

**SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE
IMPLEMENTATION OF THE GENEVA CONVENTIONS BILL - B10-2011**



Submitted to the Portfolio Committee on Defence and Military Veterans
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Introduction

The Civil Society Prison Reform Initiative (CSPRI), a project of the Community Law Centre, focuses on policy development, advocacy and educational initiatives through high-quality research, key to the critical realisation of human rights and democracy in South Africa and Africa.

CSPRI focuses on prisons and places of confinement, with the aim of furthering constitutional and human rights imperatives within these settings. One of the CSPRI's initiatives is the Campaign to Domesticate the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The Campaign seeks the fulfilment of all relevant obligations under UNCAT, including the criminalisation of torture under domestic law. This submission is motivated by this focus and the particular significance of torture as a grave breach of the Geneva Conventions and their Additional Protocols.

CSPRI welcomes the opportunity offered by the Portfolio Committee on Defence and Military Veterans to comment on the Implementation of the Geneva Conventions Bill B10-2011 (the Bill). CSPRI commends the government's willingness to enact the Geneva Conventions and their Additional Protocols to fulfil its international obligations and reinforce the South African National Defence Force's commitment to respect and uphold their obligations under international humanitarian law. Nevertheless, CSPRI has certain concerns regarding the Bill, which are outlined hereafter.

Lack of a definition of "grave breaches"

1. Sections 4(1) and (2) of the Bill criminalise all grave breaches of the four Geneva Conventions and the two Additional Protocols. According to these international instruments, the following constitute grave breaches:

- Wilful killing;¹
- Torture or inhuman treatment, including biological experiments;²
- Wilfully causing great suffering or serious injury to body or health;³
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;⁴
- Compelling a prisoner of war or a protected person to serve in the forces of the hostile Power;⁵
- Wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention;⁶
- Unlawful deportation or transfer or unlawful confinement of a protected person;⁷
- Taking of hostages.⁸
- Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he or she depends, as determined in Article 11 of Additional Protocol I;⁹

¹ Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention); Article 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention); Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention); Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). All four conventions were adopted at Geneva on 12 August 1949 and ratified by the Republic of South Africa on 31 March 1952.

² *Ibid.*

³ *Ibid.*

⁴ Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 147 of the Fourth Geneva Convention.

⁵ Article 130 of the Third Geneva Convention; Article 147 of the Fourth Geneva Convention.

⁶ *Ibid.*

⁷ Article 147 of the Fourth Geneva Convention.

⁸ Article 147 of the Fourth Geneva Convention.

- When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health; making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; making non-defended localities and demilitarized zones the object of attack; making a person the object of attack in the knowledge that he is *hors de combat*; the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Geneva Conventions or Protocol I;¹⁰
- When committed wilfully and in violation of the Conventions or Protocol I; the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement the object of attack; depriving a person protected by the Conventions or referred to in Article 85(2) of Additional Protocol I of the rights of fair and regular trial.¹¹

2. The Rome Statute of the International Criminal Court (Rome Statute) prohibits grave breaches of the Geneva Conventions through its criminalisation of war crimes.¹² It is important to mention at this stage that, although war crimes and grave breaches of the Geneva Conventions have a distinct history, it has been argued that the distinction between war crimes and grave breaches has progressively blurred in international law.¹³ The Implementation of the Rome Statute on the International Criminal Court Act 27 of 2002 (ICC Act) affords South African courts jurisdiction to adjudicate violations of the Rome Statute of the International Criminal Court (Rome Statute),

⁹ Article 11(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted at Geneva on 10 June 1977 and ratified by the Republic on 21 November 1995 (Additional Protocol I).

¹⁰ Article 85(3) of Additional Protocol I.

¹¹ Article 85(4) of Additional Protocol I.

¹² Article 8(2) and 8(3) of the Rome Statute of the International Criminal Court.

¹³ Mark Divac Öberg, "The absorption of grave breaches into war crimes law", *International Review of the Red Cross*, 2009, p. 163.

including war crimes, and therefore also including the grave breaches listed in Article 8(2) and 8(3) of the Rome Statute. Accordingly, the Bill and the ICC Act overlap insofar as they both criminalise grave breaches.

3. The CSPRI submits that any legislation purporting to domesticate the Geneva Conventions that does not criminalise grave breaches would, we argue, not be comprehensive, and CSPRI therefore welcomes the criminalisation of grave breaches in both the Bill and the ICC Act. The Rome Statute, however, contains definitions of the key concepts necessary to the interpretation of grave breaches, which the Geneva Conventions do not. This raises certain problems.

4. According to the Bill, whoever commits a grave breach, is guilty of an offence and is liable to be prosecuted before a court of law in the Republic. The Bill does not, however, define any of the grave breaches. The Geneva Conventions and their Additional Protocols do not define these terms either. Although some of the grave breaches listed in the Bill no doubt already exist in South African criminal law, some of them are not currently defined. This renders some of the grave breaches vague and legally uncertain.

5. One specific example is the crime of torture. Currently, the South African legislature has criminalised the crime of torture through the adoption of the ICC Act. The latter, by enacting the Rome Statute, has incorporated its definition of torture. Article 7(2)(e) of the Rome Statute defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

6. Torture, as prohibited in the Geneva Conventions, has been interpreted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda. This interpretation constitutes today the most authoritative interpretation of this grave breach by a court of law. The two International Tribunals have adopted the definition contained in UNCAT,¹⁴ which differs from the definition contained in the Rome Statute. Indeed, Article 1 of UNCAT defines torture as

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

¹⁴ *The Prosecutor v. Brđjanin*, (Trial Chamber), IT-99-36, September 1, 2004, paras. 481 and 482

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁵

7. South Africa is a party to UNCAT and, with the aim of domesticating this international convention, the Department of Justice and Constitutional Development has announced the prompt tabling of the Combating of Torture Bill before Parliament. It is unclear when this Bill will effectively be tabled and how it will define torture, but the definition contained in the latest version of the Combating of Torture Bill differs from that contained in UNCAT and reads as follows:

... any act or omission, by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a public official on a person

(a) in order to

- i. obtain information or a confession from him or her or a third person; or
- ii. punish him or her for an act he or she or a third person has committed, or is suspected of having committed or is planning to commit; or
- iii. intimidate or coerce him or her or a third person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind,

but 'torture' does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.¹⁶

8. Therefore, under the current disposition of the Bill under discussion and without any further guidance from the legislative drafters, when a court of law will rule on a violation of the Geneva Conventions and their Additional Protocols, it will have to decide whether to apply the definition of torture contained in the Rome Statute, in UNCAT as interpreted by the International Tribunals or in the Combating of Torture Bill when the latter will be enacted. This situation is most unwise and should be avoided at all costs.

9. Indeed, it is indispensable that legal certainty surrounds the definition of criminal offences so as to instruct individuals what behaviour is acceptable or not in society. This uncertainty also raises issues of equality, as individuals committing the same acts could be prosecuted under three different pieces of legislation, each containing different definitions of what appears to be the same concept. This differential treatment is in violation of section 9(1) of the South African Constitution, which states that everyone is equal before the law and has the right to equal protection and benefit of the law. This lack of clarity will also present challenges to victims of torture, which will not be

¹⁵ Article 1 of UNCAT, adopted on 10 December 1984 and ratified by the Republic of South Africa on 10 December 1998.

¹⁶ Draft Combating of Torture Bill, 12 November 2010, section 3.

recognised such status in a consistent manner as the definition of torture might differ, and will eventually hamper their equal right to redress.

10. Finally, the Independent Police Investigative Directorate Bill mandates the Independent Police Investigative Directorate it creates to investigate allegations of torture committed by police. Again, the Bill does not contain a definition of torture, and could bring the same legal uncertainty as outlined above.

11. Therefore, CSPRI respectfully submits that the Implementation of the Geneva Conventions Bill be amended to include specific definitions of the grave breaches of the Geneva Conventions and their Additional Protocols or to refer to the specific statutory or common law, where necessary and relevant.

Criminalisation of all breaches not of a grave nature

12. Sections 4(3) and (4) of the Bill also criminalise “all other breaches” of the Geneva Conventions and their Additional Protocols, notwithstanding the fact that these breaches have not been established as “grave breaches” by the international community or international jurisprudence.

13. These two sub-sections are rather surprising for their vagueness. The Geneva Conventions and their Additional Protocols contain a range of obligations which differ in nature. Some provisions are obligations lying solely on the State, while other provisions constitute individual obligations, the violations of which should not amount to a criminal offence. CSPRI therefore submits that it is not prudent to elevate the violation of all these obligations to criminal offences in our domestic legal system. Indeed, to take a few examples, Article 5 of the First Geneva Convention reads as follows: “For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation”. Article 24 of the same Convention reads, “Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances”. Finally, Article 39 of the same Convention reads, “Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.” Some of the obligations contained in the Geneva Conventions will be enforced by individual combatants, others will rest on military superiors. Some of these provisions can be said to amount to individual obligations, others are State obligations. The nature and extent of these obligations vary greatly, and should not all be criminalised. There are abundant similar provisions in the Geneva Conventions and their Additional Protocols.

14. By domesticating the entire content of the Geneva Conventions and their Additional Protocols, the Bill under discussion makes it clear that these provisions are obligations on all South Africans, particularly when involved in combat operations. It would be sufficient then to call on the South African National Defence Force (SANDF) to operationalise the Geneva Conventions by developing adequate regulations and standing orders, which could then be integrated into SANDF's training.

15. Despite it being of utmost importance that the full extent of the Geneva Conventions and their Additional Protocols are enacted and understood by SANDF as amounting to clear obligations that are binding upon them when involved in combat operations, CSPRI questions the purpose of the criminalisation of the violation of the provisions outlined in paragraph 13. Section 3(1) of the Bill purports to fulfil such enactment. Consequently, criminalising the entire content of the Geneva Conventions in addition to its enactment would amount to unnecessary duplication.

16. CSPRI understands one of the purposes of the Bill as to allow for the prosecution of those within and outside the Republic committing certain violations of the Geneva Conventions. However, the Bill as it stands now will only bring confusion to those prosecuting and judging these individuals, and might bring an uneven implementation of the Bill in the future.

17. This said, CSPRI welcomes the legislative drafters' willingness to go beyond the mere criminalisation of grave breaches. Indeed, criminalising grave breaches only may run the risk of defeating the purpose and object of the Bill. Therefore, CSPRI respectfully suggest that both grave breaches as well as any other violation of the Geneva Conventions that is of a comparably serious nature be criminalised. These would include any other violations of a comparably serious nature against protected persons and objects, as well as any other serious violations of the laws and customs pertaining to the conduct of hostilities that are not already addressed by Section 4(2) of the Bill under discussion.

18. CSPRI respectfully submits that the identification of the provisions of a comparably serious nature to the grave breaches should be done by the legislative drafters, having consideration for the purpose and object of the Bill. This calls for a major redrafting process of the Bill, but will bring much needed clarity and certainty to those that will be brought to implement the Bill.

Need to determine the sentence

19. In light of the considerations developed above, the CSPRI respectfully submits that it becomes imperative that the Bill under discussion explicitly stipulates the sentence for all the specific violations of the Geneva Conventions, both of a grave and of a non-grave nature (as it does

elsewhere), rather than referring a court to the Criminal Procedure Act 51 of 1977 and its Schedules for sentencing. The determination of such sentences will also provide the necessary guidance to the various institutions that will be brought to implement the Bill.

Applicable law

20. CSPRI respectfully submits that a provision similar to Section 2 of the ICC Act should be inserted, recalling that conventional and customary international law, as well as comparable foreign law, must be considered by the courts applying the Bill under discussion. This is particularly relevant considering the extensive jurisprudence developed by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, which might assist the courts in interpreting the Geneva Conventions and their Additional Protocols.

Conclusion

21. CSPRI commends and is fully supportive of South Africa's willingness to enact the Geneva Conventions and their Additional Protocols, in line with the country's international obligations. It further commends the drafters' intention to punish individuals that do not respect their obligations under the Conventions. However, CSPRI also purports that the effective implementation of the Bill and of the Geneva Conventions will only be possible if there is sufficient certainty and clarity around the criminalisation of the relevant provisions which, in our opinion, is currently lacking.