

REPUBLIC OF SOUTH AFRICA

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# INTERNATIONAL CRIMES BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 41309 of 8 December 2017)  
(The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

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**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

**To criminalise conduct constituting international crimes; to regulate immunity from the prosecution of international crimes; to grant extra-territorial jurisdiction to the courts in respect of international crimes; to regulate the investigation and prosecution of allegations of international crimes; to provide for the extradition of persons accused or convicted of international crimes to foreign States; to provide for the surrender of persons accused or convicted of international crimes to entities; to provide for cooperation with entities in respect of international crimes; to repeal the Implementation of the Rome Statute of the International Criminal Court Act, 2002; to amend the Prevention and Combating of Torture of Persons Act, 2013, so as to confirm immunity for certain persons from prosecution in respect of the crime of torture; and to provide for matters connected therewith.**

### **PREAMBLE**

**MINDFUL—**

- that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity;
- of the fact that international crimes threaten the peace, security and well-being of the world;
- that international crimes must not go unpunished and that their effective prosecution must be ensured; and
- of the obligations of the Republic of South Africa to investigate and prosecute international crimes;

**BUT ALSO MINDFUL that—**

- the Republic of South Africa is a founder member of the African Union;
- the Republic of South Africa plays an important role in resolving conflicts on the African continent and encourages the peaceful resolution of conflicts wherever they occur;
- the Republic of South Africa, in exercising its international relations with heads of state of foreign countries, particularly heads of state of foreign countries in which serious conflicts occur or have occurred, is hindered by the Implementation of the Rome Statute of the International Criminal Court Act, 2002, which together with the Rome Statute of the International Criminal Court compel South Africa to arrest heads of state of foreign countries wanted by the International Criminal Court for

the crime of genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court, even under circumstances where the Republic of South Africa is actively involved in promoting peace, stability and dialogue in those countries; and

- the Republic of South Africa wishes to give effect to the rule of customary international law which recognises the diplomatic immunity of heads of state in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent;

**AND SINCE—**

- the Republic wishes to ensure continuity in the Republic in respect of the prosecution of international crimes,

**P**arliament of the Republic of South Africa enacts, as follows:—

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### **LAWS AMENDED AND REPEALED**

## CHAPTER 1

## DEFINITIONS, OBJECTS AND APPLICATION OF ACT

## Definitions

1. In this Act, unless the context indicates otherwise—
- “**competent authority**”, for the purposes of Chapters 4 and 5, means an authority 5  
responsible for the administration of justice, prosecutions or international liaison  
on behalf of an entity;
- “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
- “**Criminal Procedure Act, 1977**” means the Criminal Procedure Act, 1977  
(Act No. 51 of 1977); 10
- “**Diplomatic Immunities and Privileges Act, 2001**” means the Diplomatic  
Immunities and Privileges Act, 2001 (Act No. 37 of 2001);
- “**Director**” means a Director of Public Prosecutions appointed under section  
13(1)(c) of the National Prosecuting Authority Act, 1998, to exercise the powers,  
carry out the duties and perform the functions conferred or imposed on or assigned 15  
to him or her by the President by proclamation in the *Gazette*, in respect of an  
international crime;
- “**Director-General**” means the Director-General of the Department of Justice and  
Constitutional Development;
- “**Directorate for Priority Crime Investigation**” means the Directorate for 20  
Priority Crime Investigation established by section 17C of the South African Police  
Service Act, 1995;
- “**entity**” means the International Criminal Court, any international organisation,  
international tribunal, international court, or similar international body which has  
jurisdiction in respect of an international crime; 25
- “**Extradition Act, 1962**” means the Extradition Act, 1962 (Act No. 67 of 1962);
- “**High Court**” means the High Court of South Africa referred to in section 6(1) of  
the Superior Courts Act, 2013 (Act No. 10 of 2013);
- “**Implementation of the Rome Statute of the International Criminal Court  
Act, 2002**” means the Implementation of the Rome Statute of the International 30  
Criminal Court Act, 2002 (Act No. 27 of 2002);
- “**International Co-operation in Criminal Matters Act, 1996**” means the  
International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996);
- “**international crime**” means a crime referred to in section 4(1);
- “**International Criminal Court**” means the International Criminal Court 35  
established by Article 1 of the Rome Statute;
- “**Magistrates’ Courts Act, 1944**” means the Magistrates’ Courts Act, 1944 (Act  
No. 32 of 1944);
- “**Minister**” means the Cabinet member responsible for the administration of  
justice; 40
- “**National Director**” means the National Director of Public Prosecutions  
appointed in terms of section 179(1)(a) of the Constitution;
- “**National Prosecuting Authority Act, 1998**” means the National Prosecuting  
Authority Act, 1998 (Act No. 32 of 1998);
- “**South African Police Service**” means the South African Police Service 45  
established by section 5(1) of the South African Police Service Act, 1995;
- “**South African Police Service Act, 1995**” means the South African Police  
Service Act, 1995 (Act No. 68 of 1995);
- “**Superior Courts Act, 2013**” means the Superior Courts Act, 2013 (Act No. 10 of  
2013); 50
- “**surrender**” means the handing over of a person who is sought by an entity for  
criminal prosecution of a crime or for the imposition or enforcement of a sentence  
in respect of such crime, and “surrendering” has a corresponding meaning;
- “**the effective date**” means the date on which the withdrawal by the Republic  
from the Rome Statute in terms of Article 127 of the Rome Statute became 55  
effective; and
- “**the Rome Statute**” means the Rome Statute of the International Criminal Court,  
adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the  
Establishment of an International Criminal Court on 17 July 1998.

## Objects of Act

2. (1) The objects of this Act are to—
- (a) criminalise international crimes under the domestic law of the Republic;
  - (b) regulate immunity in the Republic against prosecution for international crimes; 5
  - (c) afford extra-territorial jurisdiction to South African courts to adjudicate international crimes;
  - (d) provide for the investigation and prosecution of persons who commit international crimes;
  - (e) ensure that persons who are accused of international crimes may be extradited to foreign States; 10
  - (f) provide for the surrender of persons who are accused of international crimes to entities;
  - (g) provide for co-operation between the Republic and entities in respect of persons who are accused of having committed international crimes; and 15
  - (h) regulate afresh immunity from prosecution for the crime of torture.

## Application of Act

3. (1) This Act does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act, 2001. 20
- (2) Subject to section 36(2), this Act applies to all international crimes committed on or after 16 August 2002.
- (3) Any investigation into allegations of international crimes initiated prior to the commencement of this Act must continue to be investigated as is provided for in section 6. 25

## CHAPTER 2

### INTERNATIONAL CRIMES

#### International crimes

4. (1) For the purposes of this Act, “**international crime**” means—
- (a) “**a crime against humanity**” as defined in Part 2 of Schedule 1; 30
  - (b) “**a war crime**” as defined in Part 3 of Schedule 1; and
  - (c) “**genocide**” as defined in Part 1 of Schedule 1.
- (2) A person is guilty of an offence if that person—
- (a) commits an international crime;
  - (b) conspires with any other person to commit an international crime; or 35
  - (c) aids, abets, induces, incites, instigates, instructs or commands any other person to commit an international crime.

#### Jurisdiction of South African courts

5. (1) A court referred to in subsection (4) has jurisdiction to hear an international crime which has allegedly been committed within the territory of the Republic. 40
- (2) A court referred to in subsection (4) has jurisdiction to hear an international crime which has allegedly been committed outside the territory of the Republic, if—
- (a) the person who has allegedly committed the crime is a South African citizen;
  - (b) the person who has allegedly committed the crime is not a South African citizen but is ordinarily resident in the Republic; 45
  - (c) the crime has allegedly been committed against a South African citizen or against a person who is ordinarily resident in the Republic; or
  - (d) the person who has allegedly committed the crime is, after the commission of the crime, present in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic, and he or she is not extradited or surrendered in terms of this Act. 50
- (3) Where a person is charged with conspiracy or incitement to commit an international crime or as an accessory after that crime, the crime is deemed to have been committed not only at the place where the act was committed, but also at every place

where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.

(4) A prosecution against a person accused of having committed an international crime may be instituted in—

- (a) the main seat of a Division of the High Court or any local seat of a Division of the High Court, as contemplated in section 6 of the Superior Courts Act, 2013; or
- (b) a court for a regional division referred to in section 2(1)(g) of the Magistrates' Courts Act, 1944.

(5) An accused may, pending his or her arraignment for trial in a court referred to in subsection (4), appear in—

- (a) a court for a regional division referred to in subsection (4)(b); or
- (b) a court for a district referred to in section 2(1)(f) of the Magistrates' Courts Act, 1944.

(6) Where an international crime was committed outside the territory of the Republic, a warrant of arrest contemplated in section 43 of the Criminal Procedure Act, 1977, may notwithstanding section 43(1)(b) of that Act be issued by any magistrate on application by the National Director or a prosecutor authorised thereto in writing by the National Director.

#### **Duty of Directorate for Priority Crime Investigation to investigate complaints relating to international crimes**

6. (1) The Directorate for Priority Crime Investigation must investigate a complaint of an international crime which has allegedly been committed within the territory of the Republic.

(2) When a complaint is received about the commission of an international crime which has allegedly been committed outside the territory of the Republic, the Directorate for Priority Crime Investigation must conduct a preliminary investigation in order to establish—

- (a) whether a court in the Republic has jurisdiction to hear the matter;
- (b) whether the person who allegedly committed the international crime is not immune from prosecution in the Republic for such a crime;
- (c) whether the conduct complained of potentially constitutes an international crime;
- (d) the prospects of the person being extradited or surrendered in terms of this Act, to another State or an entity; and
- (e) the prospects of successfully prosecuting the person for an international crime in the Republic.

(3) The Directorate for Priority Crime Investigation must upon completion of the preliminary investigation contemplated in subsection (2), submit its recommendations to the Director for a decision in terms of subsection (4).

(4) The Director must consider the recommendations of the Directorate for Priority Crime Investigation submitted in terms of subsection (3) and must make a decision whether or not the Directorate for Priority Crime Investigation must investigate the complaint further with a view to institute criminal proceedings against the person who allegedly committed the international crime in question, having regard to all relevant considerations, including the following:

- (a) Whether the investigation is able to establish the truth, which requires that it covers all facts and evidence and that the incriminating and exonerating circumstances be investigated equally;
- (b) whether all the necessary evidence located outside the Republic can be obtained through mutual legal assistance protocols;
- (c) whether a successful prosecution may be instituted;
- (d) the nature and extent of the resources required for an effective investigation;
- (e) the strength and availability of the evidence;
- (f) the ability to secure cooperation with the State where the crime was committed and other States having evidence relating to the crime in question;
- (g) whether the same complaint is under investigation by a foreign State or an entity;
- (h) the obligation to secure the presence of victims and witnesses in the Republic;
- (i) national and regional interest considerations; and

- (j) whether credible evidence has been received that the person who has allegedly committed the international crime is due to arrive in the Republic on a fixed date or in the immediate future.

(5) The Director may, for purposes of making a decision in terms of subsection (4), request the Directorate for Priority Crime Investigation to provide, within a specified period, such additional information as may be necessary in order to make such decision. 5

(6) The decision of the Director in terms of subsection (4) may upon written application by—

- (a) the National Head of the Directorate for Priority Crime Investigation, as contemplated in section 17C(2)(a) of the South African Police Service Act, 1995; or 10

(b) any other interested person, be reviewed by the National Director.

### **Institution of prosecutions in South African courts**

7. (1) A decision by the Director to institute or not to institute a prosecution against a person for an international crime is subject to review by the National Director in terms of section 22(1)(c) of the National Prosecuting Authority Act, 1998. 15

(2) No prosecution may be instituted against a person accused of having committed an international crime without the written authority of the National Director.

(3) The prosecution for an international crime which has allegedly been committed outside the territory of the Republic must commence before a court referred to in section 5(4) designated by the National Director in consultation with the Minister and the Chief Justice of South Africa. 20

(4) A copy of the written authority contemplated in subsection (2) and the designation contemplated in subsection (3) must be served on the accused and the original thereof must be handed in at the court in which the proceedings are to commence. 25

(5) The National Director must in the annual report referred to in section 35(2)(a) of the National Prosecuting Authority Act, 1998, give an account of decisions regarding the institution of prosecutions for international crimes, including decisions not to prosecute.

### **Applicable law** 30

8. A court hearing any matter arising from the application of this Chapter must, in addition to the Constitution and other applicable law of the Republic, also consider and, where appropriate, may apply—

- (a) relevant conventional international law; 35  
 (b) relevant customary international law; and  
 (c) comparable foreign law.

### **Exclusion of defences**

9. (1) The fact that an accused person committed an international crime pursuant to an order of a Government or of a superior does not relieve him or her of criminal responsibility. 40

(2) (a) The fact that an international crime was committed by a person under effective command and control of a military commander or a person effectively acting as such does not relieve the military commander or a person effectively acting as such from criminal responsibility if he or she—

- (i) knew or, owing to the circumstances at the time, should have known, that the person under his or her effective command and control was committing or about to commit an international crime; and 45  
 (ii) failed to take all necessary and reasonable measures within his or her power to prevent such act or to refer the matter to the competent authorities for investigation and prosecution. 50

(b) The fact that an international crime was committed by a person under effective authority and control of a superior, other than a person referred to in paragraph (a), does not relieve that superior from criminal responsibility—

- (i) if he or she knew, or consciously disregarded information which clearly indicated, that the person under his or her effective authority and control was committing or about to commit an international crime; 55

- (ii) if the international crime concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) if the superior failed to take all necessary and reasonable measures within his or her power to prevent such act or to refer the matter to the competent authorities for investigation and prosecution. 5
- (3) A state of war, threat of war, internal political instability, national security or any state of emergency may not be invoked as a justification for the commission of an international crime.

### **Penalties**

**10.** A court referred to in section 5(4) must sentence a person who has been convicted of— 10

- (a) the offence of genocide, a crime against humanity or a war crime referred to in section 4(2)(a);
- (b) the offence of conspiracy, referred to in section 4(2)(b); or
- (c) the offence of aiding, abetting, inducing, inciting, instigating, instructing or commanding any other person to commit an international crime, referred to in section 4(2)(c), 15

to imprisonment for life, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence which is within that court's penal jurisdiction, in which case the court must enter those circumstances on the record of proceedings. 20

## **CHAPTER 3**

### **EXTRADITION OF PERSONS TO FOREIGN STATES FOR INTERNATIONAL CRIMES**

#### **Extradition of persons to foreign States for international crimes 25**

**11.** (1) An international crime shall be deemed to be included in the definition of “**extraditable offence**” in section 1 of the Extradition Act, 1962.

(2) An international crime shall be deemed to be included in any extradition agreement entered into before the date of commencement of this section with any foreign State by the President in terms of section 2(1)(a) of the Extradition Act, 1962. 30

(3) The Extradition Act, 1962, shall be applicable to foreign States designated before the commencement of this section by the President in terms of section 2(1)(b) of that Act in respect of an international crime.

## **CHAPTER 4**

### **SURRENDER OF PERSONS TO ENTITIES FOR INTERNATIONAL CRIMES 35**

#### **Request for surrender**

**12.** Any person accused of an international crime over which an entity has jurisdiction may, subject to this Act, any other law of the Republic and any determination in terms of section 21, on request of the competent authority of an entity, be surrendered by the Republic to that entity for the purpose of prosecuting or sentencing a person for an international crime or for enforcing a sentence imposed for an international crime. 40

#### **Content of request and documents accompanying request for surrender**

**13.** (1) A request referred to in section 12 must be made in writing and must be transmitted through diplomatic channels to, or be submitted directly to, the Director-General. 45

(2) A request referred to in subsection (1) must be accompanied by—

- (a) information which identifies the person concerned and the probable location of that person;
- (b) a statement of the facts of the case, including the time and place of the commission of the offence and the history of the case; 50

- (c) a statement of the laws describing the essential elements and the designation of the offence;
- (d) a statement of the laws describing the sentence which may be imposed for the offence; and
- (e) a statement of the laws regulating the prescription of the right to institute a prosecution or to impose a sentence in respect of the offence. 5

(3) When a request referred to in subsection (1) relates to a person who has not yet been found guilty by the entity, the request must also be accompanied by a copy of the warrant of arrest or detention issued by the relevant organ of an entity that has the authority to issue a warrant of arrest or detention. 10

(4) When a request referred to in subsection (1) relates to a person who has been found guilty by the entity concerned, the request must also be accompanied by—

- (a) a copy of the judgment of the entity setting out the conviction and, if sentenced, the sentence imposed, a statement that the sentence is enforceable and the extent to which the sentence remains to be served; and 15
- (b) a copy of the warrant of arrest or detention, or a statement that the person is subject to detention on the basis of the judgment.

(5) (a) Any request referred to in subsection (1), supporting documentation and other communications relating to such request must be certified as true and correct to the satisfaction of the Director-General and accompanied by a sworn translation in the English language if the documentation and communications are in another language. 20

(b) A document must be regarded as certified for the purposes of paragraph (a) if it contains a solemn or an attested declaration made and signed by a representative of the competent authority of an entity confirming that the document is true and correct.

#### **Additional information** 25

**14.** (1) The Director-General may, if he or she considers that the information furnished in support of a request for surrender referred to in section 12 is not sufficient to process the request for surrender, request the competent authority of the entity to furnish within a specified period such additional information as may be necessary.

(2) A person whose surrender is sought may, if he or she was arrested and detained in respect of an international crime to which the request for surrender relates and if the additional information furnished in response to a request referred to in subsection (1) is not sufficient or is not received within the time specified— 30

- (a) be released from custody unconditionally;
- (b) be released from custody on such conditions as may be necessary to ensure the availability of the person; or 35
- (c) be further detained,

pending the finalisation of the request for surrender, if a court deems it in the interest of justice.

(3) Where the person is released from custody or further detained in accordance with subsection (2), the competent authority of an entity must be notified thereof in writing as soon as is practicable. 40

#### **Communicating decision on request for surrender to entity**

**15.** (1) The Director-General must promptly notify the competent authority of an entity in writing of the decision in respect of the request for surrender referred to in section 12. 45

(2) The Director-General must, if the request for surrender is refused, furnish reasons in writing for the refusal to the competent authority of the entity.

(3) The competent authority may, if the request for surrender is refused, at any time submit a new request for the surrender of the person, if such request contains new and material information not previously submitted. 50

#### **Application of Extradition Act, 1962, to requests for surrender**

**16.** Sections 5, 7, 8, 9, 10, 11, 13, 14, 15, 16 and 17 of the Extradition Act, 1962, apply, with the changes required by the context, to a request referred to in section 12.

**Surrender of person**

17. (1) The surrender of a person to an entity in terms of a request for surrender must take place at a location indicated by the competent authority of the entity.

(2) The person to be surrendered must be removed from the territory of the Republic within a reasonable period, which date must be specified by the Director-General in concurrence with the competent authority of the entity. 5

(3) If circumstances beyond its control prevent—

(a) the Republic from surrendering the person sought; or

(b) the entity from removing the person to be surrendered,

the Director-General or the competent authority of the entity, as the case may be, must notify the other of the circumstances and a new date of surrender must be specified by the Director-General in concurrence with the competent authority of the entity. 10

(4) If the entity, without any reasonable explanation, fails to remove the person from the Republic on the date specified in subsection (2) or (3), the person may—

(a) be released from custody unconditionally; 15

(b) be released from custody on such conditions as may be necessary to ensure the availability of the person; or

(c) be further detained,

pending the surrender of the person, if a court deems it in the interest of justice to do so.

**Postponement and temporary surrender** 20

18. (1) When criminal proceedings in the Republic are pending against the person sought by an entity or that person is serving a sentence in the Republic for an offence other than the offence for which the surrender of the person is requested, the Minister may, after considering a request for surrender referred to in section 12—

(a) postpone the surrender of that person until the conclusion of the criminal proceedings or until the whole or any part of the sentence imposed had been served; or 25

(b) authorise, to the extent permitted by law, the temporarily surrender of the person to the entity for purposes of prosecution for an international crime in accordance with the conditions determined by the Minister in terms of section 21. 30

(2) The Director-General must inform the competent authority of the entity in writing of any postponement of the surrender of the person.

(3) A person who is returned to the Republic following a temporary surrender may be finally surrendered to the entity to serve any sentence imposed for an international crime. 35

**Notification of progress regarding proceedings before entity**

19. The competent authority of an entity must—

(a) if the Director-General so requests, provide the Director-General with information relating to progress with the proceedings against the person surrendered; and 40

(b) on completion of the proceedings against the person, provide the Director-General with a copy of the judgment.

**Liability for costs regarding surrender**

20. (1) The Republic shall bear the costs of any proceedings in its jurisdiction arising from a request referred to in section 12. 45

(2) The Republic shall bear the costs incurred in its territory in connection with the arrest and detention of the person who is to be surrendered.

(3) The relevant entity shall bear the costs incurred in conveying the person who is to be surrendered from the territory of the Republic, including transit costs. 50

**Other conditions of surrender**

21. Any matter or condition relating to the surrender of a person to an entity for an international crime not provided for in this Chapter may be determined by the Minister in concurrence with the competent authority of an entity.

### Concurrent requests for extradition and surrender

**22.** (1) A request for surrender in terms of this Chapter takes preference over a request for extradition in accordance with Chapter 3.

(2) Whenever requests in terms of section 12 are received from more than one entity in respect of the same person, the Minister must, having regard to all relevant circumstances, including—

- (a) the nature and extent of the international crimes;
- (b) the place of commission of the international crimes;
- (c) the nationality and ordinary place of residence of the person sought and of the victims;
- (d) the nature of the perpetrator's involvement in the international crimes;
- (e) the level of vulnerability of the victims; and
- (f) the respective dates of the requests,

make a decision as to which request for surrender enjoys preference.

### Provisional arrest

**23.** (1) In cases of urgency, the competent authority of an entity may request the provisional arrest of a person who has allegedly committed an international crime, pending the making of a request for the surrender of that person.

(2) A request for provisional arrest must be made in writing and must be transmitted through diplomatic channels to, or be submitted directly to, the Director-General.

(3) The request for provisional arrest must be accompanied by the following documents and information:

- (a) Information which identifies the person concerned and the probable location of that person;
- (b) a statement of the facts of the case, including the time and place of the commission of the offence and the history of the case;
- (c) a statement of the laws describing the essential elements and the designation of the offence;
- (d) a statement of the laws describing the sentence which may be imposed for the offence;
- (e) a statement of the laws regulating the prescription of the right to institute a prosecution or to impose a sentence in respect of the offence;
- (f) a statement of the existence of a warrant of arrest or detention, or confirming the conviction of the person sought; and
- (g) a statement that a request for surrender for the person will follow.

(4) (a) Any request referred to in subsection (1), supporting documentation and other communications relating to such a request must be certified as true and correct to the satisfaction of the Director-General and accompanied by a sworn translation in the English language if the documentation and communications are in another language.

(b) A document must be regarded as certified for the purposes of paragraph (a) if it contains a solemn or an attested declaration made and signed by a representative of the competent authority of an entity confirming that the document is true and correct.

(5) The Director-General must, upon receipt of a request from an entity for the provisional arrest of a person, immediately forward the request to the National Director to apply for a warrant of arrest for that person.

(6) On written application by the National Director, or a person designated by him or her, stating under oath or affirmation that he or she has reason to believe that—

- (a) the request of the entity has been made on grounds of urgency for the arrest of a person who is suspected or accused of having committed an international crime or who has been convicted by the entity for such a crime;
- (b) a warrant of arrest or a judgment of conviction against the person in question exists for an international crime;
- (c) a formal request for the surrender of the person for an international crime to the entity will be made later;
- (d) the person concerned is in or on his or her way to the Republic; and
- (e) the purpose of the provisional arrest is to bring the person concerned before the entity to be prosecuted or sentenced for an international crime or to take him or her to a place where he or she is to undergo imprisonment under a sentence of the entity for an international crime, as the case may be,

a magistrate may issue a warrant for the arrest of that person and notify the Director-General that a warrant has been issued.

(7) Any warrant issued in terms of subsection (6) must be in the form and executed in a manner as near as possible to what may be prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure. 5

(8) The Director-General must promptly in writing notify the competent authority of the entity of the disposition of its request and, if the request is refused, the reasons for the refusal.

(9) A person who has been arrested in terms of subsection (1) may, if the Director-General has not received the formal request for surrender and the supporting documents required in this Chapter upon the expiration of 45 days from the date of the provisional arrest, pending the finalisation of the request to surrender the person— 10

- (a) be released from custody unconditionally;
- (b) be released from custody on such conditions as may be necessary to ensure the availability of the person; or 15
- (c) be further detained for a maximum period of seven days, which period may not further be extended,

if a court deems it in the interest of justice to do so.

(10) The fact that a person has been released from custody pursuant to subsection (9) shall not prejudice the subsequent re-arrest and surrender of that person if the request for surrender and supporting documents are received by the Director-General at a later date. 20

## CHAPTER 5

### REQUESTS FOR ASSISTANCE TO OR FROM ENTITIES IN RELATION TO INTERNATIONAL CRIMES

#### Forms of assistance to entity 25

24. The following forms of assistance in relation to an international crime may be provided to an entity:

- (a) The identification and whereabouts of persons or the location of items;
- (b) the serving of documents, including documents which requires the attendance of persons before an entity; 30
- (c) the provision of information, documents and records;
- (d) the provision of items, including the lending of exhibits;
- (e) the conducting of searches and seizures in accordance with the law of the Republic;
- (f) the taking of evidence and obtaining of statements; 35
- (g) authorising officials from the Republic to execute requests for assistance;
- (h) the voluntary transfer of persons in custody for the purpose of giving evidence before the entity;
- (i) the facilitation of the appearance of witnesses before the entity;
- (j) the rendering of assistance to persons during investigations; 40
- (k) the protection of victims and witnesses on such terms and conditions as may be agreed upon by the Minister and the entity;
- (l) the preservation of evidence in the Republic; and
- (m) any other type of assistance which is authorised by law, with the view to facilitate the investigation and prosecution of an international crime within the jurisdiction of an entity. 45

#### Request for assistance by entity

25. (1) Subject to this Act and any other law of the Republic, the competent authority of an entity may request the Republic in writing for the assistance referred to in section 24 in respect of any proceedings regarding an international crime in respect of which that entity has jurisdiction. 50

(2) A request for assistance must be in writing and be transmitted through diplomatic channels to, or be submitted to, the Director-General.

(3) A request for assistance must—

- (a) identify the authority conducting the investigation, prosecution or proceedings to which the request relates; 55

- (b) set out the nature of the investigation, prosecution or proceedings, and must include a summary of the facts and a copy of the applicable laws;
- (c) specify the purpose of the request and the nature of the assistance sought;
- (d) specify any period of time within which the request should be executed; and
- (e) where applicable, be accompanied by any order of an entity in respect of which assistance is requested. 5

(4) (a) Any request referred to in subsection (1), supporting documentation and other communication relating to such request must be certified as true and correct to the satisfaction of the Director-General and accompanied by a sworn translation in the English language if the documentation and communications are in another language. 10

(b) A document must be regarded as certified for the purposes of paragraph (a) if it contains a solemn or an attested declaration made and signed by a representative of the competent authority of an entity confirming that the document is true and correct.

(5) The Director-General may, if he or she considers that the information furnished in support of a request referred to in subsection (1) is not sufficient to process the request, request the competent authority of the relevant entity to furnish within a specified period such additional information as may be necessary. 15

(6) In the case of a request for assistance that should be executed within a specified period of time, the competent authority of the entity must specify the period and must submit the request timeously to enable the Republic to comply with the request within the specified period. 20

(7) In the case of a request for the taking of evidence, search and seizure, or the location of items, the request for assistance must specify the basis for believing that the evidence may be found in the Republic.

(8) In the case of a request to take evidence from a person, the request for assistance must specify whether sworn or affirmed statements are required and must include a description of the subject matter of the evidence or statement sought. 25

(9) To the extent necessary and where possible, a request for assistance must include—

- (a) information with regard to the identity, nationality and location of the person who is the subject of the investigation, prosecution or proceedings; 30
- (b) details of the particular procedure or requirement that an entity requires to be followed;
- (c) in the case of the lending of an exhibit, the current location of the exhibit in the Republic, the place to which the exhibit will be removed, any test which will be conducted on the exhibit, the authority within the entity who will have custody of the exhibit and the date by which the exhibit will be returned; and 35
- (d) in the case of making detained persons available, the authority who will have custody during the transfer, the place to which the detained person will be transferred and the date on which the person will be returned. 40

### **Executing request for assistance**

**26.** (1) Section 7 of the International Co-operation in Criminal Matters Act, 1996, applies, with the changes required by the context, to a request referred to in section 25(1).

(2) The Director-General must cause the request for assistance to be executed promptly by the relevant authorities. 45

(3) A request for assistance must be executed in accordance with the laws of the Republic.

(4) The Director-General must in writing inform the competent authority of an entity promptly of any circumstances which are likely to cause a delay in responding to the request for assistance. 50

(5) The Director-General must in writing inform the competent authority of an entity promptly of a decision not to comply in whole or in part with a request for assistance and the reasons for the decision.

(6) The Director-General must respond promptly to inquiries by the competent authority of the entity concerning progress towards the execution of a request for assistance. 55

### **Service of process and documents**

**27.** (1) A request to serve process or a document, except a subpoena in connection with any proceedings before an entity, on a person in the Republic must be transmitted through diplomatic channels to, or be submitted to, the Director-General.

(2) Upon receipt of the request referred to in subsection (1), the Director-General must immediately transmit the request, together with the process or document, to the Provincial Commissioner of the South African Police Service within whose area of jurisdiction the person resides for service on the person concerned. 5

(3) Upon receipt of the request, the Provincial Commissioner of the South African Police Service must cause the process or document to be served on the person concerned in the manner specified in the request. 10

(4) The Provincial Commissioner of the South African Police Service must send the return of service to the Director-General for transmission to the entity.

### **Refusal or postponement of assistance**

**28.** (1) A request for assistance may be refused by the Minister, if the execution of the request for assistance would affect the Republic's sovereignty, security, public order or public interest, or when it is contrary to any law of the Republic. 15

(2) Assistance may be postponed by the Minister if the execution of the request would interfere with an ongoing investigation or prosecution in the Republic.

(3) The Director-General must promptly in writing inform the competent authority of an entity of any decision of the Republic not to comply in whole or in part with a request for assistance, or to postpone the execution thereof, and must give reasons for that decision. 20

### **Examination of witness**

**29.** Sections 8, 9 and 10 of the International Co-operation in Criminal Matters Act, 1996, apply, with the changes required by the context, to a request for assistance. 25

### **Attendance of witness before entity**

**30.** (1) Section 11 of the International Co-operation in Criminal Matters Act, 1996, applies, with the changes required by the context, to a request received from the competent authority of an entity to secure the appearance of a person present in the Republic before the entity. 30

(2) A person who is serving a sentence of imprisonment in the Republic and who is to appear before an entity, must be transferred from the Republic to the location indicated by the competent authority of an entity, if the entity has guaranteed that the person will be— 35

(a) incarcerated under the conditions and circumstances as may be determined by the Minister in terms of section 33 to ensure the safety and wellbeing of the person; and

(b) kept in custody and be subsequently returned to the Republic.

(3) A person referred to in subsection (2) who is transferred to an entity must be regarded as continuing to serve the sentence imposed in the Republic. 40

(4) The Head of a correctional centre as defined in section 1 of the Correctional Services Act, 1998 (Act No. 111 of 1998), must, if the term of imprisonment of the person concerned will expire while that person is still in the custody of the entity, in writing notify the Director-General of the date on which that term of imprisonment will expire. 45

(5) (a) The Director-General must upon receipt of the notification referred to in subsection (4) in writing notify the competent authority of the entity timeously of the date on which the term of imprisonment of the person transferred to the entity will expire, if that person is still in the custody of the entity. 50

(b) An entity must ensure that a person whose term of imprisonment has expired, is released upon the date of expiration of the term of imprisonment.

### Authentication of documents

31. (1) A document, record or object to be submitted or transmitted to an entity pursuant to a request for assistance does not have to be authenticated unless the entity specifically requested that it be authenticated.
- (2) A document, record or object required to be authenticated must be authenticated 5  
in the manner—
- (a) in which foreign documents may be authenticated to enable them to be produced in any court; or
  - (b) requested by the the competent authority of an entity.

### Liability for costs regarding assistance 10

32. The Republic bears the cost of executing the request for assistance, except for—
- (a) costs associated with conveying any person to or from the territory of the Republic at the request of an entity and any expenses payable to that person while in the territory of an entity;
  - (b) costs and fees of private experts, including translators, interpreters and transcribers hired for the purpose of executing a request for assistance in the Republic; 15
  - (c) costs associated with the transmission of evidence and statements from the Republic to an entity via video, satellite or other technological means; and
  - (d) any extraordinary costs which have emanated from the execution of the 20  
request,
- which costs must be borne by the relevant entity.

### Determination by Minister

33. Any matter or condition relating to assistance to an entity in relation to an international crime not provided for in this Chapter may be determined by the Minister 25  
in concurrence with the competent authority of an entity.

### Request to entity for assistance

34. (1) Where an investigation or criminal or other proceedings which have a bearing on an international crime is being instituted within the Republic, the National Director may request an entity to— 30
- (a) provide any information, document, record or object;
  - (b) borrow from an entity any exhibit;
  - (c) render any other assistance,
- which have a bearing on the investigation or proceedings if he or she has reason to believe that the entity may provide such assistance. 35
- (2) A request for assistance must be in writing and must specify—
- (a) the nature of the investigation, prosecution or proceedings, and must include a summary of the facts and a copy of the applicable laws;
  - (b) the purpose of the request and the nature of the assistance sought;
  - (c) any period of time within which the request should be executed; and 40
  - (d) the basis for believing that the entity may assist the Republic.
- (3) The request for assistance, supporting documentation and other communications relating to such request must be certified to be true and correct and accompanied by a sworn translation in the English language if the documentation and communications are in another language. 45
- (4) In the case of a request for assistance that should be executed within a specified period, the National Director must specify the period and must submit the request timeously to enable the entity to comply with the request within the specified period.
- (5) A request for assistance must be submitted to the Director-General who must upon receipt thereof submit the request to the competent authority of the entity. 50

## CHAPTER 6

### MISCELLANEOUS PROVISIONS

#### Regulations

- 35.** (1) The Minister may make regulations—
- (a) with regard to the proof of any matter for the purposes of this Act; 5
  - (b) prescribing forms of notices, warrants, orders and other forms to be used for the purposes of this Act; and
  - (c) providing for any matter which he or she may consider necessary or expedient with a view to achieving the objects of this Act.
- (2) Different regulations may be made in respect of different foreign States or entities. 10

#### Amendment and repeal of laws and transitional arrangements

- 36.** (1) The laws specified in Schedule 2 are hereby repealed or amended to the extent set out in the third column of that Schedule.
- (2) Notwithstanding the repeal of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, in terms of subsection (1), any cooperation with the International Criminal Court in connection with criminal investigations and proceedings in relation to which the Republic had a duty to cooperate and which commenced prior to the effective date and the continued consideration of any matter which was already under consideration by the International Criminal Court prior to the effective date contemplated in Article 127 of the Rome Statute, must be dealt with and concluded in terms of the provisions of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, as if that Act had not been repealed. 15  
20

#### Short title and commencement

- 37.** This Act is called the International Crimes Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 25

## SCHEDULE 1

### INTERNATIONAL CRIMES

#### [Section 4(1)]

#### *Part 1*

#### *Genocide*

**“Genocide”** means any of the following conduct committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) causing serious bodily harm or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group; or
- (e) forcibly transferring children of the group to another group.

#### *Part 2*

#### *Crimes Against Humanity*

**1. “A crime against humanity”** means any of the following conduct when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in item 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this item or any crime within the jurisdiction of a court referred to in section 5(4) or an entity;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid; or
- (k) other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

**2.** For the purpose of paragraph 1 of this Part—

- (a) **“attack directed against any civilian population”** means a course of conduct involving the multiple commission of acts of conduct referred to in paragraph 1 of this Part against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) **“deportation or forcible transfer of population”** means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (c) **“enforced disappearance of persons”** means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time;

- (d) **“enslavement”** means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (e) **“extermination”** includes the intentional infliction of conditions of life, among others, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (f) **“forced pregnancy”** means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
- (g) **“persecution”** means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) **“the crime of apartheid”** means inhumane acts of conduct of a character similar to those referred to in paragraph 1 of this Part, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and
- (i) **“torture”** means 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 arising only from, inherent in or incidental to, lawful sanctions.

3. The term **“gender”** refers to both sexes, male and female, within the context of society and does not indicate any meaning different from the above.

### *Part 3*

#### *War Crimes*

**“War crimes”** mean any of the following:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following conduct against persons or property protected under the provisions of the relevant Geneva Conventions:
  - (i) Willful killing;
  - (ii) torture or inhuman treatment, including biological experiments;
  - (iii) willfully 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 persons to serve in the forces of a hostile power;
  - (vi) willfully depriving a prisoner of war or other protected persons of the rights of fair and regular trial;
  - (vii) unlawful deportation or transfer or unlawful confinement; or
  - (viii) taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following conduct:
  - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities;
  - (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations of 1945, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) killing or wounding a combatant who, having laid down his or her arms or having no longer means of defence, has surrendered at discretion;
- (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) the transfer, directly or indirectly, 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;
- (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) declaring that no quarter will be given;
- (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) pillaging a town or place, even when taken by assault;
- (xvii) employing poison or poisoned weapons;
- (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition;
- (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in item (f) of paragraph 2 of Part 2, enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including

- wilfully impeding relief supplies as provided for under the Geneva Conventions; or
- (xxvi) conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following conduct 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; or
  - (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.
- (d) Paragraph (c) of this Part applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following conduct:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (v) pillaging a town or place, even when taken by assault;
  - (vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in item (f) of paragraph 2 of Part 2, enforced sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
  - (vii) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities;
  - (viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (ix) killing or wounding treacherously a combatant adversary;
  - (x) declaring that no quarter will be given;
  - (xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, which cause death to or seriously endanger the health of such person or persons; or

- (xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.
- (f) Paragraph (e) of this Part applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organised armed groups or between such groups.

## SCHEDULE 2

## LAWS AMENDED

## [Section 36]

No. and year of Act	Short title	Extent of amendment or repeal
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p>(a) Amendment of section 18 by the substitution for paragraph (g) of the following paragraph: “(g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002[;], or an <u>international crime contemplated in section 4 of the International Crimes Act, 2017;</u>”;</p> <p>(b) Amendment of Schedule 1 by the addition of the following item: “<u>Any offence contemplated in section 4 of the International Crimes Act, 2017.</u>”;</p> <p>(c) Amendment of Schedule 6 by the addition of the following item: “<u>Any offence contemplated in section 4 of the International Crimes Act, 2017.</u>”; and</p> <p>(d) Amendment of Schedule 8 by the addition of the following item: “<u>Any offence contemplated in section 4 of the International Crimes Act, 2017.</u>”.</p>
Act No. 68 of 1995	South African Police Service Act, 1995	<p>Amendment of the Schedule by the substitution for item 4 of the following item: “<b>4.</b> Any offence referred to in Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002)[;], or an <u>offence contemplated in section 4 of the International Crimes Act, 2017.</u>”.</p>
Act No. 16 of 1999	Military Discipline Supplementary Measures Act, 1999	<p>Amendment of section 3 by the substitution for subsection (4) of the following subsection: “(4) When a person who is subject to the Code is suspected of having committed a crime contemplated in section 4, <b>[or]</b> an offence contemplated in section 37 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, or a “war crime” <u>contemplated in section 4 of the International Crimes Act, 2017,</u> the matter must be dealt with in accordance with <b>[that Act]</b> <u>these Acts.</u>”.</p>

No. and year of Act	Short title	Extent of amendment or repeal
Act No. 27 of 2002	Implementation of the Rome Statute of the International Criminal Court Act, 2002	Repeal of the whole Act.
Act No. 70 of 2002	Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002	Amendment of the Schedule by the substitution for item 6 of the following item: “ <b>6.</b> any offence referred to in Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002), or an offence contemplated in section 4 of the International Crimes Act, 2017;”.
Act No. 10 of 2007	South African Red Cross Society and Legal Protection of Certain Emblems Act, 2007	Repeal of section 13.
Act No. 75 of 2008	Child Justice Act, 2008	Amendment of Schedule 3 by the substitution for Item 16 of the following Item: “ <b>16.</b> The crimes of genocide, crimes against humanity and war crimes referred to in the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002), or an offence contemplated in section 4 of the International Crimes Act, 2017.”.
Act No. 8 of 2012	Implementation of the Geneva Conventions Act, 2012	Repeal of section 20.
Act No. 13 of 2013	Prevention and Combating of Torture of Persons Act, 2013	Amendment of section 4— (a) by the deletion of paragraph (a) of subsection (3); and (b) the addition of the following subsection, after subsection (5): “(6) This Act does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001).”.

## MEMORANDUM ON THE OBJECTS OF THE INTERNATIONAL CRIMES BILL

### 1. PURPOSE OF BILL

The purpose of the Bill is to—

- (a) criminalise conduct constituting international crimes under the domestic law of the Republic;
- (b) regulate immunity from the prosecution of international crimes;
- (c) grant extra-territorial jurisdiction to the courts of the Republic in respect of international crimes;
- (d) regulate the investigation and prosecution of allegations of international crimes;
- (e) provide for the extradition of persons accused of, or convicted of, international crimes to foreign States;
- (f) provide for the surrender of persons accused of, or convicted of, international crimes to entities;
- (g) provide for cooperation with entities in respect of international crimes;
- (h) repeal the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002) (“the ICC Act”);
- (i) amend other laws which have a bearing on international crimes; and
- (j) amend the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), so as to further regulate immunity relating to the crime of torture.

### 2. BACKGROUND AND ANALYSIS OF BILL

- 2.1 South Africa’s proposed withdrawal from the Rome Statute of the International Criminal Court (“the Rome Statute”) emanates from, among others, the fact that the Rome Statute is in conflict with customary international law and with some of the provisions of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001) (“the DIPA”), in so far as it does not allow for immunity for any person in respect of international crimes before the national courts and the International Criminal Court (“the ICC”) established in terms of Article 1 of the Rome Statute. The proposed withdrawal of South Africa from the Rome Statute and the intended repeal of the ICC Act would create a *lacuna* in our domestic law concerning the prosecution of genocide, war crimes and crimes against humanity (“international crimes”). In order to ensure that South Africa does not become a safe haven for persons who commit international crimes, the Bill is enacted to address this gap.

#### Preamble

- 2.2 The preamble was formulated with a view to providing clarity on the interpretation of the clauses of the Bill. The preamble states, among others, that the Bill aims to ensure continuity in the Republic in respect of the prosecution of international crimes and that such crimes must be investigated and prosecuted within the Republic.

#### 2.3 Chapter 1: Definitions, objects and application of Bill

- 2.3.1 **Clause 1** of the Bill contains various definitions aimed at facilitating the interpretation of the Bill. Attention is drawn to the definition of “entity” which means “the International Criminal Court, any international organisation, international tribunal, international court or similar international body which has jurisdiction in respect of an international crime”. The inclusion of the ICC in this definition is to ensure continued cooperation with that Court.

- 2.3.2 **Clause 2** summarises the objects of the Bill.

2.3.3 **Clause 3(1)** of the Bill seeks to provide for the immunity for certain persons from criminal prosecution relating to international crimes and to regulate the application of the Bill.

2.3.3.1 In terms of clause 3(1), the Bill does not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the DIPA.

2.3.3.2 Customary international law confers immunity on certain state officials, which is attached to the office or status of these officials, namely an incumbent Head of State, an incumbent Head of Government and an incumbent Minister dealing with foreign affairs. The immunity is only conferred as long as the officials remain in office.

2.3.3.3 In terms of the DIPA, certain persons enjoy immunity from the criminal jurisdiction of the courts of the Republic by virtue of the application of—

- (a) the Vienna Convention on Diplomatic Relations, 1961 (the Vienna Convention);
- (b) the Convention on the Privileges and Immunities of the United Nations, 1946 (the UN Convention); and
- (c) the Convention on the Privileges and Immunities of the Specialised Agencies, 1947 (the Specialised Agencies Convention),

which were enacted into law in the Republic in terms of section 2(1) of the DIPA.

2.3.3.4 In terms of the Vienna Convention, a diplomatic agent, members of the family of a diplomatic agent, members of the administrative and technical staff of a diplomatic mission and members of the service staff of the mission are immune from criminal jurisdiction of the courts of the receiving state.

2.3.3.5 In terms the UN Convention, certain persons (representatives to the principal and subsidiary organs of the United Nations and to conferences, the Secretary-General, all Assistant Secretaries-General, their spouses and minor children and experts), are immune from the criminal jurisdiction of the courts of the receiving state.

2.3.3.6 The Specialised Agency Convention provides immunity against criminal jurisdiction to various persons while exercising their functions and during their journeys to and from the place of meeting. The various Annexures to this Convention extend the immunity from criminal jurisdiction of the courts to persons of the International Labour Organization, the Council of the Food and Agriculture Organisation, the Council of the International Civil Aviation Organization, the International Monetary Fund, the International Bank for Reconstruction and Development, the World Health Organization, the Universal Postal Union, the International Telecommunications Union, the International Refugee Organization, the World Meteorological Organization, the Inter-governmental Maritime Consultative Organization, the International Finance Corporation, the International Development Association, the World Intellectual Property Organization, the Governing Council of the International Fund for Agricultural Development and the United Nations Industrial Development Fund. Immunity against criminal jurisdiction may be waived.

2.3.3.7 The DIPA also provides for immunity for the following persons:

- (a) A head of state, a head of government, a member of government or government official who is, in terms of customary international law, immune from the criminal jurisdiction of the courts of the Republic.
- (b) A special envoy or representative from another state, government or organisation who is, in terms of section 4(3) of the DIPA, recognised as a special envoy or representative by notice in the *Gazette*.
- (c) A person participating in an international conference or meeting convened in the Republic, who is immune from the criminal jurisdiction of the courts of the Republic during his or her journey to and from and for the duration of the conference or meeting in terms of—
  - (i) an agreement contemplated in section 6(1)(b) of the DIPA; or
  - (ii) a conferral as contemplated in section 7(2) of the DIPA.

2.3.3.8 Clause 3 of the Bill also—

- (a) clarifies the application of the Bill in respect of international crimes which were committed on or before 16 August 2002, which is the date of commencement of the ICC Act (clause 3(2)); and
- (b) provides that any investigation into allegations of international crimes initiated prior to the commencement of this Act must continue to be investigated as is provided for in clause 6 of the Bill (clause 3(3)).

The purpose of clause 3(2) is to ensure that the Bill applies to all international crimes committed on or after 16 August 2002, to prevent those perpetrators from escaping prosecution when the ICC Act is repealed.

## 2.4 Chapter 2: International crimes

2.4.1 **Clause 4** of the Bill criminalises genocide, war crimes and crimes against humanity. These crimes are defined in **Schedule 1** to the Bill, which definitions correspond with the definitions used in the ICC Act.

2.4.2 **Clause 5** of the Bill regulates the jurisdiction of the South African courts to adjudicate international crimes.

2.4.2.1 In terms of clause 5(4) of the Bill, a court means any Division of the High Court of South Africa or the main seat or any local seat of a Division as referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or a court for a regional division referred to in section 2(g) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). In terms of section 5(4) of the ICC Act, international crimes may only be adjudicated upon by the High Court. Clause 5 of the Bill extends jurisdiction to adjudicate international crimes to regional courts because regional courts have jurisdiction to impose imprisonment to life sentences in certain circumstances.

2.4.2.2 In terms of clause 5(1) of the Bill a court has jurisdiction to adjudicate a matter involving an international crime which has allegedly been committed within the territory of the Republic.

2.4.2.3 In terms of clause 5(2) of the Bill a court also has jurisdiction to adjudicate a matter involving an international crime which has allegedly been committed outside the territory of the Republic, if—

- (a) the person who has allegedly committed the crime is a South African citizen;
- (b) the person who has allegedly committed the crime is not a South African citizen but is ordinarily resident in the Republic;
- (c) the said crime has been committed against a South African citizen or against a person who is ordinarily resident in the Republic; or
- (d) the person who has allegedly committed the crime is, after the commission of the crime, present in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic, and he or she is not extradited or surrendered in terms of this Act.

2.4.2.4 Clause 5(3) of the Bill provides that where a person is charged with conspiracy or incitement to commit an international crime or as an accessory to that crime, the crime is deemed to have been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.

2.4.2.5 Clause 5(1) to (3) of the Bill substantially corresponds with section 4(1) and (3) of the ICC Act, which vests local and extraterritorial jurisdiction on courts of the Republic to adjudicate matters involving international crimes.

2.4.2.6 Clause 5(5) of the Bill provides that a person may, pending his or her arraignment for trial, appear in a court for a regional division or a court for a district referred to in section 2(f) of the Magistrates' Courts Act, 1944.

2.4.2.7 Clause 5(6) of the Bill provides that where an international crime was committed outside the territory of the Republic, a warrant of arrest contemplated in section 43 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) ("the Criminal Procedure Act"), may, notwithstanding section 43(1)(b) of the Criminal Procedure Act, be issued by any magistrate on application by the National Director of Public Prosecutions ("the National Director") appointed in terms of section 179(1)(a) of the Constitution of the Republic, 1996 ("the Constitution"), or a prosecutor authorised thereto in writing by the National Director.

2.4.3 **Clause 6** of the Bill deals with the duty of the Directorate for Priority Crime Investigation ("the DPCI") established by section 17C of the South African Police Service Act, 1995 (Act No. 68 of 1995), to investigate complaints relating to international crimes.

2.4.3.1 In terms of clause 6(1) of the Bill the DPCI must investigate a complaint of an international crime which has allegedly been committed within the territory of the Republic.

2.4.3.2 In terms of clause 6(2) of the Bill, where a complaint is received about the commission of an international crime which has allegedly been committed outside the territory of the Republic, the DPCI must conduct a preliminary investigation to determine—

- (a) whether a court in the Republic has jurisdiction to hear the matter;
- (b) whether the alleged perpetrator is immune from prosecution of such offences in the Republic;

- (c) whether the complaint received constitutes an international crime;
- (d) whether there is a possibility of extraditing or surrendering the person who has allegedly committed the international crime in question to another State or entity; and
- (e) the prospects of successfully prosecuting the person for an international crime in the Republic.

2.4.3.3 In terms of clause 6(3) of the Bill, the DPCI must on completion of the preliminary investigation submit its recommendations to the Director of Public Prosecutions (“the Director”), appointed in terms of section 13(1)(c) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), for a decision as to whether a full investigation in respect of the complaint must be conducted (clause 6(3)).

2.4.3.4 Clause 6(4) of the Bill provides for considerations which the Director must take into account for purposes of authorising a full investigation into the complaint.

2.4.3.5 In terms of clause 6(5) of the Bill, the Director may request the DPCI to provide such additional information as may be necessary within a specified period for the purposes of making a decision as contemplated in clause 6(4).

2.4.3.6 In terms of clause 6(6) of the Bill a decision of a Director made in terms of clause 6(3), may, on application by the Head of the DPCI or any other interested person, be reviewed by the National Director.

2.4.3.7 Clause 6 of the Bill was drafted having regard to the Constitutional Court judgment in *The National Commissioner of the South African Police Service v Southern African Rights Litigation Centre and Another* (CCT 02/14). This case dealt with the duty of the South African Police Service (the SAPS) to investigate, under the Constitution, the ICC Act (which contains a similar provision regarding extra-territorial jurisdiction of our courts) and international law, a complaint about the commission of an international crime committed outside the territory of the Republic, in anticipation of the presence in the territory of the Republic, of a person who allegedly committed such crime, and where the State in whose territory the international crime was committed, is unable or unwilling to investigate and prosecute the alleged crime.

2.4.3.8 This clause seeks to give guidance to the SAPS on how to deal with any complaint about the commission of an international crime committed outside the territory of the Republic. It also seeks to prevent the wasting of limited resources available in the Republic, hence the preliminary investigation in order to determine the prospects of successfully prosecuting the person for an international crime in the Republic.

2.4.4 **Clause 7** of the Bill provides as follows:

- (a) Any decision by the Director to institute or not to institute a prosecution against a person for an international crime is subject to review by the National Director in terms of section 22(1)(c) of the National Prosecuting Authority Act, 1998 (clause 7(1));
- (b) a prosecution for an international crime can only be instituted against a person with the written authority of the National Director (clause 7(2));
- (c) an international crime which has allegedly been committed outside the territory of the Republic must commence before a

court designated by the National Director in consultation with the Minister of Justice and Correctional Services and the Chief Justice of South Africa (clause 7(3));

- (d) a copy of the written permission of the National Director and the designation of a court must be served on the accused and the original thereof must be handed in at the court in which the proceedings are to commence (clause 7(4)); and
- (e) the National Director must account for decisions regarding the institution of prosecutions for international crimes, including decisions not to prosecute (clause 7(5)).

This clause is similar to the ICC Act in the following respects:

- (i) The decision of the National Director is required before a prosecution against a person may be instituted (section 5(1));
- (ii) a court must be designated for a trial involving an international crime committed outside the Republic (section 5(4)); and
- (iii) the National Director must give reasons regarding a decision not to prosecute a person (section 5(5)—where reasons must be given to the central authority).

2.4.5 In terms of **clause 8** of the Bill, a court hearing any matter arising from the application of Chapter 2 must, in addition to the Constitution and other applicable law of the Republic, also consider and, where appropriate, may apply relevant conventional international law, relevant customary international law, and comparable foreign law. This clause is a restatement of section 2 of the ICC Act.

2.4.6 **Clause 9** of the Bill deals with the exclusion of defences where a person is charged with an international offence. In terms of the clause—

- (a) the fact that an accused person was under an obligation to obey an order of a government or superior, is not a defence;
- (b) the commission of an international crime by a subordinate does not, under certain circumstances, relieve his or her superior of criminal responsibility under certain circumstances; and
- (c) a state of war, threat of war, internal political instability, national security or any state of emergency may not be invoked as a justification for the commission of an international crime.

The provision relating to the criminal liability of superiors for the acts of their subordinates, is based on Articles 28 and 33 of the Rome Statute and is broader than section 4(2)(b) of the ICC Act.

2.4.7 **Clause 10** of the Bill deals with penalties.

2.4.7.1 In terms of this clause, a court which convicts a person of—

- (a) an international crime;
- (b) conspiracy to commit an international crime; or
- (c) the aiding, abetting, inducing, inciting, instigating, instructing or commanding any other person to commit an international crime,

must sentence the person to imprisonment for life unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence which is within that court's penal jurisdiction, in which case the court must enter those circumstances on the record of proceedings.

2.4.7.2 Section 4(1) of the ICC Act provides that a court may sentence a person to imprisonment, which includes imprisonment for life for an international crime. The Bill differs from sections 4(1) of the ICC Act in that it prescribes a discretionary minimum sentence. During the drafting of this clause, the provisions of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), dealing with discretionary minimum sentences, in particular the type of offences for which

discretionary minimum sentences must be imposed (for example planned murder and rape), was considered.

## 2.5 Chapter 3: Extradition of persons to foreign States for international crimes

- 2.5.1 In terms of **Clause 11** of the Bill an international crime—
- (a) shall be deemed to be included in the definition of “**extraditable offences**” in section 1 of the Extradition Act, 1962 (Act No. 67 of 1962) (“the Extradition Act”); and
  - (b) shall be deemed to be included in any extradition agreement, entered into before the date of commencement of clause 11, with any foreign State by the President in terms of section 2(1)(a) of the Extradition Act.

The clause further provides that the Extradition Act, shall be applicable to foreign States designated, before the commencement of this section, by the President in terms of section 2(1)(b) of that Act in respect of an international crime.

- 2.5.2 The above provisions will ensure that the Extradition Act can be used for the extradition of persons accused of international crimes to foreign States. The extradition of persons is, subject to certain exceptions, dependent on extradition agreements between countries. This clause aims to ensure that the Republic can use existing extradition agreements for the extradition of persons for international crimes to foreign States.

## 2.6 Chapter 4: Surrender of persons to entities for international crimes

- 2.6.1 In terms of **clause 12** of the Bill, any person accused of an international crime over which an entity has jurisdiction may, on request of a competent authority of an entity, be surrendered by the Republic to that entity for the purpose of prosecuting or sentencing a person for an international crime.

- 2.6.2 **Clause 13** of the Bill provides that a request for surrender—
- (a) must be made in writing and be transmitted through diplomatic channels to, or be submitted to, the Director-General;
  - (b) must be accompanied by information, which identifies the person who must be surrendered and probable location of the person, particulars of the international crime, procedural history of the proceedings and particulars of laws which were contravened and the sentences which may be imposed for such contraventions and any law regulating the prescription of the right to institute a prosecution or to impose a sentence in respect of the crime; and
  - (c) if it relates to a person—
    - (i) who has not yet been found guilty by the entity, it must be accompanied by a copy of the warrant of arrest or detention issued by the entity; or
    - (ii) who has been found guilty by the entity, it must be accompanied by a copy of the judgment of the entity setting out the conviction and the sentence imposed; a statement that the sentence is enforceable and the extent to which the sentence remains to be served; and a copy of the warrant of arrest or detention, or a statement that the person is subject to detention on the basis of the judgment.

The clause further provides that the request and accompanying documentation must be certified as true and correct to the satisfaction of the Director-General and be accompanied by a sworn translation in the English language. Clause 13 of the Bill is substantially in line with Article 91 of the Rome Statute.

- 2.6.3 **Clause 14** of the Bill provides that the Director-General when considering the request for surrender may, where the information furnished in support of the request is not sufficient to process the request for surrender, request the entity to furnish such additional information as may be necessary within a specified period. If the person whose surrender is sought, was arrested and detained in respect of an international crime to which the request for surrender relates and the additional information furnished in response to a request is not sufficient or is not received within the time specified, that person may be—
- (a) released from custody unconditionally;
  - (b) released from custody on such conditions as may be necessary to ensure the availability of the person; or
  - (c) further detained,
- pending the finalisation of the request for surrender, if a court deems it in the interests of justice. Article 97 of the Rome Statute also makes provision for the request of supplementary information where insufficient information was submitted to a State.
- 2.6.4 **Clause 15** of the Bill provides that the Director-General must promptly communicate the decision on the request for surrender to an entity and where the request for surrender is refused, the Director-General must furnish reasons for the refusal. The clause further provides that where the request for surrender is refused the entity may at any time submit a new request for surrender of the person if such request contains new and material information not previously submitted.
- 2.6.5 **Clause 16** of the Bill provides that the Extradition Act applies, with the necessary changes as may be required by the context, in respect of the surrender of person to an entity for international crimes. The relevant provisions of the Extradition Act are set out below:
- (a) Section 5, which provides that a magistrate may issue a warrant of arrest for a person where a request for surrender was received from a foreign state or on information that the person is accused or convicted of an extraditable offence in a foreign State.
  - (b) Section 7, which provides for the issuing of a warrant for further detention of a person where the person liable to be apprehended under any law relating to extradition, was arrested without a warrant.
  - (c) Section 8, which provides that the magistrate who issued a warrant for the arrest or further detention of a person as contemplated in sections 5 and 7 must furnish the Minister with particulars relating to the issuing of the warrant.
  - (d) Section 9, which requires that a person who is detained under a warrant for arrest or further detention must be brought before a magistrate for the holding of an enquiry with a view to surrender the person to a foreign State.
  - (e) Section 10, which provides that where a magistrate, during the enquiry contemplated in section 9, finds that there is sufficient evidence to warrant the prosecution of the person, the person may be detained pending the Minister's decision to surrender the person to a foreign State. The section further provides that the person may lodge an appeal against this decision to the High Court.
  - (f) Section 11, which provides that the Minister may order that the person—
    - (i) be surrendered to a foreign State;
    - (ii) not be surrendered to the foreign State pending finalisation of criminal proceedings against the person in the Republic or the serving of a sentence by the person within the Republic; or
    - (iii) not be surrendered.

- (g) Section 13, which deals with an appeal against the order of a magistrate in terms of section 10.
- (h) Section 14, which provides that an order for surrender may not be executed unless the periods allowed for challenging the order for surrender has expired or the appeal proceedings have been concluded.
- (i) Section 15, which provides that the Minister may at any time order the cancellation of any warrant of arrest or the discharge from custody of any person detained under the Act, if he or she is of the opinion that the offence in respect of which the surrender of the person is sought is an offence of a political nature or that the surrender of the person will not be sought.
- (j) Section 16, which deals with the removal of the person whose surrender is sought from the Republic.
- (k) Section 17, which provides that the National Director may appear at extradition proceedings.

These provisions are also comparable with sections 8 (arrest warrant for arrest of person), 10 (proceedings after arrest of person for purposes of surrender), 11 (removal of persons surrendered) and 13 (discharge of persons not surrendered) of the ICC Act.

2.6.6 **Clause 17** of the Bill further regulates the surrender of a person to an entity and addresses the situation where circumstances beyond the control of the Republic or the entity hamper the surrender of a person and the failure by an entity to take custody of a person whose surrender is sought.

2.6.7 **Clause 18** of the Bill provides for the—

- (a) postponement of the surrender of the person to an entity when criminal proceedings in the Republic are pending against that person or that person is serving a sentence in the Republic for an offence other than that for which the surrender is requested; and
- (b) temporary surrender of the person to an entity for purposes of prosecuting such person for an international crime, and for matters related thereto.

Article 94 of the Rome Statute makes provision for the postponement of a request on the basis that the request may interfere with an ongoing investigation or prosecution. The temporary surrender of a person for purposes of prosecuting the person for an international crime is not recognised in the Rome Statute. However, provision is made in many extradition agreements for the temporary extradition of a person.

2.6.8 In terms of **clause 19** of the Bill the competent authority of an entity must, if the Director-General so requests, provide information relating to progress with the proceedings against the person surrendered and, on completion of proceedings against the person, the entity must provide a copy of the final judgment to the Director-General.

2.6.9 **Clause 20** of the Bill regulates the costs incurred as a result of the request by an entity for the surrender of a person. In terms of this provision the Republic must bear the cost of any proceedings in its jurisdiction arising from a request for surrender and the costs incurred in its territory in connection with the arrest and detention of the person whose surrender is sought. The entity is responsible for the costs incurred in conveying the person from the territory of the Republic, including transit costs. Clause 20 of the Bill is based on Article 100 of the Rome Statute which regulates cost in respect of the execution of requests.

2.6.10 **Clause 21** of the Bill empowers the Minister to determine matters and conditions relevant to the surrender of a person, which are not provided for in Chapter 4, in concurrence with the competent authority of an entity. Since cooperation as envisaged in this Chapter of the Bill

is not based on any convention or may not be covered by agreements with a State where an entity exercises jurisdiction, this provision is necessary to regulate procedural aspects relevant to the surrender of a person to such an entity, which are not provided for in the Bill.

2.6.11 **Clause 22** of the Bill regulates the situation where an extradition request and a request for surrender, or multiple requests for surrender from different entities, are received in respect of the same person. Clause 22(1) provides that a request for surrender must get preference over an extradition request. Clause 22(2) provides that the Minister must, in the event of multiple requests for the surrender of the same person, make a decision having regard to prescribed circumstances, as to which request for surrender must receive preference. Article 90 of the Rome Statute also aims to regulate competing requests for surrender of a person. The provisions of the Bill in this regard are comparable to Article 90.6 of the Rome Statute, which provides for considerations which a State must take into account where requesting States are not parties to the Rome Statute.

2.6.12 **Clause 23** of the Bill, which is similar to Article 92 of the Rome Statute, provides for the provisional arrest of a person who has allegedly committed an international crime pending the making of a request for the surrender of that person. In terms of this clause:

- (a) The request for provisional arrest must be in writing and must be submitted to the Director-General who must in turn forward the request to the National Director to apply for a warrant of arrest for that person.
- (b) A magistrate may on application of the National Director, issue a warrant for the arrest of the person and notify the Director-General that a warrant has been issued.
- (c) The warrant must be in the form and executed in a manner as near as possible to what may be prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure.
- (d) The Director-General must notify the competent authority of the entity of the disposition of its request and, if the request is refused, the reasons for the refusal.

Where a formal request for surrender was not received upon the expiration of 45 days from the date of the provisional arrest, the person under provisional arrest may—

- be released from custody unconditionally;
- be released from custody on such conditions as may be necessary to ensure the availability of the person; or
- be detained further, for a maximum period of seven days, which period may not further be extended,

pending the finalisation of the request for surrender of the person if a court deems it in the interests of justice to do so. Although the Extradition Act does not provide expressly for provisional arrest, many of the extradition agreements provide for this issue.

## 2.7 Chapter 5: Requests for assistance to or from entities in relation to international crimes

2.7.1 Cooperation between the Republic and a foreign State regarding criminal proceedings involving international crimes can take place in terms of the International Cooperation in Criminal Matters Act, 1996 (Act No. 75 of 1996) (“the ICCM Act”). However, the ICCM Act does not provide for cooperation between the Republic and an entity. The provisions in Chapter 5 of the Bill are aimed at facilitating such cooperation between the Republic and an entity.

2.7.2 **Clause 24** of the Bill prescribes the forms of assistance in relation to international crimes which the Republic may provide to an entity. This

provision is substantially in line with section 14 of the ICC Act and Article 93 read with Article 99 of the Rome Statute.

2.7.3 **Clause 25** of the Bill deals with requests for assistance by an entity. In terms of clause 25(1), the competent authority of an entity may, subject to the provisions of the Bill and any other law of the Republic, request the Republic in writing for the assistance referred to in clause 24 in respect of any proceedings regarding an international crime in respect of which that entity has jurisdiction. The request for assistance must be submitted to the Director-General (clause 25(2)). In terms of clause 25(3), the request for assistance must—

- identify the authority conducting the investigation, prosecution or proceedings to which the request relates;
- set out the nature of the investigation, prosecution or proceedings, and must include a summary of the facts and a copy of the applicable laws;
- specify the purpose of the request and the nature of the assistance sought;
- specify any period of time within which the request should be executed; and
- where applicable, be accompanied by any order of the entity in respect of which assistance is requested.

Where the Director-General considers that the information furnished in support of a request for assistance is not sufficient to process the request, he or she may request the competent authority of the relevant entity to furnish within a specified period such additional information as may be necessary (clause 25(5)). Clause 25(6) to (9) further deals with the content of the request for assistance. This clause corresponds substantially with section 15 of the ICC Act, which deals with procedural aspects relating to a request for assistance to obtain evidence and Article 93 read with Articles 96 and 99 of the Rome Statute.

2.7.4 In terms of **clause 26**, section 7 of the ICCM Act applies, with the changes required by the context, to a request referred to in clause 25. In terms of section 7 of the ICCM Act the Director-General is to receive the request, consider the request and then submit it to the Minister for approval. If approved by the Minister, the request is to be referred to the magistrate within whose area of jurisdiction the witness resides. The clause further provides that the Director-General must—

- cause the request for assistance to be executed promptly by the relevant authorities;
- inform an entity of any circumstances which are likely to cause a delay in responding to the request for assistance or of a decision not to comply in whole or in part with a request for assistance and the reasons for the decision; and
- respond to inquiries by the competent authority of the entity concerning progress towards the execution of a request for assistance.

The clause further provides that a request for assistance must be executed in accordance with the laws of the Republic.

2.7.5 **Clause 27** of the Bill is similar to section 21 of the ICC Act. Clause 27 of the Bill aims to regulate the service of process and documents received from an entity. The clause provides that a request to serve process or a document, except a subpoena, in connection with any proceedings before an entity, on a person must be transmitted to the Director-General. Upon receipt of the request, the Director-General must transmit the request, together with the process or document, to the Provincial Commissioner of the South African Police Service within whose area of jurisdiction the person resides for service, who must cause the process or document to be served on the person. The

return of service must be submitted to the Director-General for transmission to the entity.

- 2.7.6 In terms of **clause 28** of the Bill, a request for assistance may be—
- refused if the execution of the request for assistance would affect the Republic’s sovereignty, security, public order or public interest, or when it is contrary to any law of the Republic; or
  - postponed if execution of the request would interfere with an ongoing investigation or prosecution in the Republic.
- The Director-General must inform the entity of such a refusal or postponement and give reasons for that decision. This clause is similar to Article 93.4 read with Article 72 of the Rome Statute and Article 94 of the Rome Statute.
- 2.7.7 **Clause 29** of the Bill provides that sections 8 (examination of witnesses), 9 (rights and privileges of witnesses) and 10 (offences by witnesses) of the ICCM Act are applicable to a request for assistance received from an entity which has been granted. This provision is substantially in line with relevant provisions of the ICC Act.
- 2.7.8 **Clause 30** of the Bill provides that section 11 of the ICCM Act (which regulates the attendance of witnesses in foreign States) applies with the changes required by the context, to a request for assistance by an entity to secure the appearance of a person in the Republic before the entity. The clause also provides for the transfer of a person who is serving a sentence of imprisonment in the Republic and who is to appear before an entity. This provision is in line with section 19 of the ICC Act. It is also in line with section 20 of the ICC Act and Article 93.7 of the Rome Statute, which provides for the transfer of a person who is serving a sentence of imprisonment in the Republic and who is to appear before an entity.
- 2.7.9 **Clause 31** of the Bill provides that a document, record or object to be submitted or transmitted to an entity pursuant to a request for assistance—
- does not have to be authenticated unless the entity specifically requested that it be authenticated; and
  - if so requested, must be authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court, or in the manner requested by the competent authority of an entity, or in the manner provided for in any agreement to which the Republic is a party.
- 2.7.10 In terms of **clause 32** of the Bill, the Republic must bear the costs of executing the request for assistance, except for the following costs which must be borne by an entity:
- Costs associated with conveying any person to or from the territory of the Republic at the request of an entity and any expenses payable to that person while in the territory of an entity;
  - costs and fees of private experts, including translators, interpreters and transcribers hired for the purpose of executing a request for assistance in the Republic;
  - costs associated with the taking of evidence and statements from the Republic to an entity via video, satellite or other technological means; and
  - any extraordinary costs which have emanated from the execution of the request.
- Clause 32 of the Bill is based on Article 100 of the Rome Statute which regulates cost in respect of the execution of requests.
- 2.7.11 **Clause 33** of the Bill empowers the Minister to determine matters and conditions relevant to requests for assistance, which are not provided

for in Chapter 5, in concurrence with the competent authority of an entity.

2.7.12 **Clause 34** of the Bill deals with the situation where the Republic requests assistance from an entity where an investigation or criminal or other proceedings which have a bearing on an international crime is being instituted within the Republic. The clause provides that the National Director may request an entity to provide any information, document, record or object, or may borrow any exhibit, or request any other assistance which have a bearing on the investigation or proceedings if he or she has reason to believe that the entity may provide such assistance. The request for assistance must be in writing and be submitted to the Director-General who must upon receipt thereof submit the request to the competent authority of the entity. The clause further prescribes the content of the request. Neither the ICC Act nor the Rome Statute deals with requests to the ICC for cooperation between states and the ICC.

## 2.8 Chapter 6: Miscellaneous provisions

2.8.1 **Clause 35** of the Bill confers the power upon the Minister to make regulations regarding a number of aspects.

2.8.2 **Clause 36** of the Bill deals with the repeal and amendment of laws and contains a transitional provision. The transitional provision is based on Article 127 of the Rome Statute which deals with continued cooperation with the ICC in respect of investigations and proceedings which commenced prior to the date on which the withdrawal from the Statute becomes effective. This clause, read with Schedule 2, effects amendments to the following laws:

(a) *Repeal of the ICC Act:*

This clause repeals the whole of the ICC Act. There is thus no need for a separate Bill.

(b) *Amendments to Criminal Procedure Act:*

(i) Section 18 is amended in order to provide that the right to institute a prosecution in respect of an international crime contemplated in section 4 of the Bill does not prescribe after the lapse of a period of 20 years from the time when such an offence was committed; and

(ii) Schedules 1, 6 and 8 are amended, among others, to provide for the arrest of a person who committed an international crime without a warrant, to regulate bail proceedings in respect of an international crime and to provide for the taking of fingerprints and bodily samples of a person charged with an international crime.

(c) *Amendments to South African Police Service Act, 1995*

The Schedule to the Act is amended in order to ensure that international crimes as contemplated in clause 4 of the Bill are, for purposes of section 16 of that Act regarded as national priority crimes, in order to ensure that international crimes must be investigated by the DPCI.

(d) *Amendments to Military Discipline Supplementary Measures Act, 1999 (Act No. 16 of 1995)*

Section 3(4) of the Act is amended in order to provide that a person who is subject to the Military Discipline Code referred to in section 104(1) of the Defence Act, 1957 (Act No. 44 of 1957), and who is suspected of having committed a “war crime” contemplated in section 4 of the Bill, must be dealt with in accordance with the provisions of the Bill.

(e) *Amendments to Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002)*

The Schedule to the Act is amended in order to include an

international crime as contemplated in section 4 of the Bill in the Schedule to the Act. (This schedule contains a list of all the offences which are for purposes of the Act regarded as serious offences.)

(f) *Child Justice Act, 2008 (Act No. 75 of 2008)*

Item 16 of Schedule 3 to the Act is amended in order to include an international crime as contemplated in section 4 of the Bill in the Schedule to the Act. (This schedule contains a list of all the offences which are for purposes of the Act regarded as serious offences.)

(g) *Prevention and Combating of Torture of Persons Act, 2013*

Section 4 of the Act is amended in order to ensure that the same degree of immunity, as is provided against international crimes, (discussed in paragraph 2.3.3 above) applies in respect of the crime of torture.

2.8.3 **Clause 37** of the Bill deals with the short title and commencement. The commencement provision provides that the Act will come into operation on the date fixed by the President by proclamation in the *Gazette*.

### 3. DEPARTMENTS/BODIES CONSULTED

Except for clause 3 of the Bill, which further regulates immunity against a prosecution for an international crime and the proposed amendment to the Prevention and Combating of Torture of Persons Act, 2013, which further regulates immunity against prosecutions for the offence of torture, the Bill is mainly a restatement of the current law and procedures which are applicable to criminal proceedings and international co-operation. The Departments which are involved in these proceedings, namely the SAPS, the National Prosecuting Authority and the Department of International Relations and Cooperation, were consulted in the drafting of the Bill. During the parliamentary process further consultation will take place as a matter of course.

### 4. FINANCIAL IMPLICATIONS FOR STATE

The ICC Act, which is to be repealed, makes provision for, among others—

- extra-territorial jurisdiction for the High Court in respect of international crimes committed outside South Africa under certain circumstances;
- the surrender of persons to the ICC, if the Republic is unable or unwilling to prosecute perpetrators in the Republic for an international crime; and
- co-operation with and judicial assistance to the ICC.

These provisions have cost implications for the Republic, namely, among others—

- costs relating to the hearing of international crimes committed within and, under certain circumstances, outside the Republic;
- costs relating to the arrest, detention and surrender of a person;
- costs of court proceedings following the arrest of a person;
- costs relating to the removal of the person to the ICC; and
- costs relating to legal assistance.

The Bill will have the same cost implications. The Bill also provides that persons accused of international crimes may not only be surrendered to the ICC but also to other entities and that legal assistance may be rendered to such entities and not only to the ICC.

### 5. PARLIAMENTARY PROCEDURE

#### 5.1 Tagging

5.1.1 Section 44<sup>1</sup> of the Constitution deals with the national legislative authority. Section 44(1) provides that the national legislative authority

<sup>1</sup> “National legislative authority

44. (1) The national legislative authority as vested in Parliament—

is vested in Parliament. The National Assembly has the power to amend the Constitution, to pass legislation with regard to any other matter, including a matter listed in Schedule 4 to the Constitution but excluding, subject to section 44(2) of the Constitution, a matter listed in Schedule 5 to the Constitution. The National Council of Provinces (“the NCOP”) has the power to participate in the amendment of the Constitution, to pass legislation in accordance with section 75 and 76<sup>2</sup>

(a) confers on the National Assembly the power—

- (i) to amend the Constitution;
- (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
- (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—

- (i) to participate in amending the Constitution in accordance with section 74;
- (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
- (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.”

<sup>2</sup> “**Ordinary Bills affecting provinces**

**76. (1)** When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must—

- (i) pass the Bill;
- (ii) pass an amended Bill; or
- (iii) reject the Bill.

(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

- (i) the Bill as passed by the Assembly;
- (ii) the amended Bill as passed by the Council; or
- (iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill’s referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph ( f ) or (h) is not passed by the Council, the Bill

of the Constitution. Section 76(3) of the Constitution refers to the legislative procedure that must be followed when dealing with ordinary Bills affecting provinces. Section 76(3) provides that a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) of section 76 if it falls within a functional

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- lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.*
- (j) *If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.*
- (k) *A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.*
- (2) *When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:*
- (a) *The Assembly must—*
- (i) pass the Bill;*
  - (ii) pass an amended Bill; or*
  - (iii) reject the Bill.*
- (b) *A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.*
- (c) *If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.*
- (d) *If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—*
- (i) the Bill as passed by the Council;*
  - (ii) the amended Bill as passed by the Assembly; or*
  - (iii) another version of the Bill.*
- (e) *If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.*
- (f) *If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.*
- (g) *If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.*
- (h) *If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.*
- (i) *If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.*
- (3) *A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:*
- (a) Section 65(2);*
  - (b) section 163;*
  - (c) section 182;*
  - (d) section 195(3) and (4);*
  - (e) section 196; and*
  - (f) section 197.*
- (4) *A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—*
- (a) envisaged in section 44 (2) or 220 (3); or*
  - (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.*
- (5) *A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that—*
- (a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and*
  - (b) if the Bill is referred to the Mediation Committee, the following rules apply:*
    - (i) If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.*
    - (ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) (e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.*
- (6) *This section does not apply to money Bills.”*

area listed in Schedule 4 to the Constitution or provides for legislation envisaged in any of the sections mentioned in paragraphs (a) to (g) of section 76(3) of the Constitution. Schedule 4 to the Constitution lists the functional areas of national and provincial legislative competence<sup>3</sup>.

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3

**“Schedule 4  
FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND  
PROVINCIAL LEGISLATIVE COMPETENCE  
PART A**

*Administration of indigenous forests*  
*Agriculture*  
*Airports other than international and national airports*  
*Animal control and diseases*  
*Casinos, racing, gambling and wagering, excluding lotteries and sports pools*  
*Consumer protection*  
*Cultural matters*  
*Disaster management*  
*Education at all levels, excluding tertiary education*  
*Environment*  
*Health services*  
*Housing*  
*Indigenous law and customary law, subject to Chapter 12 of the Constitution*  
*Industrial promotion*  
*Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence*  
*Media services directly controlled or provided by the provincial government, subject to section 192*  
*Nature conservation, excluding national parks, national botanical gardens and marine resources*  
*Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence*  
*Pollution control*  
*Population development*  
*Property transfer fees*  
*Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5*  
*Public transport*  
*Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law*  
*Regional planning and development*  
*Road traffic regulation*  
*Soil conservation*  
*Tourism*  
*Trade*  
*Traditional leadership, subject to Chapter 12 of the Constitution*  
*Urban and rural development*  
*Vehicle licensing*  
*Welfare services*

**PART B**

*The following local government matters to the extent set out in section 155 (6) (a) and (7):*  
*Air pollution*  
*Building regulations*  
*Child care facilities*  
*Electricity and gas reticulation*  
*Fire-fighting services*  
*Local tourism*  
*Municipal airports*  
*Municipal planning*  
*Municipal health services*  
*Municipal public transport*  
*Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law*  
*Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto*

- 5.1.2 In **Tongoane and Others v Minister of Agriculture and Land Affairs and Others** 2010 (8) BCLR 741 (CC), the Constitutional Court gave guidance in respect of the classification of Bills. In this judgment the Constitutional Court dealt with the classifications of the Communal Land Rights Act, 2004 (Act No. 11 of 2004), and the procedure that had to be followed in enacting that Act.
- 5.1.3 The Constitutional Court confirmed and endorsed the test for tagging that was formulated in paragraph 28 in **Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill** 2000 (1) BCLR 1 (CC), where the Constitutional Court held that—  
“(w)hatever the proper characterisation of the Bill . . . a large number of its provisions must be characterised as falling ‘within a functional area listed in Schedule 4’, more particularly the concurrent national and provincial legislative competences in regard to ‘trade’ and ‘industrial promotion’.” (emphasis added).
- 5.1.4 At paragraph 56 of the **Tongoane** judgment, Ngcobo CJ held that—  
“the heading of section 76, namely, ‘Ordinary Bills affecting provinces’ provides ‘a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76’.” (footnote omitted and emphasis added).
- 5.1.5 At paragraph 58 of the **Tongoane** judgment, Ngcobo CJ furthermore held as follows:  
“What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area listed in Schedule 4’” (emphasis added).
- 5.1.6 The Constitutional Court also held that the tagging test focusses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 to the Constitution and not on whether any of the provisions of the Bill are incidental to the substance of the Bill. The process of tagging is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how the Bill must be considered by the provincial legislatures depends on whether the Bill affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content<sup>4</sup>.
- 5.1.7 The question is therefore whether the provisions of the Bill in “substantial measure” fall within a functional area listed in Schedule 4 to the Constitution.
- 5.1.8 As indicated in the **Tongoane** judgment discussed above, the test for determining whether a Bill is an ordinary Bill affecting provinces requires that a Bill whose provisions to a substantive measure fall within a functional area listed in Schedule 4 to the Constitution must be dealt with under section 76 of the Constitution. In order to determine this, the focus must be on all the provisions of the Bill in

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*Stormwater management systems in built-up areas*

*Trading regulations*

*Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal system*

<sup>4</sup> Paragraphs 59 and 60 of the **Tongoane** judgment; see paragraph 94 above.

order to determine the extent to which those provisions substantially affect functional areas listed in Schedule 4 to the Constitution<sup>5</sup>.

5.1.9 The Bill seeks to—

- criminalise international crimes under the domestic law of the Republic;
- further regulate immunity in the Republic against prosecution for international crimes;
- afford extraterritorial jurisdiction to South African courts to adjudicate international crimes;
- provide for the investigation and prosecution of persons who commit international crimes;
- ensure that persons who are accused of international crimes may be extradited to other States;
- provide for the surrender of persons who are accused of international crimes to entities;
- provide for co-operation between the Republic and entities in respect of persons who are accused of having committed international crimes; and
- effect consequential amendments to other laws.

5.1.10 The Department and the State Law Advisers have examined all the provisions of the Bill as discussed above in order to establish whether any of the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution. In our view none of the provisions of the Bill fall within a functional area listed in Schedule 4 and the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution

5.2 **Referral to National House of Traditional Leaders** The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

<sup>5</sup> **“Ordinary Bills not affecting provinces**

75. (1) *When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:*

(a) *The Council must—*

(i) *pass the Bill;*  
(ii) *pass the Bill subject to amendments proposed by it; or*  
(iii) *reject the Bill.*

(b) *If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.*

(c) *If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—*

(i) *pass the Bill again, either with or without amendments; or*  
(ii) *decide not to proceed with the Bill.*

(d) *A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.*

(2) *When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—*

(a) *each delegate in a provincial delegation has one vote;*

(b) *at least one third of the delegates must be present before a vote may be taken on the question; and*

(c) *the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.”.*

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