

SUBMISSIONS TO PARLIAMENT

On behalf of

**The Council for the Advancement of the South African Constitution
(CASAC)**

**In re: THE IMPLEMENTATION OF THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT ACT REPEAL BILL [B23-2016]**

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GLOSSARY - LIST OF COMMON TERMS AND ABBREVIATIONS

REPEAL BILL	The Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill
ROME STATUTE	The Rome Statute of the International Criminal Court
ICC	The International Criminal Court
IMPLEMENTATION ACT	The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
COMMITTEE	The Portfolio Committee on Justice and Correctional Services
INSTRUMENT	The Instrument of Withdrawal from the Rome Statute of the International Criminal Court of 19 October 2016
DECLARATORY STATEMENT	Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court
EXPLANATORY MEMORANDUM	Explanatory Memorandum on South Africa's Withdrawal from the Rome Statute of the ICC
ACCOMPANYING MEMORANDUM	Memorandum on the Objects of the Rome Statute of the International Criminal Court Repeal Bill
CASAC	The Council for the Advancement of the South African Constitution
SALC	The Southern African Litigation Centre
DA	The Democratic Alliance
UN	United Nations
UNSC	United Nations Security Council
ICTY	The International Criminal Tribunal for the Former Yugoslavia
ICTR	The International Criminal Tribunal for Rwanda
DIRCO	Department of International Relations & Cooperation

I. INTRODUCTION

1. CASAC thanks the Committee for the opportunity to file the following written submissions on the Repeal Bill.
2. CASAC further requests an opportunity to make verbal presentations to the Committee, alternatively to the National Assembly, on the issues set out below.
3. CASAC submits that the Repeal Bill should not be adopted by Parliament, as it is deficient in procedure, form, and substance.
4. It is deficient in procedure as the Repeal Bill has been prematurely brought before Parliament, before sufficient deliberation and discussion at the levels of government, civil society, and the public.
5. It is deficient in form as, *inter alia*, the Repeal Bill fails to account for all the statutes which refer to or rely upon the Implementation Act. It also leaves an untenable and unconstitutional *lacuna* in South African law, as it means that genocide, crimes against humanity, and war crimes – the gravest and most terrible acts it is possible to commit – will no longer be crimes under South African law, wherever they have been committed.
6. Even the crime of apartheid will no longer be a crime in South Africa.¹

¹ The crime of apartheid is defined as a crime against humanity in Article 7(1)(j) of the Rome Statute, and is accordingly a crime in South Africa in terms of Part 2 of Schedule 1 to the Implementation Act.

7. It is deficient in substance as there is no rational, reasonable, nor constitutional reason why South Africa should withdraw from the ICC. There is no evidence that being a party to the Rome Statute has ever, or will ever, disadvantage South Africa in diplomatic or peace-making efforts across Africa.

8. In support of the above, these submissions deal with:
 - 8.1. The interest and nature of CASAC;
 - 8.2. Deficiencies in procedure & the prematurity of the Repeal Bill;
 - 8.3. The form and content of the Repeal Bill;
 - 8.4. The history of South Africa and the ICC;
 - 8.5. Whether South Africa should withdraw from the ICC? And
 - 8.6. Concluding submissions.

II. CASAC

9. CASAC is a juristic entity that was formed in 2010. It is a voluntary association operating as a non-governmental organisation. CASAC is an initiative to advance the Constitution as a platform for democratic politics and the transformation of society.

10. CASAC's principles are based on the founding values of the Constitution, including the rule of law, the principle of legality, the principle of accountability and respect for the doctrine of separation of powers.

11. There are a number of aspects in the controversy surrounding South Africa's relationship with the ICC which fall within CASAC's special areas of interest: the proper interpretation of the Constitution and international law, promoting respect for the separation of powers and for human rights, fighting against impunity both domestically and internationally, ensuring that the national executive complies diligently and punctiliously with its constitutional duty to implement national legislation, and ensuring that legislation is passed only after proper and rational consultation with the public, to ensure that it reflects the true will of the people.
12. Pursuant to these objectives, CASAC successfully intervened in the *Withdrawal Judgment* matter,² arguing in favour of the outcome that was eventually upheld by the High Court.
13. The High Court has declared that Parliament is the appropriate and constitutional decision-maker to determine whether or not South Africa should withdraw from the ICC. CASAC makes these written (and oral) submissions that it considers will be of assistance to the Committee.

III. PROCEDURAL DEFICIENCIES & PREMATURITY

14. It is premature for Parliament to consider the repeal of Implementation Act at this juncture.

² *Democratic Alliance v Minister of International Relations & Cooperation and Others (Council for the Advancement of the South African Constitution intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017) ("*Withdrawal Judgment*").

15. The Repeal Bill was tabled before the National Assembly on 3 November 2016, in the wake of Cabinet's decision to withdraw South Africa from the ICC.
16. The Instrument of Withdrawal was delivered to the UN Secretary-General on 19 October 2016, triggering South Africa's withdrawal in terms of international law³ within one year – that is, by 19 October 2017.
17. Notice of the introduction of the Bill was published in the Government Gazette on 3 November 2016.⁴ It was the explicit aim of the members of the executive supporting the Repeal Bill⁵ that the Bill would be passed by Parliament and come into effect on 19 October 2017.⁶
18. Cabinet's decision was held by the North Gauteng Division of the High Court to be unconstitutional and invalid on 22 February 2017.⁷ In accordance with the Court Order, the Instrument of Withdrawal was revoked on 7 March 2017.
19. But the timeframes in terms of which the Repeal Bill was brought before Parliament were truncated in order to meet the 19 October 2017 deadline.

³ In accordance with Article 127 of the Rome Statute, which states:

“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.”

⁴ http://www.justice.gov.za/legislation/notices/2016/20161103-gg40403_gen747-RomeStatue.pdf.

⁵ Being the Minister of Justice and International Relations (First Respondent), the Minister of Justice and Correctional Services (Second Respondent) and the President of the Republic of South Africa (Third Respondent).

⁶ *Withdrawal Judgment* at paras 58-60.

⁷ *Withdrawal Judgment* at para 84.

20. This is unreasonable and unconstitutional. It has prevented the full and proper discussion and debate of the Repeal Bill in wider society, which is a fundamental part of the law-making process. As the Constitutional Court stated in *Doctors for Life*:⁸

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”⁹

21. Laws that are adopted by Parliament without involving the public – even laws which are meritorious in substance – have been found by the Constitutional Court to be unconstitutional and invalid:

21.1. In *Doctors for Life*, the applicant applied directly to the Constitutional Court for an order declaring that the National Council of Provinces and the nine provincial legislatures had failed to comply with the constitutional obligations in terms of s 72(1)(a)¹⁰ and s 118(1)(a)¹¹ of the Constitution to

⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (“*Doctors for Life*”).

⁹ *Doctors for Life* at para 115.

¹⁰ Section 72(1) of the Constitution provides:

facilitate public involvement in their legislative processes in enacting certain statutes.

21.2. The Constitutional Court upheld the argument, finding that Parliament's duty to facilitate public participation is peremptory:

“What is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making'. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international-law right to political participation. As pointed out, that right not only guarantees the positive right to participate in public affairs, but it simultaneously imposes a duty on the State to facilitate

“The National Council of Provinces must-

- (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and**
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-**
 - (i) to regulate public access, including access of the media, to the Council and its committees; and**
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.”**

¹¹ Section 118(1) of the Constitution provides:

“A provincial legislature must-

- (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and**
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-**
 - (i) to regulate public access, including access of the media, to the legislature and its committees; and**
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.”**

public participation in the conduct of public affairs by ensuring that this right can be realised.”¹²

21.3. In *Land Access Movement*,¹³ the applicant contended that the Restitution of Land Rights Amendment Act 15 of 2014, which reopened the window for the lodgement of land claims under the Restitution of Land Rights Act 22 of 1994 by changing the cut-off date, had been adopted by the National Council of Provinces without facilitating adequate public involvement. The Constitutional Court upheld the complaint and reiterated the importance of public participation in the formation of legislation:

“The notion is a direct enunciation that South Africa’s democracy contains both representative and participatory elements. These elements are not mutually exclusive. Rather they support and buttress one another. This court has rejected the argument that the public need not participate in the legislative process as its elected representatives are speaking on the public’s behalf.

This court’s jurisprudence deals at length with why the Constitution imposes the obligation that Parliament facilitate public participation in the legislative process. It is beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right. In a concurring judgment in *Doctors for Life* Sachs J took the view that ‘(p)ublic involvement . . . [is] of particular significance for members of groups that have been the victims of processes of historical silencing’. He added:

‘It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be

¹² *Doctors for Life* at para 129.

¹³ *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* 2016 (5) SA 635 (CC) (“*Land Access Movement*”).

listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.”¹⁴

22. A Bill that is adopted by Parliament, but which has not, in its discussion, involved reasonable public participation will be struck down as unconstitutional regardless of its merits.

23. In this case, the unlawful inhibition of public participation concerning the Repeal Bill can be seen at three levels: government, civil society, and the broader public.

24. At a government level, even those members of the executive branch of government who initially championed the Repeal Bill no longer do so, but instead require further time to consider their position. On 2 March 2017, the Minister in the Presidency stated that Cabinet had decided to solicit the guidance of an inter-ministerial committee to determine whether to go ahead with SA’s exit from the International Criminal Court.¹⁵

25. While the final decision rests with Parliament, the views of the executive branch on this issue are of great importance.

¹⁴ *Land Access Movement* at paras 57-58.

¹⁵ “Cabinet appoints committee to look into ICC exit” *Business Day* 2 March 2017 (<https://www.businesslive.co.za/bd/national/2017-03-02-cabinet-appoints-committee-to-look-into-icc-exit/>).

26. CASAC accordingly suggests that it is appropriate for deliberation on the Repeal Bill to await the final outcome of the inter-ministerial committee established by Cabinet.
27. Furthermore, the short time frames within which submissions to Parliament had to be filed constitute a material constraint on what, and who, can make such submissions. This is neither reasonable nor constitutional.
28. The advertisement calling for submissions to Parliament was published on the Parliamentary Monitoring Group website on 14 February 2017. It came to the attention of CASAC on 15 February 2017.
29. The due date for submissions was initially 3 March 2017. It was then extended to 8 March 2017. No requests for extensions were allowed.
30. This is approximately three weeks to make submissions on an issue which is of not only national, but international, importance. Although CASAC has filed these submissions by necessity on 8 March 2017, this was only possible by limiting the scope of the research and submissions made.
31. There is no reason why more time cannot and should not be afforded for public involvement. As the Constitutional Court held in *Land Access Movement*:

“On a conspectus of all that is relevant, the adoption of the time line was a classic breach of what was held in *Doctors for Life*, that is '(t)he timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights

to the timetable'. In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real — and not merely assumed — urgency; the time truly required to complete the process; and the magnitude of the right at issue.”¹⁶

32. Other persons or entities may, and probably will, be prevented from making submissions at all within the current, impermissibly short, timeframes.

33. Thirdly, this is too short a period within which the public at large can reasonably be expected to make comments on the Repeal Bill, particularly those from vulnerable and disadvantaged communities generally.

34. It is unjustified to assume that such communities would have little interest in the Repeal Bill. On the contrary, they have a very significant interest, because it is communities like them, all over the world, and in particular in Africa, who could be deprived of justice if the ICC is undermined by, *inter alia*, the withdrawal of South Africa.

35. The purpose of the ICC is to provide justice when national systems fail to hold the perpetrators of the gravest crimes to account. The criminals are invariably the powerful in society. The victims, by contrast, tend overwhelmingly to be the poorest of the poor, and indeed the most marginalised and vulnerable.

36. Such was the case, for example, in the Darfur region of the Sudan, where approximately 300 000 men, women and children from minority ethnic groups

¹⁶ *Land Access Movement* at para 70. Emphasis added.

have died allegedly at the hands of, *inter alia*, militia at the behest of President Omar Al-Bashir.

37. A decision to withdraw from the ICC would mean that these 300 000 persons could, at least by the South African system, never have justice.

38. The Cabinet decision to withdraw from the ICC was based in part on Cabinet's view that heads of state should be immune to prosecution for their crimes. It may be that broader South African society will concur with this original Cabinet view.

39. But they may equally disagree with such impunity, and with the underlying rationale that the powerful should be privileged against the legal processes that apply to others.

40. The South African public should have a fair opportunity to present their views on this vital issue of law and justice. As matters stand, due to the prematurity and unnecessarily urgent nature of this consultative process, they have been denied such a chance.

Unfair, incomplete and/or misleading notice

41. A further concern is that the notices, advertisements and publications that sought to bring the Repeal Bill to the attention of the public may be regarded as incomplete and/or misleading.

42. The initial notice and invitation to comment on the Repeal Bill, received by CASAC on 15 February 2017, requested written submissions on the Repeal Bill only.

43. However, the advertisements in newspapers, and on the website of Parliament,¹⁷ go further and mention three different documents:

“The Committee further invites members of the public to comment on the:

- **Instrument of Withdrawal from the Rome Statute of the International Criminal Court, tabled in terms of section 231(2) of the Constitution, 1996;**
- **Declaratory Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court; and**
- **Explanatory Memorandum on South Africa's Withdrawal from the Rome Statute of the International Criminal Court.”**

44. It is significant that these additional instruments are brought before the public for comment:

44.1. They were not included in the initial advertisements calling for comment.

It thus appears that they are a belated addition.

44.2. The Instrument, and accordingly the Declaratory Statement and Explanatory Memorandum that accompanied it, have been held to be invalid in the *Withdrawal Judgement*.

¹⁷ Available at <https://www.parliament.gov.za/press-releases/justice-portfolio-committee-calls-for-inputs-international-criminal-courts-act-repeal-bill>.

45. This is not merely a matter of procedure, but of substance. The critical question inherent in any consideration of the Repeal Bill is: why would South Africa want to leave the ICC?

46. And the abovementioned three instruments give different justifications for South Africa's exit compared to that contained in the Preamble to the Repeal Bill and/or the Accompanying Memorandum.

47. The Preamble and the Accompanying Memorandum give as justification for the Repeal Bill that “[*South Africa*] wishes to give effect to the rule of international customary law which recognises the diplomatic immunity of heads of state in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent”.

48. The Declaratory Statement does refer to this reasoning, on the second page thereof. But the first, primary justification for withdrawal from the ICC is:

“Questions on the credibility of the ICC will persist so long as three of the five permanent members of the Security Council are not State Parties to the Statute. The Security Council has also not played its part in terms of Article 16 of the Rome Statute where the involvement of the ICC will pose a threat to peace and security on the African continent. There [are] also perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the Court’s relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others.”

49. The Declaratory Statement reiterates this sentiment in the conclusion in its penultimate paragraph:

“Also, there is an urgent need to assess whether the ICC is still reflective of the principles and values which guided its creation and its envisaged role as set out in the Rome Statute. The credibility and acceptability of the ICC to become the universally accepted institution for justice that will ensure the ideal of universality and equality before the law has not been realised and is under threat.”

50. These exact sentiments were repeated in the Powerpoint presentation made by DIRCO to the Committee on 31 January 2017.

51. The Declaratory Statement, and DIRCO’s presentation, raise different motivations for South Africa’s proposed exit from the ICC.

52. The Explanatory Memorandum, by contrast, contends that *“[w]ithin the African Union, the African Court of Justice and Human Rights in Arusha, the Republic of Tanzania, must play a crucial role in the fight against impunity. South Africa will work diligently to ensure that it is strengthened and its criminal chamber becomes operational as soon as possible”*.

53. None of the Repeal Bill, the Accompanying Memorandum, the Instrument, or the Declaratory Statement refers to, or places any reliance on, the African Court of Justice and Human Rights as a possible alternative to the ICC.

54. These differing motivations are dealt with in substance below.

55. But it must be stressed that there is also a procedural irregularity here, in that these reasons, which underpinned the initiation of the Repeal Bill, have not been brought to the attention of the public.

56. It is essential to the integrity of the public participation process that the public be informed of the true reasons why the executive branch seeks to adopt particular legislation. This principle applies *a fortiori* when – as is the case concerning the Repeal Bill – the facts as the basis for the withdrawal from the ICC (diplomatic considerations) lie exclusively within the knowledge of the executive branch.

57. A member of the public might have his or her attention drawn to the Declaratory Statement via the advertisements described above. But these request “*comment*” on the Declaratory Statement, and any member of the public would rightly conclude that it is impossible for the public to comment on these instruments. They are invalid. One cannot comment on an invalid document.

58. Not only are they invalid, but they contain the views – indeed, the decisions – of members of the executive, which the courts have held are unlawful as they were made without being informed by the necessary public participation.

59. Their inclusion taints the parliamentary and consultative procedures currently underway.

60. This is reinforced by paragraph 2 of the Memorandum on the Objects of the Repeal Bill, which is annexed to the Repeal Bill. It states:

“The Bill gives effect to a decision by Cabinet that the Republic of South Africa is to withdraw from the Rome Statute. There was consultation at ministerial level, and consultation will also take place during the Parliamentary process.”

61. This is wrong at almost every level:

61.1. There is no valid decision by Cabinet. Such decision was held to be unconstitutional and unlawful.

61.2. There was no valid consultation at ministerial level:

61.2.1. The consultation that led to the Instrument is no longer relevant, and occurred on the unconstitutional basis that it was for Cabinet to decide on South Africa’s exit from the Rome Statute;

61.2.2. Ministerial consultation on the Repeal Bill is still underway. As set out above, the inter-ministerial committee, headed by the Minister of International Relations and Cooperation, is still consulting. It remains unclear what the views of this committee will be.

61.3. Even if it were valid, “*consultation at ministerial level*” is in no way the kind of public involvement and participation that the Constitution envisages or requires. It means no more than that the relatively few members of Cabinet have been consulted.

61.4. As set out above, the consultation “*during the Parliamentary process*” has been unreasonably truncated, preventing the views of civil society and ordinary South Africans from being heard.

62. Yet, despite being manifestly incorrect, paragraph 2 of the Memorandum has served before all members of the public. It will mislead such members as to the manner and lawfulness of the process which brought the Repeal Bill before Parliament.

63. CASAC accordingly submits that the current process to involve, inform and debate the Repeal Bill with and amongst the public is inadequate and unconstitutional. The debates are happening on the basis of documents and facts that are not accurate and that will mislead the public.

64. If the Repeal Bill is adopted at the conclusion of such a flawed process, it will – on the basis of the principle enunciated in *Doctors for Life and Land Access Movement*, among others – fail to pass constitutional muster.

IV. THE FORM AND CONTENT OF THE REPEAL BILL

65. Even were it passed via the correct procedures and after full and proper public involvement, the current form of the Bill is defective in at least two ways.

66. First, it does not repeal and/or amend all statutes which refer to the Implementation Act.

67. The current version of section 1 of the Repeal Bill refers only to:

- 67.1. The Implementation Act itself;
- 67.2. Section 13 of the South African Red Cross Society and Legal Protection of Certain Emblems Act 10 of 2007; and
- 67.3. Section 20 of the Implementation of the Geneva Conventions Act 8 of 2012.

68. But there are many other statutory provisions that refer to the Implementation Act. For example, section 18(g) of the Criminal Procedure Act 51 of 1977 states that *“The right to institute a prosecution for any offence, other than the offences of . . . the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 . . . shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed”*.

69. It would be irrational and unconstitutional to repeal the Implementation Act, but not amend all other statutes which refer to or rely upon the Implementation Act.

70. The Repeal Bill accordingly cannot be adopted in its current form. Further legal research as to the other legislative instruments affected by the Implementation Act must be conducted.

71. Secondly, the repeal of the Implementation Act means that the acts of genocide, crimes against humanity and most war crimes¹⁸ will no longer be crimes under South African law. Even apartheid will no longer be a crime.¹⁹

72. This is, it is submitted, an unfortunate and indeed unconstitutional outcome.

73. It would be counter to the spirit and purport of the Constitution for acts like genocide to be decriminalised. These are not minor offences; they are widely considered to be the gravest crimes any human can commit.

74. It was precisely to bring to justice the perpetrators of these crimes that the Rome Statute was created. As stated by the Constitutional Court in *SALC*²⁰ at paragraph 54:

“The Rome Statute is an international agreement between the State Parties thereto, directed at the prosecution and sentencing of those responsible for the international crimes of war crimes, genocide and crimes against humanity. The importance of the international struggle to rid the world of these crimes is resoundingly stated in the Preamble in the following terms:

**‘The States Parties to this Statute,
Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,**

¹⁸ Certain acts that would, under the Implementation Act, be considered to be war crimes would still be in breach of the Geneva Conventions, and therefore be criminalised under section 5(1) of the Implementation of the Geneva Conventions Act 8 of 2012. But the list of such acts is much less extensive than those considered to be war crimes under the Rome Statute and the Implementation Act.

¹⁹ Article 7(1)(j) of the Rome Statute; Part 2 of Schedule 1 to the Implementation Act.

²⁰ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (2016) 3 SA 317 (SCA) (“*SALC*”).

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

...

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows’.”

(Emphasis added.)

75. It is submitted that any repeal of the Implementation Act that fails to put in place new offences pertaining to genocide, crimes against humanity and war crimes does not pass constitutional muster.

76. Such an act would transform South Africa, not for the better, but into a safe haven for the worst of humanity. All persons seeking to evade prosecution for genocide, crimes against humanity and war crimes would flee to South Africa.

77. And such criminals could not even be extradited. The principle of double criminality “requires that the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and requested state”.²¹ Section 1 of the Extradition Act 67 of 1962 provides that:

“extraditable offence’ means any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.”

(Emphasis added.)

78. If the Repeal Bill is adopted, a person guilty of crimes against humanity could therefore come to South Africa and South Africa would lack the tools to return him to face justice in his or her home country.²²

79. This would not only be unjust. It is submitted that it is so counter to the values and aims of the Constitution that any statute that resulted in such an outcome must be found to be irrational and invalid.

²¹ Dugard *International Law: A South African Perspective* (3rd ed.) at 215.

²² See as an example *Abel v Additional Magistrate, Cape Town and Others; S v Abel* 2002 (2) SACR 83 (C) (“*Abel*”), in which the applicant was charged with having committed certain federal offences in the United States of America. There was no explicit South African counterpart to the federal offences. The South African authorities averred that the factual allegations relied upon in the request for extradition clearly showed that the applicant was wanted to stand trial for conspiracy to murder and attempted murder – crimes which are known in South African law – and further that the requirement of double criminality was met if the offence was substantially similar in both countries. The court disagreed, holding that the wording of the charges did not support the State’s argument and that the relevant federal offences had no similar or substantially similar counterparts in the South African common law. Consequently the finding that the applicant was liable to extradition was set aside

V. THE HISTORY OF THE ICC AND SOUTH AFRICA

80. The Repeal Bill concerns South Africa's membership of the ICC. It is appropriate to begin by setting out the history and nature of the ICC.

81. In 1945, pursuant to World War II, the Nuremburg and Tokyo international military tribunals were established to try leaders of the Nazi and Japanese regimes for crimes against the peace, war crimes and crimes against humanity. It was subsequent to this that the United Nations adopted a resolution, on 9 December 1948, mandating the International Law Commission to begin work on the draft statute of an international criminal court.

82. Prior to the formulation of the Rome Statute, the need for *ad hoc* international criminal courts arose to respond to conflict and atrocities, including mass killings, massive systematic detention and rape of women and ethnic cleansing, being committed in Croatia, Bosnia and Herzegovina.

83. On 25 May 1993, the UNSC determined that the situation constituted a threat to international peace and security. The UNSC determined that the establishment of an *ad hoc* international tribunal, and the prosecution of the persons responsible for serious violations of international humanitarian law would enable its aim to be achieved and would contribute to the restoration of peace and halt the violations.

84. Acting in terms of Chapter VII of the UN Charter, the UNSC established an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. This was known as the ICTY, and was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.

85. On 8 November 1994, the UNSC made a similar determination concerning the genocide and systematic and widespread violations of international humanitarian law occurring in Rwanda. The ICTR was established, and was the first ever international tribunal to deliver verdicts in relation to genocide, to define rape in international criminal law and to recognise rape as a means of perpetrating genocide, and to hold members of the media responsible for broadcasts intended to inflame the public to commit acts of genocide.

86. The success of the ICTY and the ICTR fostered faith in an international criminal court. Both tribunals provided concrete evidence that an international criminal justice system could be efficient and successful. They provided models for procedure and a body of jurisprudence for the conviction of individuals for genocide, war crimes and crimes against humanity.

87. In 1998, delegates convened in Rome to debate and draft what became the Rome Statute.

88. South Africa played a significant role during the negotiations. South Africa's attitude towards international justice and what was to become the ICC was described by former Minister of Justice, Abdullah Mohammed Omar, as follows:

“The establishment of an International Criminal Court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the Apartheid system, the international criminal court should send a clear message that the international community was resolved that perpetrators of such gross human rights violations would not go unpunished.

. . . .

The Court was a necessary element for peace and security in the world and must therefore have inherent jurisdiction over the crimes of genocide, crimes against humanity, war crimes in international and non-international armed conflict and aggression. It should also have competence in the event of the inability, unwillingness or unavailability of national criminal justice systems to prosecute those responsible for grave crimes under the Statute, while respecting the complementary nature of relationships with such national systems”.

89. This further accords with the vision that former President Nelson Mandela had for South Africa's foreign policy:

“South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations. . . . The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources and the commitment that will allow

us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future.”²³

90. After five weeks of deliberation and debate, 120 countries voted to adopt the treaty on 17 July 1998, including South Africa as a founding member. Only 7 states voted against it and 21 states abstained from voting.

91. As noted by the Constitutional Court in *SALC*, it “*is a matter of pride to citizens of this country that South Africa was the first African state to sign the Rome Statute*”.²⁴ South Africa ratified the Rome Statute, thereby becoming the 23rd State Party, on 17 July 1998.

92. Following 60 ratifications, the Rome Statute entered into force on 1 July 2002 and the ICC was formally established.

93. On 16 August 2002, Parliament passed the Implementation Act, domesticating the Rome Statute, becoming the first African country to implement the Rome Statute through domestic legislation.

Reaction to South Africa’s withdrawal from the ICC

94. Given South Africa’s previous post-apartheid history as a champion of human rights, it is perhaps not surprising that the news of South Africa’s withdrawal from

²³ *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (“*Torture Docket Judgment*”) at para 1, quoting from Mandela “*South Africa’s Future Policy: New Pillars for a New World*” (1993) 72 Foreign Affairs.

²⁴ *SALC* at para 1.

the ICC was met with surprise and disappointment, both nationally and internationally.

95. The South African Human Rights Commission expressed disagreement with the decision to withdraw from the Rome Statute in order to bestow immunity onto sitting heads of states, noting that:

“The ICC represents an important mechanism for victims of human rights violations to access justice and to end impunity in the particular situation where their family and loved ones have been killed and maimed. In the absence of regional courts with criminal jurisdiction, the ICC provides justice internationally for those affected by egregious human rights violations, crimes against humanity, and for victims”.²⁵

(Emphasis added).

96. According to Human Rights Watch, speaking on behalf of many civil society group across Africa, the withdrawal is *“a slap in the face for victims of the most serious crimes and should be reconsidered”*.²⁶

97. The International Commission of Jurists – Kenya also condemned the decision to withdraw as an *“affront to decades of progress in the global fight against impunity.”*

98. Lawyers for Human Rights, has expressed concern that South Africa’s withdrawal from the Rome Statute is tantamount to an abandonment of the victims of the

²⁵ Available at <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court>.

²⁶ Available at <https://www.hrw.org/news/2016/10/22/south-africa-continent-wide-outcry-icc-withdrawal>.

world's most heinous crimes, who now be left without a voice “*and no place to seek justice*”. This is because “*South Africa has played an extremely important role in the development of the court and the expansion of universal jurisdiction for international crimes*”.²⁷ This sentiment was echoed by the African Centre for Justice and Peace Studies in New York.²⁸

99. The Kenya Human Rights Commission stated that “[t]he decision by Pretoria to withdraw from the Rome Statute is a response to a domestic political situation. Impervious to the country’s political history and the significance of the ICC to African victims and general citizenry, the South African leadership is marching the country to a legal wilderness, where South Africa will be accountable for nothing.”²⁹

100. Amnesty International responded to South Africa’s notice of withdrawal by calling it a “*deep betrayal of millions of victims worldwide*” and pleaded with South Africa not to “*abandon its role as a champion of human rights and justice*”.³⁰

101. The then-UN Secretary-General, Ban Ki-Moon, stated that “*I regret these steps, which could send a wrong message on these countries’ commitment to justice*”.³¹

²⁷ Available at <http://www.lhr.org.za/news/2016/south-africa%E2%80%99s-intention-withdraw-icc>.

²⁸ Available at <http://www.acjps.org/south-africa-continent-wide-outcry-at-icc-withdrawal/>.

²⁹ Available at <http://www.timeslive.co.za/politics/2016/10/22/SA%E2%80%99s-withdrawal-from-ICC-a-%E2%80%98slap-in-the-face%E2%80%99-for-victims%E2%80%9A-African-organisations-say>.

³⁰ Available at <http://www.amnestyusa.org/news/press-releases/south-africa-decision-to-leave-international-criminal-court-a-%E2%80%98deep-betrayal-of-millions-of-victims>.

³¹ Available at <http://www.un.org/apps/news/story.asp?NewsID=55427#.WL2b9vmGOUk>.

102. Other organisations that condemned the decision to withdraw include:

- 102.1. Parliamentarians for Global Action;
- 102.2. Institute for Security Studies;
- 102.3. The Legal Resources Centre;
- 102.4. The Southern Africa Litigation Centre;
- 102.5. The South African Law Commission; and
- 102.6. The International Centre for Transitional Justice.

103. It is clear from the above that South Africa's notice of withdrawal led to a dramatic shift in South Africa's standing in the international community. South Africa eroded from being a leader and advocate of international justice, to being the first African state not currently being a site of investigation to leave the ICC, opening the door for other states to follow.

104. It is significant that one of the only two other African states to decide to leave the ICC – the Gambia – reversed its decision as soon as a democratically elected leader took power.³² It was one of President Barrow's first official actions after winning elections against then-military strongman Yahya Jammeh.

105. Burundi, the sole other State to formally withdraw from the ICC, did so not on a principled basis, but because Burundian President Pierre Nkurunziza was going to be indicted for political violence relating to his attempts to secure himself an unconstitutional third term in power.

³² Available at <http://www.africanews.com/2017/02/09/the-gambia-will-remain-in-the-icc-president-barrow-confirms/>.

106. As Human Rights Watch reported:

“The decision to withdraw came after the United Nations Human Rights Council resolved, on September 30, to create a commission of inquiry into human rights abuses in Burundi since April 2015 that would identify alleged perpetrators and recommend steps to guarantee that they are held accountable.

. . . .

The ICC is meant to act as a court of last resort, stepping in only when national courts cannot or will not prosecute the most serious international crimes. Hundreds of people have been viciously tortured, killed, raped, or disappeared in Burundi since 2015. But the Burundian justice system, deeply corrupt and manipulated by ruling party officials, almost never conducts credible investigations or brings those responsible for these crimes to justice. Hundreds of arbitrarily arrested people have been detained on trumped-up charges.”³³

107. The organisations united under the banner of the International Federation for Human Rights reacted to the Gambia’s decision, and to the *Withdrawal Judgment*, by stating:

“These Gambian and South African decisions also confirm that the announced massive African withdrawal from the ICC is above all rhetoric. Botswana, Burkina Faso, Ivory Coast, Democratic Republic of Congo, Ghana, Lesotho, Mali, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania Tunisia and Zambia are among those that have reaffirmed their support for the ICC. Together with Liberia and Cape Verde, many of those countries also pushed back against [the] adoption of a so-called ‘ICC withdrawal strategy’ at the last African Union summit in January.”³⁴

³³ Available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>.

³⁴ Available at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/gambia-and-south-africa-to-remain-in-the-international-criminal-court>.

108. Indeed, as shall be demonstrated below, the ICC is neither structurally, nor in practice, biased against African states.

109. It is, in fact, a tool that African states, more than any other region of the world, have championed and supported in a quest for justice across the continent.

VI. WHY SHOULD SOUTH AFRICA WITHDRAW FROM THE ICC?

110. This is the critical question that lies at the heart of the Repeal Bill.

111. Three rationales, jointly or individually, have been advanced in support of withdrawal:

111.1. That membership of the ICC, and the duty to arrest and/or prosecute that goes with it, prevents South Africa from carrying out its diplomatic duties as a peacemaker in Africa;

111.2. That the ICC has proven itself to be biased against African nations; and

111.3. That a credible alternative exists in the African Court of Justice.

112. Each is dealt with in turn.

Peace versus justice

113. The first alleged reason for withdrawal is succinctly summarised in the Accompanying Memorandum: That South Africa is “*hindered*” by the obligations enshrined in the Implementation Act, “*even under circumstances where the Republic of South Africa is actively involved in promoting peace, stability and dialogue in those countries*”.

114. Withdrawal, in other words, would allow South Africa “*to effectively promote dialogue and the peaceful resolution of disputes wherever they may occur, but particularly on the African continent*”.

115. South Africa is no stranger to the potential conflict between peace and justice. In *AZAPO*³⁵ the Constitutional Court had to consider the constitutionality of the Truth and Reconciliation Commission, which granted amnesty to those guilty of political crimes during apartheid. The Constitutional Court stated at paragraph 19:

“For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a 'democratic society based on freedom and equality'. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming and, if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.”³⁶

³⁵ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) (“AZAPO”).

³⁶ See also Swart “*Sorry seems to be the hardest word: Apology as a form of symbolic reparation*” (2008) 24 *SAJHR* generally.

116. The problem with this ground of justification is that there is no evidence whatsoever to support it. The difficult choices which were assessed in, *inter alia*, *AZAPO* do not arise with regard to this matter.
117. All evidence points to the fact that South Africa has played, and continues to play, an important and successful role as a diplomatic interlocutor on the African continent despite being a member of the ICC.
118. Notably, in the affidavits filed in the *Withdrawal Judgment* matter, the respondents representing the executive branch were unable to point to a single example of when South Africa's mediation efforts were undermined by virtue of its membership of the ICC.
119. This is despite the fact that South Africa has been a member of the ICC for 15 years, and that it has engaged in multiple diplomatic and/or mediation missions during that time.
120. It is highlighted that South Africa's duties under the Rome Statute would be triggered only if the accused person enters or is likely to enter South African jurisdiction, among other restraining factors.³⁷

³⁷ *Torture Docket Judgment* at paras 30-32; 61-64.

121. Accordingly, as diplomatic efforts in a foreign country invariably occur on the soil of that country, potential conflicts between the ICC and diplomatic undertakings simply do not arise.

122. This can be illustrated by reference to South Africa's peace-making role in the two African countries that have proven themselves to be no friend of the ICC: Sudan and Burundi.

123. Concerning Sudan:

123.1. Sudan has, for most of the 61 years since its independence, been engulfed in civil conflict. The genesis of the current conflict is a war that began in 1983 between the Government of Sudan and the Sudan's People's Liberation Movement/Army, propelled by disputes over resources, power, the role of the religion in the state and self-determination.

123.2. South Africa has in recent years played a critical role in regional efforts to manage these recurring conflicts, most notably through former President Thabo Mbeki's chairmanship of the African Union High Level Panel on Darfur ("HLP-D") and the African Union High Level Implementation Panel for Sudan ("*HLIP-S*").

123.3. The HLP-D was established at the instance of the African Union Peace and Security Council³⁸ in February 2009, soon after the conclusion of the Comprehensive Peace Agreement between the Government of Sudan and the Sudan People's Liberation Movement in 2005.

123.4. The Council took issue with the warrant of arrest issued out of the ICC for President al-Bashir and the HLP-D was mandated to submit recommendations on "*accountability and combating impunity, on the one hand, and reconciliation and healing on the other*".³⁹

123.5. The HLP-D conducted hearings and other investigations over a six month period and issued its report in October 2009.⁴⁰ The report notes that serious crimes in violation of international law had been committed in Darfur and that Sudan had failed to ensure justice for the crimes to date. It went on observe that:

"[M]any people in Sudan 'are strongly opposed to any suspension of the ICC action, seeing it as an escape route for the Government from the demands of justice,' and that displaced Darfuris "welcomed the prospect of ICC prosecutions as the only appropriate mechanism for dealing with the situation they have suffered in Darfur.""⁴¹

123.6. The HLP-D remained neutral on the question of a prosecution in the International Criminal Court, but recommended domestic steps toward an

³⁸ African Union Peace and Security Council, 142nd meeting, July 21, 2008, Addis Ababa, Ethiopia, PSC/MIN/Comm(CXLII) Rev.1.

³⁹ *Ibid.*

⁴⁰ African Union Peace and Security Council, "Report of the African Union High-Level Panel on Darfur (Darfur: The Quest for Peace, Justice and Reconciliation)," Addis Ababa, October 2009.

⁴¹ *Ibid* paras 242 and 240.

“integrated justice and reconciliation response” involving a tribunal of Sudanese and non-Sudanese judges to try serious violations of international law in Darfur. Related recommendations included the removal of legal and *de facto* immunities and establishing a truth, justice and reconciliation commission to establish the nature, causes and consequences of the conflict in Darfur from 2002 to 2009.⁴²

123.7. The report was endorsed by the African Union in October 2009, leading to the establishment of the HLIP-S,⁴³ also chaired by former President Mbeki, to assist in the implementation of the recommendations and, broadly, to assist with the implementation of the Comprehensive Peace Agreement. The latter agreement laid the foundation for the cessation of hostilities, committing the parties to a referendum in southern Sudan on the question of its secession and establishing interim governance structures and principles pending the outcome of the referendum.

123.8. The HLIP-S oversaw the implementation of the referendum in South Sudan in 2011 and continues, under the chairmanship of Mbeki, to play a dominant role in mediating the continuing conflicts between the various groups. It has recently brokered a Roadmap Agreement, which was signed on 21 March 2016 by various opposition groups and provides concrete steps toward a peace settlement.

⁴² *Ibid* para 300.

⁴³ African Union communiqué, Peace and Security Council, 207th Meeting at the Level of the Heads of state and government, October 29, 2009, PSC/AHG/Comm.1(CCVII).

123.9. At no point in the above process, even when President Bashir was unlawfully allowed to exit South Africa in June 2015, was any suggestion made that the HLP-D or the HLIP-S processes were being undermined by South Africa's membership of the ICC.

124. Concerning Burundi:

124.1. President Nelson Mandela served as the chief mediator in talks directed at achieving a cease fire in the Burundian civil war in 2000. The talks culminated in a peace agreement signed at Arusha in August 2000,⁴⁴ by some but not all of the major parties to the conflict.

124.2. Jacob Zuma, then Deputy-President, took over Nelson Mandela's responsibilities in 2000 and was ultimately successful in brokering an agreement between all groups. A global ceasefire agreement was signed on 16 November 2003.⁴⁵

124.3. The South African Government shouldered the costs of these negotiations and also provided peacekeeping personnel to ensure a peaceful transition.

124.4. Unfortunately, political violence returned to Burundi in April 2015, when the President of Burundi, Pierre Nkurunziza, announced that he intended to run for a third term as president, in defiance of Burundi's constitution.

⁴⁴ Arusha Peace and Reconciliation Agreement for Burundi (28 August 2000).

⁴⁵ [Global Ceasefire Agreement between Burundi and the CNDD-FDD](#) (20 November 2003)

124.5. Widespread protests against President Nkurunziza were brutally suppressed. Human Rights Watch, and other international organisations, have reported on the extreme levels of lawlessness taking place in Bujumbura, including the killing, abducting, torturing, and arresting of Burundian nationals by government forces.⁴⁶

124.6. The African Union reacted to the crisis by requesting, *inter alia*, President Jacob Zuma to lead a high-level delegation to try to resolve matters through dialogue. A media statement by DIRCO, dated 23 February 2016, records:

“President Zuma to lead an African Union High-Level Delegation of Heads of State on a Visit to Burundi

At the request of the Chairperson of the African Union, H.E. Idriss Deby Itno, President of the Republic of Chad, President Jacob Zuma will lead an African Union High-Level Delegation of Heads of State and Government to Bujumbura on 25-26 February 2016.

The African Union Summit decided on 31 January 2016 that, regarding Burundi, an inclusive political dialogue must be supported under the auspices of the President of the Republic of Uganda, H.E. Mr Yoweri Kaguta Museveni.

The Summit decided, further, to dispatch a High-Level Delegation to meet with the highest authorities of the Republic of Burundi, as well as with other Burundian stakeholders, to hold consultations on the inclusive inter-Burundian dialogue.

The members of the High-Level Delegation, each representing their respective Regional Economic Community, include:

⁴⁶ Human Rights Watch “Burundi: Abductions, Killings, Spread Fear” available at <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear>.

- H.E. President Jacob Zuma of South Africa;
- H.E. President Mohamed Ould Abdel Aziz of Mauritania;
- H.E. President Macky Sall of Senegal;
- H.E. President Ali Bongo Ondimba of Gabon; and
- H.E. Mr Hailemariam Desalegn, Prime Minister of Ethiopia.

President Zuma will be supported by the Minister of International Relations and Cooperation, Ms Maite Nkoana-Mashabane.”⁴⁷

125. Again, there has been no suggestion at any point that South Africa’s membership of the ICC was a disadvantage in this enterprise.

126. It is noteworthy that Senegal – one of the ICC’s strongest supporters in Africa⁴⁸ - is also included as a representative in the High-Level Delegation.

127. It is simply not credible that South African and/or Senegal would play such significant roles in the most sensitive and important of diplomatic missions without a whisper of protest by either Sudan or Burundi, if their membership of the ICC was truly a disadvantage.

128. And more generally, since 2004, South African forces have served in 14 international peace operations,⁴⁹ playing a critical role in peacekeeping in conflict situations in Burundi, the Democratic Republic of Congo, the Central African Republic and Darfur, among others.

⁴⁷ Available at <http://www.dirco.gov.za/docs/2016/buru0123.htm>.

⁴⁸ See, *inter alia*, <https://www.businesslive.co.za/news/latest-news/2016-10-24-senegalese-icc-official-asks-sa-to-rethink-its-move-to-withdraw-from-the-court/>.

⁴⁹ T. Neethling, “*The SANDF as an Instrument for Peacekeeping in Africa*” *Journal for Contemporary History* 36:1 (2011).

129. The foremost basis on which withdrawal from the ICC is mooted is accordingly without substance.

The ICC's supposed bias against African states

130. The argument that the ICC has an "anti-African bias" does not appear from the Repeal Bill or the Accompanying Memorandum.

131. It does appear, however, in the Declaratory Statement, and in the presentations that DIRCO has previously made to the Committee. It accordingly requires consideration.

132. To assess this argument, the ICC procedure for investigating and prosecuting persons, and the decision makers involved in such procedure, must be analysed and understood.

133. African States comprise the largest category of all members of the ICC. Of the 124 State Parties, 34 are African. 19 State Parties are Asian-Pacific states, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western Europe and other states (like Canada).

134. Most of the countries in the world, and most African states, are members of the ICC. It represents a remarkable global consensus on international justice and international crimes.

135. The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not, are unwilling or unable to do so genuinely.

136. The principle of complementarity resides in Article 1 and Article 17(1) of the Rome Statute. Article 1 provides:

“An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

(Emphasis added.)

137. Article 17(1) of the Rome Statute entrenches the principle of complementarity. It provides in relevant part:

“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”.

138. As the Constitutional Court held in the *Torture Docket Judgment* at paragraph 30:

“International criminal law and the ICC system in particular are premised on the principle of complementarity. States parties may take the lead in investigating and prosecuting international crimes. The ICC will only undertake investigations and prosecutions as a court of last resort where states parties are unwilling or unable to do so. The primary responsibility to investigate and prosecute international crimes remains with states parties.”⁵⁰

139. The Constitutional Court continued – significantly – in paragraph 32:

“The need for states parties to comply with their international obligation to investigate international crimes is most pressing in instances where those crimes are committed by citizens of and within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity. If an investigation is not instituted by non-signatory countries in which the crimes have been committed, the perpetrators can only be brought to justice through the application of universal jurisdiction, namely the investigation and prosecution of these alleged crimes by states parties under the Rome Statute”.

(Emphasis added.)

140. 18 Judges serve on the ICC, of which, currently, 4 are African (from Kenya, Botswana, Nigeria, and the Democratic Republic of Congo). Judge Navanetham Pillay of South Africa also served on the ICC, from 2003 to 2008, before she took up her position as the UN High Commissioner for Human Rights.

141. The Presidency of the ICC consists of:

141.1. Judge President Silvia Fernandez de Gurmendi, from Argentina;

⁵⁰ See also Dugard International Law: A South African Perspective (3rd ed.) at 200-201.

141.2. Judge Vice-President Joyce Aluoch, from Kenya; and ,

141.3. Judge Vice-President Kuniko Ozaki from Japan.

142. The Prosecutor of the ICC is African: Fatou Bensouda, from the Gambia. She has been the ICC's chief prosecutor since June 2012, prior to which she served as the Gambia's Minister of Justice.

143. Both the Prosecutor and all Judges are required, and their offices designed, to be completely independent and impartial.

144. There are numerous safeguards in place in the Rome Statute to ensure that investigations and prosecutions occur only when, after a fair and full examination of all facts, there is genuine cause therefor. Article 15 of the Rome Statute provides in relevant part:

“1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the

Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”

145. In other words, the Prosecutor and the Judges serve as checks and balances on each other.

146. Judges can never initiate investigations; only the Prosecutor can do so. However, if the Prosecutor wishes to do more than conduct a preliminary examination of a case, she must obtain authorisation from the Pre-Trial Chamber, which will only be granted if sufficient facts favouring an investigation are proven.

147. Currently, 10 countries are the subject of preliminary examination by the Prosecutor. Only 4 of these (Burundi, Gabon, Guinea, and Nigeria) are African.

148. Palestine is also the subject of a preliminary examination, as is the conduct of the armed forces of the United Kingdom in Iraq.

149. 9 countries are the sites of active investigations: Georgia, the Central African Republic (“*CAF*”) (for two separate cases), Mali, Cote D’Ivoire, Libya, Kenya, Sudan, Uganda, and the Democratic Republic of the Congo (“*DRC*”). All but Georgia are African nations.

150. It is critical to understand, however, how these countries came to be before the ICC. Article 13 of the Rome Statute provides three ways by which crimes committed can be investigated and ultimately prosecuted by the ICC.

151. First, by self-referral.

152. 4 of the 8 African nations – the DRC, Uganda, Mali, the CAR (on both occasions) – referred themselves to the ICC.

153. The ICC's greatest involvement in Africa has thus been at the instance of African countries themselves.

154. Obviously, if an African country requests the help and assistance of the ICC, and the ICC agrees to assist such a country, bias against such African country cannot be argued.

155. Secondly, a case can be referred to the ICC by the UNSC.

156. The UNSC requires at least 9 votes (out of the 15 UNSC members) for a motion to be passed. It is thus not possible for powerful nations with permanent seats on the UNSC to refer cases or countries to the ICC without majority support from nations around the world.

157. To date, referral by the UNSC has only happened twice in Africa: Sudan and Libya.

158. In both circumstances, all African countries serving as members of the UNSC supported the referral.

159. Algeria, Tanzania and Benin backed the Sudan referral, while Gabon, Nigeria and South Africa supported the Libyan referral.

160. Again, it is submitted that there is no evidence of anti-African bias here, else there would not be unanimous support by African countries.

161. Thirdly, investigations can be initiated by the Prosecutor, in terms of the process described above.

162. Only two investigations, in Kenya and Cote d'Ivoire, were initiated in this way. Both of these countries experienced widespread violence and disruption, such that an investigation by the Prosecutor cannot be said to be unjustified. In the case of the charges against President Kenyatta of Kenya, charges were subsequently dropped.

163. There is accordingly no basis on which an argument that the ICC is biased can be sustained.

164. Neither the State Parties, nor the Judges, nor the Prosecutor, nor the procedures of the ICC, nor even the manner in which African countries have

been investigated by the ICC, demonstrate any evidence of bad faith or partiality.

No credible alternative: The African Court of Human and People’s Rights

165. Although not explicitly stated in the Repeal Bill or Accompanying Memorandum, it appears from, *inter alia*, the affidavits filed on behalf of the executive in the *Withdrawal Judgment* matter that the executive envisages that a regional African court will take over the role of the ICC in ensuring that perpetrators of war crimes and crimes against humanity are brought to justice.

166. But there is no African court that is in a position to do so.

167. The leading candidate to replace the ICC is the African Court on Human and People’s Rights (“ACHPR”). The ACHPR was established in terms of the 1998 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (“*the Protocol*”), which conferred on it jurisdiction to determine disputes concerning the interpretation and application of the African Charter on Human and People’s Rights (“*the Charter*”), the Protocol and any other relevant human rights instrument ratified by the State in question.

168. The ACHPR does not, however, have jurisdiction over criminal matters.

169. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“*the Malabo Protocol*”) would create such jurisdiction, extending the ACHPR’s jurisdiction to 14 crimes (including genocide, crimes against humanity and war crimes). This would create the African Court of Justice and Human Rights referred to in the Explanatory Memorandum.

170. If operational, the jurisdiction of this Court would overlap (theoretically) with that of the ICC.

171. There are however two major obstacles to the ACHPR serving as an African substitute for the ICC.

172. First, the Malabo Protocol will only enter into force when it has been ratified by fifteen states. To date, only five countries have done so.⁵¹

173. Significantly, South Africa has not ratified the Malabo Protocol.

174. The claim in the Explanatory Memorandum that “*South Africa will work diligently to ensure that [the ACHPR] is strengthened and its criminal chamber becomes operational as soon as possible*” is thus revealed to be without substance. If this was the genuine intention of the drafters of the Explanatory Memorandum, Parliament would be debating the Malabo Protocol, not the Repeal Bill.

⁵¹ The five countries are Benin, Burkina Faso, Congo, Libya, and Mali.

175. There is no telling when the Malabo Protocol will come into force, and until it does, the ACHPR has no criminal powers whatsoever.
176. The delay in the ratification of the Malabo Protocol is clear when compared to the Rome Statute. The Rome Statute was adopted in July 1998 and came into force, with 60 ratifications, in July 2002. In other words, within four years, it obtained the necessary ratifications to become operational.
177. The Malabo Protocol, by contrast, was adopted in June 2008.
178. It has now been almost nine years, and the Malabo Protocol has only been ratified by a third of the required states (five of fifteen). The evidence suggests that it will be many years, even decades, before the Malabo Protocol ever comes into force.
179. There is accordingly no African alternative for the ICC, nor is there likely to be one in the future.
180. Furthermore, the Malabo Protocol is critically different from the ICC in at least one respect: it provides complete immunity to heads of government, heads of state and other senior state officials.
181. Thus, the ACHPR will only be able to try perpetrators where they are not associated with the government of a member state. This limitation will almost

certainly render many future atrocities non-justiciable, and leave millions of innocent victims deprived of justice.

VII. CONCLUSION

182. For all of the above reasons, it is submitted that Parliament should reject the Repeal Bill *in toto*.

183. A proper and lawful procedure, allowing for full public participation, has not been followed in the consideration of the Repeal Bill. To adopt the Repeal Bill is a radical move, which requires the most careful possible consideration.

184. In form, it contains many omissions and unacceptable *lacunae*, including that it will mean that the crimes of genocide, crimes against humanity, and war crimes are no longer illegal in South Africa.

185. And in substance, it is an unfortunate day for South Africa when it chooses not to support the only international judicial mechanism that can hold those guilty of the gravest and most heinous of crimes to account.

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