**Briefing of the Justice Portfolio Committee on the Rome Statute of the International Criminal Court Act Repeal Bill, 2016 (the Bill)**

1. South Africa was one of the first signatories to Rome Statute of the International Criminal Court (the Rome Statute) and took steps to domesticate the Rome Statute in South Africa, by means of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002) (the International Criminal Court Act). South Africa recognises that the ICC has an important role to play in combatting international crimes and eliminating a culture of impunity in this regard. However, South Africa also wants to promote peace, stability, development and good governance in Africa through the peaceful resolution of all disputes. These disputes include disputes which are the subject of investigation by the International Criminal Court (the ICC) and in respect of which heads of state, heads of Government and other officials of the countries concerned are the subject of warrants of arrest issued by the ICC. The ability of South Africa to continue to resolve disputes in war ravaged countries has been hindered by the International Criminal Court Act and South Africa’s membership to the ICC. The International Criminal Court Act requires South Africa, which is a state party to the Rome Statute, to arrest persons, including incumbent heads of state, incumbent heads of government and other senior government officials accused of crimes against humanity and other serious crimes and to surrender them to the ICC for prosecution, which may adversely affect initiatives by South Africa to promote peaceful resolution of disputes.

2. South Africa also wants to give effect to international customary law, which recognises the immunity of certain persons in order to effectively promote dialogue and the peaceful resolution of conflicts, wherever they may occur, but particularly on the African continent. The Republic of South Africa has adopted the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001) (the DIPA), which confer immunity upon—

\* diplomatic missions and members of such missions, in accordance with the Vienna Convention on Diplomatic Relations, 1961, and consular posts and members of such posts, in accordance with the Vienna Convention on Consular Relations, 1963 (section 3 of the DIPA);

\* heads of state, special envoys and certain representatives (section 4 of the DIPA);

\* the United Nations in terms of the Convention on the Privileges and Immunities of the United Nations, 1946, specialised agencies and their officials in terms of the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, and organisations and their officials recognised by the Minister as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2) of the Act (section 5 of the DIPA); and

\* officials and experts of the United Nations, of any specialised agency and of any organisation, and representatives of any state, participating in an international conference or meeting convened in the Republic, as is provided for in the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, as the case may be, or provided for in an agreement or conferred upon them in terms of section 7(2) of the Act (section 6 of the DIPA).

The DIPA, also enacts into law the Convention on the Privileges and Immunities of the United Nations, 1946, the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963. The International Criminal Court Act was adopted shortly after the DIPA, and in effect negates the immunities and privileges provided for in the DIPA.

3. In *MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT V THE SOUTHERN AFRICAN LITIGATION CENTRE*(867/15) [2016] ZASCA 17 (15 MARCH 2016),the Supreme Court of Appeal held that although customary international law recognises that heads of states and other high ranking office bearers enjoy immunity from arrest and prosecution or other interference while visiting a foreign state, South Africa is bound in terms of it’s obligation in terms of the Rome Statute and the International Criminal Court Act, which remove such immunity.

4. International relations and international cooperation between states require an effective process of communication between states. It is important that states should be able to negotiate with each other freely and that those persons charged with such activities should be able to perform their functions freely without harassment by other states. These immunities are necessary to ensure free dialogue to resolve conflicts and peaceful cooperation and co-existence among states, an aspect recognised by the International Court of Justice (the ICJ) in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, where the ICJ remarked at paragraph. 75: “immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system”.

5. In order to ensure free dialogue and the resolving of conflicts, especially on the African continent and the mediation role of South Africa, such immunities should be reinstated. The mechanism to achieve this result, is the repeal of the International Criminal Court Act and the withdrawal of South Africa from the Rome Statute. In terms of Article 127 of the Rome Statute, a State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date. The Instrument of withdrawal from the Rome Statute was deposited with the United Nations Secretary-General on 19 October 2016. On 3 November 2016, the National Assembly referred the Declaratory Statement on the decision to withdraw from the Rome Statute of the International Court to the Portfolio Committee on Justice and Correctional Services for consideration and to report thereon, and to the Portfolio Committee on International Relations and Cooperation for consideration.

6. Provisions of Bill

6.1 Clause 1 of Bill

6.1.1 Clause 1(1) of the Bill repeals the International Criminal Court Act.

6.1.2 Clause 1(2), repeals section 13 of the South African Red Cross Society and Legal Protection of Certain Emblems Act, 2007 (Act No. 10 of 2007) (the SARC Act), which section provides that the provisions of the SARC Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the International Criminal Court Act, or as exempting any person from any duty or obligation imposed by the International Criminal Court Act or prohibiting any person from complying with any provision of the International Criminal Court Act. The repeal of this section is occasioned by its reference to the International Criminal Court Act, and does not impact on the operation of the SARC Act.

6.1.3 Clause 1(3) repeals section 20 of the Implementation of the Geneva Conventions Act, 2012 (Act No. 8 of 2012) (the Geneva Convention Act), which section provides that the provisions of the Geneva Convention Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the International Criminal Court Act, or as exempting any person from any duty or obligation imposed by the International Criminal Court Act or prohibiting any person from complying with any provision of the International Criminal Court Act.

6.2 Clause 2

Clause 2 gives effect to Article 127(2) of the Rome Statute, and provides for a transitional clause to deal with cooperation with the ICC, established by Article 1 of the Rome Statute, in connection with criminal investigations and proceedings in relation to which the Republic had a duty to cooperate and which commenced prior to the date on which the withdrawal became effective. In terms of this clause such proceedings must be dealt with and concluded in terms of the provision of the International Criminal Court Act, as if the Act has not been repealed.

6.3 Clause 3

Clause 3 provides for the short title and commencement. In terms of this clause the Bill will come into operation on a date fixed by the President by proclamation in the *Gazette*. The reason for this clause is to provide that the Bill will come into operation on an appropriate date after the formalities for withdrawal, as provided for in Article 127 of the Rome Statute, have been complied with.

7. When Cabinet approved the introduction of the Bill into Parliament, concerns were raised about the lack of domestic legislation criminalising international crimes (genocide, war crimes and crimes against humanity), which will result from the repeal of the International Criminal Court Act. A draft Bill providing for the criminalisation of international crimes was submitted to the JCPS Cabinet Committee to be dealt with at its meeting on 24 November 2016. The JCPS Cabinet Committee recommended that Cabinet notes that the draft Bill is work in progress and approves that the Bill be deferred to 2017, which recommendation was accepted by Cabinet at its meeting on 7 December 2016. The draft Bill is in the process of being finalised. The draft Bill aims to -

 (a) criminalise international crimes under the domestic law of the Republic;

(b) further regulate immunity in the Republic against prosecution for international crimes;

(c) afford extra-territorial jurisdiction to South African courts to adjudicate international crimes;

(d) provide for the investigation and prosecution of persons who commit international crimes;

(e) ensure that persons who are accused of international crimes may be extradited to other States;

(f) provide for the surrender of persons who are accused of international crimes to entities (which is defined as any international organisation, international tribunal, international court, or similar international body which has jurisdiction in respect of an international crime);

(g) provide for co-operation between the Republic and entities in respect of persons who are accused of having committed international crimes;

(h) effect various consequential amendments to other laws; and

(i) further regulate immunity from prosecution for the crime of torture.