

Analysis: South African Executive Cannot Unilaterally Withdraw from the ICC

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By: James Hendry

The High Court of South Africa recently made a declaration that a notice of withdrawal from the Rome Statute of the International Criminal Court filed by the executive of the South African government without prior Parliamentary approval was unconstitutional and ordered it withdrawn.[1] The central question for the Court was one of domestic separation of powers under the Constitution of South Africa. Did the executive's power to negotiate and sign treaties under s. 231 of the Constitution impliedly give it the power to unilaterally withdraw after Parliament (the legislative authority under s. 42 of the Constitution) had ratified and implemented the treaty?

The Court noted that the issue had arisen with its 2016 order[2] that the government's failure to arrest Omar Hassan Ahmed al-Bashir, President of Sudan, while in South Africa for a summit in 2015, was unconstitutional. He was the subject of two warrants issued by the ICC for his arrest relating to charges of war crimes, crimes against humanity and genocide in Darfur. In October 2016, South Africa' national executive filed a notice of withdrawal from the Rome Statute purportedly triggering the country's withdrawal under art. 127. The executive explained that the clash between the Rome Statute and customary international law recognizing the immunity of heads of state frustrated its diplomatic efforts in Africa.

After the notice was filed, the Minister of Justice referred a bill to Parliament to repeal the South African implementing legislation. That act sets up a scheme for the prosecution of genocide, war crimes and crimes against humanity, including the crime of apartheid.

The Democratic Alliance brought these proceedings seeking an order declaring the filing of the notice and the cabinet decision authorizing it unconstitutional and requiring the executive to withdraw it.

The executive initially argued the proceedings were premature because any unlawfulness in its process could be corrected before the notice of withdrawal became effective, even though the one year delay for before that occurred under the Rome Statute was running.

The Court rejected the argument holding that the constitutional issue was triggered by the deposit of the notice of withdrawal by the executive without prior Parliamentary approval and so the matter was not premature. If it were found that Parliament had to act before the notice was filed, then the executive would have acted unconstitutionally, contrary to the separation of powers.

The parties did not dispute that s. 231 of the Constitution, with some exceptions not relevant to this case, gave power to the executive to negotiate and sign treaties which did not bind the country internationally until approved by Parliament and did not become the law of the land until enacted by Parliament.

However, the executive argued that withdrawing from a treaty was juridically equivalent to making a treaty which was within executive powers and did not involve Parliament. The executive argued that it had the power to conclude a treaty which was expressed by unilaterally ratifying it and therefore it had the power to “unconclude” a treaty.

The court disagreed. Under the South African Constitution, the notice of withdrawal is the equivalent of ratification which requires prior Parliamentary approval under s. 231. Signing a treaty has no direct legal effect, while the notice of withdrawal has concrete legal effects at international law because it ends treaty obligations accepted by Parliament. The notice of withdrawal under art. 127 of the Rome Statute must be signed by a representative of the state, but the court rejected the executive’s argument that the bare signature was all that was required. The signature had to be authorized according to domestic law. If Parliament had to decide whether to ratify a treaty before that could be accomplished and to implement a treaty by legislation, then the reverse process should be subject to the same rules. Ratification creates a “social contract” between the people through their Parliamentary representatives and the executive giving rise to rights and obligations. It made no sense that the executive could end those rights and obligations by itself. Further, s. 231 gave Parliament the power to bind the country and so it followed that only Parliament could “unbind” it. South Africa could withdraw only on approval of Parliament and on its repeal of the implementation legislation. The lack of a grant of power to the executive to withdraw from international treaties confirmed the grant of constitutional power to negotiate a treaty, but not the power to bind the country that must be found either in the Constitution or Act of Parliament, otherwise it would be contrary to the principle of the separation of powers. Political legitimacy required the people be consulted through their representatives in

Parliament, which could carry out further consultations before acting.

The government argued that the bill already in Parliament to approve the withdrawal and repeal the implementation act would constitute approval after the fact.

The court again disagreed. First, the executive had purported to exercise a power it did not have under the Constitution making it a nullity which could not be revived. Second, from a practical point of view, Parliament might not have been able to “cure” the defect within the year of the purported withdrawal.

The court also noted that the executive action in filing the notice of withdrawal without Parliament’s prior approval suffered from procedural irrationality. In South Africa, all government action must accord with the principle of legality by meeting the test of procedural and substantive rationality in the connection between government means and ends. Procedural rationality requires a reviewing court to examine the whole of an impugned process to determine if the government’s steps in the process are rationally related to the government objective.[3] The absence of a connection between a step and the objective might taint the process with irrationality.

The procedural irrationality in this case was the failure of the executive to obtain Parliament’s approval before filing the notice of withdrawal. The executive’s objective was to enable South Africa to take a prominent place in diplomacy and resolution of conflict in Africa and not have to arrest visiting leaders under ICC warrants. The Court observed that even if the notice were effective, the State had to obey the implementation legislation until it was repealed by Parliament. The arrests would continue. In the process, the executive had ordered Parliament to repeal the implementing legislation before the notice of withdrawal took effect. The Court found this demand was improper because Parliament governed its own procedure. Further, it might deliberate for some time and might decide not to approve the withdrawal or repeal the implementing legislation in which case South Africa would present an inconsistent position to the world. The repeal might be challenged in Constitutional Court. The unexplained haste of the executive was also irrational.

The Court declined to deal with the substantive questions about the withdrawal. The bill to repeal the implementation act was before Parliament. Should it pass, a challenge to the withdrawal from the treaty would be against Parliament, and not as here, against the executive. The action would also likely proceed in the Constitutional Court because it has exclusive jurisdiction over the failure of the legislature to act constitutionally. The Court would not intervene in the Parliamentary process on the assumption that Parliament will act unconstitutionally.

The court declared the notice of withdrawal and the underlying executive decision unconstitutional and invalid and ordered that the notice be withdrawn.

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James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) (83145/2016)*, [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP) (22 February 2017).
2. *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others*, [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP); 2015 (2) SA 1 (GP), appeal dismissed, *Minister of Justice and Constitutional Development & others v The Southern Africa Litigation Centre*, [2016] 2 All SA 365 (SCA); 2016 (4) BCLR 487 (SCA); 2016 (3) SA 317 (SCA) leave to appeal to the Constitutional Court granted, but withdrawn by the government.
3. Note 1 at para. 64 citing *Democratic Alliance v President of the Republic of South Africa*, 2012 (12) BCLR 1297; 2013 (1) SA 248 (Con.Ct.) para 37.