



Institute for Security Studies

POLICY BRIEF

RECOMMENDATIONS

- The Geneva Conventions Act requires close study by courts, policymakers, civil society groups, prosecutorial and police authorities, and military commanders and members of South Africa's security forces. Aside from domestic offences, the Act provides for the potential prosecution of war crime offences committed outside South Africa by South Africans, and permits the investigation and prosecution of foreign nationals suspected of grave breaches of international humanitarian law. The Act also makes possible the prosecution of superiors for war crimes committed by their own forces, and for their failure to investigate properly and punish subordinates implicated in such crimes.
- As far as military commanders and members of South Africa's armed forces are concerned, it is imperative that training be provided to them with regard to the Geneva Conventions Act and its importance to those involved in military operations in South Africa and abroad – recalling the obligation contained in section 199(5) of the South African Constitution that '[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'. This training could be provided through the SA National Defence College's Executive National Security Programme or at the South African War College.
- There is also a need for South African law enforcement agencies and civil society groups to recognise the new avenues of prosecution for international human rights violations committed before 2002 being opened up by the Geneva Conventions Act.

The Geneva Conventions and South African law

Max du Plessis

SUMMARY

South Africa's adoption of the Implementation of the Geneva Conventions Act, 2012 (Act 8 of 2012) (Geneva Conventions Act) comes as a welcome addition to the country's legal landscape. Apart from criminalising a variety of offences as war crimes under domestic law, the Act also brings the doctrine of command responsibility to South African law, and places a duty on the authorities to investigate and prosecute those who are suspected of war crime violations, including superiors. However, given how long it took South Africa to enact this legislation, questions remain about the interplay between some of the Act's provisions and preceding legislation in the form of South Africa's International Criminal Court Act. One notable advance offered by the Geneva Conventions Act is the possibility of its utilisation with regard to apartheid crimes committed prior to South Africa's democratisation and other international crimes committed before 2002.

INTRODUCTION

In 2012, South Africa's Parliament adopted the Implementation of the Geneva Conventions Act, 2012 (Act 8 of 2012) (Geneva Conventions Act), 60 years after the country acceded to the 1949 Geneva Conventions. The reasons for not implementing the Conventions prior to 1994 are self-evident. While the apartheid government's initial reticence to implement the Conventions are a matter for conjecture, after the adoption of the 1977 Additional Protocols to the Geneva Conventions the little hope there was for their implementation disappeared. Additional Protocol I included a provision extending the rules of international humanitarian law relating to international armed conflicts to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. This provision was included with the African National Congress (ANC) in mind.

The ANC was present at the conferences that led to the Protocol's adoption, but apparently it did not formally 'sign up' to the Protocol at the time (notably, the Pan Africanist Congress and the South West African People's Organization did). In June 1980, the late Oliver Tambo, the ANC's president at the time, made a declaration undertaking to apply the Geneva Conventions

and Protocols, presumably pursuant to article 96(3) of Additional Protocol I. However, the declaration did not comply with the Protocol's requirements – it was handed to the president of the International Committee of the Red Cross, not the Swiss Federal Council – leaving doubt as to its validity. This notwithstanding, the ANC claimed in its statement to the Truth and Reconciliation Commission (TRC) in 1996 that it 'became a signatory to the Geneva Convention on the conduct of war in 1977'.

Considering this history, one might have thought that the post-1994 implementation of the Geneva Conventions would have been politically acceptable for an ANC-led government. Matters did, in fact, get off to a good start with South Africa's ratification of two Additional Protocols to the Geneva Convention in 1995. The following year, the Constitutional Court in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) (AZAPO) swept away concerns that the Convention's obligation to prosecute might complicate the TRC's amnesty process, and cleared the way for the implementation of the Conventions. Remarkably, it then still took over a decade to do so.

While there is more to the Geneva Conventions than their war crimes-related provisions, the Act's purpose is largely to prosecute breaches of the Conventions

Against this background, South Africa's final implementation of the Geneva Conventions is a matter of some relief. However, certain questions arise from its implementation. In the first place, implementation comes after the 'grave breaches' regime of the Geneva Conventions was 'domesticated' through South Africa's implementation of legislation in respect of the 1998 Rome Statute of the International Criminal Court (ICC). Second, what is the relationship, if any, between the Geneva Conventions and the implementation legislation of the ICC? And, third, how should overlaps be avoided? In addition, the relevant portions of the 1949 Conventions, and most of the 1977 Protocols, now form part of customary international law and therefore, by operation of section 232 of South Africa's Constitution, are already part of its law. Of course, while there is more to the Geneva Conventions than their war crimes-related provisions, the Act's self-stated purpose relates largely to prosecuting breaches of the Conventions. This raises a further question: is the Geneva Conventions Act mere legislative surplusage?

OVERVIEW OF THE GENEVA CONVENTIONS ACT

According to the preamble, the purpose of the Geneva Conventions Act is two-fold: to enact the Geneva Conventions and its Protocols into South African law, and to ensure the prevention and punishment of grave and other breaches. The first aim is accomplished by annexing the Conventions in full to the Act and by providing in section 4(1) of the Act that '[s]ubject to the Constitution and this Act, the Conventions have the force of law in the Republic'. The second is accomplished by creating a war crimes regime for prosecuting 'breaches' of the Geneva Conventions in South African courts under certain circumstances.

Offences

Two categories of offences are created under the Act, each subject to a different jurisdictional base. First, the Act criminalises 'grave breaches' of the Geneva Conventions and Additional Protocol I, which, according to section 5(2) of the Act, are breaches referred to in article 50 of the First Convention, article 51 of the Second Convention, article 130 of the Third Convention, article 147 of the Fourth Convention, and articles 11 or 85 of Protocol I. Such breaches are committed during international armed conflicts. In addition, section 5(1), to be read in conjunction with section 7(1), provides for the exercise of 'universal jurisdiction' over grave breaches of the Conventions. Notably, there is some support for the contention that universal jurisdiction is required insofar as 'grave breaches' of the Geneva Conventions are concerned, and its inclusion is thus welcomed.

Second, the Act determines that '[a]ny person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence'. This 'catch-all' category includes breaches of common article 3 of the 1949 Conventions, which applies to 'armed conflicts not of an international character', and the relevant provisions of Additional Protocol II, thereby creating a 'war crimes' regime applicable to 'non-international armed conflicts' under the Act.

However, offences under this category do not attract universal jurisdiction. Rather, they are subject to the 'traditional' jurisdictional bases of territoriality and nationality. For example, section 5(3) states: 'Any person who *within the Republic* contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.'

Modes of liability

As far as modes of liability are concerned, the Act provides for criminal responsibility for individuals in respect of war crimes through two distinct avenues. First, section 5 of the Act provides for responsibility by way of *direct perpetration* of breaches of the Convention. Second, section 6 of the

Act incorporates the doctrine of command responsibility into South African law.

This doctrine provides, and section 6 confirms this, that a 'military superior officer' is guilty of an offence if (i) forces under his or her effective command, authority and control, (ii) commit a 'grave breach' or an ordinary breach, (iii) the superior knew, or in the circumstances ought to have reasonably known, that his or her subordinates were committing such a breach, and (iv) failed to take the necessary steps to prevent and/or punish said breach. Section 6(1)(c) further specifies that the failure to take necessary steps means failure to 'exercise effective command, authority and control over the forces', or 'take all necessary and reasonable measures within his or her power to prevent or repress the commission of any breach or offence', or 'submit the commission of the breach or offence ... to the competent authorities for investigation and prosecution'.

While the introduction of command responsibility into our law is a positive development, on the whole the Act is not sufficiently extensive insofar as modes of liability are concerned. The glaring omission in this regard relates to forms of indirect participation or 'accessorial liability', such as aiding and abetting or procuring the commission of an offence. This is unfortunate, given that such liability has been accepted as part of international law since the Nuremberg trials.¹

To remedy these omissions, the South African courts will presumably turn to analogous domestic modes of liability, such as aiding and abetting, and the common purpose doctrine, when it comes to prosecutions under the Geneva Conventions Act. Should this not be the case, the potential for prosecutions of international crimes would be severely curtailed. The omission of certain modes of liability from the Geneva Conventions Act is thus clumsy, although not fatal.

The important point is that the specific inclusion of the doctrine of command responsibility, and the elements therefor, is notable and was required since the doctrine is a unique construction of international criminal jurisprudence and does not have a domestic equivalent. What is more, the inclusion in the Act of a provision empowering courts to consider and apply international law (both conventional and customary) and comparable foreign law should lead to the incorporation of further 'international' modes of liability as required on a case-by-case basis.

THE GENEVA CONVENTIONS ACT AND THE ICC ACT

Unlike the majority of states that have enacted implementing legislation for the Geneva Conventions and their Protocols, South Africa is doing so *after* it had already passed implementing legislation in respect of the Rome Statute of the ICC by virtue of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002) (the ICC Act). This Act already provides a

comprehensive framework for the investigation and prosecution of war crimes, and crimes against humanity and genocide, creating the potential for overlap between the two statutes. In recognition of this, section 9 of the Geneva Conventions Act provides that the Act shall not limit, amend, repeal or otherwise alter any provision of the ICC Act.

Differences and overlaps

As far as war crimes are concerned, the Geneva Conventions Act adds nothing to the ICC Act in terms of substantive elements or definitions of crimes. However, insofar as jurisdiction over crimes committed in non-international armed conflicts is concerned, the Geneva Conventions Act is a retrograde step in that such crimes can only be prosecuted if they are committed on South African territory or by South African citizens. In contrast, the ICC Act permits a South African court to exercise jurisdiction over persons who commit such crimes on the basis of universal jurisdiction as long as the accused, after the commission of his offence, is present on South African territory.

Under section 7(4) of the Geneva Conventions Act, breaches of the Geneva Conventions that took place under apartheid are now prosecutable

However, the Geneva Conventions Act differs from the ICC Act in one crucial and positive aspect. Whereas the ICC Act is limited in its temporal application in that it is not enforceable over acts committed before its implementation in 2002, the Geneva Conventions Act opens up the possibility of prosecuting war crimes that occurred prior to the implementation date of the ICC Act, on the basis that they were already crimes under customary international law. This follows a trend seen in other international criminal legislation, which generally allows for the criminalisation domestically of that which is already criminal under customary international law. This trend is particularly appropriate in respect of the 1949 Geneva Conventions, which have been ratified on an almost universal basis (hence the standards contained therein are generally regarded as customary international law), with the 1977 Additional Protocols to a lesser extent. For this reason, a number of other countries besides South Africa have felt comfortable to adopt legislation that provides for the retrospective application of the penal provisions to the point at which the international crimes in question became criminalised under customary international law.

Crucially, such 'retrospective application' of criminal legislation does not offend the principle of *nullum crimen sine lege*. This principle is applicable only in instances where a new offence is created, unlike offences that were at the time of their commission criminalised under international law and subsequently criminalised domestically. This exception is recognised in both international and domestic human rights law. According to article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), 1966, to which South Africa is a party, '[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'. Further, article 15(2) of the ICCPR specifically qualifies this statement in respect of international crimes, noting: '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 recognised by the community of nations.'

As far as South African law is concerned, section 35(3)(l) of the Constitution, while recognising the general rule against the retrospective application of criminal law, 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'. Notably, the wording of this section is almost identical to article 15(1) of the ICCPR. Professor Dugard, South Africa's leading international lawyer, notes:²

[W]hile the criminalization of ... [crimes under international law, viz. crimes against humanity] by means of a retrospective statute might have been impossible under the interim Constitution, it would be possible for such legislation to be adopted under the final Constitution *which qualifies the prohibition on retrospective prosecution in respect of acts that were offences under international law at the time they were committed*.

How far back does the Geneva Conventions Act stretch?

A critical question then arises: when did the crimes contained in the Geneva Conventions Act become crimes under customary international law? A survey of comparative foreign statutes reveals two different approaches.

The first is to fix a specific date at which the crimes concerned were recognised as such under customary international law. For example, the United Kingdom's International Criminal Court Act of 2001³ provides for 'retrospective' jurisdiction to be exercised over genocide, war crimes and crimes against humanity that have taken place since 1991. This date was chosen by the legislators as the date from which the contemporary crimes against humanity regime was criminalised under customary

international law. They were criticised, however, for not extending the application of war crimes and genocide further back in time, given the pedigree and status of such crimes under customary international law.

The second is to leave it to the courts to determine the date at which the crimes concerned were recognised as such under customary international law. This approach can be seen in section 6(3) of Canada's Crimes Against Humanity and War Crimes Act (2000),⁴ in terms of which a war crime is defined as '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'. The Act further provides in section 6(4) that the offences contained in 'article 8 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'.

During the public hearings on the Bill that preceded the Geneva Conventions Act, submissions were made to the Portfolio Committee on Defence and Military Veterans proposing that the Act should specifically provide for the 'retrospective application' of its provisions. It was recommended that South Africa follow the Canadian approach and leave the courts to determine the date of application. Following these submissions, a provision now appears in the Act that states:⁵

Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.

While welcome in principle, this provision has not indicated a clear choice between the approaches exemplified by the Canadian and United Kingdom Acts. Although the Geneva Conventions Act confirms that prosecutions can take place in respect of crimes committed before the Act came into force, it is unclear how this is to be done.

Crimes of the past – apartheid?

Important for now is the confirmation that South Africa's prosecuting authorities are empowered to prosecute and its courts are entitled to adjudicate upon customary international law crimes without implementing legislation (presumably with reliance on section 232 of the Constitution)⁶. The implication of this construct is that this could go beyond the prosecution of war crimes. It remains to be seen whether prosecutions can be brought in respect of other customary international law crimes as well, including crimes against humanity, and without reliance directly on the ICC Act or the Geneva Conventions Act.

In a South African context, this raises interesting possibilities, as the Constitutional Court in *AZAPO* (see above) limited its discussion to war crimes and their

application to apartheid crimes,⁷ despite ample evidence that crimes against humanity were committed under apartheid and that apartheid *itself* is a crime under international law.⁸

CONCLUSION

In the final analysis, the Geneva Conventions Act has significantly expanded South Africa's international criminal law regime by recognising the possibility of prosecuting (some) international crimes that took place prior to the 2002 implementation date of the ICC Act. Under section 7(4) of the Geneva Conventions Act, breaches of the Geneva Conventions that took place under apartheid are now prosecutable, the argument being that any international crime committed under apartheid is prosecutable under section 232 of the Constitution as read with the Geneva Conventions Act, provided it was a crime under customary international law at the time it was committed.

Such prosecutability is of course academic until the National Prosecuting Authority decides to initiate a prosecution under the Act for apartheid-era crimes. To date the South African authorities have shown little inclination towards the prosecution of apartheid-era crimes, despite being mandated to do so.

Whatever may or may not be done as regards the crimes of the past, it is nonetheless noteworthy that South Africa has now joined a multitude of states that have shown their commitment to the Geneva Conventions by an act of domestic incorporation. While it was long in coming, the Geneva Conventions Act is a most welcome addition to the South African statute books.

NOTES

1. For further reading, see Doug Cassel, Corporate aiding and abetting of human rights violations: confusion in the courts, *Northwestern Journal of International Human Rights Law* 6(2) (2008), 307.
2. John Dugard, Is the Truth and Reconciliation process compatible with international law? An unanswered question, 13 *SAJHR* 258 (1997) 260.
3. Available at <http://www.legislation.gov.uk/ukpga/2001/17/contents>, accessed 3 June 2013.
4. Crimes against Humanity and War Crimes Act (2000), Canada, available at <http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf>, accessed 3 June 2013.
5. Implementation of the Geneva Conventions Act, 2012 (Act 8 of 2012), section 7(4).
6. Section 232 of the Constitution provides that '[c]ustomary international law is law in the Republic *unless it is inconsistent with the Constitution or an Act of Parliament*'. For the pre-Constitutional position see John Dugard, International law *is* part of our law', *SALJ* 88 (1971), 13.
7. In this regard see Dugard, John, Is the Truth and Reconciliation process compatible with international law? 264.
8. In *S v Basson* 2007 (3) SA 582 (CC) the Constitutional Court held (para. 37): 'It is ... clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.'

ABOUT THE AUTHOR

Max du Plessis is a senior research associate with the International Crime in Africa Programme (ICAP) at the ISS. He is also an Associate Professor of Law at the University of KwaZulu-Natal, South Africa, and a member of the KwaZulu-Natal Bar with special expertise in international law, constitutional law and administrative law. Max has written widely in the fields of international criminal law and human rights. He is an associate tenant at Doughty Street Chambers, London.

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ISS Pretoria

Block C, Brooklyn Court,
361 Veale Street,
New Muckleneuk,
Pretoria, South Africa
Tel: +27 12 346 9500
Fax: +27 12 460 0998
Email: pretoria@issafrica.org

ISS Addis Ababa

5th Floor, Get House Building,
Africa Avenue, Addis Ababa,
Ethiopia
Tel: +251 11 515 6320
Fax: +251 11 515 6449
Email: addisababa@issafrica.org

ISS Dakar

4th Floor, Immeuble Atryum,
Route de Ouakam,
Dakar, Senegal
Tel: +221 33 860 3304/42
Fax: +221 33 860 3343
Email: dakar@issafrica.org

ISS Nairobi

Braeside Gardens,
off Muthangari Road,
Lavington, Nairobi,
Kenya
Tel: +254 20 266 7208
Fax: +254 20 266 7198
Email: nairobi@issafrica.org