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promoting liberal constitutional democracy

SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES

in respect of

IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ACT REPEAL BILL

made by

THE HELEN SUZMAN FOUNDATION

8 MARCH 2017

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INTRODUCTION

1. The Helen Suzman Foundation's ("**HSF**") mandate is to promote and defend South Africa's constitutional democracy. The HSF's interest in *The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill* ("**the Bill**") centres on our commitment to our constitutional obligations of human dignity, the achievement of equality and the advancement of human rights and freedoms ensuring that liberty is protected; and that the unintentional as well as intentional consequences of legislation and policies are properly scrutinised. Central to our work is the defence of the rule of law.

2. The HSF welcomes the opportunity to make a submission on the Bill. The HSF sees this opportunity as a way of fostering critical, yet constructive, dialogue between civil society and government in the context of the legislative process.

3. South Africa's ratification of the Rome Statute ("**the Rome Statute**") of the International Criminal Court ("**ICC**") enables our participation in the international tribunal with jurisdiction over the gravest crimes. In addition, it signals our commitment to the international community to protect human rights globally. This lends credibility to our global standing, and affords us a seat at the table at a number of important international fora (either directly, or because of the goodwill our membership affords us).

4. This status in the international community and approach to human rights is a Constitutional mandate and is acknowledged as such by the Implementation of the Rome Statute of the International Criminal Court Act, 2002 ("**the Implementation Act**").

5. The Preamble to our Constitution records that the people of South Africa adopted the Constitution *inter alia* to:

> "*establish a society based on democratic values, social justice and fundamental human rights... and... build a united and democratic South Africa able to take its rightful place as a sovereign state in a family of nations*".

6. The preamble to the Implementation Act records that Parliament was:

> *"mindful that... the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the international community."*

7. At the time of the Implementation Act's adoption, this sentiment was also the view of the National Executive, when the then Minister of Justice stated:

> "*The [Implementation Act] is a reaffirmation of South Africa's commitment to participating in the world's effort at eradicating and punishing the worst forms of cruel human conduct imaginable, namely the crime of genocide, crimes against humanity which, by the way, include the crime of apartheid, and war crimes.*"

8. Indeed, it is significant that the Rome Statute and the Implementation Act, for the first time, codified that the racist regime of Apartheid was not a mere controversial policy of separation, but a crime against humanity, the perpetrators of which should be tried and punished no matter where they may seek refuge. Bearing this in mind, South Africa's signature, ratification and domestication of the Rome Statute is a key measure to ensure, as so

aptly stated in the Inauguration Address of the late President Nelson Mandela, that:

> "*never, never and never again shall it be that this beautiful land will experience the oppression of one by another, and suffer the indignity of being the skunk of the world*".

9. Any decision of South Africa to resile from the Rome Statute would be a betrayal of South Africa's progress towards its Constitutional goals and is reminiscent of our pre-democratic past where political pragmatism and power overrode basic humanity dignity and justice.

10. Any decision to withdraw would furthermore be a retrogressive step and thus unconstitutional.

11. The HSF submits that the Bill, in any case, does not, in any way, authorise the executive to withdraw from the Rome Statute. Indeed, it proceeds on the assumption that the withdrawal has already been effected and that Parliament simply has to give effect to that withdrawal. This, however, is a false and unlawful premise. As held by the Full Court in *Democratic Alliance v Minister of International Relations and Cooperation* [2017] ZAGPPHC 53 (22 February 2017) ("**the Withdrawal case judgment**"), the executive does not have any power to effect the withdrawal and the National Executive has now accepted this as the correct legal position by revoking the relevant notice of withdrawal.

12. For the reasons that will be set out in this submission, the HSF urges the Honourable Members of the Committee on Justice and Correctional Services ("**the Committee**") to recommend to the National Assembly that the Bill be rejected.

THE BILL PROCEEDS FROM AN UNCONSTITUTIONAL PREMISE

13. On 19 October 2016, the Minister of International Relations and Cooperation signed a declaration effectively giving notice of South Africa's withdrawal from the Rome Statute ("**the notice of withdrawal**"). This notice was delivered to the UN Secretary-General, purportedly giving effect to a cabinet decision to effect such a withdrawal. On 21 October 2016, during a press conference, the Minister of Justice publically announced the intention to withdraw from the ICC and resile from the Rome Statute. On the same day, the Minister of Justice authored a letter to the chairperson of the National Council of Provinces informing the Chairperson of Cabinet's decision to withdraw from the Rome Statute.

14. Shortly after this, the Bill was introduced in Parliament. According to the explanatory memorandum attached to the Bill, the Bill was introduced explicitly to "*[give] effect to a decision by Cabinet that the Republic of South Africa is to withdraw from the Rome Statute*" and is structured on that basis.

15. As you may be aware the Gauteng Division of the High Court in Pretoria, rendered judgment on 22 February 2017 in the case of *Democratic Alliance and another v Minister of International Relations and Cooperation and Others* (GNP case no: 83145/2016) ("**the Withdrawal case**"). The HSF was a Respondent in that case. As you are further aware, the Court's judgment declared the notice of withdrawal unconstitutional and invalid on the basis that prior parliamentary approval was not given. The Court also set aside the Cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General and ordered the Minister of Justice and Correctional Services ("**the Minister of Justice**"), together with the Minister of

International Relations and Cooperation and the President, to revoke the notice of withdrawal.

16. Accordingly, the Bill proceeds from an unconstitutional premise and is drafted to give effect to an act of Cabinet which has been declared unconstitutional and invalid. Should the Bill proceed on this basis, it will be susceptible to constitutional challenge.

17. The Bill is also fundamentally defective in that it contains no authority for the executive to withdraw South Africa from the Rome Statute. The Withdrawal case judgment has made it clear that the executive may only withdraw from the Rome Statute if it has prior parliamentary authorisation. The Bill purports to be part of a scheme to effect the withdrawal of South Africa from the Rome Statute, yet South Africa has made no decision to withdraw from the Rome Statute. The Bill is thus fundamentally defective.

18. It is further submitted that it is not now possible for the Bill simply to be amended to include such an authorisation. Such a change to the Bill would fundamentally change its purpose, and the public would be denied a reasonable and adequate opportunity to engage with and make submissions on the new substance on the Bill. [1] Accordingly, requiring the legislative process to begin anew and a fresh invitation to be issued for public comment.

19. Respectfully, this should be the end of the matter in respect of the Bill. Indeed, the HSF requested the Minister of Justice, in a letter on 1 March 2017, to withdraw the unconstitutional Bill immediately. This letter

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[1] See, for example, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).

was copied to Committee and is attached for ease of reference marked "**A**". A similar letter was sent to the Committee on 2 March 2017, which is attached for ease of reference marked "**B**". The HSF did not receive a response from the honourable Minister nor did it receive a response from the Committee.

20. The HSF respectfully submits that the Committee is no longer able to proceed with respect to the Bill in any way as the Bill seeks to give effect to a decision that was declared unlawful and unconstitutional and set aside by a court of law.

ADEQUATE CONSULTATION

21. In the HSF's letter to the Committee of 2 March 2017, the HSF also pointed out that there had been inadequate time for consultation in respect of the Bill. The original invitation was issued only on 14 February 2017. This gave the public only 16 working days to make submissions on the bill by the deadline of 8 March 2017.

22. Further, the Withdrawal case judgment has had a material impact on the Committee's intended public hearings with respect to the Bill. The public requires adequate time to consider the consequences of the Withdrawal case judgment for the purposes of their submissions on the Bill.

23. In the circumstances, it is respectfully submitted that a period of merely three weeks does not afford the public sufficient time to make useful substantive submissions given the complexity of the subject at hand.

24. As the Committee knows, the failure to provide adequate opportunity for public consultation itself constitutes a fatal flaw in the legislative process and

may render the legislation subject to a constitutional challenge. The Constitutional Court has said that parliamentary approval on its own does not satisfy the requirement of "public participation". Likewise, inadequate periods of time given to the public to make submissions are not considered "adequate" and may be a ground to declare a piece of legislation unconstitutional.[2]

25. The HSF has made this submission under great time pressure and to the best of its abilities in the circumstances. It does so, however, under reservation of rights to challenge the Bill on the basis of inadequate consultation should it be relevant. The HSF also reserves its rights to supplement this submission should the Committee extend the period for consultation.

26. It is respectfully submitted that, in any case, the Committee should extend the period for consultation by at least one calendar month.

THE BILL WILL NOT ACHIEVE WHAT IT IS INTENDED TO ACHIEVE AND IS UNLAWFUL

27. In the first instance, as mentioned above, the Bill will not achieve any meaningful purpose as there has not been any lawful decision to withdraw South Africa from the Rome Statute. The Bill itself also does not constitute an authorisation to the executive to withdraw South Africa from the Rome Statute. In any event, the Bill is substantively unconstitutional as it is unlawful and irrational for the reasons set forth below.

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[2] *Ibid.*

28. Accordingly, it is not clear what the Bill seeks to achieve. In the present circumstances, the Bill will only remove the mechanism by which South Africa's obligations under the Rome Statute are implemented. South Africa will continue to have these obligations. To proceed with the Bill will thus be utterly fruitless and lead to legal uncertainty.

29. To the extent that the Bill is meant to pave the way for a withdrawal, or to the extent that the Bill will be amended to include an authorisation to the executive to withdraw, the HSF contends that any decision to withdraw is manifestly irrational and will not achieve any of the purposes intended by the drafters of the Bill. The State's reasoning and justification for the decision is based on errors of law and fact and internal contradictions.

30. For these purposes, the HSF assumes the drafters of the Bill have the same stated intentions as those recorded in the, now set-aside, notice of withdrawal. The Minister of Justice, who is the individual responsible for the Bill, is after all a member of Cabinet and the original decision to withdraw was made by Cabinet.

The justification and motivation for the decision to withdraw

31. The notice, coupled with the submissions made by the Minister of International Relations and Cooperation, the Minister of Justice and the President in the Withdrawal case, proposes the following reasons to withdraw from the Rome Statute:

31.1 the Republic of South Africa is involved in the promotion of and protection of human rights internationally, and especially on the African continent;

31.2 there is a perception that the ICC is biased against African states based on the proportion of African cases brought before the ICC; and

31.3 the Republic of South Africa has found that its efforts to find peaceful resolution of conflicts are at times incompatible with the ICC's interpretation of member states' obligations in terms of the Rome Statute.

32. The Minister of Justice recorded the following in his October letter:

32.1 South Africa is hindered in exercising its international relations with foreign countries plagued by conflict as the Implementation Act and the Rome Statute compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law.

32.2 South Africa wants to give effect to customary international law which recognises diplomatic immunity of heads of States and others, in order to find peaceful resolution of conflicts, through the Diplomatic Immunities and Privileges Act, 2001 ("**DIPA**"). DIPA, however, is inconsistent with the Implementation Act.

32.3 By repealing the Implementation Act, South Africa can afford immunity to foreign heads of state and others in order to more effectively broker peace.

33. These reasons are irrational and unlawful for at least the following reasons:

33.1 South African law, even in the absence of the Implementation Act, does not afford absolute immunity to heads of State and similar individuals. Absolute immunity, even if sourced in customary international law, is in

direct conflict with our Constitution. In such cases of conflict, our Constitution prevails.

33.2 South Africa need not invite any heads of State or others to South Africa to perform its negotiating role. It can perform such a role from another neutral venue. South Africa has done this on many occasions.[3]

33.3 The State has previously admitted its concerns may be addressed at the Hague at the next meeting of the Assembly of State Parties (scheduled for 16 to 24 November 2016).[4]

33.4 There is no evidence of bias against African States. It is in the very nature of the ICC and its structures to investigate allegations of crimes against humanity, genocide and war crimes lawfully referred to the ICC. This is usually by way of referrals from member states or the UN Security Council. Most of the referrals pertaining to African investigations emanated from African states themselves. Only Libya and Sudan investigations have been referred by the Security Council. No African state voted against those referrals and South Africa, then member of the Security Council, voted in favour of the Libyan referral. In any event, it is better to investigate, rather than not to investigate, crimes against humanity, genocide and war crimes. South Africa's position seems to be that if certain Western states are not being investigated (largely because they are not state parties to the Rome Statute), then African states in respect of whom there is a lawful referral should not be investigated either. This is transparently an

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[3] Ibid. See 66 below..

[4] See the answering affidavit from the state in *Democratic Alliance v Minister of International Relations and Cooperation* (GNP case no: 83145/16), at para 14.

unsustainable position. There is no allegation that the ICC has unlawfully convicted or condemned any African states or leaders, let alone that it has done so on a systematic basis. This is discussed in great detail below at paragraphs 76 to 85.

34. Any decision to withdraw from the Rome Statute is not compatible with the State's own averments that it is "*committed to fight impunity and bring those who commit atrocities and international crimes to justice.*" The very reasoning behind the decision to withdraw is to afford immunity to those heads of State accused of international law crimes and crimes against humanity. Yet, the drafters of the Bill contradict themselves by recording that South Africa also intends to hold all perpetrators accountable and prosecute these perpetrators, regardless of status, and to fight against impunity. These averments are irreconcilable between themselves let alone with any regard to what South Africa's purported withdrawal will achieve.

35. The drafters of the Bill and its proponents seek to draw a distinction between functional and personal immunity. But absolute functional immunity is likewise unconstitutional. It would afford absolute immunity to office bearers of states. Those accused of crimes against humanity may and typically do hold office for many years and even for life. The only reason to afford functional immunity circles back to the peace efforts argument, which is addressed above and below.

36. All international crimes are crimes in South Africa by virtue of section 232 of the Constitution. The South African State has a constitutional obligation to investigate and prosecute these crimes and the absolute immunity sought to be posited by the State is unavailing and must yield to the constitutional obligation.

37. Further, the immunity envisaged by the decision to withdraw is incompatible with South Africa's obligations under a number of international instruments and conventions, which remain extant (see, for example, South Africa's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide).

DIPA, the constitutionality of immunity, and an independent duty to arrest

38. Section 4(1) of the DIPA,[5] according to the State's reasoning, codifies customary international law as part of our domestic statutory law and confers on heads of state absolute immunity from the criminal and civil jurisdiction of the courts of the Republic. However, DIPA must be read and interpreted in terms of our Constitution and its fundamental values.

39. Consistent with the norms of constitutional supremacy:

39.1 The plain meaning of the section does not support the State's interpretation.

39.2 In any event, to the extent that section 4(1)(a) of the DIPA purports to afford absolute immunity to heads of state who *prima facie* appear to have committed crimes against humanity, war crimes or genocide, it must be read consistently with and to give best effect to the Constitution. The Constitution cannot be read to legitimise such

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[5] Section 4(1) provides:

"A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as:

(a) heads of state enjoy in accordance with the rules of customary international law;

(b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

(c) may be conferred on such head of state by virtue of section 7(2)."

repugnant crimes, by providing blanket immunity from prosecution. In fact, the Constitution does the very opposite, by making international crimes punishable in the Republic.

Section 4(1)(a) of DIPA

40. First, the introductory language of section 4(1) merely defines the immunities and privileges afforded by the provision, while paragraphs (a) - (c) set out the jurisdictional requirements to enjoy these immunities and privileges. Heads of state cannot have absolute immunity by virtue of the introductory language alone. If that were so, the paragraphs that follow would be redundant. Interpretation by recourse to redundancy is unacceptable to coherent interpretation of any legislation.

41. Second, section 4(1)(a), which refers specifically to immunities and privileges that heads of state enjoy in accordance with the rules of customary international law, must necessarily be read together with section 232 of the Constitution.[6]

42. As a result, only customary international law that is found to comply with the Constitution will find application in the Republic, whether or not domesticated. Any reading of section 4(1)(a) must, therefore, limit the immunities and privileges conferred by customary international law so as to ensure consistency with our Constitution. The only constitutionally compliant interpretation of section 4(1)(a) is that it domesticates the rules of customary international law in respect of immunities and privileges only insofar as these rules are consistent with the Constitution.

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[6] Section 232 of the Constitution provides that "*[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".

43. This reading down would be in keeping with the rule of statutory interpretation requiring courts, where the wording of a statute permits it, to prefer a constitutionally compliant interpretation of legislation over ones that would render the legislation invalid.

44. No rule that is consistent with our Constitution may afford any person, including heads of state, absolute immunity from criminal prosecution when that person appears *prima facie* to be guilty of crimes against humanity, war crimes or genocide. To suggest otherwise is disingenuous as it undermines the Constitution's power to protect human rights.

International crimes against humanity, genocide and war crimes

45. International crimes are crimes under customary international law and are thus crimes in South Africa.[7]

The doctrine of immunity

46. Heads of state are afforded immunity under customary international law in order to facilitate efficient cooperation, communication, and dealings between states, for the sake of promoting various economic, social, cultural and political interests.[8]

47. According to the International Court of Justice in the *Arrest Warrant Case*,[9] immunity is not granted for their "*personal benefit*". It is granted "*to ensure the effective performance of their functions on behalf of their respective States*". These immunity rules exist, therefore, to allow the head of state to

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[7] *National Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 37; and section 232 of the Constitution.

[8] D Akande 'International law immunities and the International Criminal Court' (2004) 98 *AJIL* 409.

[9] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep 3.

act as a representative of the state "*in international negotiations and intergovernmental meetings*".[10]

48. A head of state charged with international crimes is charged with undermining the very fabric of the community of nations and cannot be allowed to enjoy a benefit of the system which he may actively undermine.

49. The recognition of immunity to preclude arrest and surrender or prosecution of a head of state where there is *prima facie* evidence that they have conducted themselves in a way that undermines the very basis for them to enjoy immunity in the first place goes beyond the bounds of the Constitution.

The Limits of the Doctrine of Immunity and the Significance of International Crimes

50. In order for the rules pertaining to immunity to be consistent with the Constitution, they must affirm our national identity and membership within the community of nations as espoused in the Preamble to the Constitution.

51. Failing to arrest, or where necessary prosecute or surrender for prosecution, a person charged with international crimes, such as crimes against humanity, war crimes and genocide, , violates not only the norms and rules of international law, but also the Constitution, our supreme law.

52. By inference, then, failing to take action with respect to these crimes is an affront to the right to dignity - a violation of section 10 of the Constitution.

53. The hosting of individuals in South Africa who are accused of crimes against humanity violates sections 12(1)(c), 12(1)(d) and 12(2) of the Constitution, for

[10] Ibid.

it constitutes a threat to the physical and/or psychological integrity of all persons living or residing in South Africa. This threat is multiplied in respect those persons who may have fled to South Africa as a result of the flagrant human rights' violations.

54. Failing to arrest a person wanted for committing genocide, crimes against humanity and war crimes violates the rule of law, which in terms of section 1(c) is one of the founding values of the Constitution. Ensuring that perpetrators of international crimes are brought to justice is a recognised incidence of the rule of law.

55. The exceptional nature of these crimes has been recognised by the Constitutional Court: "*Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international-treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order*'."[11]

56. In light of the above:

56.1 international crimes are crimes in South Africa;

56.2 they are of such an egregious nature that their commission and allowing alleged perpetrators of such crimes to avoid arrest and prosecution constitutes an affront to our constitutional framework; and

56.3 since the values underpinning the above conclusions are strongly supported by the history and the text of the Constitution, their force

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[11] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para [37], emphasis added.

would not easily be displaced by any concepts (such as the absolute immunity contended for by the executive in the past) undermining the efficacy of that recognition.

The Duty to Detain and Arrest

57. As international crimes are crimes in South Africa, every person accused of these crimes is a suspect in the Republic. In recognition of the status of international crimes, the State has a constitutionally-sourced power and duty to detain and/or arrest alleged perpetrators of these crimes who come within the territory of South Africa.[12]

58. The South African Police Service has, in terms of s 205(3) of the Constitution, a duty to prevent, combat and investigate crime. This is so even where these crimes were committed outside of the territory of South Africa, by a foreign national and/or against foreign nationals.

59. The Constitutional Court has affirmed that those who commit crimes against humanity and genocide are "*the enemy of all humankind*" and must be held "*accountable for their crimes, wherever they may have committed them or wherever they may be domiciled*."[13]

60. Furthermore, the Constitutional Court held that: "*Our country's international and domestic-law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful*

[12] Section 7(2) of the Constitution further places positive obligations on the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Section 7(2) enjoins the State to prevent and combat crimes, including crimes against humanity, which threaten the rights in the Bill of Rights and the rule of law.

[13] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para 74.

place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."[14]

61. Therefore, on a proper constitutional interpretation of section 4(1) of the DIPA, it does not confer absolute immunity on heads of State accused of crimes against humanity. These individuals, if in South Africa, may well fall to be investigated, arrested, detained and/or prosecuted.

South Africa's peace brokering role within Africa

62. It is entirely illogical and misleading to proffer the notion that the Rome Statute hinders South Africa's peacekeeping efforts, including peace brokering and dialogue facilitation in those African states plagued by conflict. South Africa could perform these roles without having to invite head of State perpetrators of international law crimes to the Republic by attending a neutral venue to facilitate these negotiations, dialogue and / or talks.

63. It is entirely illogical, and incorrect, to postulate that South Africa must terminate its membership of the ICC, jeopardise its international standing and reputation and consider granting immunity, within South Africa, to head of State perpetrators of international law crimes simply so it can perform a peace-brokering and dialogue facilitation role in respect of African countries which are in, or have been in, conflict situations.

64. Quite simply, South Africa could perform all these roles without having to invite head of State perpetrators of international law crimes to South Africa. South Africa's representatives could attend at any neutral venue to facilitate these negotiations, dialogue and/or talks.

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[14] *Ibid* at para 80, emphases added.

65. Indeed, South Africa has a long history of having its leaders and representatives doing just this. Just last year, President Jacob Zuma facilitated peace talks in Burundi, continuing a history of South African facilitation and mediation in Burundi (which efforts have been led by both Presidents Mandela and Mbeki, as well as President Zuma when he was a Deputy President). As discussed below, South Africa has a long history of facilitating peace talks outside of South Africa. There is no clear or pressing need for such talks to be in South Africa.

66. That South Africa has played an active role in facilitating peace talks in Africa (outside of South Africa) is apparent from the following, by no means exhaustive, list:

66.1 Burundi: South Africa participated in various peace efforts held in Tanzania and Burundi from 2000 to 2016 to facilitate talks regarding the negotiation and implementation of the Arusha peace accords, and with the aim of resolving political instability and civil violence between ethnic groups. A significant number of these talks took place outside of South Africa, including a recent visit by President Zuma.[15]

66.2 The Democratic Republic of the Congo ("**The DRC**"): South Africa played a critical role in facilitating negotiations between 2000 and 2002 pertaining to the Lusaka Ceasefire Agreement, to put an end to conflict

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[15] Independent Online *Mandela's first trip as Burundi Mediator* 11 January 2000 (accessed at: <http://www.iol.co.za/news/africa/mandelas-first-trip-as-burundi-mediator-23039>); Agence France-Press *Burundi peace depends on ending Tutsi power monopoly: Mandela* 21 February 2000 (accessed at: <http://reliefweb.int/report/burundi/ burundi-peace-depends-ending-tutsi-power-monopoly-mandela>); Irin News *Mbeki to join Mandela in Arusha* 18 February 2000 (accessed at: <http://www.irinnews.org/news/2000/02/18-0>); Independent Online *Mbkei jets in as Burundi peace deal unwinds* 7 October 2002 (accessed at: <http://www.iol.co.za/news/politics/mbeki-jets-in-as-burundi-peace-deal-unwinds-95447>); Independent Online *Mbeki heads up Burundi peace talks* 17 June 2006 (accessed at: <http://www.iol.co.za/news/africa/mbeki-heads-up-burundi-peace-talks-282002>); Voa News *African Union Continues Peace Efforts in Burundi* 25 February 2016 (accessed at: <http://www.voanews.com/a/african-union-continues-peace-efforts-in-burundi/3209102.html>).

between the DRC, Angola, Zimbabwe and Sudan. South Africa was also instrumental in mediating peace talks between rebel forces and government to conclude the Global and Inclusive Agreement on Transition in the DRC in 2002. A significant number of these talks took place outside of South Africa.[16]

66.3 Cote D'ivoire: South Africa aided in brokering peace accords and facilitating talks between rebel groups and the government in relation to military reign, civil war, the involvement of foreign forces, and political stalemates regarding elections between 2002 and 2011. South Africa continues to play an on-going role in conflict resolution in Cote D'ivoire. A significant number of these talks took place outside of South Africa.[17]

66.4 Zimbabwe: Delegates in South Africa have continued to be involved in peace negotiations and power-sharing agreements in Zimbabwe since 2002. South Africa has played an important role in mediating talks in Harare between the two leading parties pertaining to political coups,

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[16] All Africa *South Africa: Mbeki to Rescue Mugabe from DRC* 20 October 2000 (accessed at: <http://allafrica.com/stories/200010200033.html>); BBC news *Mbeki push for DR Congo peace* 1 September 2004 (accessed at <https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=mbkei+pushes+for+dr+congo+peace&*>); The Presidency *President Zuma ends the working visit to the Democratic Republic of Congo* 21 June 2011 (accessed at: <http://www.gov.za/president-zuma-ends-working-visit-democratic-republic-congo>); Times Live *Zuma going to Tanzania for DR Congo Crisis talks* 5 December 2012 (accessed at: <http://www.timeslive.co.za/africa/2012/12/05/Zuma-going-to-Tanzania-for-DR-Congo-crisis-talks>); The Presidency *President Zuma arrives in DRC* 15 October 2015 (accessed at: <http://www.thepresidency.gov.za/content/president-zuma-arrives-kinshasa,-democratic-republic-congo-attend-9th-session-bi-national>).

[17] News24 *Mbeki to I Coast as AU mediator* 24 November 2004 (accessed at: <http://www.news24.com/World/News/Mbeki-to-I-Coast-as-AU-mediator-20041124>); Independent Online *SA's Mbeki on a peace mission in Abidjan* 24 November 2004 (accessed at: <http://www.iol.co.za/news/africa/sas-mbeki-on-a-peace-mission-in-abidjan-227833>); Mail & Guardian *Mbeki presents road map for peace* 3 December 2004 (accessed at: <https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Mbeki+presents+road+map+for+peace&*>); GCIS *President Zuma arrives in Ivory Coast on a working visit* 3 March 2011 (accessed at:< http://www.gcis.gov.za/content/president-zuma-arrives-ivory-coast-working-visit>).

unfair elections, oppressive laws and land reform. A significant number of these talks took place outside of South Africa.[18]

66.5 Sudan: South Africa has participated in various peace negotiations between Sudan and South Sudan since 2004, and continues to play an important role in a region plagued by civil war and violence. A significant number of these talks took place outside of South Africa.[19]

67. It is disingenuous for South Africa, on the one hand, to purport to be a country that respects the Rule of Law, fights for the realisation of human rights and upholds justice, whilst, on the other hand, to withdraw from a legal body who encapsulates all these norms and values.

Alleged continued commitment to fight human rights abuses

68. The drafters of the Bill and proponents of withdrawal from the Rome Statute purported desire to continue to fight human rights abuses is contradicted by the apparent motivation to withdraw.

69. Affording suspected perpetrators of such crimes absolute immunity is contrary to any averment that South Africa intends to prosecute such heads of State "*irrespective of their standing.*"

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[18] Telegraph *Mbeki leads new peace initiative in Zimbabwe* 5 May 2003 (accessed at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/1429226/Mbeki-leads-new-peace-initiative-in-Zimbabwe.html>); The National *Mbeki holds crisis talks in Zimbabwe* 10 August 2008 (accessed at: <http://www.thenational.ae/news/world/africa/mbeki-holds-crisis-talks-in-zimbabwe>); News24 *Zuma set for Zimbabwe peace talks* 13 August 2012 (accessed at: <http://www.news24.com/africa/zimbabwe/zuma-set-for-zimbabwe-peace-talks-20120813>).

[19] SA Breaking News *Ramaphosa arrives in Addis Ababa for South Sudan peace talks* 30 October 2014 (accessed at: <http://www.sabreakingnews.co.za/2014/10/30/ramaphosa-arrives-in-addis-ababa-for-south-sudan-peace-talks/>); The Presidency *President Zuma arrives in Uganda for continuation of peace talks* 22 December 2014 (accessed at: <http://www.thepresidency.gov.za/content/president-zuma-arrives-uganda-continuation-peace-talks>); Independent Online *Zuma and al-Bashir meet in China* 3 September 2015 (accessed at: <http://www.iol.co.za/news/politics/zuma-and-al-bashir-meet-in-china-1910384>).

Withdrawal does not release the State of any obligations in respect of President al-Bashir

70. Should the decision to withdraw be informed, even in part, by a desire to host President al-Bashir in South Africa, then Article 127 of the Rome Statute is dispositive of the rationality of such decision.

71. Article 127(2), under the heading "*Withdrawal*", reads:

> "*A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective*."

72. Our Courts have recognised the survival of such obligations even where the institution creating such institutions no longer exists.[20]

73. Indeed, we note that section 2(2) of the Bill explicitly provides for the survival of such obligations.

74. The fact is that, until the ICC withdraws the warrant of arrest against President al-Bashir, South Africa will have a perpetual obligation to arrest

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[20] *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

President al-Bashir (as well as any person against who the ICC currently has an arrest warrant) should he (or they) ever be present in the Republic again, regardless of any withdrawal from the Rome Statute or the passage of the Bill.

The Declaratory Statement

75. The State relies on the "*Declaratory Statement On The Decision To Withdraw From The Rome Statute*" ("**the Declaratory Statement**") as providing justification for the decision to withdraw. That document relies on the ‘‘perception of bias’’ argument.

There is no reasonable apprehension of bias

76. Proponents of withdrawal from the Rome Statute have often relied on the so-called "*reasonable apprehension of bias*". This apprehension is unfounded in reality and is entirely manufactured. The HSF submits that "*reasonable apprehension of bias*" is not an appropriate basis for South Africa to withdraw from the ICC. In any case, the apprehension is not reasonable as there is no factual basis to support it.

77. The test of a "reasonable apprehension of bias" is not an appropriate basis for withdrawal. This is a concept of South African administrative law and it is unclear how and why it may be applicable to the withdrawal from international law instruments.

78. Moreover, even if there are ICC decisions which give rise to a reasonable apprehension of bias (which is denied), then it is these individual decisions which should be challenged.

79. Even if the test of a "reasonable apprehension of bias" is somehow apposite, then it is submitted that the apprehension is not reasonable.

80. An argument as to systemic anti-African bias on the part of the ICC is undermined by the facts:

80.1 the Prosecutor of the ICC is Fatou Bensouda, a national of the Islamic Republic of The Gambia;

80.2 4 of the 18 current judges of the ICC are African, including judges from the Republic of Kenya, the Federal Republic of Nigeria, the DRC and Botswana (three of these four judges are nationals of states which are the subject of investigations or preliminary examinations by the ICC);

80.3 8 of the 42 judges of the ICC since inception have been African (including one South African), and the vast majority of ICC judges have been from the developing world;

80.4 to the extent that it is alleged that the ICC "targets" Africa, this cannot be sustained for at least the following reasons:

80.4.1 of the ten situations presently under investigation before the ICC:

80.4.1.1 five of the nine cases in respect of African states (the Republic of Mali; two situations referred by the Central African Republic; the DRC; and Republic of Uganda) were referred to the ICC <u>by the governments of those states themselves</u>;

80.4.1.2 three of the cases were initiated *proprio motu* by the prosecutor (two African countries, the Republic of Kenya and Côte d'Ivoire, as well as in Georgia);

80.4.2 there are thus only two cases referred to the ICC by the United Nations Security Council ("**UNSC**"):

80.4.2.1 the case of the Republic of The Sudan; the resolution referring the matter to the ICC (UNSC Resolution 1593) was supported by 11 of the 15 members of the UNSC. There were no votes against. Among the African members of the UNSC, Algeria abstained, while Benin and Tanzania voted in favour of the resolution. South Africa has subsequently accepted a duty to arrest President al-Bashir of Sudan;

80.4.2.2 in the case of the State of Libya, the resolution in question (UNSC Resolution 1970) was unanimous. The UNSC at the time included votes from the Gabonese Republic, Nigeria and South Africa.

80.4.3 the following situations are under preliminary examination: the Republic of Afghanistan; the Republic of Burundi; the Republic of Colombia; Nigeria; Gabon; Guinea; the Republic of Iraq (with respect to crimes committed by nationals of the United Kingdom of Great Britain and Northern Ireland - notably a permanent member of the Security Council); the State of Palestine; registered vessels of the Union of Comoros, the Hellenic Republic of Greece and Kingdom of Cambodia in respect of crimes allegedly committed by the State of Israel; and the Ukraine which, also includes

investigations into Russian nationals (Russia is also a permanent member of the Security Council and, in fact, not a party to the Rome Statute). Only four of these ten situations are with respect to African countries.

80.4.4 More than a quarter of the member states of the ICC are African and they have a substantial say in how the ICC is run.

81. Some of those most critical of the ICC, and those who seek to perpetuate the myth of an ICC African bias, are African states who (a) are under investigation by the ICC and whose senior government members in particular are targets of investigation (for instance Kenya and Burundi); and/or (b) have unlawfully harboured and failed to apprehend a fugitive of the ICC (South Africa). This suggests an opportunism underlying the bias argument: it is the accused who say they have been unfairly targeted. However, numerous African countries have recently reaffirmed their support for the ICC: Nigeria, the Democratic Republic of Congo, Botswana, Ivory Coast, Tunisia, Ghana, Mali, Burkina Faso, Tanzania, Lesotho, Uganda, Malawi, Senegal, Sierra Leone and Zambia.

82. On 1 November 2016, and in the wake of South Africa's, Burundi's and The Gambia's decisions to withdraw, the previously mentioned African States explicitly reaffirmed their support in the United Nations General Assembly.[21] Nigeria's support is particularly notable in light of the fact that a preliminary examination has begun in respect of suspected war crimes committed by the Nigerian Army and by Boko Haram in Nigeria, Africa's most populous state

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[21] Independent Online *Kenya hits out ICC at UN General Assembly* 1 November 2016 (accessed at: <http://www.iol.co.za/news/africa/kenya-hits-out-icc-at-un-general-assembly-2085525>).

and largest economy in terms of gross domestic product. It is also significant that, after the democratic election of President Adam Barrow, The Gambia withdrew its notice of withdrawal and reaffirmed its commitment to the ICC in February 2017. South Africa's position against the ICC is entirely out of step with the majority of our fellow African nations and an unfortunate lapse in South Africa's history of leadership in the field of human rights on the continent.

83. These facts demonstrate the unreasonableness of any apprehension of bias on the part of the ICC. An alleged bias through a numerical analysis of the ICC's caseload proves that the claim of bias is both factually inaccurate and unsound as a matter of principle.

84. The Declaratory Statement suggests that another indication of the ICC's bias lies in the response South Africa received when it asked the UN Security Council, the Court and the Assembly of State Parties to extend diplomatic protections to heads of state. These bodies denied the request, as it would violate the Rome Statute. The denial can hardly be put up as proof of a perception of bias: it is the implementation of the Rome Statute which South Africa approved.

85. Accordingly, there can be no basis for any allegation that a reasonable person aware of all the facts would entertain any suspicion that the ICC might be biased.

Structural issues in the UN Security Council

86. During the Withdrawal case, the State, for the first time, sought to expand the reasoning for the decision to withdraw, alleging that there is "*actual and institutional*" ICC bias.

87. The basis for this allegation has nothing to do with South Africa's membership of the Rome Statute.

88. Instead, the Minister of International Relations and Cooperation, the Minister of Justice, and the President pointed to the fact that the UNSC has the power to subject non-members of the Rome Statute to the jurisdiction of the ICC, despite the fact that three of the five permanent members of the Rome Statute are not in fact members of the ICC.

89. This does not speak to actual or institutional bias in the ICC system: it goes to show, at worst, the shortcomings of the UN system. The UNSC is empowered, under Chapter VII of the UN Charter, to make resolutions which are binding on all member states of the UN in matters which present a threat to international peace and security. This is a power which arises from the UN Charter, not the Rome Statute.

90. South Africa's withdrawal from the Rome Statute, therefore, is misplaced. It will not abolish or in any way frustrate what the Government deems to be the unfair powers of the UNSC under the UN Charter. Indeed, South Africa will remain bound by the Chapter VII resolutions of the UNSC so long as it remains a member of the UN.

91. In any event, there is no suggestion that the two investigation referred to the ICC by the UNSC (Libya and Sudan) should not have been referred. African states on the UNSC did not object and five (including South Africa) voted in favour.

92. The state's complaint that the UNSC is structurally imbalanced is an important consideration with respect to UN reform, but irrelevant to the Rome Statute; it is not a rational reason for the decision to withdraw. As UNSC

Resolutions 827, 955, 1593 and 1970 demonstrate, South Africa may be obliged to cooperate with the ICC, or other international criminal tribunals, even should it withdraw from the Rome Statute. Indeed, even if the ICC were to collapse entirely, *ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda could be established without South Africa's involvement in the establishment of these bodies at all and South Africa could still be required to cooperate with these tribunals. The decision to withdraw thus clearly does not solve the alleged structural failings of the UNSC that South Africa purports to seek to solve. Accordingly, it is not a rational basis for the decision to withdraw.

THE BILL AND ANY DECISION TO WITHDRAW CONSTITUTES A RETROGRESSIVE STEP

93. Victims of oppression and victims who are subjected to international crimes "*appeal to legal principles external to*" domestic law for redress and access to justice. In doing so the victims are, in effect, appealing to "*international law as a higher law*".[22] By repealing the Bill and withdrawing from the ICC the government is in fact denying these victims redress and access to justice.

94. If it is found that no domestic instruments create the same or comparable rights as rights as those created by the ratification of the Rome Statute, then the decision to withdraw is a retrogressive step, as it takes away certain rights from people of South Africa, who have no recourse to replacement rights of equal or greater effect. Likewise, the Bill would constitute a

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[22] John Dugard *International law: A South African Perspective* 4th ed, 21.

regressive step to extent it undermines any of these rights, or gives effect, in any way, to a withdrawal.

95. In resiling from the ICC, South Africa loses the ability to prosecute certain crimes before the ICC. To the extent that no comparable forum exists to prosecute such crimes, the State has failed to further, or at least maintain the *status quo*, in realising the right of access to courts. Membership of the African Union is not a comparable alternative – it does not purport to have a criminal court that does the work of the ICC.

96. Access to courts, and to have disputes adjudicated, is a fundamental right, enshrined in the Bill of Rights – it is not open to the State to diminish this right in a way that is not compliant with the limitation of rights provisions within the Constitution.[23]

97. South Africa's ratification and domestication informs a number of domestic rights, strengthening obligations on the State to arrest, detain, surrender and/or prosecute perpetrators of international law crimes.

98. Section 7(2) obliges the State not only to respect, but also to "*protect, promote and fulfil*" the rights in the Bill of Rights. The Constitutional Court has recognised that section 7(2), in addition to imposing a negative obligation on the State "*not [to] act in a manner which would infringe or restrict [a] right*"[24] in the Bill of Rights, it also prescribes for the State in appropriate circumstances a *positive obligation* to take deliberate, reasonable measures to give effect to *all* these fundamental rights.

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[23] *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC).
[24] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras [47] and [69].

99. The Constitutional Court's jurisprudence confirms that this positive obligation applies in respect of both socio-economic rights,[25] and the civil and political rights which the Bill of Rights protects, including the rights to equality, dignity, life, freedom and security of the person.[26] But while there are several reasonable ways that the State can give effect to its obligations, it cannot embark on a series of regressive steps which undermine its ability to fulfil its constitutional mandate.

100. We submit that the prohibition on retrogressive measures applies with even greater force to civil and political rights in view of the nature of these rights and the requirements of section 7(2) of the Constitution.

THE AFRICAN COURT DOES NOT PRESENT A VIABLE ALTERNATIVE TO THE ICC

101. Any assertion that the HSF's view of the African Court represents a dismissive "Afro-pessimism" is not supported by the facts.

102. The State's contention that, following its withdrawal from the ICC, South Africa will work closely with the African Union and other countries in Africa to strengthen continental bodies, such as the African Court on Human and People's Rights ("**the African Court**") is admirable in principle but practically and legally unsustainable.

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[25] See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at paras [11] – [14]; *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) at paras [19] – [20] and paras [26] – [47]; *Minister of Health v Treatment Action Campaign and Others* No 2 2002 (5) SA 721 (CC) at paras [23] – [73] and paras [82] – [95]; *Khosa v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* (6) BCLR 569 (CC) at paras [40] – [67].

[26] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), para [44]; *S v Baloyi (Minister of Justice and Another Intervening*) 2002 (2) SA 425 (CC) at para [11].

The African Court on Human and Peoples' Rights

103. The executive has previously optimistically relied on "*continental bodies, like the African Court on Human and People's Rights*". They present these bodies as alternative to, rather than potential partners of, the ICC. But, unlike the ICC, none of these bodies enjoys criminal jurisdiction.

104. In any event, South Africa has not yet made the declaration submitting itself to the jurisdiction of the African Court.[27]

105. The inefficacy of the African Court is no doubt a result of the insipid procedural impediments contained within the Protocol to the African Charter of Human and Peoples' Rights ("**the Protocol**"):

105.1 Read together, articles 5(3) and 34(6) of the Protocol create two prerequisites for the Court to hear a matter:

105.1.1 It is mandatory for member states of the AU to make a declaration in terms of article 34(6) of the Protocol in order for the African Court to exercise jurisdiction to hear matters concerning that particular member state.

105.1.2 The African Court must exercise its own discretion in deciding whether or not to hear the matter brought before it. This discretion seems to be exercised narrowly, resulting in far too few cases being heard on their merits. While article 5 of the Protocol further provides that the African Court may still hear a matter in the absence of the declaration where the African Commission submits

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[27] See also http://www.african-court.org/en/ in this regard.

such a matter to the African Court, it is nevertheless alarming to note that a mere eight member states have made this declaration. South Africa is not one of them.

105.2 The ultimate goal of the African Union appears to be the creation of an African Court with extended jurisdiction over criminal and civil matters. Due to financial and practical constraints, however, this envisioned African judicial forum was not operationalised; rather, the AU decided that the African Court and this new body would amalgamate into a single body: the African Court of Justice and Human Rights ("**ACJHR**"). This court has yet to come to fruition.

105.3 Moreover, it appears that a fundamental aspect in the ACJHR's creation is the adoption of an absolute immunity for those persons occupying the upper echelons of African governments. In the 23rd Ordinary Session of the African Union held in June 2014, an amendment was made to the Protocol on the Statute of the African Court of Justice and Human Rights ("**the ACJHR Protocol**") which seeks to provide full immunity to African leaders who are allegedly responsible for the commission of heinous human rights violations. Article 46A*bis* of the ACJHR Protocol reads:

> "*No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*"

105.4 In essence, the ACJHR would lack jurisdiction to hear matters where the alleged perpetrator is a sitting head of state or senior government official.

106. Moreover, the ICC and the African Court (or such other tribunal vested with comparable jurisdiction) need not operate as mutually exclusive arbiters of international crimes. In fact, there is every reason to believe that the principles of complementarity would apply and that persons accused of committing such crimes could, theoretically, be tried in either of these courts. But at this stage, the fact remains that the African Court does not enjoy either the power or the capacity of the ICC to bring perpetrators of international crimes to justice. The African Court would also not apply to crimes committed outside of Africa.

107. In addition, the ICC has established a fully functional Trust Fund for Victims and is empowered to order the forfeiture of proceeds, property and assets derived directly or indirectly from the crimes committed. This creates an important mechanism in the ICC's remedial arsenal. As a result, the ICC may, in addition to its ordinary penal function, order that reparations be made to victims in certain circumstances. In the absence of a functioning African Court with adequate (or any) criminal jurisdiction, and with the State clearly favouring immunity over its international law obligations, the decision to withdraw simply opens the door to further violation of the rights of victims and every South African.

108. Importantly, the regional alternative to the African Court (the Southern African Development Tribunal) has also lost its capacity to hear such cases. The point remains that the ICC is an important mechanism for attaining justice and that the African Court (and the SADC Tribunal) do not offer similar relief

and would not be substitutes for it even if they were operationalised in due course.

CONCLUSIONS

109. The Bill is fatally constitutionally defective from the outset as it proceeds from an unconstitutional premise – the decision of the Cabinet to withdraw from the ICC, which decision has been declared unconstitutional.

110. The public has also not been given adequate time to comment on the Bill, being a piece of legislation with a context and consequences of great complexity and importance. This inadequate period of time to comment will render the Bill susceptible to constitutional challenge.

111. Any decision to withdraw from the Rome Statute, or indeed prematurely to begin stripping the domestic implementation of the Rome Statute will not address the State's stated aims of a decision to withdraw, which include concerns with the UN and UNSC. The Bill, and indeed any withdrawal from the Rome Statute, will thus be, in any case, inefficacious.

112. The Bill, together with any decision to withdraw, is impermissibly retrogressive and contrary to the State's obligations to respect, protect and promote the rights enshrined in the Bill of Rights. It is also irrational as it cannot possibly achieve the stated objectives. The Bill is thus substantively unconstitutional.

113. In any event, it is not clear why Parliament would authorise the abrogation of the Implementation Act. The ICC is an important institution in the global fight to ensure that the perpetrators of international crimes are brought to justice, wherever such crimes may have taken place.

114. Accordingly, the HSF respectfully requests the Committee to recommend to the National Assembly to reject the Bill.

THE HELEN SUZMAN FOUNDATION

Francis Antonie, Director

Chelsea Ramsden, Legal Researcher

WEBBER WENTZEL

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And to:

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c/o Hon. Dr Mathole Motshekga
Chairperson of the Portfolio Committee on Justice and Correctional Services
c/o Mr V Ramaano

By email: vramaano@parliament.gov.za

01st March 2017

Dear Honourable Minister

The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill ("the Bill")

1. We refer to the Bill which you introduced to the National Assembly on 9 November 2016 and which is currently before the National Assembly's Portfolio Committee on Justice and Correctional Services ("**the Committee**"). The Helen Suzman Foundation ("**the HSF**")

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intends to make written and oral submissions on the Bill and will do so at the appropriate time.

2. As you are aware the Gauteng Division of the High Court in Pretoria, rendered judgment on 22 February 2017 in the case of *Democratic Alliance and another v Minister of International Relations and Cooperation and Others* (GNP case no: 83145/2016), ("**the Judgment**"). The HSF was a Respondent in that case. As you are further aware, the Court's judgment declared the notice of withdrawal from the Rome Statute of the International Criminal Court of 19 October 2016 ("**the notice of withdrawal**") unconstitutional and invalid on the basis that prior parliamentary approval was not given. The Court also set aside the Cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General and ordered you, together with the Minister of International Relations and Cooperation and the President, to revoke the notice of withdrawal.

3. According to the explanatory memorandum attached to the Bill, the Bill was introduced explicitly to "*[give] effect to a decision by Cabinet that the Republic of South Africa is to withdraw from the Rome Statute*" and is structured on that basis. Accordingly, the Bill proceeds from an unconstitutional premise and is drafted to give effect to an act of Cabinet which has been declared unconstitutional and invalid. Should the Bill proceed on this basis, it will be susceptible to constitutional challenge.

4. Accordingly, the HSF respectfully requests that you, as the person in charge of the bill introduced to the National Assembly, withdraw the Bill immediately.

5. We look forward to hearing from you at your earliest convenience.

Yours faithfully

Francis Antonie
Director

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02nd March 2017

Dear Honourable Members

The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill ("the Bill")

1. We refer to the Bill which is currently before the National Assembly's Portfolio Committee

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on Justice and Correctional Services ("**the Committee**").

2. The Helen Suzman Foundation (''**HSF**'') notes that on 14 February 2017, the Committee invited members of the public to comment on the following:

2.1 the Bill;

2.2 the Notice of Withdrawal from the Rome Statute of 19 October 2016 ("**the notice of withdrawal**");

2.3 the Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court; and

2.4 the Explanatory Memorandum on South Africa's Withdrawal from the Rome Statute of the International Criminal Court.

3. The HSF wishes to draw the Committee's attention to the fact that on 22 February 2017, a Full Court of the Gauteng Division of the High Court, Pretoria, delivered judgment in the case of *Democratic Alliance and another v Minister of International Relations and Cooperation and Others* (GNP case no: 83145/2016), ("**the Judgment**"). The HSF was a respondent in this case.

4. At paragraph [84] of its judgment, the Court made the following orders:

4.1 It declared the notice of withdrawal unconstitutional and invalid on the basis that prior parliamentary approval was not given.

4.2 It set aside the Cabinet decision to deliver the notice of withdrawal to the United Nations Secretary-General.

4.3 It ordered the Ministers of International Relations and Cooperation and Justice and Correctional Services, as well as the President, to revoke the notice of withdrawal.

5. These orders have a material impact on the Committee's intended public hearings with respect to the Bill.

6. The HSF respectfully submits that the Committee is no longer able to proceed with respect to the Bill in any way as the Bill seeks to give effect to a decision that was declared unlawful and unconstitutional and set aside by a court of law.

7. According to the Bill's explanatory memorandum, the Bill was introduced explicitly to "*[give] effect to a decision by Cabinet that the Republic of South Africa is to withdraw from the Rome Statute*". That Cabinet decision no longer exists in law.

8. As such, should the Bill proceed through the Committee and Parliament, it will do so from an unconstitutional premise. The Bill is thus doomed from the outset and will be susceptible to constitutional challenge.

9. Unless and until an appeal against the Court's judgment is decided in favour of the Government, the Bill simply cannot proceed.

10. However, should the Committee choose to proceed with the call for public comment on this Bill, notwithstanding the Court's judgment, the HSF respectfully submits that the three weeks afforded to the public to make comment on the Bill is inadequate for proper public consultation to occur. This period is merely three weeks long and does not afford the public sufficient time to make useful substantive submissions given the complexity of the subject at hand. Respectfully, this is even so despite the deadline being moved to 8 March 2017.

11. The HSF has addressed these similar concerns in a letter directed to the Minister of Justice and Correctional Services. In that letter the HSF requests the Minister to withdraw the Bill because, as things presently stand, it is bad in law. The Committee was copied on that letter.

12. Should the Minister fail to withdraw the Bill, the HSF respectfully submits that the Committee must recommend in its report to the National Assembly on the Bill that it be rejected *inter alia* on the basis that it proceeds from an unconstitutional premise and its further consideration should be discontinued forthwith.

13. Accordingly, should the Minister not withdraw the Bill in the interim, the HSF respectfully requests that the deadline for submissions on the Bill be moved at least by one calendar month. As the Committee knows, the failure to provide adequate opportunity for public consultation itself constitutes a fatal flaw in the legislative process and may render the legislation subject to a constitutional challenge.

14. In any event, and with reservation of all its rights to challenge the process followed in respect of the Bill, the HSF intends to make written and oral submissions on the Bill. If it is

forced to do so by the deadline of 8 March 2017, this will simply compound the unlawfulness of the process followed and the HSF reserves its rights in this respect.

15. We look forward to the Committee's urgent response.

Yours faithfully

Francis Antonie
Director