during its 28th Summit, the AU decided on a collective withdrawal strategy from the Rome Statute.⁵⁴ Since then, not much action has been taken by African states; to the contrary, some African states⁵⁵ have expressed their support for the ICC.

After the South African government had lost the case concerning its duty to arrest Al Bashir, its bold next move to withdraw from the Rome Statute came as no surprise, even though it is a rare event in the history of the ICC.⁵⁶ Resistance by the Democratic Alliance and non-governmental civil-rights organisations was also not unexpected, as these parties carefully monitored the unfolding of the ICC-South Africa saga. The ICC, in turn, is also adamant in keeping South Africa to terms, as the latter was asked to appear at an unprecedented hearing at The Hague in April 2017 for failing to comply with a co-operation request from the court.⁵⁷ On 6 July 2017, Pre-trial Chamber II found that South Africa had failed to

⁵³ 'Decisions, Declarations and Resolution of the Assembly of the Union Twenty-Third Ordinary Session' (26–27 June 2014) Malabo, Equatorial Guinea available at <http://summits.au.int/en/23rdsummit/documents/decisions-declarations-and-resolution-assembly-union-twenty-third-ordinary-sess> (accessed 14 June 2017). This protocol is not currently in force as it has not yet acquired the minimum number of ratifications.

⁵⁴ 'Draft Decisions, Declarations, Resolution and Motion, Assembly of the Union Twenty-Eighth Ordinary Session' Assembly/AU/Draft/Dec.1(XXVIII) Rev.2 (30–31 January 2017) Addis Ababa, Ethiopia available at https://www.hrw.org/sites/default/.../assembly_au_draft_dec._1_-_19_xxviii_e.pdf (accessed 12 April 2017).

⁵⁵ Botswana, Senegal, Sierra-Leone, Tunisia, Nigeria, Gabon, The Central African Republic, The Democratic Republic of Congo, Tanzania, Mali and Niger.

⁵⁶ On 18 October 2016, President Pierre Nkurunziza signed legislation calling for Burundi's withdrawal from the ICC. As a result, Burundi submitted notification of its withdrawal to the UN Secretary-General. After this, South Africa announced on 21 October that it had notified the UN Secretary-General that it was withdrawing from the ICC. The Gambia announced its intention to withdraw on 24 October, but the victory of opposition candidate, Adama Barrow, in the December 2016 presidential election moved the Gambia to rejoin the ICC.

⁵⁷ 'Decision Convening a Public Hearing for the Purposes of a Determination under Article 87(7) of the Statute with respect to the Republic of South Africa' ICC-02/05-01/09-274 (Pre-trial Chamber II 8 December 2016) available at https://www.icc-cpi.int/CourtRecords/CR2016_25714.pdf (accessed 14 June 2017).

comply with the court's request for the arrest and surrender of Al Bashir contrary to the provisions of the Rome Statute, thereby preventing the court from exercising its functions and powers under the Rome Statute in connection with the criminal proceedings instituted against Al Bashir.⁵⁸

The judgement in the *DA v Minister of International Relations* case is important, not so much for confirming the structure and effect of article 231 in the treaty-making process, but for correctly and decisively determining its effect on the process for South Africa's withdrawal from international agreements. This is of particular importance since there are no precedents for such withdrawal in South Africa's history and because there is further no provision in the Constitution or in any other legislation dealing with this matter. With regard to the relationship between the executive and parliament, this judgement is of further importance, because it confirms that parliament is the master of its own processes,⁵⁹ and that the executive is not entitled to dictate time frames to it within which to consider the Repeal Bill or any other bill. This, the court warns, is impermissible, as it has the potential to undermine the process of parliament.⁶⁰

6 Conclusion

The court followed a simple textual construction of section 231 to answer the question before it and, during this process, took established principles from the Constitution and jurisprudence into account. These included the principle of legality, the rule of law and the separation of powers – especially between the executive and the legislature as embodied in section 231 – which makes the interpretation and application of this section constitutionally tenable and useful for any future disputes in this regard.

Based on the court's finding, namely that the notice of withdrawal from the Rome Statute and cabinet's consequent decision to deliver the notice of withdrawal to the UN Secretary-General without prior parliamentary approval were unconstitutional and invalid, the first, second and third respondents (the Minister of International Relations and Cooperation,

⁵⁸ 'Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the arrest and surrender of Omar Al-Bashir' ICC-02/05-01/09-302 (Pre-trial Chamber II 6 July 2017) available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-302> (accessed 11 August 2017).

⁵⁹ S 57(1)(a) of the Constitution of the Republic of South Africa, 1996 provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures. S 70(1)(a) gives similar powers to the National Council of Provinces.

⁶⁰ *DA v Minister of International Relations* case (note 5 above) para 67.

the Minister of Justice and Correctional Services and the President of the Republic of South Africa) were ordered to revoke the notice of withdrawal. The effect of this is that a fresh notice is required to restart the twelve-month withdrawal period required by the Rome Statute.

Although the court declined the invitation to pronounce on the substantive merits of South Africa's withdrawal from the Rome Statute, and although the tabling of the Repeal Bill to this effect was untainted by the invalid withdrawal – meaning that the process of promulgation of the Repeal Bill could have continued without impediment – the Department of Justice and Correctional Services on 14 March 2017 announced government's decision to withdraw the Repeal Bill in accordance with Rule 334 of the Rules of the National Assembly, stating that the Bill may be re-introduced at a later stage.⁶¹ This came after the UN Secretary-General announced the revocation of the instrument of withdrawal from the Rome Statute effectively from 7 March 2017.⁶²

⁶¹ Available at <http://www.news24.com/SouthAfrica/News/rome-statute-repeal-bill-withdrawn-from-parliament-20170314> (accessed 14 June 2017).

⁶² For the depositary notification, see C.N.121.2017.TREATIES-XVIII.10 (7 March 2017) available at <https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf> (accessed 14 June 2017).