# SUBMISSION TO THE PORTFOLIO COMMITTEE ON DEFENCE AND MILITARY VETERANS:

## Implementation of the Geneva Conventions Bill [B10-2011]

**Submitted by the Southern Africa Litigation Centre (SALC), Professor Max du Plessis and Christopher Gevers**

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## Introduction

1. The Southern Africa Litigation Centre (SALC), Professor Max du Plessis and Mr Christopher Gevers welcome the opportunity to submit comments on the Implementation of the Geneva Conventions Bill (the Bill) to the Portfolio Committee on Defence and Military Veterans (Portfolio Committee).

2. SALC, an NGO based in Johannesburg, promotes human rights and the rule of law through litigation support and training. It monitors international criminal law and its enforcement and development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their international legal obligations and through litigation and advocacy encourages them to give effect to these obligations by: Ensuring adequate legal frameworks are in place to accommodate the investigation and prosecution of international crimes; ensuring domestic courts and prosecuting authorities have the capacity to try perpetrators of international crimes; ensuring that indicted and suspected criminals when found within their borders are arrested and tried; or extradited to capable and willing jurisdictions.

3. Professor Max du Plessis is associate professor of law at the University of KwaZulu-Natal, Durban, senior research associate in the International Crime in Africa Programme at the Institute for Security Studies, and a practising advocate at the KwaZulu-Natal Bar with a practice predominantly in international and constitutional law.

4. Christopher Gevers is a lecturer in law at the University of KwaZulu-Natal, Durban, and formerly worked for Amnesty International and the International Crisis Group.

## Purpose and Structure of Submissions

5. The preamble to the Bill states that its purpose is three-fold: to enact the Geneva Conventions and Protocols additional to those Conventions into law; to ensure prevention and punishment of grave breaches and other breaches of the Conventions and Protocols; and to provide for matters connected therewith.

6. The Bill seeks to ensure that South Africans and non-South Africans comply with all aspects of the Geneva Conventions during armed conflicts. More importantly it seeks to ensure that those responsible for breaches of the conventions, regardless of where they occur or by whom they are committed, will be held criminally liable in South Africa.

7. These submissions focus on the ability of the Bill to ensure that the offences it domesticates into South African law are dealt with effectively. The submissions are motivated by a concern to ensure that the primary objective of the Bill – the prevention and punishment of Convention breaches – is realized.

8. The submissions will firstly, highlight issues that the Portfolio Committee ought to be aware of and that may not have been considered during the drafting process. Secondly, and against this backdrop, the submissions will provide sectional commentary on those provisions of the Bill that are potentially problematic.

## Interaction of the Bill with the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

9. South Africa, unlike the majority of states that have enacted legislation implementing the Geneva Conventions, is doing so after it domesticated the Rome Statute of the International Criminal Court (Rome Statute). South Africa enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) in 2002. The ICC Act

provides for a framework to allow for the effective investigation and prosecution of war crimes, crimes against humanity and genocide.

10. In respect of war crimes the Rome Statute, the provisions of which have been wholly incorporated into our law through the ICC Act,[1] recognizes breaches of the Geneva Conventions[2] as war crimes. Article 8(2)(a) of the Rome Statute, in relation to armed conflicts of an international character, defines war crimes as–

> "*Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*
>
> *(i) Wilful killing;*
> *(ii) Torture or inhuman treatment, including biological experiments;*
> *(iii) Wilfully causing great suffering, or serious injury to body or health;*
> *(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
> *(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;*
> *(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*
> *(vii) Unlawful deportation or transfer or unlawful confinement;*
> *(viii) Taking of hostages."* (Emphasis added)

11. In relation to non-international armed conflicts and in terms of Article 8(2)(c) of the Rome Statute, war crimes also include–

> *"serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:*
>
> *(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
> *(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;*
> *(iii) Taking of hostages;*
> *(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.*" (Emphasis added)

[1] Part 3 of Schedule 1 to the ICC Act.

[2] It is important to note that not all grave breaches and breaches of common article 3 are included in article 8 of the Rome Statute.

12. Because South African law already recognizes breaches of the Geneva Conventions as war crimes and allows for their domestic prosecution, there will inevitably be overlaps between the ICC Act and the Bill, both of which seek to prevent and punish the commission of war crimes. It is noted that section 19 of the Bill provides that –

> *"provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act"*

13. However to avoid the Bill "limiting, amending, repealing or otherwise altering any provision" of the ICC Act, it is submitted that the Portfolio Committee should ensure that unnecessary inconsistencies between the two pieces of legislation are avoided. The two Acts must complement each other given that the ultimate objective of both laws is to ensure impunity for the commission of international crimes is avoided. It is therefore submitted that harmonization between both laws must be given due regard.

14. During the course of these submissions, these inconsistencies will be highlighted and recommendations made in this regard.

**Retrospective application of the Bill**

15. It is so that in both South African and international law a presumption against retrospective application of criminal norms exists. Section 35(3)(l) of the South African Constitution, reflecting the accepted legal principle *nullum crimen sine lege*, which guards against retrospective criminalization, provides that every accused has a right to a fair trial which includes the right-

> "*not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted*".

16. The presumption against retrospectivity however is applicable only in instances in which a new offence is created. Its observance is therefore subject to the qualification that offences

that were, at the time of their commission, unlawful under international law and subsequently criminalized on a later date, will not offend section 35(3)(l) of the Constitution.

17. The retrospective application of the Bill will only offend section 35(3)(l) if it is shown that the offences in question were not considered to be offences under international customary law at the time of its commission. In relation to the offences provided for in the Bill it is submitted that the provision of retrospective application is not equivalent to the retroactive creation of new law and therefore, as will be demonstrated below, will not be inconsistent with the Constitution or international law.

18. The enactment of legislation in South Africa to allow the prosecution of 'war crimes' in South Africa merely empowers South African courts to utilize a jurisdiction that for many years has already been available to them under international law. That jurisdiction is commonly known as "universal jurisdiction".

19. In support of the proposition above is the following:

    a. In *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No 3)* [1999] 2 WLR 872 (HL); [1999] 2 All ER 97 (HL), the House of Lords had been grappling with whether the crimes Pinochet had been charged with in Spain (which he had committed in Chile), were 'extradition crimes' for the purposes of the UK Extradition Act. Contentiously, the majority found that for his crimes to be extradition crimes for the purposes of the Act, they had to be crimes under UK domestic law at the date they were committed.

    b. Lord Millett disagreed. At 911F-913B of the judgment Lord Millett found that torture had become a crime attracting universal jurisdiction long before the 1984 Torture Convention. His Lordship argued that the jurisdiction of the English criminal courts is usually statutory, but is supplemented by the common law, including customary international law. Thus, to Lord Millett, the English Courts had and always had extra-territorial criminal jurisdiction in respect of crimes that attract

universal jurisdiction. Since torture was such a crime, the UK courts did not have to rely on the Criminal Justice Act's incorporation of the Torture Convention to punish torturers.

c. Furthermore, the *Eichmann* case (1968) 36 ILR 5 is further authority for the proposition that while domestic courts might be given express jurisdiction to prosecute international crimes by a national statute, that express conferral of jurisdiction is not necessary for the court to exercise jurisdiction over the offender. That is because the court in any event has that jurisdiction on the international law basis of universal jurisdiction (a basis or rule of jurisdiction which is certainly part of customary international law, and which is therefore part of our common law through s 232 of the Constitution). At para 12 of the Eichmann judgment the following was said:

> "*The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations ('delicti juris gentium'). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal*".

d. This dichotomy between the national and international bases for the court's jurisdiction is also apparent at para 16 of the judgment:

> "*We have said that the crimes dealt with in this case are not crimes under Israeli law alone, but are in essence offences against the law of nations. Indeed, the crimes in question are not a free creation of the legislator who enacted the law for the punishment of Nazis and Nazi collaborators, but have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes against the law of nations.*"

e. Further in that paragraph the Court made it clear that there are in fact two bases for jurisdiction: national and international –

> "*The 'crime against the Jewish people' under section 1 of the Israeli Law constitutes a crime of 'genocide' within the meaning of Article 2 of the [Genocide] Convention, and*

> *inasmuch as it is a crime under the law of nations, Israel's legislative authority and judicial jurisdiction in this matter is based upon the law of nations*".

f. Other cases[3] have elaborated upon *Eichmann* and confirm that the Israeli court had two, independent, bases for exercising jurisdiction. These are summarized by Jonathan Wenig, "Enforcing the Lessons of History: Israel Judges the Holocaust", in McCormack and Simpson (eds), The Law of War Crimes: National and International Approaches, 1997, p 109:

> "*Irrespective of the applicability of these principles to Israel's position, the international community accepted universality as the primary basis of jurisdiction.*
>
> *Bassiouni observes that 'Israel had jurisdiction over the defendant on the basis of universality of jurisdiction. …'. Indeed, in the US extradition proceedings for John Demjanjuk, both the District Court and the Sixth Circuit of the Court of Appeals, concluded that Israel had jurisdiction over Demjanjunk pursuant to its legislation and according to international law, on the basis of the universality principle.*"

g. At p. 115, the same author says the following:

> "*All of the US courts – from the District Court to the Sixth Circuit of the Court of Appeals – relied heavily on the precedents of Nuremberg and Eichmann, and in relation to the Israeli legislation came to similar conclusions. They were prepared to accept the validity of Israel's Nazi and Nazi Collaborators (Punishment) Law despite its retroactivity because the Nazi statute was not necessary to establish the criminality of Demjanjuk's alleged acts. The court confirmed the validity of Israel's jurisdiction at international law – on the basis of the principle of universality of jurisdiction with respect to war crimes, and crimes against humanity.*"

20. Hence, these authorities demonstrate that crimes committed under customary international law (such as war crimes) have always been punishable under South African law with our courts being empowered to exercise jurisdiction based on the law of nations.

21. If that is so, then in truth there is no retrospectivity problem arising under the Bill. That is put beyond any doubt by the International Covenant on Civil and Political Rights (ICCPR), 1966, to which South Africa is a party.

[3] See *Demjanjunk* (US District Court), 612 F. Supp. 544, 556 (N.D.Ohio) 1985; and *Demjanjunk* (6th Circuit), 776 F.2d 571, 582-3 (6th Cir. 1985).

22. Article 15(1) of the ICCPR provides that "*[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed*".

23. However, Article 15(2) qualifies this statement in respect of the crimes that are the focus of the Bill. It provides as follows:

> "*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*".

24. Similarly, article 7(2) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms also makes the prohibition on retrospectivity subject to the following proviso:

> "*This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*"

25. In this regard the Commonwealth Secretariat recently revised its Model Law on the International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions. The Commentary thereto states:[4]

> "*As a general principle, genocide, crimes against humanity, and war crimes would fall within the category of crimes described in paragraph 2 of Article 15 though there is some doubt as to whether all of the conduct included in the definition of crimes against humanity in the Rome Statute was recognised at the time of its adoption (1998) as criminal under customary international law. Subject to arguments on this point, retrospective jurisdiction for these crimes would be permissible.*"

[4] See *Report of The Commonwealth Expert Group on Implementing Legislation for The Rome Statute of the International Criminal Court* (April 2011), para. 17. Available at http://www.thecommonwealth.org/files/238381/FileName/LMM(11)17PICCStatuteandImplementationoftheGeneva Conventions.pdf

26. It is therefore submitted that the crimes covered in the Bill have long been recognised as crimes under international customary law and therefore in terms of section 232 of the Constitution, have automatically formed part of South Africa's domestic law.

*The Geneva Conventions as International Customary Law*

27. It is by now incontrovertible that the Geneva Conventions regime (at least in so far as grave breaches are concerned) forms part of customary international law. Extensive case law and academic opinion is available to this effect. For example the International Court of Justice (ICJ) concluded that in light of the broad accession to the Conventions and the fact that the denunciation clauses contained in the Conventions have never been invoked the customary nature of the Conventions cannot be denied.[5] The ICJ took the view that rules created by the Geneva Conventions–

> "*are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law*."[6]

28. Regard can also be had to the report submitted by the United Nations Secretary-General pursuant to the Security Council Resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), in which it was stated that 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise'[7]. In doing so, the ICTY in the leading case of *Tadic*, subsequently confirmed the customary nature of the grave breaches regime.[8]

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[5] Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 8 July 1996, ICJ Reports (1996), 257, at 79. To date every nation has signed and ratified the four Geneva Conventions.

[6] Id at para 79.

[7] UN Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, at 34.

[8] Decision on the Defence Motion on Jurisdiction - *Tadic* (IT-94-1-T), Trial Chamber, 10 August 1995,

at 52 ("In the case of what are commonly referred to as 'grave breaches", this conventional law has become customary law').

29. As indicated above, the incorporation of most of the grave breaches and other breaches into the Rome Statute is also relevant because during the Rome Statute's negotiations, there was a "*general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law*".[9] The adoption of the Statute has also generated additional state practice recognizing the grave breaches as war crimes.

30. Although it is widely accepted that the grave breaches regime forms part of customary international law, there is debate as to whether other breaches of the Conventions are also recognized under customary international law, particularly violations of common Article 3 and additional Protocol II, which provide for observance of certain rules in armed conflicts not of an international character. The ICJ in the *Nicaragua Case* held that:

> "*Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'*"[10]

31. The ICTY in *Tadic* also confirmed this approach, opining that–

> "*customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.*"[11]

32. The Trial Chamber in *Tadic* also noted that –

> "*each of the prohibitions in common Article 3 … constitute, as the [ICJ] put it 'elementary considerations of humanity", the breach of which may be considered a 'breach of a rule protecting important values' and which 'must involve grave consequences for the victim'*"

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[9] Kirsch, 'Foreword', in K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March, April and August 1996, UN General Assembly Official Records, UN Doc. A/51/22, 13 September 1996 at 54.

[10] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ, Judgment on Merits, 27 June 1986, ICJ Reports (1986), at para 218.

[11] *Supra* note 8, at para. 134.

33. South Africa's ICC Act implicitly recognized this when it incorporated the Rome Statute crimes – including articles 8(2)(c) and 8(2)(e) which relate to breaches of common article 3 and Additional Protocol II respectively – into our law through section 4(1). So too do the ICC implementation Acts of Kenya[12] and Uganda.[13] Further, a number of foreign jurisdictions contain penal provisions relating to the prosecution of war crimes, *unrelated to the Rome Statute*, without making any distinction between international and non-international armed conflict.[14]

34. Regard must also be had to the Constitutional Court's decision in *S v Basson*[15] in relation to the status of international humanitarian law. In endorsing the pronouncements of the ICJ and the ICTY the Court not only confirmed the customary nature of international humanitarian law as reflected in the Geneva Conventions[16] but noted that-

> "*since the 1930s the distinction between international and internal armed conflict has become more and more blurred and international legal rules had increasingly emerged to regulate internal armed conflict*".[17]

35. Ample authority for the recognition of violations of common article 3 of the Geneva Conventions as customary international law thus exists. Less certain, however, is precisely when breaches of common article 3 were recognized under customary international law. However, this alone should not preclude the retrospective application of the Bill to internal armed conflict, as discussed further below.

*Retrospective application*

36. In deciding the extent of the retrospective application of the Bill, it is established practice to give domestic recognition to an offence on the date on which it was recognized as a crime

[12] *International Crimes Act* 2008.

[13] *International Criminal Court Act* 2010.

[14] See article 8 of Rwanda's *Law No. 33*bis 2003 (adopted on 6 July 2003), article 272 of Ethiopia's *Proclamation No.414/2004* (amending the Criminal Code of The Federal Democratic Republic of Ethiopia).

[15] 2007 (3) SA 582 (CC).

[16] Id at paras 171-174.

[17] Id at para 175. See also the Court's remarks at para 179.

under customary international law. This requires a thorough analysis of international law, state practice and relevant international and domestic jurisprudence – and in practice, arises on a case-by-case basis in respect of the particular crime charged and prosecuted.[18] Although debate exists as to when a crime was recognized as such under international law, the difficulties associated with this assessment are not insurmountable. These submissions do not purport to represent such an assessment of the customary nature of breaches of the Geneva Conventions and their additional Protocols, but instead, seek to demonstrate to the Portfolio Committee that the offences provided for in the Bill must be subject to such an analysis and their retrospectivity will in any event require scrutiny on case by case basis in accordance with customary and conventional international law.

37. As previously submitted, domestication of the Geneva Conventions does not create new law, but reflects customary international law, creating a suitable domestic legislative framework in which to cater for the domestic application, administration and enforcement of the Geneva Conventions. Thus, to limit the Bill to its *prospective* application would be to ignore customary international law and negate the constitutional recognition and acceptance of customary international law as law in South Africa – as affirmed by the Constitutional Court in *Basson*.

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[18] See for example the decision of the Special Court for Sierra Leone in *Prosecutor v Sam Hinga Norman* Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Case No, SCSL-2004-14-AR72(E). In that case Article 4 of the Statute for the Special Court provides that the Court has the power to prosecute persons who committed serious violations of international humanitarian law, including "[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities". For crimes committed after 30 November 1996, the date on which the Court's jurisdiction was established, Article 4 provides the Court with jurisdiction over the crime of "child-recruitment". Mr Norman was charged with child-recruitment alleged to have been committed after 30 November 1996. His lawyers contended that the crime of "child-enlistment" only became a crime in customary international law with the passing of the Rome Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child. The Special Court examined the Geneva Conventions and the Convention on the Rights of the Child, concentrating on those provisions that set out the norms regarding child recruitment. It found, contrary to the assertions by Norman's lawyers, that already prior to 1996, the act of recruiting child soldiers was a war crime outlawed under international humanitarian law. Accordingly, to the Court, the Rome Statute and the Optional Protocol of the Convention on the Rights of the Child were merely codifying and effectively implementing the existing customary norm which criminalised child-recruitment. The Court's conclusion was expressed thus (at para. 52, per the judgment of Justice Ayoola, concurred in by Justice King (Justice Robertson dissenting):

> " … *the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.*"

38. In this respect the Portfolio Committee's attention is drawn below to the legislative amendments and legislation in foreign jurisdictions and their endorsement of retrospectivity in relation to certain international crimes.

*Senegal*

39. On 12 February 2007 Senegal adopted Law No. 2007-02 (which came into force on 11 March 2007) amending the Penal Code to *inter alia* provide for the punishment of war crimes, genocide and crimes against humanity.[19] According to article 413-6 of Law No. 2007-02 any person can be tried for any act or omission, which, *at the time when it was committed*, was a crime according to the general principles of law recognized by the community of nations.[20]

*United Kingdom*

40. The United Kingdom, in 2010, amended its domestic International Criminal Court Act of 2001[21] in order to provide for retrospective jurisdiction over genocide, war crimes and crimes against humanity.[22] The amendments, originally proposed by civil society,[23] were made in recognition of an impunity gap that existed as a result of the limited temporal jurisdiction provided for in the International Criminal Court Act over genocide, war crimes

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[19] At the same time it adopted Law No. 2007-05, to amend its criminal procedure accordingly.

[20] Article 413-6 states:

> "Nonobstant les dispositions de l'article 4 du present code, tout individu peut être juge ou condamne en raison d'actes ou d'omissions vises au présent chapitre et a l'article 295-1 du Code pénal, qui au moment et au lieu ou ils étaient commis étaient tenus pour une infraction pénale d'apres les principes généraux de droit reconnus par l'ensemble des nations, qu'ils aient ou non constitue une transgression du droit en vigueur a ce moment et dans ce lieu."

[21] Available at http://www.legislation.gov.uk/ukpga/2001/17/contents.

[22] See *Ministry of Justice Circular* 2010/06 at http://www.justice.gov.uk/publications/docs/circular-06-2010-coroners-justice-act-provisions.pdf at paras 9-16. The amendments were brought about by the Coroners and Justice Act 2009.

[23] See in this regard *Closing the Impunity Gap: UK Law on Genocide and Related Crimes*, a report prepared by the Human Rights Joint Committee, available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/15302.htm. See also R Cormacin, N Donavon, A McDonald, B Meyersfeld *Suspected War Criminals and Genocidaires in the UK – Proposals to Strengthen our Law* prepared by the Aegis Trust, available at http://www.aegistrust.org/images/reports_briefings_2009/suspected_war_criminals_and_genocidaires_in_the_uk.pdf.

and crimes against humanity committed after the coming into force of the Act. The difficulty was that alleged perpetrators of international crimes committed before 2001 fell outside of the jurisdiction of British law and could not be prosecuted.

41. The proposed retrospective reach for these offences was 1948 for genocide[24], 1991 for crimes against humanity[25], and 1949 for war crimes[26] (and 1977 for the additional Protocol I and II). The United Kingdom chose to backdate the jurisdiction over these crimes to 1991, the date from which it was accepted that crimes against humanity were recognized in international customary law.

42. It is worth noting that this date has been criticized, the Human Rights Joint Committee, although welcoming the British Government's willingness to apply retrospection to these crimes, noted that it failed-

> "*to understand the justification for using 1991 as the date from when extra-territorial jurisdiction should apply to genocide and war crimes; it is a date relevant only to crimes against humanity. In principle the aim should be to establish jurisdiction as far back as legally possible…We recommend that the Government use the dates when the relevant crimes were internationally recognized, and establish retrospection accordingly. We recommend that the law be amended to provide extraterritorial jurisdiction over genocide from 1948 and war crimes in internal conflicts from 1949*."[27]

*Canada*

43. The Portfolio Committee's attention is also drawn the Crimes Against Humanity and War Crimes Act of Canada.[28] The issue of retrospectivity was clearly assessed prior to its enactment as section 6(3) of the Act explicitly provides that–

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[24] The date of the Convention for Prevention and Punishment of Genocide, 1948. Notably, in 1946 the UN General Assembly adopted Resolution 96(I) which declared: "*genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable*". United National General Assembly Resolution 96(I), December 11, 1946, at para. 4.

[25] The date that the Statute for the Tribunal for the former Yugoslavia was adopted recognizing that crimes against humanity are "beyond doubt part of customary law". See in this regard, Report of Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), May 3, 1993, UN Doc. S/25704, at 9.

[26] The date of the Geneva Conventions, 1949

[27] *Closing the Impunity Gap: UK Law on Genocide and Related Crimes* above note 8 at para 67.

[28] S.C. 2000, c. 24 available at http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf.

> "'*war crime' means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission*." (Emphasis added)

Section 6(4) goes on to provide crimes in–

> "*article 8 [war crimes provisions] of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law*." (Emphasis added)

44. Should the Committee decide to make the relevant provisions of the Bill apply retrospectively (as has been done in Canada, Senegal and the United Kingdom – as shown above), attention is drawn to the Commentary to the Commonwealth's revised Model Law, which recommends that states follow the Canadian approach in this regard.[29]

45. It is therefore submitted that the Portfolio Committee must ensure that retrospectivity is given due consideration and that the Bill allow for the punishment of the relevant crimes under international customary and conventional law to the fullest extent possible. At the very minimum, the Bill should find retrospective application to 2002, the year in which South Africa enacted the ICC Act and incorporated war crimes into municipal law.[30] However it is strongly recommended that the identification of specific dates be avoided out of an appreciation that different crimes achieved customary recognition at different times, thus allowing for a determination of retrospectivity by a Court in respect of each crime, as implied in Canadian law, and as demonstrated by the example above in the *Norman* matter from the Special Court for Sierra Leone.

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[29] *Supra* note 4, para. 3.

[30] It must be stressed that the ICC Act also limits the temporal jurisdiction of South African courts to crimes committed after 2002. This highlights deficiencies in South Africa's domestic framework and, like the United Kingdom's un-amended legislation, there is potential for an impunity gap in relation to international crimes committed prior to 2002. It is therefore recommended that the ICC Act is not an appropriate basis for determining the extent of the Bill's retrospectivity and instead the Bill should be amended to allow for a case-by-case determination as suggested earlier.

**Legislative Consistency and the need for South African Law to Reflect Developments in Contemporary International Criminal and Customary Law**

46. The International Committee for the Red Cross (ICRC) has developed the Model Geneva Conventions Act (for common law States)[31] and the Model Law Geneva Conventions (Consolidation) Act ("Model Laws").[32] The Model Laws provide a legislative template for domestic implementation of the Geneva Conventions. Given the extensive work of the ICRC in the area of international humanitarian law the model law represents what states, at a minimum, should include in their implementing legislation. The Model Laws make the legislative process easier and they allow for uniformity of legislation in national law. This in turn provides for legal certainty and international legislative consistency.

47. It is noted, and commended, that much of the Bill does incorporate the Model Laws. While states contemplating the domestication of the Geneva Conventions are not bound to implement every aspect of the Model Laws, we draw attention to the fact that many countries that have domesticated Geneva Conventions have drawn extensively on the model law and certain elements of the Model Laws are common to all national implementing legislation.

48. It is also submitted that national jurisdictions in their enactment of implementing legislation are entitled to go beyond provisions of the ICRC's Model Laws. Jurisdictions such as Belgium and Germany, Holland and Switzerland, for example, have broadened the scope of their domestic Geneva Conventions legislation recognizing, for example, universal jurisdiction over breaches of common article 3.

49. A country is therefore at liberty to decide, within the parameters of international law, how best to give effect to its international obligations and to ensure impunity does not go unpunished and international humanitarian law respected. This includes, but is not limited to, acknowledging developments in state practice, foreign and international case law and

[31] Available at http://www.icrc.org/eng/resources/documents/misc/5jykmc.htm

[32] Available at http://www.icrc.org/eng/assets/files/other/model_law_gc-ap-i-ii-iii.pdf

appreciating the changing face of warfare and the manner in which it is carried out in both internal and international armed conflicts.

50. During the course of these submissions, inconsistencies between the Bill and the Model Laws as well as the potential for broadening certain provisions will be highlighted and recommendations made in this regard.

**Practical Considerations**

51. The Bill clearly envisages domestic prosecutions of persons who breach the Conventions. The effective enforcement and administration of the Bill is essential if successful investigations and prosecutions of crimes, in terms of and pursuant to the Bill, are to be carried out. The Bill is silent on the administration of the Bill. While the Minister for Defence and Military Veterans fulfils an oversight role, the Bill is silent on all other aspects and it is unclear how its provisions will be invoked and breaches responded to. It is a very real concern that if a complaint is brought in terms of the Bill the necessary support structures will not be in place to deal adequately with the complaint – with a concomitant risk of inaction and possible breach by South Africa of its obligations under international law.

52. In this regard the Portfolio Committee's attention is drawn to the ICC Act and the procedural elements contained therein. Section 5 of the ICC Act, for example, provides for the "Institution of Prosecution in South African Courts". No similar provision is provided for in the Bill. It is therefore submitted that the following aspects be taken into account to ensure that offences in the Bill are properly investigated and prosecuted.

53. First, offences created by the Bill must be afforded the status of "national priority offences" as defined in section 17A of the South African Police Service Act 65 of 1998 (SAPS Act) as amended. National priority offences are those that require "specialized skills in the

prevention and investigation thereof'.[33] Crimes contemplated in the ICC Act are considered national priority offences, and therefore by implication so are grave breaches and breaches of common article 3. There is thus no justification, given the seriousness of offences in the Bill, for them not to be included as national priority offences. The rationale behind the elevation of their status is that if Convention breaches are considered to be priority offences they would fall within the prosecutorial mandate of the Priority Crimes Litigation Unit (PCLU) within the National Prosecuting Authority, and the investigatory mandate of the Directorate for Priority Crimes Investigation (DPCI) within the South African Police Service, specialised units that investigate and prosecute serious crimes. It is therefore submitted that the Bill ensures that the Schedule to the SAPS Act be amended to include:

"Any offence referred to in sections 4(1), 4(3) and 4(4) of the Implementation of the Geneva Conventions [Act]."

54. Consequent amendments are further necessary. For instance, in 2003, by way of Presidential Proclamation, the PCLU was established within the National Prosecuting Authority. Its mandate at the time was to manage and direct investigations and prosecutions relating to a specific class of serious crimes including, for example, crimes contemplated in the ICC Act. Given the gravity of the offences in the Bill, the management of investigations and prosecutions of offences in the Bill should also fall within the mandate of the PCLU. It is submitted that by new proclamation its mandate should be extended accordingly.

[33] The Schedule to the SAPS Act lists the following as national priority offences: High treason; Any offence referred to in paragraph (*a*) of the definition of 'specified offence' of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004); Sedition; Any offence referred to in Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002); Any offence referred to in Chapters 2, 3 and 4 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998); Any offence referred to in section 13 (*f*) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992); Any offence referred to in the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993); Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament; Any offence contemplated in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); Any offence referred to in the Regulation of Foreign Military Assistance Act, 1998 (Act No. 15 of 1998), or the Prohibition of Mercenary Activities and the Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006); Any offence referred to in the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002); Any offence the punishment wherefor may be imprisonment for life.

## Sectional Commentary

*Section 1 – Definitions*

55. It is submitted that section 1 should include a broad definition of the term "person". The proposed definition would read as follows:

> **"person"** means a natural person who is a citizen of or is permanently resident in the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within or outside the borders of the Republic

56. South African legislation does, in certain circumstances, provide for broad liability and extraterritorial jurisdiction over crimes committed outside of South Africa by both natural and juristic persons.[34] Specifically, the Portfolio Committee's attention is directed to the Regulation of Foreign Military Assistance Act 15 of 1998 which creates an offence for the provision of services by juristic persons that have the result of furthering the military interests of a party to an armed conflict in a manner that is inconsistent with South Africa's international obligations (which would necessarily include its obligations under the Geneva Conventions).[35]

57. It is submitted that it is desirable for South African law to recognize the potential impact corporate actors can have in armed conflicts and their ability to be complicit in the perpetration of breaches of the Geneva Conventions. Such recognition would place South Africa at the forefront of a growing trend by which juristic persons are held liable for their involvement in the commission of international crimes and breaches of international humanitarian law.

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[34] See in this regard the Prevention and Combating of Corrupt Activities Act 12 of 2004 read with the Prevention of Organised Crime Act 121 of 1998. See also the Regulation of Foreign Military Assistance Act 15 of 1998 and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict Act 27 of 2006

[35] Section 1 of the Regulation of the Foreign Military Assistance Act read with the authorization procedure provided for in section 7.

58. This definition would also be consistent with the Bill's applicability to juristic persons, provided for in sections 13 and 14.

*Section 2 – Objects of the Act*

59. It is submitted that in order to ensure the proper application and interpretation of the Bill it is necessary to insert a new section akin to section 2 of the ICC Act.[36] The Geneva Conventions came into force 62 years ago. They have thus been frequently interpreted and applied by both domestic and international courts and over time have developed considerably. To ensure that the Bill is correctly interpreted and applied, so as to reflect developments in international law, it is recommended that a new section – "Applicable Law"- be inserted into the Bill that would provide:

> "In addition to the Constitution and the law, any competent court in the Republic hearing any matter arising from the application of the Implementation of the Geneva Conventions Act must also consider and where, appropriate, may apply-
>
> (a) Conventional international law, and in particular the Conventions;
>
> (b) Customary international law; and
>
> (c) Comparable foreign law."

*Section 4 – Breaches of the Conventions and Penalties*

*Jurisdiction*

60. Section 4(1) provides for the exercise of universal jurisdiction over grave breaches of the Conventions. In doing so it commendably goes further than the limited model of universal jurisdiction provided for in the ICC Act in respect of the grave breaches regime.[37] There is

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[36] Section 2 of the ICC Act provides:

> "In addition to the Constitution and the law, any competent court in the Republic hearing any matter arising from the application of the [ICC Act] must also consider and where, appropriate, may apply-
>
> (a) Conventional international law, and in particular the [Rome] Statute;
>
> (b) Customary international law; and
>
> (c) Comparable foreign law."

[37] Section 4(3)(c) provides that anyone who commits a crime in terms of the ICC Act and is present in South Africa after its commission is deemed to have committed the crime within South Africa.

support for the contention that universal jurisdiction is *required* by the Geneva Conventions and its inclusion in the Bill is accordingly necessary.[38]

61. Sections 4(3) and (4), however, do not provide for universal jurisdiction, even in a limited form as is provided in the ICC Act. Breaches of the Conventions that fall outside the grave breaches regime, provided for in section 4(2), accordingly do not attract universal jurisdiction.

62. Section 4(3) limits the imposition of liability for non-grave breaches to persons who commit these breaches within South Africa. The practical consequences are that persons outside South Africa who are guilty of committing non-grave breaches of the Conventions cannot be held liable if they are subsequently found within South Africa – thereby creating an impunity gap. Whilst this gap is to an extent filled by the ICC Act, the limited temporal jurisdiction of the ICC Act and the fact that it does not incorporate all breaches means that there are potential loopholes within the ICC Act regime; these can and should be closed by the Bill.

63. While the Bill in this respect mirrors the Model Laws, these provisions do not reflect the reality of the majority of present day armed conflicts, which are not of an international character, and which accordingly are not covered by the grave breaches regime. In these internecine conflicts it is common article 3 and additional Protocol II that will find application more frequently.

64. Section 4(4), although providing for the extraterritorial application of the Act, still only applies to South African citizens who commit non-grave breaches outside of South Africa.

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[38] Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, create obligations on states parties to prosecute or extradite offenders who commit grave breaches. These provisions have been interpreted by some as entailing universal jurisdiction over such offences as no mention is made of the traditional jurisdictional bases. See, for example, Henzelin, *Le principe de l'universalité en droit pénal international: droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, 2000, pp. 354-356. However, in their *Joint Dissenting Opinion* in the *Arrest Warrant case*, Judges Higgins *et al* noted (at para. 32): "*As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol 1.*" *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p.3.

65. Furthermore, as discussed above,[39] South Africa, through the enactment of the ICC Act, has already criminalized non-grave breaches of the Conventions and has recognized that the commission of these offences can be by both South African and non-South African citizens as well as outside of its borders.

66. Notably, the correlative provisions of foreign jurisdictions provide courts with jurisdiction to punish non-grave breaches *wherever they occur* (i.e. even extraterritorially under the principle of universal jurisdiction). For example, Ghana's recently adopted Geneva Conventions Act 2009[40] covers offences not specified under the provisions on grave breaches but that otherwise contravene any of the Conventions or Protocols,[41] and further provides:[42]

> "*Where a person commits an offence under this section outside the country, the person may be tried and punished as if the offence were committed within this country.*"

67. It is therefore suggested that the Bill be amended to ensure that it is consistent with the principles expressed in the ICC Act; thereby ensuring that there is no disconnect between the Bill's jurisdictional provisions in respect of non-grave breaches and those of the ICC Act. To do so will ensure that South Africa closes the impunity gap in respect of all violations of international humanitarian law, regardless of where they occur or whether in an international or internal armed conflict.

*Modes of Liability*

68. The Bill contains two distinct modes of liability: section 4 of the Bill provides for direct perpetration of acts outlawed under that section and section 5 incorporates the doctrine of command responsibility into our law. These provisions relating to modes of liability, and in particular the inclusion of the doctrine of command responsibility in section 5, are welcomed. However, the following comments are offered for the benefit of the Committee:

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[39] See above at paras 9-14

[40] Adopted on 6 January 2009.

[41] Article 1(3), *Geneva Conventions Act* 2009.

[42] Article 1(4), *Geneva Conventions Act* 2009.

*Aiding and abetting*

69. The Bill does not explicitly include *indirect* participation as a mode of liability (either through aiding and abetting or procuring the commission of an offence). Sections 4(1), (3) and (4) limit liability to the person directly responsible for a breach, and do not expressly provide for the possibility of aiding and abetting. It is submitted that the Bill should expressly allow for aiding and abetting breaches of the Conventions for a number of reasons.

70. As Cassel notes:[43]

> "*Since Nuremberg there has been no question that accomplices, including those who aid and abet crimes, are responsible under international criminal law. The Nuremberg Charter imposed individual responsibility on "accomplices participating in the formulation or execution of a common plan or conspiracy to commit" a crime enumerated within the Charter. Although the Nuremberg Tribunal limited application of this provision to crimes against peace and did not apply it to other crimes, the International Law Commission ("ILC") of the United Nations in 1950 articulated Nuremberg Principle VII as follows: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.*"

71. The Rome Statute of the International Criminal Court,[44] the provisions of which have been incorporated into the ICC Act, exemplifies the international criminal law position and provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC, which includes grave breaches and breaches of common article 3, if that person:

> "*(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [or]*
>
> *(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.*"[45]

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[43] Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', 6(2) *Northwestern Journal of International Human Rights Law* (2008), at 307.

[44] July 17, 1998, 2187 U.N.T.S. 90

[45] Article 25(3)(c) and (d).

72. A number of other international instruments also criminalize the conduct of a person who contributes to the commission of a crime.[46] Further, the mode of liability of *aiding and abetting* has long been recognized under South Africa's domestic criminal law

73. Notably, the ICRC Model Laws,[47] and the legislation of numerous common law jurisdictions around the globe,[48] approach the commission of breaches of the Conventions broadly by providing that any person who "*commits or aids, abets or procures any other person to commit*" a grave or any other breach of the Geneva Conventions and the additional protocols, is guilty of an indictable offence.

74. One of the core principles arising from the post–World War II war crimes trials is the individual criminal responsibility of those who aid and abet violations of international law. This principle has been reflected in international treaties thereafter. These treaties include major agreements addressing fundamental human rights concerns such as torture, apartheid, slavery and genocide.[49]

75. Given the nature of modern day warfare and the fact that international crimes are often committed with the indirect support of third party actors, limiting liability to only those directly involved cannot be justified.

76. It is therefore submitted that sections 4(1), 4(3) and 4(4) of the Bill be amended:
    a. To provide for jurisdiction over the commission of non-grave breaches committed by non-South African citizens committed within South Africa and abroad;

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[46] Article 7(1) of the Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (ICTY Statute); Article 6(1) Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES955 (ICTR Statute).

[47] Supra note 31 and 32, ss 3(1) and 4(1) and (2) thereof.

[48] See in this regard implementing legislation in Ghana, Namibia, the United Kingdom, New Zealand, Australia, Sri Lanka, India and Canada. See also article 17 of Rwanda's *Law No. 33*bis 2003.

[49] See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention on the Suppression and Punishment of the Crime of Apartheid, article III(b), Nov. 30, 1973, 1015 U.N.T.S. 243; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, art. 6, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, art III(e), Dec. 9, 1948, 78 U.N.T.S. 277, 280.)

b. To explicitly recognize complicity in the commission of all breaches of the Geneva Conventions, in accordance with international law and consistent with the Model Laws and equivalent legislation in other common law jurisdictions. Section 4 should therefore read (underlined text indicating additions and bold text in square brackets indicating deletions):

> "*(1) Any person who, whether within or outside the Republic, commits, or aids, abets, or procures any other person to commit a grave breach of the Conventions, is guilty of an offence.*
>
> ***…***
>
> *(3) Any person whether* ***[who]*** *within or outside the Republic commits, or aids, abets or procures any other person to commit a breach* ***[contravenes or fails to comply with a provision]*** *of the Conventions not covered by subsection (2), is guilty of an offence;*
>
> *(4)* ***[Deleted]***"

*Section 5- Command Responsibility and the Failure to Prevent Breaches of Conventions*

77. Section 5(1) attaches liability to two classes of persons and finds broad application. First, liability attaches to a "*military superior officer*", which in terms of section 5(4)(a) and (b) includes a military superior officer and a person holding a superior civil position.

78. Secondly, in terms of section 5(2), liability is also founded for any person who is "*under a duty*" to prevent the commission of a convention breach.

79. Both classes of persons can be held liable for failing to prevent all breaches of the Conventions.

80. However it is not clear whether the jurisdictional limits applicable in sections 4(3) and (4) fall away when an offence contemplated in section 5 is committed. Section 5(2) makes it an offence for "*[a]ny person, whether within or outside the borders of the Republic, who fails to act when under a duty to do so in order to prevent the commission of a*" breach of the Conventions. It appears

therefore that the jurisdictional limits present in sections 4(3) and (4) do not apply to persons that are found to be "*under a duty*" to prevent the commission of a breach of the Conventions. Similarly, the section 4 limitations would not be applicable to military superior officers who, in terms of section 5(1)(a), fail to exercise the necessary control to prevent a breach of the Conventions "*whether within or outside the borders of the Republic*". Furthermore there is no indication whether the nationality of military superior officer will determine the application of the Bill.

81. Two readings of section 5 are therefore possible:

    *a.* First, is that in cases where persons are under a duty or are military superior officers and they fail to prevent a breach of the conventions, they are liable despite the jurisdictional limits in section 4 and regardless of their nationality and where the breach occurred.

    *b.* Second, the duty of persons and military superior officers described in section 5 only becomes actionable in terms of the jurisdictional scenarios identified in section 4.

82. Section 5 is to an extent ambiguous. It is therefore submitted that the amendment suggested in paragraph 76 above is necessary in order to reconcile the offences in contained in section 4 and the application of section 5.'

83. Finally, if the above recommendation that aiding and abetting be included as a mode of liability is followed, then the Committee should consider incorporating section 5 into section 4, or incorporating the relevant provisions of that section 4 into section 5 so as to make a single provision titled "*Modes of Liability*".

*Section 6 Jurisdiction, aut dedere aut judicare and immunity*

*Aut dedere aut judicare: the obligation to exercise jurisdiction*

84. The Geneva Conventions explicitly recognize and oblige all states to ensure that perpetrators of grave breaches be extradited or prosecuted domestically. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

> "*Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*"

85. Further, article 85(1) of the Additional Protocol I incorporates this provision by reference.

86. These provisions create *aut dedere aut judicare* obligations on states parties in respect of grave breaches of the Conventions. Under the principle – which is contained in a number of other treaties – states must extradite or, alternatively, prosecute certain crimes under their domestic law, or at least "*take steps towards prosecution*".[50]

87. In the explanatory memorandum to the Bill this duty is acknowledged.[51] It is however submitted that this obligation be expressly incorporated in the Bill to ensure that in the event South Africa is unable or unwilling to prosecute breaches of the Conventions, it will be legally bound to extradite those responsible to willing and able jurisdictions. In this regard it is submitted that a provision, based on the following terms, be inserted into section 6:

> "*If for whatever reason it is not possible for an offence under this Act to be tried by a court in the Republic, the Minister in consultation with the National Director for Public Prosecutions and the Department of International Relations and Cooperation, must ensure that persons responsible for*

[50] The International Law Commission has defined this principle as follows:

> "*The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory.*"

[51] Memorandum on the Objects of the Implementation of the Geneva Conventions Bill, 2011 at para 1.6: Those "*responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold.*"

*offences under this Act are extradited to a willing and able jurisdiction in accordance with South African and international law*."

*Immunity from jurisdiction*

88. Under customary international law, certain officials[52] enjoy immunity in respect of their person – personal immunity (*ratione personae*) – and in respect of their conduct – functional immunity (*ratione materiae*) – under defined and limited circumstances.[53]

89. While there is near universal acceptance that international crimes cannot be covered by functional immunity before international or domestic tribunals,[54] and that personal immunity does not apply to individuals in proceedings before international courts,[55] the question of whether personal immunity continues to apply in *domestic* proceedings is controversial.

90. In 2003 the International Court of Justice held that Belgium had "*failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law*" when it *issued* an arrest warrant for

[52] Such as Heads of State and Government, as well as (according to the ICJ) Foreign Ministers. See *Arrest Warrant* case, para. 45.

[53] Functional immunity relates to *conduct* carried out on behalf of a State. This form of immunity is based on the notion that "*a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal*". Personal immunity "*provides complete immunity of the person of certain officeholders while they carry out important representative functions*". In contrast to functional immunity, personal immunity is absolute (i.e. it covers both private and public acts committed by officials), but temporary (i.e. it only applies insofar as the person holds the office in question) and can be waived by the State concerned. Cryer, *An introduction to international criminal law and procedure, (2007), Cambridge University Press*. 422.

[54] See further ICTY, *Prosecutor v Blaskic*, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997,IT-95-14-AR108bis, at para. 38; Akande, 'International Law Immunities and the International Criminal Court', 98(3) *AJIL* (2004), 407-433, at 413; and *In re Goering & others*, (1946) 13 International Law Reports 203 221. See further *Arrest Warrant* case, Dissenting Opinion of Judge Van den Wyngaert, at para 36; *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97, HL. See also Chinkin, 'Regina v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)', 93 *AJIL* (2003), 703. See however Akande at 414-415.

[55] See article 227 of the Treaty of Versailles; article 6, *Charter of the International Military Tribunal* (1946); SCSL, *Prosecutor v. Charles Taylor*, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004), para. 52; ICJ, *DRC v Belgium*, (2004), at para. 61.

him for crimes against humanity and war crimes.[56] Moreover, this position finds support in both academic opinion[57] and domestic jurisprudence.[58]

91. However, some states maintain that personal immunity does not apply to domestic prosecutions for crimes under international law. South Africa's own ICC Act appears to take this position. Section 4(2)(a) states:

> "*[Notwithstanding] any other law to the contrary, including customary and conventional international law, the fact that a person . . . is or was a head of State or government, a member of a government or parliament, an elected representative or a government official . . . is neither: (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime*".

92. Most commentators have interpreted this provision as removing both personal and functional immunity in respect of the prosecution of war crimes, genocide and crimes against humanity before South African courts under the Act.[59] Dugard and Abraham, for example, suggest that section 4(2)(a) of the ICC Act represents a conscious choice by the legislature not to follow the "*unfortunate*" *Arrest Warrant* decision, "*of which it must have been aware*".[60]

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[56] *DRC v Belgium*, para. 75.

[57] Akande, *supra* note 57, at 411. Cryer, *supra* note 57, at 425.

[58] This has been confirmed by a number of domestic courts in subsequent decisions in the UK (in respect of General Pinochet, albeit *obiter*), Belgium, France, Spain and the United States, amongst others. See for example: *Ghaddafi case*, No. 1414 (Cass. crim. 2001) (Fr.), 125 ILR 456; *Castro case*, No. 1999/2723, Order (Audiencia Nacional Mar. 4, 1999) (Spain); *H.SA. et al. v. S.A.*, Cass. 2e civ., Feb. 12, 2003, No. P.02.1139.F (Belg.), translated in 42 ILM 596 (2003); *Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet* (No.3), [1999] 2 All E.R. 97, 126-27, 149,179, 189 (H.L.) (per Goff, Hope, Millett, Phillips, L.JJ.); *Plaintiffs A, B, C, D, E, F v. Jiang Zemin,* 282 F.Supp.2d 875 (N.D. Ill. 2003); *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001); *Arrest Warrant Against General Shaul Mofaz* (Bow St. Mag. Ct. Feb. 12, 2004) 53 *Int'l & Comp. L. Q.* 769, 771.

[59] Du Plessis notes:

> "*In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to 'trump' the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.*" Du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example', 5(2) *Journal of International Criminal Justice* (2007), 460 – 479, at 470.

[60] Dugard & Abraham 'Public international law' (2002) *Annual Survey of South African Law* 140, at 165-66.

93. This interpretation is supported by the position the South African government has taken in respect of the ICC's Arrest Warrant for President al-Bashir of Sudan, namely, that al-Bashir's position is not a bar to cooperation with the Court under the Rome Statute and the ICC Act (i.e. al-Bashir does not enjoy personal immunity).

94. The effect of section 4(2)(a) of the ICC Act is to trump the personal immunity enjoyed by certain officials under customary international law by operation of section 232 of the Constitution, which states: "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*" (i.e. the ICC Act).

95. The Bill itself does not contain any reference to either functional or personal immunity. This is problematic for two reasons: First, South Africa has taken a remarkably progressive position on the issue of immunity for international crimes that sets it apart from a number of other states. It would be anomalous for that not to be recognized in the Bill. Second, and perhaps more importantly, the absence of a correlative provision relating to immunity in the Bill makes it impossible for the Bill and the ICC Act to be used in tandem in respect of the prosecution of an individual who enjoys personal immunity under customary international law. That is because by operation of section 232 that immunity would continue to be a bar from prosecution under the Bill.

96. This, it is submitted, could be avoided by interpreting section 4(2)(a) of the ICC broadly, so as to remove personal immunity in respect of *all* prosecutions of such crimes by South African Courts (including those undertaken in terms of this Bill). However, for Parliament to leave it to the Courts to rationalize these two pieces of legislation would (with respect) be clumsy, if not neglectful, and contrary to the need (outlined above) to avoid unnecessary inconsistencies between the two. This could be done by inserting a provision into the Bill providing that personal and functional immunity shall not bar South African courts from exercising jurisdiction under the Bill (see proposed text below at para. 100).

97. In addition to providing that personal and functional immunity shall not bar South African courts from exercising jurisdiction under the Bill, the Committee is encouraged to include a provision to the effect that such immunity shall not prevent cooperation with international courts (such as the ICC) or other states, pursuant to the *aut dedere aut judicare* obligation discussed above. In respect of the former, the ICC Act (and the South African government's position on al-Bashir) confirms that personal immunity in particular is not a bar to cooperation with the Court pursuant to a request for arrest and surrender under the Rome Statute. In respect of cooperation with other states, the Geneva Conventions themselves make no reference to immunity as an exception to the operation of the *aut dedere aut judicare* obligation contained therein.

98. Notably, Kenya's *International Crimes Act* (2008) states:

> *The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.*" "

99. The inclusion of a similar provision in the Bill will demonstrate that South Africa take seriously its obligations under the Geneva Convention to cooperate in the suppression of grave breaches, as well as its commitment to combating impunity for international crimes

100. As to how these issues relating to immunity could be addressed, section 4(2)(a) of the ICC could be modified accordingly and inserted into the Bill. However, given the clumsy wording of that provision and the attendant confusion (both in terms of its interpretation, and that of article 27(1) of the Rome Statute upon which it was based), it is recommended that a more precise provision be inserted into the Bill. The following text is suggested:

> "Notwithstanding any other law to the contrary, including customary and conventional international law;

(a) the existence of any immunity or special procedural rule attaching to the official capacity of any person, or

(b) the fact that a person is or was a head of State or government, a member of a government or parliament, an elected representative or a government official,

shall not:

(i) bar any Court from exercising jurisdiction under this Act in terms of section 4;

(ii) be a defence to a crime;

(iii) constitute a ground for any possible reduction of sentence once a person has been convicted of a crime;

(iv) constitute a ground for:

(aa) refusing a request for surrender by an international court; or

(bb) refusing a request for extradition by another State under [insert relevant section] of this Act."

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## Conclusion

101. The Southern Africa Litigation Centre, Prof. du Plessis and Mr C. Gevers would like to thank the Portfolio Committee for the opportunity to make this submission. We look forward to expanding on our written submissions should we be invited to make oral submissions. Should any further information be required prior to the oral presentation, please do not hesitate to contact us.

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