

**South Africa's obligation to prevent, suppress and punish grave  
breaches of humanitarian law**

By

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## List of Abbreviations

AJCR	Journal of International Criminal Justice
Am J Int Law	American Journal of International Law
AYIHL	African Yearbook on International Humanitarian Law
AU	African Union
ASP	Assembly of State Parties
BCLR	Butterworths Constitutional Law Reports
CCR	Constitutional Court Review
CSP	Council of State Parties
CIHL	Customary International Humanitarian Law
Eur J Int'l L	European Journal of International Law
GP	High Court of South Africa, Gauteng Division, Pretoria
Hum Rights Q	Human Rights Quarterly
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IGCA	Implementation of the Geneva Conventions Act 8 of 2012
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IRRC	International Review of the Red Cross

J Int Crim Justice	Journal of International Criminal Justice
J Lat Am Stud	Journal of Latin American Studies
Leiden J Int Law	Leiden Journal of International Law
Mich J Int'l L	Michigan Journal of International Law
NATO	North Atlantic Treaty Organization
Nord J Hum Rights	Nordic Journal of Human Rights
PELJ	Potchefstroom Electronic Law Journal
POWs	Prisoners of War
SA	South Africa Law Reports
SACR	South African Criminal Law Reports
SADC	Southern African Development Community
SADCT	Southern African Development Community Tribunal
SAfrYIL	South African Yearbook of International Law
SAJHR	South African Journal on Human Rights
SALC	Southern Africa Litigation Centre
SANDF	South African National Defence Force
UN	United Nations
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USA	United States of America

Va J Int'l L

Virginia Journal of International Law

ZAGPPHC

High Court of South Africa, Gauteng Provincial Division, Pretoria

## **Declaration**

I declare that the dissertation, titled '**South Africa's obligation to prevent, suppress and punish grave breaches of humanitarian law**' is my work. I have acknowledged and indicated all the sources that I used. My dissertation has been submitted for electronic originality check, and it satisfies the required standards.

I further declare that this work has not been submitted before, either wholly or in part, for examination at Unisa for another qualification or at any other higher education institution.

NOMAZULU NDEBELE

DATE:



## **Acknowledgements**

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## **Dedication**

To James Brown and Hilda Ndebele.

## **Abstract**

This study examines South Africa's legal obligations to prevent, suppress and punish grave breaches of international humanitarian law (IHL). Whereas South Africa signed, ratified, and domesticated instruments that seek to end impunity for serious international crimes committed during armed conflicts, and whereas it is bound by customary IHL to act against perpetrators of grave breaches, it finds itself torn between its conflicting obligations to show solidarity with its counterparts in the African Union and the international community. Its failure, or refusal at best, to arrest, detain and surrender the former Sudanese strongman, Omar Al Bashir, to the International Criminal Court, and its aborted attempt to withdraw from the Roman Statute of the International Criminal Court illustrate its unwillingness to exercise universal jurisdiction for grave breaches of IHL. In the light of these events, this study explores the substantive content of South Africa's international obligations against perpetrators of grave breaches of IHL within its borders and outside its boundaries. The study unpacks the challenges faced by South Africa in meeting these international obligations. To do so, it examines the international legal framework and domestic legislation on this aspect, as provided in the Constitution of the Republic of South Africa, 1996, defence law and statutes implementing the Geneva Conventions and the Rome Statute of the International Criminal Court. The study concludes by proffering recommendations to enhance South Africa's fulfilment of its international obligations to end impunity for serious violations of IHL by repressing, suppressing and punishing grave breaches.

**KEY WORDS:** Grave breaches; IHL; universal jurisdiction; implementation; cooperation; repression, suppression and prevention; genocide; war crimes; crimes against humanity

# Chapter 1 Introduction

## 1.1 Background

Africa grapples with armed conflicts and many other threats to democracy and the rule of law.<sup>1</sup> The never-ending wars in Somalia,<sup>2</sup> the conflicts in the Congo,<sup>3</sup> the Boko Haram insurgency in Nigeria,<sup>4</sup> the 2017 coup in Zimbabwe,<sup>5</sup> the Al Shabaab insurgency in Cabo Delgado, Mozambique,<sup>6</sup> and protests in Swaziland<sup>7</sup> are examples of internal strife in African states. The devastation, hunger, disease and death that come with war cause untold suffering to civilian populations.<sup>8</sup> Atrocities committed during the civil wars in Sudan, South Sudan, and Nigeria demonstrate the cruelty of war on civilians.<sup>9</sup> The commission of war atrocities by belligerents and the need to protect civilian populations caught up in armed conflicts led to the development of an international legal framework that protects certain persons during war, such as civilians.<sup>10</sup> The Geneva Conventions<sup>11</sup> and the Rome Statute of the International Criminal Court (the ICC

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<sup>1</sup> Charles M Fombad, 'An Overview of the Crisis of the Rule of Law in Africa' (2018) 18 AHRLJ 213, 240-241.

<sup>2</sup> Mark Bradbury and Sally Healy, 'Endless War: A Brief History of the Somali Conflict' (*Accord*, 2010) <<https://www.c-r.org/accord/somalia/endless-war-brief-history-somali-conflict>> accessed 31 August 2020.

<sup>3</sup> United Nations Economic Commission for Africa, *Conflicts in the Democratic Republic of Congo: Causes, Impact and Implications for the Great Lakes Region* (United Nations 2015) paras 11-14.

<sup>4</sup> Aduku A Akubo and Benjamin Ikani Okolo, 'Boko Haram Insurgency in Nigeria: Implications for National Security and Restorative Justice' (2019) 19 AJCR 109.

<sup>5</sup> Jason Burke, 'Zimbabwe's Strange Crisis Is a Very Modern Kind of Coup' (*The Guardian*, 2017) <<https://www.theguardian.com/world/2017/nov/21/zimbabwes-strange-crisis-is-a-very-modern-kind-of-coup>> accessed 4 September 2020.

<sup>6</sup> International Crisis Group, 'Stemming the Insurrection in Mozambique's Cabo Delgado' (*International Crisis Group*, 2021) <<https://www.crisisgroup.org/africa/southern-africa/mozambique/303-stemming-insurrection-mozambiques-cabo-delgado>> accessed 17 October 2021.

<sup>7</sup> News Agencies, 'Eswatini Deploys Army to Quell Pro-Democracy School Protests' (*Al Jazeera*, 2021) <<https://www.aljazeera.com/news/2021/10/12/eswatini-deploys-army-quell-pro-democracy-school-protests>> accessed 17 October 2021.

<sup>8</sup> See Associated Press, 'UN Food Chief Says to End Hunger, End Conflict' (*News24*, 2017) <<https://www.news24.com/World/News/un-food-chief-says-to-end-hunger-end-conflict-20171111>> accessed 4 January 2018.

<sup>9</sup> See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (ICRC 2001) para 14.

<sup>10</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 151 (ICRC and Cambridge University Press 2005), Rule 151.

<sup>11</sup> The four Geneva Conventions are: ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 and ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

Statute)<sup>12</sup> are integral components of international criminal justice. They criminalise grave breaches of international humanitarian law (IHL), such as attacks on civilians and property, genocide, war crimes, and other crimes against humanity.<sup>13</sup>

The Geneva Conventions are part of customary international law.<sup>14</sup> They bind South Africa to repress and suppress grave breaches of IHL.<sup>15</sup> In pursuit of the responsibility to suppress and prevent grave breaches, South Africa enacted laws for the implementation of IHL. The statutes include the Constitution of the Republic of South Africa, 1996 (the Constitution), the Defence Act,<sup>16</sup> the Implementation of the Rome Statute of the International Criminal Court Act (the ICC Implementation Act)<sup>17</sup> and the Implementation of the Geneva Conventions Act (the IGCA).<sup>18</sup> Read in their totality, these statutes commit South Africa to fulfil the responsibility to repress, suppress and punish grave breaches of IHL. When fulfilling its duties under IHL, South Africa demonstrates its commitment to end impunity for serious international crimes.<sup>19</sup>

This study examines South Africa's legal obligations to repress, suppress and punish grave breaches of IHL. The cases on attempts to prosecute the former Sudanese leader, Omar Hassan Ahmad Al Bashir (*Al Bashir* cases)<sup>20</sup> and South Africa's attempted withdrawal from the ICC Statute<sup>21</sup> illustrates threats to the rule of law caused by a failure to fulfil international obligations. The study examines these cases and the issues and challenges hampering South Africa's fulfilment of its IHL obligations.

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<sup>12</sup> United Nations General Assembly, *Rome Statute of the International Criminal Court (Last Amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

<sup>13</sup> See, for instance, the ICRC, *First Geneva Convention*, article 50; ICRC, *Second Geneva Convention*, Article 51; ICRC, *Third Geneva Convention*, Article 130; and ICRC, *Fourth Geneva Convention*, Article 147.

<sup>14</sup> Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 Am J Int Law 348, 353.

<sup>15</sup> Common Article 1 to all four Geneva Conventions, ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; Article 80 (1) and (2).

<sup>16</sup> Defence Act 42 of 2002.

<sup>17</sup> Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

<sup>18</sup> Implementation of the Geneva Conventions Act 8 of 2012.

<sup>19</sup> Max Du Plessis, 'The Geneva Conventions and South African Law' (2013) 43 Institute for Security Studies Policy Brief 1-5, 1.

<sup>20</sup> *Southern Africa Litigation Centre v Minister of Justice* 2015 9 BCLR 1108 (GP) and *Democratic Alliance v Minister of International Relations and Cooperation* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

<sup>21</sup> *Democratic Alliance v Minister of International Relations and Cooperation*.

## 1.2 Research questions

What is the substantive content of South Africa's international obligation to prevent, suppress and punish grave breaches of IHL; and what are the challenges facing South Africa in complying with these obligations?

## 1.3 Objectives

The study has the following objectives:

- (i) to provide an overview of grave breaches of IHL, as articulated in customary international law, the Geneva Conventions, and other international instruments.
- (ii) to analyse South Africa's international and domestic law obligations to repress, suppress and punish grave breaches of IHL.
- (iii) to examine challenges encountered by South Africa in the enforcement of the law against perpetrators of grave breaches of IHL, with reference to the *Al Bashir* case and the attempt by South Africa to withdraw from the ICC Statute.
- (iv) to proffer recommendations on how South Africa can enhance the fulfilment of its international obligations to end impunity for serious international crimes by repressing, suppressing and punishing grave breaches of IHL.

## 1.4 Assumptions

This study is informed by the following assumptions:

- (i) There is no conflict between South Africa's regional and international obligations to end impunity for serious crimes in international law.
- (ii) Competing regional and international interests on the prosecution of serious crimes in international law do not relieve South Africa of its obligations to repress, suppress and punish grave breaches of IHL.

## 1.5 Literature review

The Geneva Conventions define grave breaches of IHL. However, the list of crimes that constitute these grave breaches is not exhaustive.<sup>22</sup> The Geneva Conventions carry a similar definition of grave breaches of IHL, which they define as:

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<sup>22</sup> The ICC Statute and the Protocols Additional to the Geneva Conventions also criminalise individual acts, which if committed during wartime, constitutes grave breaches of IHL.

...any of the acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out wilfully and wantonly.<sup>23</sup>

Humanitarian law articulates the need to end impunity for grave breaches as expressed in the Geneva Conventions, the Protocols Additional to the Geneva Conventions and the ICC Statute. It imposes obligations on state parties to repress grave breaches.<sup>24</sup> According to Bernard, IHL in this context should be understood as:

...the expression of an international consensus. It could be seen as a “social contract” between States to protect human life and dignity even in times when mortal peril could seem to justify all acts of violence.<sup>25</sup>

State Parties must prosecute and co-operate in the prosecution of perpetrators of grave breaches of IHL.<sup>26</sup> Provisions on grave breaches apply to internal and external armed conflicts. A state may refuse to domesticate IHL conventions, although it will always be bound to act under international customary law.<sup>27</sup> Provisions on grave breaches of IHL in the Geneva Conventions are codifications of such customary law.<sup>28</sup> The intention for the enactment of IHL instruments was to ensure universal peace, which could be attained without organising a centralised peacekeeping military force.<sup>29</sup> It was hoped that giving each state power to prosecute or extradite accused persons under universal jurisdiction would contribute to international peace.<sup>30</sup> After the failures of attempts at stabilising peace after the Second World War, the International Committee of the Red Cross (ICRC), which is the guardian of IHL, drafted a new body of IHL in the form of the Geneva Conventions. Although the list of crimes qualified as grave breaches of IHL is not exhaustive, the ICRC listed them in all the four Geneva Conventions.<sup>31</sup> Universal jurisdiction for the prosecution of grave breaches is also informed by

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<sup>23</sup> Articles 50, 51, 130 and 147 of the ICRC, *First Geneva Convention*, ICRC, *Second Geneva Convention*, ICRC, *Third Geneva Convention* and ICRC, *Fourth Geneva Convention*, respectively.

<sup>24</sup> For a discussion, see Beth Van Schaack and Ronald C Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (2<sup>nd</sup> edn, Foundation Press 2010) 21.

<sup>25</sup> Vincent Bernard, 'Time to Take Prevention Seriously' (2014) 96 IRRC 689.

<sup>26</sup> Lilian Chenwi and Franziska Sucker, 'South Africa's Competing Obligations in Relation to International Crimes' (2015) 7 CCR 199, 199-200.

<sup>27</sup> Meron, 'The Geneva Conventions as Customary Law' 348-349.

<sup>28</sup> Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 J Int Crim Justice 683, 684.

<sup>29</sup> Tanisha M Fazal, 'The Fall and Rise of Peace Treaties' (2014) 108 Am J Int Law 46.

<sup>30</sup> Kriangsak Kittikhaisaree, *The Obligation to Extradite or Prosecute* (Oxford University Press 2018) 15.

<sup>31</sup> Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 J Int Crim Justice 657, 673-674.

globalisation and state sovereignty. As such, it is up to its state to honour its duties under IHL by repressing, suppressing and punishing grave breaches.<sup>32</sup>

South Africa is obliged by section 232 of the Constitution and the ICC Statute to implement customary IHL and to refuse immunity for anyone accused of committing grave breaches. Although South Africa enacted domestic law, in the form of the Defence Act, the Implementation of the ICC Statute Act and the IGCA, it has adopted an inconsistent and often controversial approach towards its obligations to repress, suppress and punish grave breaches of IHL.<sup>33</sup> The Al Bashir incident, during which South Africa refused to implement a court order to arrest, detain and surrender the Sudanese leader to the ICC to face prosecution for international crimes, is an illustration.<sup>34</sup> South Africa's subsequent attempt to withdraw from the ICC Statute is another example of its approach.<sup>35</sup> Gevers says this demonstrates the nation's 'complex and schizophrenic'<sup>36</sup> approach to international criminal justice.

South Africa's inconsistencies on suppression, repression and prevention of grave breaches are attributed to the misinterpretation of its obligations in international law and to its considerations of diplomacy within the African Union.<sup>37</sup> A neo-imperialistic ideology clouds South Africa's view of its international legal duties.<sup>38</sup> South Africa appears to have taken the position that the indictment of Al Bashir and Kenyan President Uhuru Kenyatta were persecutions of Africans by the ICC, which is said to have turned a blind eye to British and American atrocities in the Middle East.<sup>39</sup> While much could be said about the failure of the ICC to prosecute persons

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<sup>32</sup> Kingsley C Moghalu, *Global Justice: The Politics of War Crimes Trials* (Praeger Security International 2006).

<sup>33</sup> Chenwi and Sucker, 'South Africa's Competing Obligations in Relation to International Crimes' 200.

<sup>34</sup> For a discussion of the circumstances surrounding the Al Bashir controversy, see the court decision in *Southern Africa Litigation Centre v Minister of Justice*, para 1108.

<sup>35</sup> South Africa expressed its intention to withdraw from the ICC Statute through the Declaration Statement by the Republic of South Africa on the Decision to Withdraw from the Rome Statute of the International Criminal Court. The Instrument of Withdrawal subsequently revoked the declaratory statement following a court decision in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 1 SA SACR 623 (GP).

<sup>36</sup> Christopher Gevers, 'The Implementation of International Law in Germany and South Africa' in Erika De Wet, Holger Hestermeyer and Rüdiger Wolfrum (eds), *International Criminal Law in South Africa* (PULP 2015), 403-404.

<sup>37</sup> For a full discussion, see Mills Kurt, "'Bashir Is Dividing Us": Africa and the ICC' (2012) 34 Hum Rights Q 404, 404-447.

<sup>38</sup> Angelo Dube, 'The Au Model Law on Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle' (2015) 18 PELJ 449, 454-455.

<sup>39</sup> Ian Sprouse, 'The Gambia's Unsurprising Renunciation of the ICC, or the So-Called "International Caucasian Court"' (*The London School of Economics and Political Science*, 2016) <<https://blogs.lse.ac.uk/africaatlse/2016/11/10/the-gambias-unsurprising-renunciation-of-the-icc-or-the-so-called-international-caucasian-court/>> accessed 9 September 2020.



responsible for atrocities in the Middle East, South Africa's approach shows a deficiency of understanding of fundamental international law and constitutes an attempt to condone impunity on the African continent. It fails to address principles related to the enforcement of international obligations on non-state parties to IHL instruments and could defeat efforts to end impunity for international crimes.

The fulfilment of South Africa's international law obligations to repress grave breaches of IHL partly depends on its commitment to the rule of law. The rule of law means that the government must obey its laws.<sup>40</sup> It ensures the accountability of the government for fulfilling the laws it has created. The rule of law is one of the founding principles of the Constitution.<sup>41</sup> Failure by the government to fulfil its own laws creates certainty, particularly in international relations in which the whole purpose of entering into international agreements to end impunity for grave breaches of IHL will be defeated.

National and international courts complement each other in the administration of international criminal justice under the principle of universal jurisdiction in which national courts have a primal duty while international courts play a complementary role.<sup>42</sup> However, the duty to exercise universal jurisdiction is not binding on every national court, meaning that in cases where national courts cannot try perpetrators of international crimes, they may extradite them to international courts such as *ad hoc* tribunals, regional tribunals and the ICC.<sup>43</sup> By enacting legislation for the implementation of IHL, South Africa empowered its courts to try perpetrators of grave breaches and to play a role in their extradition to other willing states and international courts.<sup>44</sup>

With the help of the AU and SADC, South Africa must intervene even in internal matters of a state when there are cases of gross violations of international law on the protection of human rights.<sup>45</sup> When it enacted legislation for the implementation of its IHL obligations, South Africa

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<sup>40</sup> See CL Ten, 'Constitutionalism and the Rule of Law' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *Contemporary Political Philosophy* (2<sup>nd</sup> edn, Blackwell Publishing Ltd 2007) 493.

<sup>41</sup> See 1(c) of the Constitution.

<sup>42</sup> Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice' (2002) 84 IRRC 145,147-148.

<sup>43</sup> Claus Krieb, 'Reflections on the Iudicare Limb of the Grave Breaches Regime' (2009) 7 J Int Crim Justice 789, 790.

<sup>44</sup> Gary D Solis, *The Law of Armed Conflict International Humanitarian Law in War* (1 edn, Cambridge University Press 2010) 85.

<sup>45</sup> Gavin Cawthra, 'Southern Africa: Threats and Capabilities' <[https://www.ipinst.org/wp-content/uploads/publications/rpt\\_safrica.pdf](https://www.ipinst.org/wp-content/uploads/publications/rpt_safrica.pdf)> accessed 19 September 2021.

showed its intention to fulfil its duties to end impunity for grave breaches. This was an acknowledgement that South Africa cannot be an island of peace within a continent that is severely affected by armed conflicts and related challenges such as hunger and diseases.<sup>46</sup> However, the AU sentiment that Africa should not co-operate with the ICC on the arrest and surrender of Al Bashir and the Uhuru Kenyatta seemed to appeal to South Africa.<sup>47</sup> The mooted boycott of the ICC expresses the anger of African states on their alleged selective prosecution by the ICC.<sup>48</sup> It also expresses their disappointment at exclusion in significant decision-making platforms such as the United Nations Security Council.<sup>49</sup> Their exclusion from the United Nations Security Council speaks to what may be called poor administration of justice in the global legal system.<sup>50</sup>

Against this background, South Africa and its SADC and AU counterparts could not be of any help in bringing Al Bashir and other perpetrators of international crimes to the ICC for prosecution. SADC and the AU could not do anything about South Africa's failure to arrest and surrender Al Bashir to the ICC. For SADC, the situation was worsened by the fact that its tribunal, the Southern African Development Community Tribunal (SADCT), was suspended.<sup>51</sup> While AU and its member states might have some bone to chew with the international community on selective prosecution for international crimes, the consequences of their disregard for international criminal justice by failure to repress, suppress and punish grave breaches are suffered by the victims of the perpetrators such as Al Bashir. South Africa is a

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<sup>46</sup> *ibid.*

<sup>47</sup> Benedict A Chigara and Chidebe M Nwankwo, 'To Be or Not to Be?' The African Union and Its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33 Nord J Hum Rights 243, 245. See also, Angelo B Dube, 'Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa' (PhD thesis, University of the Western Cape 2015) 54-55.

<sup>48</sup> Kamari Maxine Clarke, 'Is the ICC Targeting Africa Inappropriately or Are There Sound Reasons and Justifications for Why All of the Situations Currently under Investigation or Prosecution Happen to Be in Africa?' (*ICC Forum*, 2013) <<https://iccforum.com/africa#Clarke>> accessed 19 September 2021.

<sup>49</sup> UN News, 'In UN Speech, South African President Calls for Reform of Security Council' (*UN News Global Perspective Human Stories* 2015) <<https://news.un.org/en/story/2015/09/510262-un-speech-south-african-president-calls-reform-security-council#:~:text=%E2%80%9CIt%20is%20unacceptable%20and%20unjustifiable%20that%20more%20than,structure%20of%20the%20United%20Nations%2C%20the%20Security%20Council.>> accessed 19 September 2021.

<sup>50</sup> Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law; Africa and the International Criminal Court' (2009) *SAfrYIL* 57, 58.

<sup>51</sup> *Mike Campbell (Pty) Ltd v Republic of Zimbabwe* [2008] SADCT 2.

regional powerhouse in the SADC region and should, ideally, use its power to ensure that IHL is upheld in the region and the continent.

IHL is based on the need for retribution through the punishment of perpetrators of grave breaches.<sup>52</sup> It seeks to deter prospective criminals from committing international crimes.<sup>53</sup> It also seeks to satisfy the urge for vengeance by victims.<sup>54</sup> However, reparations for atrocities such as grave breaches are not the primary focus of IHL, leaving victims with long-lasting suffering where their properties and livelihoods have been destroyed by perpetrators.<sup>55</sup> As such, failure to prosecute perpetrators of grave breaches of IHL under universal jurisdiction leaves victims with no remedy, making them doubt the capability of international criminal justice to play its part in ending impunity for grave breaches.<sup>56</sup> Although IHL is substantially transparent and aims to punish offenders and end impunity for grave breaches, certain procedural impediments in fulfilling these aims are mostly political in South Africa and across the globe.<sup>57</sup>

Notwithstanding the intricate relationship between politics and international law, there is a need to ensure justice for victims of serious crimes such as grave breaches of IHL.<sup>58</sup> Human rights must be protected at all times, including war and peacetime.<sup>59</sup> There is no doubt that comity and good international relations derive from sharing common actual human rights values of individuals and groups, instead of ignoring the violation of such rights through crimes such as grave breaches.<sup>60</sup> In the context of this background, this study explores South Africa's international law obligations to repress, suppress and punish grave breaches. It contextualises this obligation within realities in international relations and the ensuing issues and challenges that arise in fulfilling this obligation.

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<sup>52</sup> Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *Eur J Int'l L* 2, 3.

<sup>53</sup> *ibid.*

<sup>54</sup> David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 *Hum Rts Q* 592, 593.

<sup>55</sup> *ibid.*, 593.

<sup>56</sup> Mary Griffin, 'Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century' (2000) 82 *IRRC* 369, 388-389.

<sup>57</sup> See Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (Koninklijke Brill NV 2004) 34-35 on the politics of international criminal justice.

<sup>58</sup> Moghalu, *Global Justice: The Politics of War Crimes Trials* 11.

<sup>59</sup> Roberta Arnold and Noelle Quenivet, *International Humanitarian Law and Human Rights Law: Towards a Merger in International Law* (Martinus Nijhoff Publishers 2008) 273.

<sup>60</sup> Sonja C Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer-Verlag 2010) 5.

## **1.6 Outline of the study**

This study is divided into five chapters, which, in addition to this chapter, are as follows:

Chapter 2 examines the theoretical framework for the criminalisation of grave breaches of IHL. It sets out to establish the international obligation to prevent, repress and punish grave breaches.

Chapter 3 analyses the constitutional and legislative obligation placed on South Africa by the Constitution, the Implementation of the Rome Statute of the International Criminal Court Act and the Implementation of the Geneva Conventions Act to prevent, repress and punish grave breaches of IHL.

Chapter 4 discusses challenges faced by South Africa in preventing, repressing and punishing grave breaches of IHL, with specific reference to the *Al Bashir* cases and the attempted withdrawal of South Africa from the ICC Statute.

Chapter 5 proffers recommendations to enhance South Africa's fulfilment of the international and domestic obligation to prevent, suppress and punish grave breaches of IHL.

## **1.7 Research methodology**

This study was conducted through doctrinal legal research, which requires extensive reliance on primary and secondary sources of law which enshrine South Africa's international and domestic obligations to prevent, repress and punish grave breaches of IHL. These include primary sources such as the Constitution, legislation (the Implementation of the Rome Statute Act, the IGCA and the Defence Act), and international instruments - particularly the Geneva Conventions and their Protocols, the ICC Statute and relevant AU and SADC instruments. The primary sources also include several instructive court decisions on the subject, including the *Al Bashir* cases and judicial decisions on South Africa's attempt to withdraw from the ICC Statute.<sup>61</sup> The secondary sources of law used in this study include academic writings in books, journal articles and other legal periodicals on international criminal justice.

## **1.8 Research ethics**

The primary ethical considerations which inform this study are the research guidelines of the University of South Africa and applicable copyright legislation. All sources cited in this work

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<sup>61</sup> *Southern Africa Litigation Centre v Minister of Justice and Democratic Alliance v Minister of International Relations and Cooperation.*

were read, analysed and presented in terms of the university guidelines and as directed by the study leader.

## Chapter 2 Grave Breaches of International Humanitarian Law

### 2.1 Introduction

IHL treaties are codifications of customary international law on the conduct of an armed conflict.<sup>1</sup> They prescribe the elements of crimes that constitute violations of IHL. An extreme subset of these crimes constitutes grave breaches of IHL.<sup>2</sup> States must respect and ensure respect of IHL through the repression, suppression and prevention of grave breaches of IHL.<sup>3</sup> This chapter outlines grave breaches of IHL. It traces the history of grave breaches to contextualise their codification in the Geneva Conventions and discusses the crimes that constitute grave breaches of IHL.

### 2.2 History of grave breaches of IHL

Grave breaches of IHL were gradually recognised as a fragment of IHL by the international community. The codification of grave breaches came after states noted the need to protect vulnerable people, their properties and livelihoods from the excesses of mankind during the war.<sup>4</sup> Throughout history, war was used as a tool to attain political, economic, and religious power. However, the unfortunate reality was that war brought untold suffering to vulnerable people, such as children, women and people living with disabilities, among others.<sup>5</sup> One of the pillars of the law of war was that combatants could not be reproved for killing other combatants during an armed conflict. This privilege was limited to the extent that those who were no longer taking part in combat could not be attacked. As such, combatants could kill anyone taking part in combat but could not kill civilians, religious personnel, physicians and wounded and sick combatants who were declared to have ceased taking part in active hostilities.<sup>6</sup> Priests served as public religious stewards since religion was essential for human survival. Priests could go to war to offer religious services to combatants. Physicians also offered healthcare services to combatants. As such, priests and physicians had to be spared because of their unique role during

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<sup>1</sup> Nirmala Chandrahasan, 'The Continuing Relevance of Customary International Law in the Development of International Humanitarian Law' (2009) 21 Sri Lanka J Int'l L 55, 55-56.

<sup>2</sup> ICRC, *First Geneva Convention*, Article 50; ICRC, *Second Geneva Convention* Article 51; ICRC, *Third Geneva Convention*, Article 130; ICRC, *Fourth Geneva Convention*, Article 147 and ICRC, *Protocol I*, Article 85.

<sup>3</sup> Article 1 common to the Geneva Conventions and ICRC, *Protocol I*, Article 1.

<sup>4</sup> Dieter Fleck, *The Handbook of International Humanitarian Law* (2 edn, Oxford University Press 2008) 20.

<sup>5</sup> Ian Brownlie, *Principles of Public International Law* (7 edn, Oxford University Press 2008) 729.

<sup>6</sup> Marko D Oberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91 IRRC 163, 166.

times of combat. Prisoners of war were not supposed to be attacked. This was meant to avoid superfluous killing. Some methods of warfare were forbidden, including the poisoning of wells and the use of deadly crossbows and bows.<sup>7</sup>

These formerly unwritten laws are now part of customary IHL and have been codified in the Geneva Conventions and their Protocols. A rule should have been a common practice by states for it to be recognised as a custom.<sup>8</sup> Customary laws are generally accepted as law and ‘exist independent of treaty law’,<sup>9</sup> although some have been coded into treaties. Noting the devastation that war brings to people, observation of grave breaches of IHL became necessary and universally acceptable.<sup>10</sup>

The purpose of customary IHL is to overcome problems associated with applying treaty law. Even though grave breaches of IHL are clearly defined in treaties, further provisions are strictly recognised as valid international customs that overlap on matters not covered by treaties.<sup>11</sup> One of the first prominent codifications of IHL by a state was the Lieber Code,<sup>12</sup> written by Franz Lieber in 1863 as a military regulation for the United States of America. The purpose of the Code was to protect prisoners of war and outlaw attacks on medical facilities and cultural property. Notably, these provisions are now part of classifications of grave breaches of IHL.

Another significant improvement in the making of the grave breaches of IHL was the Memory of Solferino, written in 1859 by Henry Dunant after he witnessed the suffering of wounded soldiers in the battle of Solferino. Dunant said that wounded soldiers were left to bleed to death. This was an unpleasant sight, making Dunant believe that soldiers should not be deprived of their fundamental human right to life merely because of their involvement in war.<sup>13</sup> Dunant worked to protect soldiers from grave consequences of war and formed the ICRC, which is the custodian of IHL. The ICRC upholds the IHL and promotes the observation of law against grave breaches of IHL.

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<sup>7</sup> Gerhard Werle, *Principles of International Criminal Law* (2 edn, TMC Asser Press 2009) 348.

<sup>8</sup> *Libyan Arab Jamahiriya v Malta* 1985 I.C.J. 13, 3 June 1985, paras 29–30.

<sup>9</sup> ICRC, ‘Customary Law’ (ICRC, 2020) <<https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>> accessed 17 January 2021.

<sup>10</sup> *ibid.*

<sup>11</sup> Henckaerts, ‘The Grave Breaches Regime as Customary International Law’, 178. See also Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 24.

<sup>12</sup> Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (D van Nostrand 1898).

<sup>13</sup> See Henry Dunant, *A Memory of Solferino* (ICRC 1947).

After the formation of the ICRC, the first Geneva Convention came into force addressing the treatment of wounded combatants in the field. It was followed by the other three Geneva Conventions. The second Geneva Convention regulated conditions of wounded, sick and shipwrecked combatants at sea. The third Geneva Convention prescribed the treatment of prisoners of war, while the fourth Geneva Convention sought to ensure the protection of civilians. The Geneva Conventions were supplemented with Additional Protocols. Additional Protocol I protected victims in international armed conflicts, while Additional Protocol II protected victims in non-international armed conflicts. Additional Protocol III protected distinctive humanitarian emblems.<sup>14</sup>

In addition to the Geneva Conventions, the Hague Conventions emerged to regulate the means and methods of warfare. The Geneva Conventions initially regulated international armed conflicts. However, frequent non-international armed conflicts led to the extension of their ambit to non-international armed conflicts, which were already regulated by common Article 3 to all the Geneva Conventions.<sup>15</sup> Eventually, the ICC Statute came. It establishes the ICC as the IHL enforcement mechanism.<sup>16</sup>

The ICC, *ad hoc* international tribunals and national courts ensure proper adjudication of matters when grave breaches of IHL have been committed. However, treaties are only binding to states that have signed and ratified them.<sup>17</sup> Notwithstanding, customary IHL fills the gap when states are not parties to treaties that proscribe grave breaches. Customary IHL binds all states to repress, suppress and prevent grave breaches of IHL.

Legal precedent allows decision-makers to decide on issues when treaties and customary law do not answer a given problem in international law.<sup>18</sup> National legislation and precedents by national courts could be relied upon for issues that are not provided in international law.<sup>19</sup>

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<sup>14</sup> ICRC, 'The Geneva Conventions of 1949 and Their Additional Protocols' (ICRC, 2014) <<https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>> accessed 28 October 2021.

<sup>15</sup> Werle, *Principles of International Criminal Law* 350.

<sup>16</sup> Diakonia International Humanitarian Law Centre, 'Sources of International Humanitarian Law' (*Diakonia International Humanitarian Law Centre*, 2013) <<https://www.diakonia.se/en/IHL/The-Law/International-Humanitarian-Law-1/Introduction-to-IHL/Sources-of-international-law/>> accessed 21 August 2019.

<sup>17</sup> Henckaerts, 'The Grave Breaches Regime as Customary International Law' 177.

<sup>18</sup> Icelandic Human Rights Centre, 'Sources of International Law' <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/sources-of-international-law>> accessed 25 January 2021.

<sup>19</sup> *Prosecutor v Anto Furundzija (Trial Judgement)* IT-95-17/1-T (ICTY), 10 December 1998 para 178.



However, not all legal precedents are automatically binding in IHL.<sup>20</sup> Like precedents, the writings of academics contribute to the expansion and analysis of grave breaches of IHL, although they have an indirect influence.<sup>21</sup> Article 38 of the Statute of the International Court of Justice (ICJ Statute)<sup>22</sup> provides that court decisions and teachings of renowned scholars are sources of international law. They are not binding on states parties but have substantial legal weight in resolving violations of international law, including IHL.<sup>23</sup>

### 2.3 Acts that constitute grave breaches of IHL

The Geneva Conventions contain a common article that lists crimes that constitute grave breaches of IHL.<sup>24</sup> All states must enact domestic laws for the implementation of IHL. Domestic laws must provide operative penal codes against the commission of grave breaches of IHL.<sup>25</sup> Effective penal codes must be strictly applied, transparent and accessible to the public.<sup>26</sup> They must deter prospective perpetrators from committing crimes by concisely stating elements of the crimes and the consequences of the commission of such crimes.<sup>27</sup> Penal sanctions must apply uniformly to all perpetrators. The principle of proportionality between the degrees of the punishment and the severity of the crimes must be considered when sentencing. The implementing laws must also provide for national jurisdiction on the prosecution of grave breaches of IHL.<sup>28</sup>

Grave breaches of IHL are specified in the Geneva Conventions relating to wounded and sick combatants in the field;<sup>29</sup> wounded, sick and shipwrecked combatants at sea;<sup>30</sup> prisoners of war

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<sup>20</sup> Werle, *Principles of International Criminal Law* 53.

<sup>21</sup> Icelandic Human Rights Centre, 'Sources of International Law'.

<sup>22</sup> United Nations General Assembly, *Statute of the International Court of Justice*, 18 April 1946.

<sup>23</sup> Icelandic Human Rights Centre, 'Sources of International Law'.

<sup>24</sup> Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary* (ICRC 1952) 370.

<sup>25</sup> ICRC, *First Geneva Convention*, Article 49, ICRC, *Second Geneva Convention*, Article 50, ICRC, *Third Geneva Convention*, Article 129 and ICRC, *Fourth Geneva Convention*, Article 146.

<sup>26</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions' (*ICRC*, (date unknown)) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>> accessed 25 January 2021.

<sup>27</sup> *Prosecutor v Kupreskic Et Al. (Trial Judgement)* IT-95-16-T (ICTY), 14 January 2000, para 848.

<sup>28</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions'.

<sup>29</sup> ICRC, *First Geneva Convention*.

<sup>30</sup> ICRC, *Second Geneva Convention*.

(POWs);<sup>31</sup> and civilians and protected persons.<sup>32</sup> Article 50 of the first Geneva Convention stipulates grave breaches of the Conventions in the following terms:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The exact wording is used concerning grave breaches in the second,<sup>33</sup> third<sup>34</sup> and fourth Geneva Conventions.<sup>35</sup> The third Geneva Convention also criminalises the compulsion of POWs or other protected persons to serve in a hostile state's armed forces and the wilful deprivation of such persons of their rights to a fair trial as envisaged in the Convention. Article 147 of the fourth Geneva Convention outlaws the unlawful deportation, transfer or confinement of civilians or other protected persons and the taking of such persons as hostages.

Article 85 of Additional Protocol I lists several acts into the category of grave breaches of the Geneva Conventions.<sup>36</sup> It provides that:

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- a) making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a)iii);
- b) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii);
- c) making non-defended localities and demilitarised zones the object of attack;
- d) making a person the object of attack in the knowledge that he is *hors de combat*;
- e) the perfidious use, in violation of Article 37, of the distinctive emblem of the Red Cross, red crescent or red lion and sun or of other protective signs recognised by the Conventions or this Protocol.<sup>37</sup>

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<sup>31</sup> ICRC, *Third Geneva Convention*.

<sup>32</sup> ICRC, *Fourth Geneva Convention*.

<sup>33</sup> See ICRC, *Second Geneva Convention*, Article 51.

<sup>34</sup> See ICRC, *Third Geneva Convention*, Article 130.

<sup>35</sup> See ICRC, *Fourth Geneva Convention*, Article 147.

<sup>36</sup> See ICRC, *Protocol I*, Article 85.

<sup>37</sup> *Ibid*, Article 85(3).

Thus, grave breaches of IHL also qualify as serious violations of IHL. However, the distinction between grave breaches and severe violations of IHL is debatable.<sup>38</sup> This study focuses on grave breaches of IHL only. Grave breaches of IHL could be committed in international and non-international armed conflicts.<sup>39</sup> They are war crimes in terms of Article 8 of the ICC Statute.<sup>40</sup> For acts to qualify as grave breaches of IHL, there must be a link between the armed conflict and the crimes committed.<sup>41</sup> When determining whether the crimes committed were linked to the armed conflict, the perpetrator should have been a combatant, and the victim should have been a non-combatant or a prisoner of war who is a member of the opposition. The acts should have been committed for a military operation, while the perpetrator should have committed the crimes while on duty.<sup>42</sup> Genocide<sup>43</sup> and crimes against humanity<sup>44</sup> also qualify as grave breaches of IHL when committed during an armed conflict. Genocide is commonly a consequence of politically motivated endeavours by politicians who have hatred for other groups such that they eventually seek to destroy the groups either in part or in whole.<sup>45</sup> In determining the threshold of killings that constitute genocide, the Pre-Trial Chamber in *Prosecutor v Omar Al Bashir*<sup>46</sup> stated that genocide is committed ‘when the relevant conduct

<sup>38</sup> See Chile Eboe-Osuji, "Grave Breaches' as War Crimes: Much Ado About ... 'Serious Violations'?" <<https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf>> accessed 21 January 2021.

<sup>39</sup> Werle, *Principles of International Criminal Law* 364-368.

<sup>40</sup> United Nations General Assembly, *ICC Statute* article 8(2) For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.

<sup>41</sup> See *Prosecutor v Zlatko Aleksovski (Appeal Judgement)* IT-95-14/1-A (ICTY), 24 March 2000, para 573.

<sup>42</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)* IT-96-23 & IT-96-23/1-A (ICTY), 12 June 2002, paras 58-59.

<sup>43</sup> United Nations General Assembly, *ICC Statute*, Article 6.

<sup>44</sup> *Ibid*, Article 7.

<sup>45</sup> *Ibid*, Article 6, United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as Amended on 17 May 2002)*, 25 May 1993, Article 4(2), United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda (as Last Amended on 13 October 2006)*, 8 November 1994, Article 2(2) and United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, Article II,

<sup>46</sup> *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-3, 04 March 2009, para 124.

presents a concrete threat to the existence of the targeted group, or a part thereof.’ The Trial Chamber further stated that the threat imposed must be ‘concrete and real, as opposed to just being latent or hypothetical.’<sup>47</sup> Crimes against humanity are committed through “widespread or systematic attacks directed against any civilian population, with knowledge of the attack” and are motivated by a state or an organisational policy.<sup>48</sup>

Crimes that constitute grave breaches of IHL can only be committed against protected persons or property. Protected persons include the wounded and sick, civilians, and medical and religious personnel.<sup>49</sup> The Geneva Conventions protect them from attack by combatants during armed conflict because persons not taking part in combat must not be attacked.<sup>50</sup> These persons lose their protection when they actively participate in hostilities for the furtherance of military objects. It is noteworthy that both combatants and civilians can commit grave breaches of IHL.<sup>51</sup> Combatants are members of the armed forces of the belligerent parties who directly participate in hostilities and should not be punished for their participation. They become prisoners of war when they fall under the power of the enemy through capture.<sup>52</sup> When prosecuting perpetrators of grave breaches, the prosecution must prove that the accused was aware that he attacked protected persons or property. The perpetrator should only have been aware of the factual circumstances of the object or the person he attacked but should also have foreseen the consequences of the attack.<sup>53</sup>

### 2.3.1 Wilful killing

The wilful killing of a protected person entails murder, which is the unlawful and intentional killing of a human being.<sup>54</sup> Article 8(2)(a)(i) of the ICC Statute provides for the crime of wilful killing of a protected person in a non-international armed conflict as a grave breach of IHL.

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<sup>47</sup> *ibid*, para 124.

<sup>48</sup> United Nations General Assembly, *ICC Statute*, Article 7.

<sup>49</sup> See the ICRC, *First Geneva Convention*: Articles 13, 15, 24, 25, 26 and 27 on protected persons and Articles 19, 20, 33, 34, 35 and 36 on the protected property.

<sup>50</sup> ICRC, *Law of Armed Conflict: Basic Knowledge* (ICRC 2002) 12. See also ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Article 48 and Article 52 (2).

<sup>51</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions'.

<sup>52</sup> ICRC, 'Rule 3. Definition of Combatants' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3)> accessed 21 January 2021. See also *Protocol I*, Article 43(2).

<sup>53</sup> *Naletilic and Martinovic (Appeal Chamber)* IT-98-34 (ICTY), 3 May 2006, paras 116 and 118. See also United Nations General Assembly, *ICC Statute*, Article 30.

<sup>54</sup> *Prosecutor v Zdravko Mucic (Trial Judgement)* IT-96-21-T (ICTY), 16 November 1998, para 422.

This is the same protection given in all four Geneva Conventions.<sup>55</sup> The conduct of the accused must have caused or contributed to the death of the protected person. Thus, the act or omission by the perpetrator must have been the cause of death of the protected person. The mental element required to prove the crime is that it must have been committed wilfully. The term wilful accommodates both intention and negligence.<sup>56</sup> The term wilful killing includes the literal maiming of the protected person. It also includes causing the protected person to starve through deprivation of food.<sup>57</sup> The motive for the commission of the crime is not an excuse. Therefore, mercy killing qualifies as the wilful killing of the protected person. The body of the victim needs not be recovered as proof of their death. Nevertheless, death can be proved based on circumstantial evidence. A reasonable inference may be drawn to ascertain the cause of the victim's death.<sup>58</sup>

### 2.3.2 Torture

The Geneva Conventions and their Additional Protocols<sup>59</sup> proscribe torture during the conduct of an armed conflict. A person accused of torture must have intentionally or deliberately inflicted severe physical or mental pain on a protected person.<sup>60</sup> The degree of pain that qualifies as torture is determined through the severity of pain inflicted on the victim and the extent of time in which it was inflicted. The infliction of pain must be done for, amongst other things, obtaining information or humiliating the protected person. Such torture must be connected to an armed conflict. The person accused of torture, or his co-perpetrators during a joint enterprise, must be a public official acting in his official capacity.<sup>61</sup> There is no need for

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<sup>55</sup> ICRC, *First Geneva Convention*, Article 50; ICRC, *Second Geneva Convention*, Article 51; ICRC, *Third Geneva Convention*, Article 130 and ICRC, *Fourth Geneva Convention*, Article 147.

<sup>56</sup> See *Prosecutor v Tihomir Blaskic (Appeal Judgement)* IT-95-14-A (ICTY), 29 October 1997, para 152, where the court stated that the *mens rea* constitutes both intent and recklessness.

<sup>57</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions'.

<sup>58</sup> See the following ICTY judgements: *Prosecutor v Milorad Krnojelac (Trial Judgement)* IT-97-25-T (ICTY), 15 March 2002, para 326; *Prosecutor v Miroslav Kvočka (Appeal Judgement)* IT-98-30/1-A (ICTY), 28 February 2005, para 260; *Prosecutor v Vlastimir Dordevic (Trial Judgment)* IT-05- 87/1-T (ICTY), 23 February 2011, para 1708; *Prosecutor v Boskoski and Tarculovski (Trial Judgment)* IT-04-82-T (ICTY), 10 July 2008, para 305; *Prosecutor v Mrksic (Trial Judgment)* IT-95-13/1-T (ICTY), 27 September 2007, para 486; *Prosecutor v Limaj Et Al. (Trial Judgment)* IT-03-66-T (ICTY), 30 November 2005, para 241; and *Prosecutor v Radoslav Brdjanin (Trial Judgement)* IT-99-36-T (ICTY), 1 September 2004, para 383.

<sup>59</sup> Articles 50, 51, 130 and 147 respectively of the Four Geneva Conventions, ICRC, *Protocol I*, Article 75(2)(a) and (e) and ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 609, Article 4(2)(a) and (h).

<sup>60</sup> United Nations General Assembly, *ICC Statute*, Article 7(2)(e).

<sup>61</sup> *Prosecutor v Zdravko Mucic (Trial Judgement)*, para 494, and *Prosecutor v Anto Furundzija (Trial*

visible physical marks on the body of the protected person to prove torture. An act or omission is used to prove torture. Torture is classified as a grave breach crime because it is committed for a specific intention during the conduct of armed hostilities. If the pain inflicted is not severe, the crime does not qualify as torture but as inhuman treatment.<sup>62</sup>

### 2.3.3 Inhuman treatment

Inhuman treatment is the intentional or deliberate ill-treatment of persons protected by IHL and committed contrary to the general principles of humanity. The definition of inhuman treatment was given by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Delalic*<sup>63</sup> as a deliberate act or omission that causes severe mental or physical harm or that undermines human dignity. This principle protects combatants and civilians in the enemy's hands from having their dignity ravaged to the level of animals. Therefore, the difference between torture and inhuman treatment is on the threshold of the pain inflicted.<sup>64</sup>

### 2.3.4 Biological experiments

IHL prohibits the undertaking of biological experiments on protected persons. Biological experiments have a higher threshold of pain inflicted on a person than torture and inhuman treatment. They were banned to stop the inhuman treatment of people at concentration camps during World War II.<sup>65</sup> For a medical experiment to constitute a grave breach of IHL, it must be proven that the perpetrator used protected persons as subjects for medical experiments, that the experiments harmed the wellbeing of the protected persons, and that the experiments were not justified by health institutions and were not in the interests of the protected persons.<sup>66</sup> Consent is not an excuse for conducting medical experiments on protected persons. Thus, consent is not a defence for criminal liability, particularly in matters concerning prisoners of war.<sup>67</sup> A medical experiment constitutes a grave breach of IHL if it also seriously endangers

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*Judgement*), para 162.

<sup>62</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions'.

<sup>63</sup> *Prosecutor v Zdravko Mucic (Trial Judgement)*, para 543.

<sup>64</sup> ICRC, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016: Article 49: Penal Sanctions'.

<sup>65</sup> See UN War Crimes Commission, *Law Reports of Trials of War Criminals*, vol 1 (His Majesty's Stationery Office 1947) 46-54; 93-103.

<sup>66</sup> United Nations General Assembly, *ICC Statute*, Article 8(2)(b)(x); Articles 12, 13 and 32 respectively, of the four Geneva Conventions; ICRC, *Protocol I*, Article 11 and ICRC, *Protocol II*, Article 5(2)(e).

<sup>67</sup> See ICC, 'Elements of Crimes' <<https://www.refworld.org/docid/4ff5dd7d2.html>> accessed 28 January 2021, Article 8(2) (b) (x)-1 at (footnote 46), which provides that consent may not be an excuse for the criminal

the wellbeing of the protected person.<sup>68</sup> However, biological experiments may be allowed if they are genuinely intended to improve the health of patients.<sup>69</sup>

### 2.3.5 Wilfully causing severe pain or serious injury to body or health

In *Naletilić and Martinović*,<sup>70</sup> the ICTY stated that this offence comprises acts that do not constitute torture, even though torture may be a part of their definition. The degree of mistreatment only requires the wrongful act to cause injury or suffering at an elementary level. An act or omission that results in the ill-treatment of protected persons constitutes the crime. The accused may not have committed the crime for a specific reason, but the inhuman treatment of these persons is enough evidence for the proof of the crime committed. Elements to be considered in proving the crime of causing severe pain or injury to body or health include the nature of the act or omission, the duration of the victim's ill-treatment and the victim's circumstances.<sup>71</sup> The term 'wilful' incorporates both intention and negligence.<sup>72</sup>

### 2.3.6 Extensive destruction or appropriation of protected property

The extensive destruction or appropriation of protected property does not qualify as a grave breach of IHL if it is committed out of military necessity and when it is not carried out unlawfully and wantonly.<sup>73</sup> IHL does not necessarily protect all property. Examples of protected property include medical establishments, historical monuments, the natural environment, and property essential to the survival of civilians.<sup>74</sup> Protected property may be

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conduct committed, any act which is not necessary or justified by medical standards is prohibited.

<sup>68</sup> ICRC, *Third Geneva Convention*, Article 13.

<sup>69</sup> ICRC, 'Article 12: Protection and Care of the Wounded and Sick' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CECD58D1E2A2AF30C1257F15004A7CB9#\\_Toc452043466](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=CECD58D1E2A2AF30C1257F15004A7CB9#_Toc452043466)> accessed 12 February 2012.

<sup>70</sup> *Prosecutor v Mladen Naletilic (Trial Judgement)* IT-98-34-T (ICTY), 31 March 2003, para 341.

<sup>71</sup> ICRC, 'Commentary of 2017 Article 51: Grave Breaches' (date unknown) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=51B3435E776E06CEC1258115003EC277>> accessed 13 February 2021.

<sup>72</sup> *Prosecutor v Pavle Strugar (Trial Judgement)* IT-01-42-T (ICTY), 31 January 2005, para 235.

<sup>73</sup> ICRC, *Fourth Geneva Convention*, Article 33; ICRC, *Protocol I*, Articles 52, 53, 54, 55 and 56; ICRC, 'Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7#:~:text=Interpretation-,Rule%207.,be%20directed%20against%20civilian%20objects.](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7#:~:text=Interpretation-,Rule%207.,be%20directed%20against%20civilian%20objects.)> accessed 25 January 2021; ICRC, *Protocol I*, Article 52(1); *ibid*, Article 52 (2) and ICRC, 'Rule 8. Definition of Military Objectives' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8#:~:text=Rule%208.,-In%20so%20far&text=This%20practice%20indicates%20that%20such,official%20statements%20and%20reported%20practice.](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8#:~:text=Rule%208.,-In%20so%20far&text=This%20practice%20indicates%20that%20such,official%20statements%20and%20reported%20practice.)> accessed 24 January 2021.

<sup>74</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 93-97.

destroyed if it is used for military purposes.<sup>75</sup> The appropriation of property is a grave breach of IHL if it adversely affects the owner.<sup>76</sup> The appropriation or the destruction of the property must not have been justified by military necessity<sup>77</sup> and must be extensive to qualify as a grave breach of IHL.<sup>78</sup>

### **2.3.7 Compelling prisoners of war to serve the hostile power**

A prisoner of war may not be compelled to serve the hostile power or to take part in a war against his own country, even though he was a combatant of the hostile power before the war began or during the war.<sup>79</sup>

### **2.3.8 Unlawful deportation or transfer**

A protected person may not be unlawfully deported or transferred.<sup>80</sup> Article 7(2)(d) of the ICC Statute prohibits the unlawful deportation and transfer of these persons. It outlaws forced displacement by expulsion or other coercion to relocate from their place of lawful occupation. Displacement is an offence when done through force. Unlawful displacement of a single person also constitutes a grave breach of IHL.<sup>81</sup> Unlawful deportation occurs when a protected person is forced to cross the border of a state to another state, while unlawful transfer occurs when a protected person is forcibly moved from one territory to another territory in the same state.<sup>82</sup> The perpetrator must have intended to transfer or deport the victim permanently.<sup>83</sup>

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<sup>75</sup> Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 106.

<sup>76</sup> *Prosecutor v Dusko Tadic (Judgement in Sentencing Appeals)* IT-94-1-A. 38 ILM 1518 (1999) (ICTY), 15 July 1999, para 94.

<sup>77</sup> *Prosecutor v Dario Kordic, Mario Cerkez (Appeal Judgement)* IT-95-14/2-A (ICTY), 17 December 2004, para 686.

<sup>78</sup> *Prosecutor v Radoslav Brdjanin (Trial Judgement)*, para 587.

<sup>79</sup> United Nations General Assembly, *ICC Statute*, Article 8(2)(a)(v) and (b)(xv).

<sup>80</sup> ICRC, *Fourth Geneva Convention*, Article 147, ICRC, *Protocol I*, Article 87 (4) (a), *ibid*, Article 17 and United Nations General Assembly, *ICC Statute*, Article 7(1)(d). For further reading, see also United Nations General Assembly, *Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement")*, 8 August 1945, Article 6(c); United Nations General Assembly, *International Military Tribunal for the Far East Charter*, 19 January 1946, Article 5(c); United Nations Security Council, *ICTY Statute*, Article 5(d); United Nations Security Council, *ICTR Statute*, Article 3(d).

<sup>81</sup> United Nations General Assembly, *ICC Statute*, Article 7(1)(d).

<sup>82</sup> *Prosecutor v Radislav Krstic (Trial Judgement)* IT-98-33-T (ICTY), 2 August 2001, para 521 and *Prosecutor v Milorad Krnojelac (Trial Judgement)*, para 474.

<sup>83</sup> *Prosecutor v Milomir Stakic (Appeal Judgement)* IT-97-24-A (ICTY), 22 March 2006, paras 278, 308, 317.



### 2.3.9 Unlawful confinement

A person may not be confined without cause.<sup>84</sup> The unlawful confinement of a person qualifies as a grave breach of IHL if it deprives the victim of freedom of movement without following lawful legal procedures for the confinement of such a person.<sup>85</sup> Persons who detain prisoners of war (POWs) must act within the parameters of the law.<sup>86</sup> POWs may not be confined as a punishment for their participation in an armed conflict. However, a fair trial may be undertaken for the crimes they committed. POWs may be confined as a way of stopping them from further taking part in armed hostilities.<sup>87</sup>

### 2.3.10 Taking hostages

Taking hostages is prohibited by Article 147 of the fourth Geneva Convention, Article 75(2) of Additional Protocol I, Article 4(2)(c) of Additional Protocol II, Article 8(2)(a)(viii) of the ICC Statute and by Rule 96 of the customary IHL rules. The act is included as a crime because it unduly violates the right to liberty. Article 1 of the International Convention against the Taking of Hostages<sup>88</sup> defines the taking of hostages as seizure or detention or a threat to kill or injure calculated to compel the third party (a juristic or natural person) to comply with a condition for the release of the hostage.<sup>89</sup> The criminalisation of taking hostages is classified as a grave breach of IHL to protect civilians who are not taking part in active hostilities from being taken as hostages for the furtherance of military objectives in armed conflicts.

### 2.3.11 Misuse of the Red Cross emblem

The Red Cross emblem is a sign of protection. Its misuse or imitation undermines the ICRC's purpose, subsequently putting the persons it protects at risk.<sup>90</sup> States which did not ratify the Geneva Conventions and their Protocols should incorporate the protection of the Red Cross

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<sup>84</sup> United Nations General Assembly, *ICC Statute*, Article 8(2)(a)(vii) and ICRC, *Fourth Geneva Convention*, Article 147.

<sup>85</sup> *Prosecutor v Zdravko Mucic (Trial Judgement)*, para 576.

<sup>86</sup> Lexis Nexis, 'What Is the Rule of Law?' (*Lexis Nexis*, 2017) <<https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law>> accessed 25 January 2021.

<sup>87</sup> Jeniffer K Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism* (Darby Diane Publishing 2007) 16.

<sup>88</sup> United Nations General Assembly, *International Convention against the Taking of Hostages*, 17 November 1979, No. 21931.

<sup>89</sup> United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 1.

<sup>90</sup> ICRC, *First Geneva Convention*, Article 53.

emblem into their laws.<sup>91</sup> Protected emblems are provided for in Article 38 of the first Geneva Convention. These include the Red Cross emblem, the Red Crescent, the red lion and the red sun, and the red crystal. The red crystal is provided for by Additional Protocol III, while the Israeli red star of David also applies.

#### 2.4 The obligation to respect and ensure respect for the Geneva Conventions

The obligation of states to ensure respect for IHL and to ensure that other states do so stems from Article 1 common to the Geneva Conventions and Article 1 of Additional Protocol I.<sup>92</sup> The maxim of *pacta sunt servanda*, provided for in Article 26 of the Vienna Convention on the Law of Treaties,<sup>93</sup> stipulates that states must meet legal obligations set by treaties they ratified. Respecting and ensuring respect for IHL means that states must fulfil all their obligations to the law and must desist from aiding and abetting other states to violate it.<sup>94</sup> This duty was summed up as abstaining from deliberately committing grave breaches of IHL, nationally implementing and applying IHL, and ensuring respect for IHL by other states or belligerent parties.<sup>95</sup>

States must repress, suppress and prevent the commission of grave breaches of IHL by domestically implementing IHL. These terms repress, suppress and prevent have closely related functions but should not be taken to mean the same. Preventing grave breaches of the Geneva Conventions implies that states must hinder the commission of these breaches. States must suppress ongoing grave breaches of the Geneva Conventions, meaning that they must forcibly put an end to ongoing breaches by all possible means. If such breaches cannot be stopped, they must be repressed, that is, states must take measures to lessen the intensity of the violations.<sup>96</sup> The Geneva Conventions require states to respect IHL all the time, no matter the circumstances. As such, states cannot deviate from fulfilling their obligations merely because

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<sup>91</sup> Ibid, Article 54.

<sup>92</sup> *UN General Assembly, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Including in and around East Jerusalem* 2 August 2004, A/RES/ES-10/15, para 157.

<sup>93</sup> United Nations General Assembly, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155.

<sup>94</sup> See ICRC, 'Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule144#:~:text=international%20armed%20conflicts-.Rule%20144.,violations%20of%20international%20humanitarian%20law.>](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144#:~:text=international%20armed%20conflicts-.Rule%20144.,violations%20of%20international%20humanitarian%20law.>) accessed 21 January 2021.

<sup>95</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 268.

<sup>96</sup> Bernard, 'Time to Take Prevention Seriously', 689.

another state failed to reciprocate the duty.<sup>97</sup> They must take sufficient measures to ensure that combatants respect the law.<sup>98</sup>

Compliance with IHL prevents grave breaches of IHL and ensures respect for the following principles of IHL: humanity, distinction, military necessity, prevention of the infliction of superfluous injury and proportionality. The benefactors are persons affected by armed conflict, particularly civilians.<sup>99</sup> IHL requires states to always uphold the law. This primarily entails that states must guarantee and ensure that members of their armed forces comply with IHL.<sup>100</sup> They must give orders and instructions to their military personnel to uphold IHL.<sup>101</sup> Military commanders must give lawful commands and stop grave breaches of IHL by their subordinates. They must report incidents of grave breaches.<sup>102</sup> States must ensure that adequately trained legal advisers counsel military commanders on the application of IHL to assist the military commanders in executing their duties without committing grave breaches.<sup>103</sup>

States should conduct themselves diligently when fulfilling their responsibility to respect and ensure respect for IHL.<sup>104</sup> A state which has ascertained grave breaches of IHL by another state must first exert diplomatic pressure on such other state to coerce it into respecting the law. Article 90 of Additional Protocol I provides that such pressure may be mounted through intermediaries and referral to the International Fact-Finding Mission. It may also entail diplomatic isolation through the expulsion of diplomats and, where applicable, referral to the ICC.<sup>105</sup>

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<sup>97</sup> Common Articles 1 and 3 to all the four Geneva Conventions; see also ICRC, 'Rule 140. Principle of Reciprocity' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule140#:~:text=international%20armed%20conflicts-,Rule%20140.,does%20not%20depend%20on%20reciprocity.&text=State%20practice%20establishes%20this%20rule,and%20non%20international%20armed%20conflicts.](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140#:~:text=international%20armed%20conflicts-,Rule%20140.,does%20not%20depend%20on%20reciprocity.&text=State%20practice%20establishes%20this%20rule,and%20non%20international%20armed%20conflicts.)> accessed 24 January 2021.

<sup>98</sup> Knut Dormann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 *IRRC* 707, 707.

<sup>99</sup> *ibid* 708.

<sup>100</sup> See Common Article 1 to all the four Geneva Conventions; and ICRC, *Protocol I*, Article 1(1).

<sup>101</sup> *Ibid*, Article 80(2). See also ICRC, *First Geneva Convention*, Article 45 and ICRC, *Second Geneva Convention*, Article 46.

<sup>102</sup> ICRC, *Protocol I*, Article 87(3).

<sup>103</sup> *Ibid*, Article 82; ICRC, 'Rule 141. Legal Advisers for Armed Forces' (*ICRC*, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule141#:~:text=armed%20opposition%20groups-,Rule%20141.,application%20of%20international%20humanitarian%20law.&text=State%20practice%20establishes%20this%20rule,law%20for%20State%20armed%20forces.](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule141#:~:text=armed%20opposition%20groups-,Rule%20141.,application%20of%20international%20humanitarian%20law.&text=State%20practice%20establishes%20this%20rule,law%20for%20State%20armed%20forces.)> accessed 24 January 2021.

<sup>104</sup> Dormann and Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' 723-724.

<sup>105</sup> *ibid* 726.

States must always disseminate the text of IHL during peace and wartime.<sup>106</sup> Members of the force must be trained on the application of IHL to their military strategies and choice of equipment. Effective sanctions must be imposed on members of armed forces who commit breaches of law during peace times and armed conflicts. Peacekeepers, authorities who are prosecuting serious IHL violations, and civilians must also receive training on the application of IHL. IHL must also be introduced as a learning course in educational institutions.<sup>107</sup> Making everyone aware of IHL is the prerequisite to the fruitful suppression and prevention of grave breaches of IHL.

Taking reasonable steps in the prevention of an armed conflict shows respect for IHL. States are encouraged to test their military methods and weapons during times of peace. In case of a change of laws, weapons prohibited at an armed conflict must be identified and destroyed. States must further ensure that their methods of warfare are within the regulations of IHL.<sup>108</sup> National committees must be established to advise states on the application of IHL. In South Africa, the National Committee on International Humanitarian Law was formed in 2006. It includes representatives from the departments of International Relations and Cooperation, Justice and Correctional Services, Defence, Home Affairs, Health, Police, and non-governmental organisations such as the ICRC. The Committee evaluates the adequacy of the implementation of IHL. If the law is not adequate, they must improvise remedies to the law. The Committee further monitors the interpretation of IHL by domestic courts.<sup>109</sup>

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<sup>106</sup> Articles 47, 48, 127 and 144 of the ICRC, *First Geneva Convention*, ICRC, *Second Geneva Convention*, ICRC, *Third Geneva Convention* and ICRC, *Fourth Geneva Convention*, respectfully.

<sup>107</sup> ICRC, *First Geneva Convention*, Article 47; ICRC, *Second Geneva Convention*, Article 48; ICRC, *Third Geneva Convention*, Article 127; ICRC, *Fourth Geneva Convention*, Article 144; ICRC, *Protocol I*, Article 83. See also ICRC, *Protocol II*, Article 19; ICRC, 'Rule 142. Instruction in International Humanitarian Law within Armed Forces' (ICRC, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule142#:~:text=armed%20opposition%20groups-.Rule%20142.,law%20to%20their%20armed%20forces.>](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule142#:~:text=armed%20opposition%20groups-.Rule%20142.,law%20to%20their%20armed%20forces.>) accessed 24 January 2021 and ICRC, 'Rule 143. Dissemination of International Humanitarian Law among the Civilian Population' (ICRC, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule143#:~:text=Armed%20opposition%20groups-.Rule%20143.,law%20to%20the%20civilian%20population.&text=Volume%20II%2C%20Chapter%2040%2C%20Section%20E.&text=State%20practice%20establishes%20this%20rule%20as%20a%20norm%20of%20customary%20international%20law.>](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule143#:~:text=Armed%20opposition%20groups-.Rule%20143.,law%20to%20the%20civilian%20population.&text=Volume%20II%2C%20Chapter%2040%2C%20Section%20E.&text=State%20practice%20establishes%20this%20rule%20as%20a%20norm%20of%20customary%20international%20law.>) accessed 24 January 2021.

<sup>108</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 272.

<sup>109</sup> See the list of national committees and their functions on: ICRC, 'Table of National Committees and Other National Bodies on International Humanitarian Law' (ICRC, 2019) <<https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>> accessed 24 January 2021,1-52.

Every state must ensure that other states respect IHL. A state must endeavour to end grave breaches of IHL by another state.<sup>110</sup> The United Nations may intervene during violations of IHL if states fail to stop the commission of grave breaches of IHL. Additional Protocol I obligates states jointly and individually to co-operate with the United Nations to uphold IHL and international human rights.<sup>111</sup> The United Nations Security Council (UNSC) demands belligerent states to respect IHL when there is an extreme violation of IHL. The UNSC may deploy peacekeepers to administer the observation of IHL. If the belligerent state continues with the violations, the Council may impose sanctions against such a state<sup>112</sup> in compliance with Chapters VI and VII of the UN Charter.<sup>113</sup> The United Nations deliberates on peace and security measures to repress, prevent, suppress and punish grave breaches of IHL. The UN may adopt a resolution that compels a state to stop the violations. It may impose sanctions against such a state or deploy peacekeepers to enforce its resolution in some cases. When all these measures have been exhausted, the UN may use force against such a state to enforce compliance with IHL.<sup>114</sup> The International Conference of the Red Cross and Red Crescent controls the functioning of the Red Cross Movement. It further ensures that humanitarian activities are executed satisfactorily.<sup>115</sup> Contracting State Parties are obliged to meet and deliberate on issues that affect the application of IHL.<sup>116</sup> Switzerland must hold a meeting on demands from states and facilitate their deliberation and approval. However, such a meeting has not been held since the assent of the Protocol.<sup>117</sup>

The ICC leaves the primary role of prosecuting grave breaches of IHL to states. It complements national jurisdictions and assumes its jurisdiction when states fail or refuse to prosecute perpetrators.<sup>118</sup> It has jurisdiction to determine individual criminal responsibility for grave

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<sup>110</sup> See ICRC, 'Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes' which provides that States may not incite the violation of IHL by other parties to an armed conflict.

<sup>111</sup> ICRC, *Protocol I*, Article 89.

<sup>112</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 277.

<sup>113</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>114</sup> All Answers Ltd, 'Prohibited and Permissible Use of Force in International Relations' (2019) <<https://www.lawteacher.net/free-law-essays/international-law/prohibited-and-permissible-use-law-essay.php?vref=1>> accessed 19 May 2021.

<sup>115</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 278.

<sup>116</sup> ICRC, *Protocol I*, Article 7.

<sup>117</sup> Melzer, *International Humanitarian Law: A Comprehensive Introduction* 278.

<sup>118</sup> International Centre for Transitional Justice, 'What Is Complementarity? National Courts, the ICC, and the Struggle against Impunity' (*International Centre for Transitional Justice*, (date unknown)) <<https://www.ictj.org/sites/default/files/subsites/complementarity-icc/>> accessed 18 January 2021.

breaches of IHL, including war crimes.<sup>119</sup> The ICJ has jurisdiction to determine the responsibility of states for IHL violations. Its competence is limited to the issuance of advisory opinions.<sup>120</sup> It is the responsibility of all states to refrain from grave breaches of IHL. States must enact penal codes on the grave breaches of IHL, which will apply to offenders regardless of their nationality or where the crime was committed. These penal codes must plainly define the crimes and state a sufficient penalty for each. Disciplinary measures should also be included for minor crimes.

## **2.5 Conclusion**

Grave breaches of IHL are derived from general customs that have been recognised by states uniformly for an extended period. These customs set the basis for the law and bind all states equally. States that have not signed and ratified IHL treaties are enjoined to observe the principles of IHL set in customary IHL. Fundamental principles of IHL provide basic rules to be followed by combatants during armed conflict. These rules are general customs of warfare whose violation constitutes grave breaches of IHL. The primary purpose of these regulations is to protect protected persons, such as civilians and other persons who do not partake in armed hostilities. The Geneva Conventions and other international treaties such as the ICC Statute prohibit the commission of certain crimes during the conduct of armed hostilities. These crimes are grave breaches of IHL. The aim behind setting the elements of grave breaches of IHL is to alert possible perpetrators about the consequences of their acts or omissions. The following chapter discusses the legal framework for the repression, suppression and punishment of grave breaches of IHL in the South African legal system.

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<sup>119</sup> United Nations General Assembly, *ICC Statute*, Article 8.

<sup>120</sup> Sharon Weill, 'The Role of National Courts in Applying International Humanitarian Law' (2014) 14 *J Int Crim Justice* 744.

## **Chapter 3 The Constitutional and Legislative Framework for the Prevention, Suppression and Punishment of Grave Breaches**

### **3.1 Introduction**

Common Article 1 to the Geneva Conventions requires every state that ratified the Geneva Conventions to respect and ensure respect for IHL. Various mechanisms must be employed to fulfil this obligation. South Africa suppresses and prevents grave breaches of IHL through constitutional recognition of international law,<sup>1</sup> the entrenchment of fundamental human rights in the Bill of Rights, as well as its signature, ratification, and domestication of instruments on IHL. The domestication of the Geneva Conventions through the Implementation of the Geneva Conventions Act 8 of 2012 (IGCA) expresses legislative acceptance of the Geneva Conventions. The Geneva Conventions are the international standard of meeting IHL demands and ensuring its respect.<sup>2</sup> International instruments and relevant national legislation ensure dual enforcement of IHL in South Africa, thus leading to the repression, prevention and punishment of grave breaches of IHL.<sup>3</sup> This chapter analyses the statutory implementation of South Africa's international obligations to repress, suppress and punish grave breaches of IHL. It also sheds light on the judiciary's role in suppressing and preventing grave breaches of IHL.

### **3.2 Statutory implementation of IHL prohibitions against grave breaches**

States must respect and ensure respect for IHL by, amongst other things, domesticating treaties meant to end impunity for war crimes.<sup>4</sup> When implementing IHL, states enact laws and regulations on suppressing and preventing grave breaches of IHL. The laws must impose punitive measures for any conduct that violates IHL. There are no stipulated formalities on the process of the implementation of international laws.<sup>5</sup> States are left to follow their respective procedures. The primary reason for the implementation of international law is to provide for

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<sup>1</sup> Constitution, Section 39(1)(b).

<sup>2</sup> The dual nature of the South African legal system is that an international instrument should have been domesticated by means of approval by the parliament and made a national law for it to be applicable as binding law in the Republic (Constitution, section 231(2)), although a few instruments may be applied as law without approval by the parliament (Constitution, section 231 (3)) such an instrument must be consistent with the Constitution.

<sup>3</sup> See Implementation of the Rome Statute of the International Criminal Court Act, Section 5 and Dube, 'The Au Model Law on Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle', 466-467.

<sup>4</sup> Article 1 common to the Geneva Conventions.

<sup>5</sup> *Public Committee against Torture in Israel v Government of Israel* H CJ 769/02, 14 December 2006, para 19.

issues beyond the scope of national law.<sup>6</sup> South Africa took steps towards the fulfilment of its IHL obligations by incorporating international law obligations in the Constitution, the Defence Act, and the Implementation Act and the IGCA.

### 3.2.1 The Constitution

The Constitution is the supreme law of the Republic of South Africa. It binds all persons<sup>7</sup> and says that any conduct inconsistent with its text, values and principles is null and void to the extent of its inconsistency. All obligations imposed by the Constitution must be fulfilled.<sup>8</sup> The notion of constitutional supremacy was introduced by the constitutional revolution of 1993 when the Interim Constitution<sup>9</sup> was adopted. Section 4 of the Interim Constitution provided that any law or Acts contrary to the Interim Constitution and its underlying principles were invalid.<sup>10</sup> Subsequently, the adoption of the 1996 Constitution entrenched respect for human rights, including the fundamental human rights provided by the Universal Declaration of Human Rights,<sup>11</sup> international human rights law (IHRL) and IHL.

The Constitution requires the state to conduct security services in a manner that makes everyone in the Republic feel safe and free from fear.<sup>12</sup> It further emphasises that South Africans may not unlawfully participate in any armed national or international conflict. It prohibits its citizens from acting outside its provisions even if they are outside South African borders. As such, South African citizens outside the country may not engage in any conduct that violates IHL.<sup>13</sup>

The Constitution prevents grave breaches of IHL by regulating national security forces, including the South African National Defence Force (SANDF). It does so by providing that national security must be pursued in compliance with international law.<sup>14</sup> It requires the

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<sup>6</sup> ICRC, *First Geneva Convention*, Article 48; Antoine A Bouvier, *International Humanitarian Law and the Law of Armed Conflict* (Peace Operations Training Institute 2012); ICRC, *Second Geneva Convention*, Article 49; ICRC, *Third Geneva Convention*, Article 128; ICRC, *Fourth Geneva Convention*, Article 145; ICRC, *Protocol I*, Article 84.

<sup>7</sup> Constitution of the Republic of South Africa, 1996, Section 8 (2).

<sup>8</sup> Ibid, Section 2.

<sup>9</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>10</sup> Ibid, Section 4.

<sup>11</sup> Ibid, Section 199 (5).

<sup>12</sup> Constitution of the Republic of South Africa, Section 198(a).

<sup>13</sup> Ibid, Section 198(b)-(d).

<sup>14</sup> Ibid, Section 198(c).



SANDF, intelligence agencies, and other security services to teach their members to act in compliance with the Constitution and other applicable law, which includes IHL.<sup>15</sup> The Constitution further prohibits members of national security forces from obeying manifestly illegal orders.<sup>16</sup> The executive must consult with Parliament on the declaration of a state of national defence to prevent the issuance of illegal orders to members of the SANDF.<sup>17</sup> These constitutional provisions entrench the principles of legality, expressed as follows by the Supreme Court of Appeal to mean that:

[N]o Parliament, however *bona fide* or eminent its membership; no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution.<sup>18</sup>

The Constitution requires the SANDF to be disciplined and demands its members to defend and protect the Republic according to the Constitution and all laws regulating the use of force.<sup>19</sup> Such applicable laws include international law and is found in customary IHL, the Geneva Conventions and their Protocols. Section 232 of the Constitution, which accords customary IHL the status of law in South Africa (except where such custom is inconsistent with national law), is a further entrenchment of international law.

When interpreting the Constitution or any other law in South Africa, the courts must ensure consistency with international law.<sup>20</sup> This requirement implies that international law must guide courts in decision-making in cases where international law applies. Hence, courts may only rely on IHL instruments if domestic laws are not reliable in problem-solving. South Africa is only bound by international treaties that it has signed and ratified. Other laws have persuasive force. In *National Commissioner of SAPS v Southern African Litigation Centre*,<sup>21</sup> the court emphasised that South Africa is bound by international law and treaties, which it has signed, ratified and domesticated through legislation. In *Glenister v President of the Republic of South Africa*,<sup>22</sup> the importance of international law was emphasised as follows:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights

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<sup>15</sup> Ibid, Section 199(5).

<sup>16</sup> Ibid, Section 199(6).

<sup>17</sup> Ibid, Section 203.

<sup>18</sup> *Speaker of National Assembly v De Lille* (297/98) [1999] ZASCA 50, para 14.

<sup>19</sup> Constitution of the Republic of South Africa, Section 200 (2).

<sup>20</sup> Ibid, Section 233.

<sup>21</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (CCT 02/14) [2014] ZACC 30.

<sup>22</sup> *Glenister v President of the Republic of South Africa* (CCT 48/10) [2011] ZACC 6, para 97.

law... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

Hence, all laws enacted by Parliament must be consistent with the Constitution. In discharging this mandate, the legislature has enacted several pieces of legislation which comprehensively regulate the conduct of the SANDF and all other security forces in the territory in the implementation of IHL.

### **3.2.2 The Defence Acts**

Section 2 of the Defence Act of 2002 provides that the SANDF must, when exercising its powers, have due regard to the requirement to conform to the Constitution and IHL. Section 2 accordingly reiterates the constitutional requirement in section 199(6) of the Constitution that members of the SANDF may not obey any manifestly illegal order. It obliges SANDF to respect the fundamental rights and dignity of all persons in carrying out its mandate. Section 105 of the Defence Act criminalises offensive behaviour. This section is vital in that it makes the slightest deviation from the Act punishable, thereby deterring members of the SANDF from committing illegalities that, if unchecked, may lead to grave breaches of IHL.

The Defence Act of 1957 was repealed by section 106 of the Defence Act of 2002, save for the Military Disciplinary Code in the First Schedule. The Code sets out disciplinary measures to be taken when military regulations are violated. Without discipline in the military, unseemly behaviours of the military force may be the initial cause of instability within the state. The Code binds not only the military force but also persons who are lawfully detained by the military.<sup>23</sup> The Code prohibits failure or refusal to comply with a lawful command given by the superior.<sup>24</sup>

Fabricating statements in an official capacity is prohibited. The fabricator is condemnable for the conduct if he either knew that the fabricated statement was misleading or even if he was not aware that such a statement could be misleading. The offence includes the signing of documents that are known to contain false statements or forging a signature, or omitting to sign as a way of deceiving the person to whom the document is directed.<sup>25</sup> Members of the Defence

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<sup>23</sup> Defence Act 44 of 1957, Section 104.

<sup>24</sup> Ibid, Section 19.

<sup>25</sup> Ibid, Section 30.

Force must desist from riotous behaviour and must ensure that they conduct themselves appropriately. The duty to conduct oneself seemly extend to warranting other militants to do so.<sup>26</sup> Failing to stop a riot, instigating or commanding anyone to commit an offence in prejudice of military codes is also prohibited. The instigator or the commander bears similar criminal liability as the person who committed the offence.<sup>27</sup> The conduct of SANDF members should not breach or prejudice military laws and standards. Good order must always be sustained.<sup>28</sup> Harboursing a person who committed a crime or assisting a criminal in covering a crime is an offence of intending to defeat the means of justice and is punishable by imprisonment.<sup>29</sup>

### **3.2.3 The Implementation Act**

South Africa's signature and ratification of the ICC Statute followed the domestication of the Rome Statute of the ICC through the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). This statute achieves the objectives of bringing jurisdiction of international criminal law to South African courts. It criminalises grave breaches of IHL and requires domestic courts to co-operate with the ICC and use both international and domestic criminal laws to do so.<sup>30</sup> The Act emphasises complementarity between the ICC and national courts in the prosecution of international crimes and grave breaches of IHL. It grants national courts jurisdiction on international crimes committed even outside South African borders.<sup>31</sup> Section 4 of the Act grants South African courts jurisdiction over war crimes and crimes against humanity, both of which are grave breaches of IHL by nature and definition.<sup>32</sup>

The Implementation Act defines grave breaches of IHL and prescribes the elements of crimes to be proven. Protection of arrested, detained and accused persons under section 35 of the Constitution are protected in the adjudication of crimes mentioned in the Implementation Act. When a domestic court surrenders an accused to the ICC, it must ensure that the person whom it surrenders is the one whose names appear in the warrant, that the arrest has been secured in

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<sup>26</sup> Ibid, Section 45.

<sup>27</sup> Ibid, Section 48. See also <https://rightsblog.net/2020/08/27/the-challenges-of-deploying-the-army-in-civilian-covid-19-policing-operations-a-south-african-perspective/> on the duty for members of the force to abide by the law when they are executing their duties.

<sup>28</sup> Ibid, Section 46.

<sup>29</sup> Ibid, Section 49.

<sup>30</sup> Implementation of the Rome Statute of the International Criminal Court Act preamble.

<sup>31</sup> Ibid, Section 3.

<sup>32</sup> See also Implementation of the Geneva Conventions Act, Part 3 of Schedule 1.

terms of the domestic law, and that the accused's rights have been observed during the process.<sup>33</sup> The ICC must also have an interest in the surrender of the accused. Furthermore, the domestic court must surrender the accused for prosecution for a crime and sentencing. The Act does not apply retrospectively, as it excludes crimes that were committed before its commencement on 1 July 2002.<sup>34</sup>

Section 2 of the Act is vital for the repression, suppression and punishment of grave breaches of IHL. It provides an inclusive interpretation model for the Act by stipulating that courts must, when interpreting the Act, consider the ICC Statute, customary international law and comparative foreign law. This provision effectively encompasses IHL as articulated in the Geneva Conventions. The section further undermines the impunity of heads of state and other governmental officials. It includes universal jurisdiction.<sup>35</sup> Considering the political systems of most African states, which often disregard the rule of law, it is important for South Africa to be careful in how it negotiates the administration of its foreign affairs. As such, it was necessary to make the provision on universal jurisdiction not absolute. This was meant to allow the law to be flexible to suit the circumstances of each case in instances where South Africa is likely to ruin good relations with a state on whose leader or citizen it applies universal jurisdiction.

Judicial independence and the need for non-interference with court functions are given legislative recognition in the Implementation Act.<sup>36</sup> Justice is in jeopardy when courts are not independent. The threshold of violence and the common political status of perpetrators of crimes classified as grave breaches of IHL demand strict rules on the protection of the judiciary. The most politically affected is a provision on diplomatic immunities of heads of states and special diplomatic members against civil or criminal jurisdictions. These persons enjoy immunity from prosecution for crimes that they commit during their terms. It is based on the understanding that states must protect each other's representatives.<sup>37</sup>

### **3.2.4 The Implementation of the Geneva Conventions Act**

The Implementation of the Geneva Conventions Act 8 of 2012 (IGCA) was enacted to give

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<sup>33</sup> Implementation of the Rome Statute of the International Criminal Court Act, Section 10(1)(c).

<sup>34</sup> Ibid, Section 5(2).

<sup>35</sup> Ibid, Section 4(3).

<sup>36</sup> Ibid, Section 7.

<sup>37</sup> Ibid, Section 7(2).

recognition of the Geneva Conventions in South African law and to enhance the prevention and successful punishment of IHL violations.<sup>38</sup> The IGCA is divided into chapters dealing with the objects of the Act and the interpretation of Conventions into domestic law,<sup>39</sup> grave breaches of the Conventions,<sup>40</sup> jurisdiction and status,<sup>41</sup> and legal proceedings for grave breaches of IHL.<sup>42</sup> Also, the IGCA has a chapter on the use and protection of emblems<sup>43</sup> and general provisions.<sup>44</sup>

Section 3 of the IGCA prescribes the interpretation of the Act. It provides that South African courts hearing disputes relating to the IGCA must engage the Constitution and applicable law, conventional international law, customary international law and comparative foreign law. This section is critical to the whole Act in that it encompasses the inclusion of the Geneva Conventions and IHL in its totality in South African law. Thus, grave violations of IHL are specifically criminalised by the IGCA.

Section 4 of the IGCA endorses the Geneva Conventions and Additional Protocols 1 and 2 into South African law. This means that these instruments have the full force of law in the Republic. Section 5 of the IGCA criminalises the commission of grave breaches of IHL by any person within or outside the Republic's borders as follows:

- (1) Any person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence.
- (2) For the purposes of subsection (1), "a grave breach" means—
  - (a) a grave breach referred to in Article 50 of the First Convention;
  - (b) a grave breach referred to in Article 51 of the Second Convention;
  - (c) a grave breach referred to in Article 130 of the Third Convention;
  - (d) a grave breach referred to in Article 147 of the Fourth Convention; or
  - (e) a grave breach referred to in Article 11 or 85 of Protocol I.
- (3) Any person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.
- (4) Any citizen of the Republic who outside the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence.
- (5) A person convicted of an offence contemplated in subsection (1), (3) or (4) is liable to a fine or to imprisonment, including imprisonment for life, or to such imprisonment without the option of a fine or to both a fine and such imprisonment.

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<sup>38</sup> Implementation of the Geneva Conventions Act, preamble.

<sup>39</sup> Ibid, Chapter 1.

<sup>40</sup> Ibid, Chapter 2.

<sup>41</sup> Ibid, Chapter 3.

<sup>42</sup> Ibid, Chapter 4.

<sup>43</sup> Ibid, Chapter 5.

<sup>44</sup> Ibid, Chapter 6.

The criminalisation effectively encompasses the SANDF's conduct when operating in foreign missions as a peacekeeping force or as an AU force on active military duty. Consequently, the geographical location at which such violations are committed has no significance. This section successfully settles the issue of criminal jurisdiction and universal jurisdiction.

In consultation with the Chief Justice and the National Director of Public Prosecutions, the Minister of Defence can designate a court to try persons accused of grave breaches of IHL under section 5 of the IGCA.<sup>45</sup> Violations specifically covered by section 5 relate to articles 50 of the First Geneva Convention, section 51 of the Second Geneva Convention, section 130 of the Third Geneva Convention, section 147 of the Fourth Geneva Convention and articles 11 and 85 of Additional Protocol I. Thus, section 5 covers grave breaches of the Geneva Conventions as spelt out in the Geneva Conventions. However, this does not mean that violations not explicitly covered by section 5 are permissible. Section 5(3) stipulates that failure to comply with any provision of the Geneva Conventions is criminal.

The IGCA recognises that grave breaches of IHL may be committed by ordinary soldiers taking instructions from either their commanders or other military superiors – even though the Constitution forbids members of the SANDF from following manifestly illegal orders. To cover this, section 6 of the IGCA provides that a military superior who fails to prevent a subordinate from committing grave breaches of IHL due to malicious intent, negligence or recklessness, is liable for such offences.<sup>46</sup> The provision extends to civilian persons commanding the SANDF. In practice, this means that the Minister of Defence and the President, both civilian figures in command of the SANDF, are liable through command responsibility if they give orders that are in violation of IHL.

### **3.3 Judicial enforcement of the Implementation Acts**

The primary duty to enforce IHL rests on domestic courts whilst international courts serve a complementary role. International courts are only activated when national courts refuse or cannot prosecute perpetrators of grave breaches. National courts are habitually affected by national politics and pressures than international courts because of their proximity to governments. Nevertheless, national courts must ensure that the rule of law is not violated by

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<sup>45</sup> Ibid, Section 7(2).

<sup>46</sup> Ibid, Section 6(4)(b).

the government and must guarantee the protection of the rights of accused persons.<sup>47</sup> The courts determine whether a matter arises from an international or non-international armed conflict and ascertain the applicable legal regime.<sup>48</sup> They further direct when an issue constitutes a crime under domestic laws and if domestic courts have jurisdiction over the matter. The most decisive factor in the institution of proceedings is the evidence. Enough evidence must have been gathered for the prosecution to begin. If the accused is a military member, it must be determined if the matter should be referred to a military court or tribunal.<sup>49</sup>

Judicial precedence has mainly contributed to IHL and affects practices by states and humanitarian organisations.<sup>50</sup> In South Africa, lower courts are bound by the decisions of higher courts. Decisions of lower courts have a persuasive force in the decision-making by higher courts. The same rule applies when adjudicating matters on IHL violations - domestic courts are bound by international court decisions. Courts of other states may only have a persuasive force.<sup>51</sup> Cases on IHL violations are typically accompanied by extreme violence, which may be intimidating to the judiciary. Hence the judiciary must be guaranteed absolute independence from interference by other governance branches or individuals for it to be impartial. Basic Principles on the Independence of the Judiciary adopted by the UN in 1985 provide the characteristics of an independent judiciary. States are required to include, in their constitutions or general legislation provisions on judicial independence. Their purpose is to establish that the judiciary can only be functional if assisted by fair and independent prosecutors and members of the bar.<sup>52</sup>

Judicial independence is defined as the ability of courts to decide on cases without significant intrusion by politicians or governmental agents.<sup>53</sup> Therefore, judicial independence must not be separated from the doctrine of separation of powers and the principle of checks and balances since attaining this independence is a prerequisite to a democratic country. Article 26 of the

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<sup>47</sup> Weill, 'The Role of National Courts in Applying International Humanitarian Law', 1146-1147.

<sup>48</sup> Derek Jinks, Jackson N Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (T.M.C Asser Press 2014) 1-2.

<sup>49</sup> ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual* (ICRC 2015) 31.

<sup>50</sup> Henckaerts, 'The Grave Breaches Regime as Customary International Law' 5.

<sup>51</sup> *Prosecutor v Zlatko Aleksovski (Appeal Judgement)*, para 107. See also United Nations General Assembly, *ICC Statute*, Article 21(2) which states that the ICC may be bound by its precedent.

<sup>52</sup> Joanne Lee and Daniel C Prefontaine, 'The Rule of Law and the Independence of the Judiciary' (1998) 11 *Revue québécoise de droit international* 163, 4-5.

<sup>53</sup> Joel G Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 *J Lat Am Stud* 463, 463.

African Charter<sup>54</sup> requires that states must ensure judiciary independence and establish national institutions that will promote the rights and freedoms as guaranteed by the Charter. Judicial independence will be a benefactor in establishing criminal liability of an individual as it is necessitated by the International Covenant on Civil and Political Rights, which demands that the accused person be entitled to a fair public hearing by a legally established competent, independent and impartial court.

South Africa is a sovereign state with its foundations laid on constitutional supremacy and the rule of law to ensure accountability, receptiveness and transparency.<sup>55</sup> Judiciary authority in the Republic is given to courts to apply the law without fear, favour or prejudice.<sup>56</sup> The Constitution prohibits the government and its officials from interfering in court functions and obliges other organs of state to protect the judiciary.<sup>57</sup> The separation of powers further protects the judiciary from interference.<sup>58</sup>

The role of the South African judiciary in the application and enforcement of both international and domestic law is critical. Since the executive's implementation of international and domestic law is a constitutional obligation, the High Court, the Supreme Court of Appeal and the Constitutional Court have jurisdiction to review executive actions. They have the power to issue a range of remedies to vindicate the Constitution.<sup>59</sup> The Constitution provides that the courts may issue appropriate, just and equitable remedies when constitutionally reviewing the acts of the executive and the legislature.<sup>60</sup> Since the domestic implementation of international law is an executive prerogative that requires balancing competing interests in international politics, the doctrine of separation of powers subsequently limits South African courts. This doctrine indicates that branches of government have equal powers and exercise checks and balances over each other.<sup>61</sup> However, the system of checks and balances, whose primary purpose is to prevent branches of government from usurping powers from one another, dictates

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<sup>54</sup> OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>55</sup> Constitution of the Republic of South Africa, Section 1.

<sup>56</sup> *Ibid*, Section 165(2).

<sup>57</sup> *Ibid*, Section 165(3) and (4).

<sup>58</sup> *Ibid*, Section 41.

<sup>59</sup> See *ibid*, Sections 8, 38 and 172(1).

<sup>60</sup> *Ibid*, Section 38.

<sup>61</sup> *Glenister v President of the Republic of South Africa*, para 28.



that courts must exercise deference and restraint when dealing with foreign policy matters. This is because diplomatic matters are within the exclusive domain of the executive.<sup>62</sup>

### **3.4 Conclusion**

The suppression, repression and prevention of grave breaches of IHL in South Africa require legislative and institutional mechanisms which entrench international law into domestic law. This ensures that IHL is given a practical legal effect. South Africa ratified and domesticated the ICC Statute and recognises the fundamental principles of IHL embodied in the Geneva Conventions and its Additional Protocols. The most important South African statutes on the suppression and punishment of grave violations of IHL are the Constitution, the Defence Acts, the Implementation Act and the IGCA. Having analysed the dual perspectives on the suppression and prevention of grave breaches of IHL through the signature, ratification and domestication of IHL instruments in South Africa, it is imperative to examine contemporary challenges in suppressing and preventing these grave breaches of IHL in South Africa. This is achieved in the following chapter.

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<sup>62</sup> Kate O'Regan, 'A Forum for Reason: Reflections on the Role and Work of the Constitutional Court - Helen Suzman Memorial Lecture' (2012) 28 SAJHR 116.

## Chapter 4 Practical Challenges in Repressing, Suppressing and Punishing Grave Breaches

### 4.1 Introduction

The repression, suppression and punishment of grave breaches of IHL in South Africa is hampered by global and regional politics, diplomatic preferences and executive discretion.<sup>1</sup> Whereas South Africa has a solid constitutional and statutory framework for the repression, suppression and punishment of grave breaches of IHL, institutional mechanisms have failed to give effect to international instruments and legislation. This failure is partly due to challenges posed by the controversies of universal jurisdiction. In this regard, two incidents come to mind: the Al Bashir issue<sup>2</sup> and South Africa's aborted withdrawal from the ICC Statute.<sup>3</sup>

This chapter examines the challenges faced by different stakeholders in repressing, suppressing and punishing grave breaches of IHL in South Africa. It commences with an analysis on the nature of and challenges to universal jurisdiction under international law and proceeds to discuss South Africa's failure to arrest, detain and surrender Al Bashir to the ICC. This chapter also dichotomises the legal implications of South Africa's attempt to withdraw from the ICC Statute.

### 4.2 Universal jurisdiction

Universal jurisdiction is a global mechanism used to bring perpetrators of grave breaches of IHL to justice. Under this principle, states may search, arrest and try the perpetrator regardless of the accused's nationality or the place where the crime was committed or the victim's nationality.<sup>4</sup> Generally, states have no jurisdiction over matters that have been committed outside their territory. The perpetrator may be extradited to another state, provided the requesting state has established a *prima facie* case against the accused person.<sup>5</sup> General principles of criminal procedure must be followed. The perpetrator must be lawfully brought

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<sup>1</sup> See Chigara and Nwankwo, 'To Be or Not to Be?' The African Union and Its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)'.  
<sup>2</sup> See *Southern Africa Litigation Centre v Minister of Justice*.

<sup>3</sup> See *Democratic Alliance v Minister of International Relations and Cooperation*.

<sup>4</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It*. Clarendon (Oxford University Press 1995) 57.

<sup>5</sup> Oberg, 'The Absorption of Grave Breaches into War Crimes Law' 165.

before the court and be offered a fair and regular trial.<sup>6</sup> Those who have committed, instigated, aided or ordered the commission of the crime are individually held liable for the crimes they committed.<sup>7</sup> The Accused persons must be allowed to have legal defence counsel. National penal legislation should prohibit and punish court officials for seeking bribes from the accused, as this may prejudice the fair trial rights of the accused. In essence, general rules of legal procedure must be followed when dealing with perpetrators of grave breaches of IHL.<sup>8</sup> The minimum judicial guarantees that must be awarded to the accused person include the following:

- the accused be informed of the crime with which he is charged and given sufficient time to prepare for trial;
- the accused must be convicted on an individual penal responsibility basis;
- the accused must not be convicted on an act or omission which was not a crime at the time it was committed;
- a heavier sentence beyond the sentence that was applicable at the time the crime was committed may not be imposed – instead, the accused must benefit from a lighter sentence introduced by a change of the law where applicable;
- the accused must be presumed innocent until proven guilty;
- the accused has the right to be present at the trial;
- no one shall be allowed to testify against himself or self-incriminate;
- the accused has the right to examine witnesses;
- no one should be prosecuted for a crime for which he was convicted or acquitted;
- the accused has the right to have the judgement publicly pronounced; and
- the accused must be advised of judicial remedies at his disposal and their time limits.<sup>9</sup>

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<sup>6</sup> Jamil D Mujuzi, 'The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues' (2015) AYIHL 96, 116.

<sup>7</sup> United Nations General Assembly, *Nuremburg Charter*, Article 6(a); United Nations General Assembly, *Tokyo Charter*, Article 5(a); United Nations Security Council, *ICTY Statute*, Article 7 (1); United Nations Security Council, *ICTR Statute*, Article 6(1).

<sup>8</sup> ICRC, 'Persons Deprived of Their Liberty' (date unknown) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter37](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter37)> accessed 12 February 2021.

<sup>9</sup> ICRC, *Protocol I*, Article 75 (4). See fair trial guarantees on ICRC, 'Practice Relating to Rule 100. Fair Trial Guarantees' (ICRC, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule100#:~:text=The%20accused%20persons%20shall%20be,of%20War%20of%2012%20August](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule100#:~:text=The%20accused%20persons%20shall%20be,of%20War%20of%2012%20August)> accessed 25 January 2021.

In summation, a person who commits grave breaches of IHL is entitled to fundamental procedural rights when put to trial.

There is no prescribed time at which states may start to institute legal proceedings under the principle of universal jurisdiction. States are only required to initiate legal proceedings within a reasonable time. In terms of the Geneva Conventions, states may investigate the alleged crime committed, prosecute or extradite the accused as soon as they know that the accused is present within its territory or jurisdiction. The provisions of Article 49 (2) of the First Geneva Convention, Articles 6 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>10</sup> and the decision of the *Obligation to Prosecute or Extradite* case<sup>11</sup> require that the investigation or the enquiry on the allegation, be done as soon as the state is aware that the perpetrator who is within its jurisdiction, has committed a grave breach of IHL.<sup>12</sup>

The Geneva Conventions are silent about the immunity of persons such as state officials when they commit grave breaches of IHL. Article 27 of the ICC Statute provides that state officials' immunity shall not exempt them from criminal responsibility or prosecution by courts, meaning that the status that one holds cannot absolve a person from prosecution for grave breaches of IHL. However, a person is exempt from prosecution by local domestic courts during their term of office. Lord Bingham stated that criminal jurisdiction might not be assumed otherwise, and immunity may not be granted to the adequately charged.<sup>13</sup> This issue was also discussed in the *Arrest Warrant* case, where Belgium had issued an international arrest warrant against the Minister of the Democratic Republic of Congo who had committed, amongst other crimes, grave breaches of IHL. The court held that Belgium violated customary law and the general rules of international law in issuing the warrant of arrest against a state official. The court did not discuss the rights as they are embodied in the principle of universal jurisdiction. According to the court, a state official is not subject to prosecution for grave breaches of IHL before the

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<sup>10</sup> United Nations General Assembly, *Convention Against Torture*.

<sup>11</sup> See *Human Rights Watch, Belgium/Senegal: World Court to Hear Habre Trial Dispute* 16 February 2012.

<sup>12</sup> See *Belgium v Senegal* International Court of Justice GL No 144, ICGJ 437 (ICJ 2012), Judgment of 20 July 2012, para 88.

<sup>13</sup> *United Kingdom, House of Lords, Regina v Jones* Judgment of 19 March 2006, para 19.

lapse of the term of office, and there is no customary law exception to the rule.<sup>14</sup>

It must be noted that the existence of the principle of universal jurisdiction should not affect the immunities guaranteed to state officials by customary international law. The immunity granted should not be mistaken for impunity since states have the discretion to either waive the immunity of their officials and institute criminal proceedings. An international court or tribunal that has jurisdiction may prosecute persons accused of grave breaches of IHL. Other courts with the jurisdiction may prosecute former heads of state.<sup>15</sup> The decision of the *Arrest Warrant case* confirms that perpetrators are liable for grave breaches of IHL committed before or during their terms of office.<sup>16</sup>

A state may extradite an accused upon request by another state that has established a *prima facie* case against the accused.<sup>17</sup> The condition that a *prima facie* case must be established before extradition is intended to protect the accused from unjustified requests and effects of conflict of laws.<sup>18</sup> For a state to extradite or request extradition of the accused, it must have valid legislation that provides for such procedures, and such procedures must not be done in bad faith.<sup>19</sup>

States must implement IHL as a way of ensuring respect for the law. They must align their domestic criminal laws with IHL. Furthermore, they must assist each other in the prosecution

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<sup>14</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* International Court of Justice (ICJ) 14 February 2002, para 54.

<sup>15</sup> See Zappala Salvatore, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour De Cassation' (2001) 12 Eur J Int'l L 595 Akande Dapo and Shah Sangeeta, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 Eur J Int'l L 815. and Akande Dapo and Shah Sangeeta, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 Eur J Int'l L 815.

<sup>16</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras 63–90. Judges Higgins, Kooijmans and Buergenthal stated that Ministers in office are entitled to immunity for “official acts”, in the exclusion of serious international crimes.

<sup>17</sup> See ICRC, *First Geneva Convention*, Article 49.

<sup>18</sup> See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 3567.

<sup>19</sup> See the International Law Commission, 'Final Report of the Working Group on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' <<https://digitallibrary.un.org/record/774207?ln=en>> accessed 20 December 2020 para 37, states that the domestic condition in extradition must be applied in good faith.

of grave breaches of the law.<sup>20</sup> The obligation for states to co-operate falls under customary law Rule 173, which was added in Additional Protocol I<sup>21</sup> and provides as follows:

the High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches.

The UN General Assembly also requires states to co-operate in fighting against grave breaches of IHL and affording aid to other states to bring perpetrators to justice.<sup>22</sup> Customary IHL Rule 161 also emphasises the issue of cooperation and assistance by states. The accused person should be guaranteed the general rights of an accused person.<sup>23</sup> The measures used in bringing the accused to justice must tally with the gravity of the crime committed.<sup>24</sup> Article 49(4)<sup>25</sup> adds that the accused should benefit from a fair trial and the defence's general standards. These judicial guarantees are essential, particularly when an international court tries the accused to avoid adverse inferences in the administration of international criminal justice.

### 4.3 Challenges of universal jurisdiction

The repression, suppression and punishment of grave breaches of IHL are imperative for preserving peace and public order. This can only be attained when states fully co-operate.<sup>26</sup> Universal jurisdiction gives states competence to search, arrest, try or extradite and surrender to the ICC or *ad hoc* international criminal tribunals any persons accused of committing international crimes, regardless of their nationality, the nationality of the victims, the offences in question and the location at which the offences were committed.<sup>27</sup> Its primary purpose is to end impunity for grave breaches of IHL. Customary IHL condemns the commission of severe violations of IHL. It uses universal jurisdiction as a mechanism to bring perpetrators of these

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<sup>20</sup> Anna Segall, *Punishing Violations of International Humanitarian Law at the National Level: A Guide for Common Law States – Drawing on the Proceedings of a Meeting of Experts* (ICRC 2001) 130.

<sup>21</sup> ICRC, *Protocol I*, Article 88 (1).

<sup>22</sup> See the United Nations General Assembly, *Resolution 3074, Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, 3 December 1973, A/RES/3074(XXVIII), paras 3-4.

<sup>23</sup> See ICRC, *Protocol I*, Article 75 (4).

<sup>24</sup> See Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para 3402. See also Jesse Medlong, 'All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions' (2013) 34 *Mich J Int'l L* 229, 829–856.

<sup>25</sup> ICRC, *First Geneva Convention*.

<sup>26</sup> *United States of America v Cotroni; United States of America v. El Zein 1989 CanLII 106 (SCC), [1989] 1 SCR 1469* para 215.

<sup>27</sup> Christopher Burke, 'Universal Jurisdiction under Fire in South Africa' (2015) *AYIHL* 118,121.

heinous crimes to justice.<sup>28</sup> Apart from customary international law, there are treaties on universal jurisdiction. Universal jurisdiction is provided in Articles 49, 50, 129 and 146, respectively, of the four Geneva Conventions; Article 4 of the International Convention on the Suppression and Punishment of the Crime of Apartheid;<sup>29</sup> and Articles 5 and 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Punishment of 1984.<sup>30</sup>

The general rule is that the jurisdiction of South African courts in criminal matters is restricted to offences committed within its borders.<sup>31</sup> As is the case with almost all legal rules, there are exceptions to this rule. Some examples of exceptions include treason cases, which by their nature, threaten the government and are thus by default within the purview of the courts.<sup>32</sup> Other exceptions include crimes that Parliament has designated as justiciable in the courts. Through customary IHL and by signing, ratifying and domesticating the Geneva Conventions and the ICC Statute, the IGCA and the Implementation Act of the Rome Statute of the ICC, the legislature gave the courts jurisdiction over grave breaches of IHL.<sup>33</sup>

In *National Commissioner of the South African Police Service v Southern African Litigation Centre*,<sup>34</sup> the court identified piracy, genocide, war crimes, crimes against humanity, apartheid and slave trade as offences for which courts may exercise universal jurisdiction. South African courts have jurisdiction over crimes against humanity, war crimes, grave breaches of IHL and genocide.<sup>35</sup> It does not matter whether these offences were committed within or outside South African borders. The courts exercise universal jurisdiction with international courts.<sup>36</sup> In the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v*

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<sup>28</sup> Regardless of negativity of some states in cooperating with the ICC in the arrest and extradition or surrender of the accused to the court, a mandatory duty to end impunity against perpetrators of grave breaches of IHL compels states to cooperate. See Angelo Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (Galda Verlag 2016) 153-154.

<sup>29</sup> United Nations General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, A/RES/3068(XXVIII).

<sup>30</sup> United Nations General Assembly, *Convention Against Torture*.

<sup>31</sup> JJ Joubert, *Criminal Procedure Handbook* (10 edn, Juta 2011) 41.

<sup>32</sup> Mujuzi, 'The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues', 97.

<sup>33</sup> Constitution of the Republic of South Africa, Section 231(4). See also *Minister of Justice and Constitutional Development v Southern African Litigation Centre* (867/15) [2016] ZASCA 17, paras 9-10.

<sup>34</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* para 37.

<sup>35</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre*, para 10.

<sup>36</sup> See Mujuzi, 'The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues' 97.

*Spain*),<sup>37</sup> the ICJ state duties to the international community against the obligations they share with other states. The former duty is more demanding than the latter. In contrast to the global community's duties, states have interests to protect peace amongst each other.

The obligation under universal jurisdiction is not between South Africa and isolated states but between South Africa and the international community at large. As the world evolves, perpetrators find means to defeat the ends of justice to protect their interests. They use national borders to protect themselves such that for them to be arrested, state sovereignty should have been overcome. They are aware that with state sovereignty, a state may not cross borders of another to exercise its power to arrest a perpetrator of a serious crime since each state is obliged to respect other states.<sup>38</sup> They may seek amnesty in their own countries or asylum in neutral countries, enabling them to escape punishment for their crimes.<sup>39</sup> It is evident that if perpetrators were allowed to escape to havens, that would be a failure of international criminal justice.<sup>40</sup>

Several legal issues arise concerning the jurisdiction of South African courts over grave breaches of IHL. The first one is time-related. The question in this regard is whether the courts have jurisdiction over persons who committed offences before the signature and ratification of applicable instruments on IHL? What about offences committed before the enactment of the IGCA and the Implementation Act? The last question arises from the legal principle that no one may be charged for acts that were not crimes at the time of their commission. The IGCA and the Implementation Act are silent on this issue, leaving it on the courts to develop the law on an *ad hoc* basis when the need arises. Perceptibly, this creates a degree of uncertainty in the law, undermining the legal order and the fight to end impunity for international crimes.<sup>41</sup>

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<sup>37</sup> *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain, Judgment, Merits, Second Phase ICJ GL No 50, [1970] ICJ Rep 3; (1970) 9 ILM 227; ICGJ 152 (ICJ 1970), 5 February 1970*, para 33.

<sup>38</sup> Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, 'Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime' (*OAS*, 2007) <[http://www.oas.org/juridico/mla/en/can/en\\_can\\_prost.en.html#ftn2](http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html#ftn2)> accessed 20 January 2021.

<sup>39</sup> Paul Chevigny, 'The Limitations of Universal Jurisdiction' (*Global Policy Forum*, 2006) <<https://www.globalpolicy.org/component/content/article/97/32133.html>> accessed 17 January 2021.

<sup>40</sup> Ibish Hussein, 'Universal Jurisdiction Raises as Many Problems as It Solves' (*The National*, 2013) <<https://www.thenationalnews.com/universal-jurisdiction-raises-as-many-problems-as-it-solves-1.277149>> accessed 10 January 2021.

<sup>41</sup> For a discussion, see Mujuzi, 'The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues' for a discussion of the challenges that come with universal jurisdiction and how African states can deal with these issues. See, also,



Enforcement of IHL, like all law in South Africa, depends on the jurisdiction of the courts to determine whether organs of the state and responsible persons comply with the Constitution and all applicable laws in the investigation of crimes and prosecution of perpetrators. Given the criminal nature of the grave breaches of IHL, the question of the jurisdiction of South African courts to criminal offences committed outside its borders, in Africa or abroad, boils down to the competence of the courts to decide such matters.<sup>42</sup>

Universal jurisdiction interferes with political affairs and the sovereignty of states.<sup>43</sup> State sovereignty is a foundational doctrine in IHL and is based on the understanding that all states are equal and should be treated as such.<sup>44</sup> Universal jurisdiction marks the point where international law and national law meet, where interests of states and human rights face each other, and where law and politics collide.<sup>45</sup> The main challenge with universal jurisdiction is that sovereignty has always been a powerful tool in perpetrating crimes in societies.<sup>46</sup> Perpetrators use state sovereignty as a shield against prosecution. Therefore, universal jurisdiction should disregard state sovereignty. Bassiouni states that disregard for state sovereignty may cause world disorder:

Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilised in a cautious manner that minimises possible negative consequences, while at the same time enabling it to achieve its useful purposes.<sup>47</sup>

The principle of universal jurisdiction must be approached with great caution since a mere act of negligence may offend other states.<sup>48</sup> State officials are generally immune from punishment

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Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* 153.

<sup>42</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre*, paras 33-40.

<sup>43</sup> United Nations General Assembly, 'Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission' (UN, 2011) <<https://www.un.org/press/en/2011/gal3415.doc.htm>> accessed 12 January 2021.

<sup>44</sup> Louise Arimatsu, Royal Institute of International Affairs and Royal Institute of International Affairs, International Law Programme, 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' (*Chatham House*, 2010) <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp>> accessed 21 January 2021.

<sup>45</sup> Ibid.

<sup>46</sup> Extradition, 'Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime'.

<sup>47</sup> Cherif M Bassiouni, 'Universal Jurisdiction for International Crimes' (2001) 42 Va J Int'l L 81, 82.

<sup>48</sup> The attitude of the USA towards universal jurisdiction is an example Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* 154-155.

by foreign courts. There is an exception to this rule - when they commit grave breaches of IHL. The ICJ cleared the argument in the adjudication of matters against state officials under universal jurisdiction when it stated that:

It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.<sup>49</sup>

The immunity of state officials is not waived for all crimes. Only the commission of a set of grave breaches of IHL, such as genocide, war crimes and crimes against humanity, can lead to prosecution by foreign courts under the principle of universal jurisdiction. Politics is a significant problem in the adjudication of matters under universal jurisdiction. Most war crimes are committed with political motivation from the most potent countries with veto power in the United Nations Security Council.<sup>50</sup> Regardless of the merits of the case or court jurisdiction, politics by powerful states intervene to disturb cases and the choice of jurisdiction.<sup>51</sup> Most African states are asserting that the prosecution of IHL violations is only directed to African states.<sup>52</sup> Bula Bula J contended that universal jurisdiction is a wisely set jurisdiction meant to prejudice other states to the exclusion of others.<sup>53</sup> Subsequently, the impartiality of prosecution under universal jurisdiction is questionable as there is no guarantee that due legal processes would be followed.

Universal jurisdiction leads to a conflict of priorities and laws. South Africa's obligations to the ICC, for instance, conflict with its responsibilities to the AU. This conflict is manifested in the Diplomatic Immunities and Privileges Act,<sup>54</sup> which protects diplomats and heads of state

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<sup>49</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, para 59.

<sup>50</sup> Shruthee Srinivasan, 'Analysing the Concept of Universal Jurisdiction, Its Problems and Prospects' (*Law Farm*, 2016) <<https://lawfarm.in/blogs/analysing-the-concept-of-universal-jurisdiction-its-problems-and-prospects>> accessed 20 June 2019.

<sup>51</sup> Chevigny, 'The Limitations of Universal Jurisdiction'.

<sup>52</sup> Dube, 'The Au Model Law on Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle', 467.

<sup>53</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* paras 104 and 107.

<sup>54</sup> Diplomatic Immunities and Privileges Act 37 of 2001 as amended by Diplomatic Immunities and Privileges

of other nations from arrest, detention and criminal prosecution while carrying their official duties in South Africa.<sup>55</sup> However, IHL places a strict obligation on South Africa to arrest, detain and surrender to the ICC all persons suspected of grave breaches of IHL. This issue practically manifested in the Al Bashir case when South Africa refused to arrest, detain and surrender Al Bashir to the ICC while he was on his official visit to South Africa to attend an AU summit.<sup>56</sup> Although a state may have discretion on how to conduct itself according to an IHL instrument and in terms of its domestic laws, customary IHL, which is the basis of IHL, requires each state to ensure accountability for international crimes.

The scope of universal jurisdiction and the extent of its application is uncertain. The circumstances and conditions in which it applies vary.<sup>57</sup> Universal jurisdiction must be distinct to avoid law abuse, which could jeopardise international relations, order and security.<sup>58</sup> The difference in criminal procedure and rules of evidence creates problems in adjudicating matters under universal jurisdiction. For example, in cases where the accused has been extradited, the extraditing state's arrest warrant should be recognisable within the requesting state.<sup>59</sup>

If many states decide to prosecute perpetrators of international crimes, it will result in a conflict of laws, with different solutions proposed and thus delaying the completion of cases.<sup>60</sup> Several states have signed treaties on the extradition of criminals, while some have only their national laws that determine terms on the extradition of perpetrators. The requesting and the extraditing states should have dual criminality in that for extradition to be undertaken, the criminal conduct in question must be constituting a crime in both states. The major problem is in how criminal offences are defined, named and proven by states.<sup>61</sup>

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Amendment Act, 2001 as Amended by Diplomatic Immunities and Privileges Amendment Act 35 of 2008.

<sup>55</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre* para 17.

<sup>56</sup> *Ibid*, para 4.

<sup>57</sup> United Nations General Assembly, 'Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission'.

<sup>58</sup> United Nations General Assembly, 'Universal Jurisdiction Principle Must Be Defined to Avoid Abuse, Endangerment of International Law, Sixth Committee Hears as Debate Begins' (*UN*, 2014) <[https://www.un.org/press/en/2014/gal3481.doc.htm#:~:text=\(AM%20%26%20PM\)-,Universal%20Jurisdiction%20Principle%20Must%20Be%20Defined%20to%20Avoid%20Abuse%2C%20Endangerment,Committee%20Hears%20as%20Debate%20Begins&text=The%20principle%20waived%20the%20habitual,the%20criminal%20justice%20of%20States.](https://www.un.org/press/en/2014/gal3481.doc.htm#:~:text=(AM%20%26%20PM)-,Universal%20Jurisdiction%20Principle%20Must%20Be%20Defined%20to%20Avoid%20Abuse%2C%20Endangerment,Committee%20Hears%20as%20Debate%20Begins&text=The%20principle%20waived%20the%20habitual,the%20criminal%20justice%20of%20States.)> accessed 12 February 2020.

<sup>59</sup> Extradition, 'Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime'.

<sup>60</sup> Srinivasan, 'Analysing the Concept of Universal Jurisdiction, Its Problems and Prospects'.

<sup>61</sup> Extradition, 'Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime'.

Courts are habitually lenient with the wrong deeds of states. In undemocratic states, courts are used to legitimise government policies that are contrary to the general provisions of the law. This leads to severe violations of IHL, which the courts ignore. This means that courts must adopt a unique approach to issues. Judicial interpretation allows courts to interpret issues in line with the political demands of their states as a way of absolving themselves from condemnation by other branches of government.<sup>62</sup> Courts play a crucial role in enforcing the law against grave breaches of IHL. Hence, they must always uphold the law.<sup>63</sup>

#### 4.4 The refusal to detain Omar Al Bashir

In June 2015, the former President of Sudan, Omar Al Bashir, was invited by the AU for a summit in Pretoria, South Africa. South Africa published a notice in the Government Gazette in which it designated the venue for the summit.<sup>64</sup> This placed Pretoria outside the jurisdiction of the South African legal system, per Article 29 of the Vienna Convention on Diplomatic Relations and the Diplomatic Immunities and Privileges Act.<sup>65</sup> Al Bashir's arrival at the OR Tambo International Airport in Johannesburg was met with an immediate application to the High Court in Pretoria by the Southern African Litigation Centre (SALC), which sought a court order to compel the South African government to arrest, detain and surrender Al Bashir to the ICC.<sup>66</sup> The ICC had standing warrants against him for grave breaches of IHL committed under his watch through genocide, war crimes and crimes against humanity during a non-international armed conflict in Sudan.<sup>67</sup> The SALC relied on section 10 of the Implementation Act, which obliges South Africa to arrest, detain and surrender any person to the ICC when the ICC seeks such person for trial for international crimes, which include grave breaches of IHL.

The High Court granted the SALC's urgent application and issued a *rule nisi* which required

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<sup>62</sup> The Editor, 'Challenges in Creating an African Court of Justice and Human Rights – Chofor Che' (*African liberty*, 2015) <<https://www.africanliberty.org/2015/03/26/challenges-in-creating-an-african-court-of-justice-and-human-rights-chofor-che/>> accessed 28 October 2021.

<sup>63</sup> Weill, 'The Role of National Courts in Applying International Humanitarian Law', 1146-1147.

<sup>64</sup> Government of the Republic of South Africa, *Host Agreement between the Commission of the African Union (Auc) and the Government of the Republic of South Africa on the Material and Technical Organization of the Summit of the African Diaspora on 25 May 2012, Sandton Convention Centre, Johannesburg, South Africa: Article 13: Privileges and Immunities* (No.35376 of 24 May 2012).

<sup>65</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre* para 14. See also the Diplomatic Immunities and Privileges Act.

<sup>66</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre*.

<sup>67</sup> *Situation in Darfur, Sudan in the Case of the Prosecutor v Omar Hassan Albashir ("Omar Al Bashir")* 4 March 2009 and *The Prosecutor v Omar Hassan Ahmad Al Bashir. Situation: Situation in Darfur, Sudan ICC-02/05-01/09-94*, 12 July 2010.

the government to show cause why the interim order should not be final. The state opposed the application and relied on the Diplomatic Immunities and Privileges Act, the sovereignty of the Republic, and the conflicting obligations of South Africa to the ICC and the AU. It was argued that the summit venue was outside the jurisdiction of South African authorities because it was, for the whole duration of the summit, an AU venue. These arguments were rejected by a full bench of the High Court.

The court intervened and ruled against the government based on its constitutional obligation to compel the executive to abide by international law and to fulfil its responsibilities.<sup>68</sup> However, the decision conflicted with the doctrine of separation of powers and its system of checks and balances. Under this doctrine, diplomacy and international relations are exclusive domains of the executive, to which the courts must be deferent and exercise restraint.<sup>69</sup> However, Al Bashir left South Africa, contrary to the court order. The court felt that its ruling was defied, while the executive viewed the order as an overreach and usurpation of the powers of the executive.<sup>70</sup>

When the government defied the court order to arrest, detain and surrender Al Bashir to the ICC for prosecution for grave breaches of IHL, it violated the rule of law. The conduct of the government was in direct violation of the constitutional duty of every person and every organ of the state to obey court decisions.<sup>71</sup> Whereas the government was under the impression that the Al Bashir order was granted erroneously, it had an obligation, not a discretion, to enforce the court order. In *State v Mamabolo*,<sup>72</sup> the court reasoned that:

The specter of executive officers refusing to obey orders of court because they think they were wrongly granted, is ominous. It strikes at the very foundations of the rule of law when government servants presume to disregard orders of court.

The government's refusal to arrest, detain and surrender Al Bashir to the ICC undermined the legal system and the administration of justice. What is more alarming about the government's refusal to arrest him is that the court was powerless to do anything about it. It is a common cause that the courts rely on moral authority for the government to obey their

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<sup>68</sup> *Southern Africa Litigation Centre v Minister of Justice* paras 37.1-38.

<sup>69</sup> See in general Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009).

<sup>70</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre*.

<sup>71</sup> Constitution of the Republic of South Africa, Section 165(5). See the discussion on *Southern Africa Litigation Centre v Minister of Justice*, para 37.1-38.

<sup>72</sup> *S v Mamabolo* (CCT 44/00) [2001] ZACC 17, para 65.

decisions.<sup>73</sup> When there is a lack of a political will to implement court decisions, the rule of law crumbles. Hence, the government's defiance of the court order in the *Al Bashir case* had serious legal ramifications not only for the international community and the victims<sup>74</sup> of his alleged violations but also for the rule of law in South Africa. The controversy undermined the South African constitutional order and can be viewed as an affront to the values and principles for which the South African Constitution stands. Regrettably, the South African government followed its Al Bashir position by commencing steps to withdraw from the ICC Statute.<sup>75</sup>

#### 4.5 The attempted withdrawal from the ICC Statute

In October 2016, South Africa notified the Secretary-General of the United Nations, Ban Ki-moon and the ICC of its intention to withdraw from the ICC Statute, citing a conflict of obligations to the ICC and the AU.<sup>76</sup> The decision to withdraw from the ICC after the Al Bashir controversy exposed the South African government to embarrassment internally and abroad. At the same time, the incident drummed up support for the AU view that the ICC is a neo-colonialist tool meant to keep Africa in subservience to the West.<sup>77</sup> The AU has been making persistent calls for the ICC to investigate war crimes and crimes against humanity allegedly committed by the USA and its North Atlantic Treaty Organisation allies in Iraq and Afghanistan.<sup>78</sup> These perceptions of vindictive and selective justice have been justified because only Africans have been investigated and successfully prosecuted in the ICC for international crimes.<sup>79</sup>

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<sup>73</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre* para 16. *Southern Africa Litigation Centre v Minister of Justice*, para 37.2.

<sup>74</sup> It should be noted that although the law is not sufficient in restoring the *status quo* of victim's lives may not be restored fully but the law seeks to strike a balance between the demands of a victim and the offender for continued peace and harmony. See the discussion by Avitus A Agbor, 'An Analysis of the Principles on the Award of Reparations Per Article 75(1) and (2) of the Rome Statute of the ICC' (2018) 1 AYIHL 98.

<sup>75</sup> *Democratic Alliance v Minister of International Relations and Cooperation*, paras 1-3.

<sup>76</sup> *Ibid*, paras 4-5. See also Simon Allison, 'Breaking: South Africa Begins Process to Exit International Criminal Court' (*Daily Maverick*, 2016) <<https://www.dailymaverick.co.za/article/2016-10-21-breaking-south-africa-begins-process-to-exit-international-criminal-court/>> accessed 20 January 2021.

<sup>77</sup> Felex Share, 'African ICC Must Try Europeans: Mugabe' (*Chronicle*, 2015) <<https://www.chronicle.co.zw/african-icc-must-try-europeans-mugabe/>> accessed 7 October 2019.

<sup>78</sup> Editorial-Staff, 'Goodbye ICC: The Bold Steps Taken by Three African Countries' (*African Globe.net*, 2016) <<https://www.africanglobe.net/editorial/goodbye-icc-bold-steps-african-countries/>> accessed 17 January 2021.

<sup>79</sup> See Tanzil-Zaman Chowdhury, 'Selective Justice, the ICC and Africa' (*International Policy Digest*, 2011) <<https://intpolicydigest.org/2011/08/23/selective-justice-the-icc-and-africa/>> accessed 7 October 2019 and Mariam G Alemayehu, 'Who's Having "Nightmares" in Africa?' (*Zewashera - WordPress.com*, 2013) <<https://zewashera.wordpress.com/tag/international-criminal-court/>> accessed 17 January 2021.

Whereas the arguments against the ICC have factual backing, they manifest a complete misunderstanding of the ICC and its jurisdiction. The USA did not ratify the ICC Statute. As such, it remains out of the ICC's jurisdiction, regardless of horrendous crimes committed by its armed forces in Iraq, Afghanistan and Guantanamo Bay.<sup>80</sup> Instead, what African states should be pleading in their grounds of withdrawal should be anything other than selective justice and vindictiveness at the hands of the ICC. They rushed to sign and ratify the ICC Statute without carrying out thorough legal research and due diligence on the proposed jurisdiction of the ICC. Perhaps, African states lacked the wisdom to appreciate that it is always easier not to get into an international treaty than to amend it or get out of it.<sup>81</sup>

South Africa's attempted withdrawal from the ICC Statute should have come into effect after a year from the notice of withdrawal.<sup>82</sup> This move has international and domestic legal ramifications. First, it shows how South Africa abandoned its commitment to the foundations and fabric of IHL, which it had woven itself into as part of a promise to end impunity for serious crimes in international law, particularly grave breaches.<sup>83</sup> Secondly, it is a symbolic abandonment of the victims of these heinous crimes and an assurance to some African leaders who have chosen the path of violence and brutal killings to suppress dissent and remain in power. The attempted withdrawal also gave other African states the moral approval to withdraw from the ICC Statute, as exemplified by Burundi's withdrawal from the ICC Statute.<sup>84</sup>

South Africa's expression of its intent to withdraw from the ICC Statute led to the question of which institutions, if any, will be available to end impunity for grave breaches of IHL if all

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<sup>80</sup> Steven Groves and Brett Schaefer, 'The U.S. Should Not Join the International Criminal Court' (*The Heritage Foundation*, 2009) <<https://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court>> accessed 17 January 2021.

<sup>81</sup> Curtis A Bradley, 'U.S. Announces Intent Not to Ratify International Criminal Court Treaty' (*The American Society of International Law*, 2002) <<https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>> accessed 14 June 2021.

<sup>82</sup> Roze Moodley, 'Sa Formally Withdrawing from ICC' (*South African Government News Agency*, 2016) <<https://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc#:~:text=%E2%80%9CThe%20withdrawal%20will%20take%20effect%20one%20year%20after,the%2012%20months%E2%80%99%20notice%20period%2C%E2%80%9D%20Minister%20Masutha%20said>> accessed 10 June 2021.

<sup>83</sup> *Southern Africa Litigation Centre v Minister of Justice*, paras 37.1-38.

<sup>84</sup> *Situation in the Republic of Burundi, Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi'* ICC-01/17-X-9-US-Exp, ICL 1832 (ICC 2017), 25th October 2017.

African states followed up on their promise for an exodus from the ICC Statute? Little assurance is derived from the African Court of Justice and Human Rights, which is riddled with ratification and budgetary constraints. There is also a massive gap in that the Protocol on the Statute of the African Court of Justice and Human Rights,<sup>85</sup> which established the African Court of Justice and Human Rights, exempts seating heads of state from prosecution for international crimes covered by the founding statute for the entire duration of their terms in office.<sup>86</sup> Given the propensity among most African leaders to stay in power for life, it is unlikely that any of them will be brought to justice for grave breaches of IHL.<sup>87</sup> There is no need to mention SADC in assisting South Africa in fighting impunity against perpetrators of grave breaches of IHL, as the functions of its tribunal were suspended.<sup>88</sup>

#### 4.6 Conclusion

South Africa faces numerous challenges in fulfilling its obligations to repress, suppress and punish grave breaches of IHL. Several political, legal and economic factors hinder the effective prevention of grave breaches of IHL. Whereas South Africa has adequate legislation to punish grave breaches, regional and international politics and diplomacy make it difficult for it to effectively deliver on its international and domestic mandates to end impunity for grave breaches of IHL. The *Al Bashir case*, with its broad legal ramifications for IHL, and the resultant attempted withdrawal of South Africa from the ICC Statute, are the most notorious examples. These two issues find their basis on arguments about universal jurisdiction over gross violations of IHL and severe international crimes. Although South Africa is trying hard to meet its international and domestic obligations to end impunity for grave breaches of IHL, there is no certainty of achieving these in the foreseeable future due to political, legal and economic factors in play. The following chapter makes recommendations on how South Africa can enhance its compliance with the legal obligations to repress, suppress and punish grave breaches of IHL.

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<sup>85</sup> African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.

<sup>86</sup> See *ibid*, Article 46A.

<sup>87</sup> Here talking about common African long serving Presidents.

<sup>88</sup> *Mike Campbell (Pty) Ltd v Republic of Zimbabwe*.



## **Chapter 5 Conclusion and Recommendations**

### **5.1 Introduction**

South Africa's international legal obligations to repress, suppress and punish grave breaches of IHL form the subject of this study. South Africa incurred these obligations through customary IHL and by signing, ratifying and domesticating the Geneva Conventions and the ICC Statute. South Africa, like most members of the international community, is subject to the duty to uphold IHL. However, the Al Bashir incident, in which South Africa refused to arrest, detain and surrender Omar Al Bashir to the ICC, and the subsequent attempt to withdraw from the ICC Statute were derelictions of South Africa's international obligations to end impunity for grave breaches of IHL. Contrary to its obligations, South Africa refused to play an active role in making sure Al Bashir faced prosecution for grave breaches committed through war crimes and crimes against humanity in Sudan. The decision gave safety to a perpetrator of grave breaches of IHL without considering the plight of his victims. As much as the law is there to protect everyone, its interests must be saved in ensuring that just and equitable legal actions are taken in meeting the ends of justice. This chapter summarises the study, presents the main findings and proffers recommendations to enhance South Africa's legal obligations to repress, suppress and punish grave breaches of IHL.

### **5.2 Summary of the study**

The introductory chapter outlines the context of the study by providing its background, the research question, objectives and assumptions. It also contains a review of the literature on the repression, suppression and punishment of grave breaches of IHL. The research doctrinal legal methodology used in this study is also discussed in the first chapter.

The second chapter outlines the international legal framework for the criminalisation of grave breaches of IHL. Customary IHL is a prominent source of the prohibition of grave breaches. Chapter 2 emphasises that customary IHL binds all states. Therefore, states that have not signed and ratified IHL treaties are still bound by customary IHL. Treaties on IHL, such as the Geneva Conventions and the ICC Statute, are codifications of customary IHL. Fundamental principles of IHL, found in customary IHL, entail those combatants who are not or no longer taking part in armed conflict should be spared, and that specific properties may not be attacked. They also regulate the means and methods of warfare.

States must respect and ensure respect for these fundamental principles by enacting laws that implement IHL. They must disseminate the IHL text and prosecute persons who violate IHL. They can do so by exercising universal jurisdiction. Under universal jurisdiction, national courts are mandated to search, arrest and prosecute perpetrators and extradite them to requesting states or surrender them to the ICC. Conduct that constitutes violations of these fundamental principles is a grave breach of the Geneva Conventions. To this end, the substantive content of grave breaches of the Geneva Conventions is specifically examined in chapter 2 of this study.

The third chapter explores South African legislation on the repression, suppression and punishment of grave breaches of IHL. The applicable legislation includes the Constitution, the two Defence Acts, the IGCA and the Implementation Act. IHL is domesticated through legislation and enforced through institutional mechanisms. Decisions by courts on the Al Bashir issue prove that South African law is sufficient to repress, suppress and punish grave breaches of IHL.

The fourth chapter discusses contemporary challenges on the repression, suppression and punishment of grave breaches of IHL in South Africa. It commences by examining Africa's perceptions of the ICC as a tool for selective and vindictive justice against Africans and how this view has imposed challenges on South Africa's exercise of universal jurisdiction for grave breaches of IHL. The chapter zooms on the *Al Bashir case* and the subsequent attempt by South Africa to withdraw from the ICC Statute. South Africa faced political and legal challenges in executing its duty to arrest, detain and surrender Al Bashir to the ICC for grave breaches of IHL.

### **5.3 Major findings**

IHL is meant to protect certain persons and property during armed conflict and to end impunity for grave breaches such as war crimes and crimes against humanity. Common Article 1 to the Geneva Conventions requires states to respect IHL and ensure that other states do the same. Together with all other states, South Africa carries this duty to respect and ensure respect for IHL by other states. Universal jurisdiction ensures respect for IHL in that it allows states to

arrest, detain and surrender perpetrators of grave breaches of IHL to the ICC.<sup>1</sup> South Africa failed the test to fulfil its duty to respect IHL when it refused to arrest, detain and surrender Al Bashir to the ICC,<sup>2</sup> notwithstanding its request for it to do so. South Africa's excuse was that Al Bashir was immune from prosecution because he was a head of the state.

The Geneva Conventions require states to implement IHL by incorporating it into their domestic legal systems. Domestication of IHL gives national courts jurisdiction over cases of grave breaches of IHL. As shown in this study so far, South Africa has domesticated several IHL instruments condemning grave breaches of IHL and awarding its courts jurisdiction on the same. Hence, South African courts have primary jurisdiction, while the ICC complements them in the prosecution of grave breaches of IHL.<sup>3</sup> The ICC Statute undermines the centralisation of the administration of justice to the ICC. Together with the Geneva Conventions, it does not compel South Africa to implement its provisions on universal jurisdiction but leaves to everything its willingness and ability to enforce the grave breaches legal regime.<sup>4</sup>

International law endows South Africa with discretion on whether to adopt IHL instruments. Whether South Africa has not signed, ratified and domesticated IHL instruments, it is still bound by customary IHL. There are many ways of incorporating an international instrument into domestic law. South Africa could choose to sign IHL instruments with reservations or interpretative declarations. Through reservations, it could modify the application of selective provisions to its favour or exclude itself from being bound by specific provisions. Interpretive declarations reveal South Africa's understanding of the treaties.<sup>5</sup> However, instruments such as the ICC Statute forbid the use of reservation statements or interpretive declarations because such statements or declarations often defeat the purpose of particular instruments.<sup>6</sup>

South Africa could have chosen not to incorporate specific IHL instruments into its national law. Instead, it could rely on ordinary national law to cover crimes that constitute violations of

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<sup>1</sup> Bassiouni, 'Universal Jurisdiction for International Crimes'.

<sup>2</sup> *Minister of Justice and Constitutional Development v Southern African Litigation Centre*.

<sup>3</sup> United Nations General Assembly, *ICC Statute* Article 1.

<sup>4</sup> *Ibid*, Article 17.

<sup>5</sup> ICRC, 'Guiding Principles Concerning the Status and Methods of Operation of National Bodies for the Implementation of International Humanitarian Law' (*ICRC*, 1998) <[https://www.icrc.org/en/doc/resources/documents/misc/guiding\\_principles\\_national\\_committees.htm](https://www.icrc.org/en/doc/resources/documents/misc/guiding_principles_national_committees.htm)> accessed 21 January 2021.

<sup>6</sup> See Chapter 6 of Anthony Aust, *Adoption and Authentication*, *Modern Treaty Law and Practice* (2 edn, Cambridge University Press 2007).

IHL. International law does not sanction states for not setting their domestic criminal law to the standards required by IHL. When the provisions of domestic criminal law are not adequately providing for IHL, South Africa may hand the matter over to the ICC for proper adjudication.<sup>7</sup> South Africa had the discretion to sign treaties and it willingly signed the ICC Statute. However, its refusal to act according to the ICC Statute will not absolve it from liability to fulfil obligations under IHL because most, if not all, of the rules embodied in IHL treaties are from customary IHL, which applies to all states by default. Customary IHL binds all states because there is a general duty that all states must assist in the suppression and prevention of international crimes such as grave breaches of IHL.<sup>8</sup>

Although universal jurisdiction for the prosecution of grave breaches of IHL in South Africa is a theoretically sound principle for ending impunity for international crimes, it has some gaps that need to be filled. Throughout the study, it has been shown that from the perspective of South Africa, this principle affects the sovereignty of states as it compels them to defy their will and uphold IHL.<sup>9</sup> It pushes states to remain with the choice of either serving their interests or IHL. In most instances, states will opt to fulfil their political demands instead of the law, as South Africa showed when it refused to arrest, detain and surrender Al Bashir to the ICC. Hence, universal jurisdiction in South Africa will always be a reminder that law and power will forever conflict.<sup>10</sup> Noting the attitude of fellow African states towards the punishment of grave breaches of IHL and fear of provoking other states, states that intend to enforce universal jurisdiction risk regional exclusion and turmoil in their territories due to instability that may ensure.

To avoid political and security repercussions, states such as South Africa choose not to enforce IHL under universal jurisdiction. It is in South Africa's spirit of maintaining good relations with Sudan that it refused to arrest, detain and surrender its former leader to the ICC.<sup>11</sup> By

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<sup>7</sup> ICRC, 'International Humanitarian Law in Domestic Law' (ICRC, 2015) <<https://www.icrc.org/en/document/international-humanitarian-law-domestic-law>> accessed 25 January 2021.

<sup>8</sup> ICRC, 'Rule 149. Responsibility for Violations of International Humanitarian Law' (ICRC, (date unknown)) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule149](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149)> accessed 21 January 2021.

<sup>9</sup> Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 4.

<sup>10</sup> Cherif M Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law & Contemp Probs* 9, 11-12.

<sup>11</sup> Republic of South Africa Department of Foreign Affairs, 'Sudan (the Republic of the)' 2003) <<http://www.dirco.gov.za/foreign/bilateral/sudan.html>> accessed 21 January 2021.

failing to arrest Al Bashir for grave breaches of IHL, good relations were maintained between South Africa and Sudan, with the latter always grateful to its South African counterparts. The same could be said of their relationships with foreign allies, with whom they share similar political sentiments.<sup>12</sup> While this is good for regional stability, it shows a callous disregard for the plight of victims who perished when Al Bashir allegedly committed grave breaches of IHL.

Government officials, such as Presidents, may, in their capacity, be held immune from prosecution by foreign courts for some crimes. This exclusion does not apply to grave breaches of IHL. Immunity is founded on the principles that all states are equal and that no state should interfere with another.<sup>13</sup> Articles 31 and 39 of the Vienna Convention on Diplomatic Relations provides that state officials may enjoy immunity from their states of residence but may be subjected to prosecution if they commit grave breaches of IHL. The need for the prosecution of grave breaches outweighs the right to jurisdictional immunity of a state official who committed them. In *DR Congo v Belgium*, the ICJ observed that ‘jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.’<sup>14</sup>

Therefore, an official who committed grave breaches during his term of office is subject to prosecution when his term of office lapses. In *Prosecutor v Blaskic*,<sup>15</sup> the ICTY (Appeals Chamber) decided that a state official may not be held liable for acts committed in an official capacity. However, there is an exception to this rule when war crimes, crimes against humanity and genocide have been committed. Perpetrators of these crimes may not claim immunity as a defence, even when these crimes were committed while acting under their official capacity. On the contrary, a defence that an act was committed in pursuit of sovereign functions is an aggravating factor. The issue of immunity may have been a core excuse for South Africa’s refusal to arrest, detain and surrender Al Bashir to the ICC, although it was clarified by courts that South Africa must act accordingly since Al Bashir was not immune from prosecution. South Africa’s failure to act clearly demonstrates how the ends of justice in the adjudication of

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<sup>12</sup> Phillip De Wet, 'Sa Will Suffer No Consequences for Failing to Deliver Al-Bashir to Justice' (*Mail and Guardian*, 2017) <<https://mg.co.za/article/2017-07-06-sa-fails-icc-duty-but-avoids-consequences/>> accessed 26 January 2021.

<sup>13</sup> Werle, *Principles of International Criminal Law* 352.

<sup>14</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, para 60.

<sup>15</sup> *Prosecutor v Tihomir Blaskic (Appeal Judgement)* 29 October 1997, para 41.

grave breaches of IHL may be defeated. This is seen when Al Bashir never faced prosecution of gravely breaching IHL during his term of office as the President of Sudan. It is now that the Sudanese government tries to prosecute Al Bashir for his crimes. However, other African states are not showing any will in assisting Sudan to establish a special tribunal to try him or to surrender him to the ICC.<sup>16</sup>

Emphasis must be put on every state, including South Africa, that the principle of universal jurisdiction does not undermine the immunity of state officials. Instead, IHL complements IHRL. As such, IHL prohibits the violation of human rights in an armed conflict. It stands that state officials who commit grave breaches should not use their immunity as an excuse for their liability for war crimes, genocide and crimes against humanity. The reason for this is that these crimes deprive people of their non-derogable right to life.<sup>17</sup>

There is an increased risk of political interpretation and implementation of IHL, especially in the context of Africa and South Africa, which say that the ICC selectively adjudicates grave breaches of IHL.<sup>18</sup> Interference of politics in the adjudication of grave breaches of IHL leads to misinterpretation as states try to reconcile international law with politics. This affects the administration of justice and perpetuates impunity for grave breaches of IHL when committed by powerful states. The politicisation of IHL when it comes to international crimes defeats the purpose of protecting vulnerable people and ending impunity for serious crimes.

The fact that the ICC requests, instead of ordering, states to co-operate suggests that the obligation to co-operate is consensual. The United Nations Security Council Resolution 1583 (2005) compels all states to co-operate fully with the ICC. The obligation is binding to both State Parties and non-State Parties to the ICC Statute. Chad, Kenya, Djibouti, Malawi, and the Democratic Republic of Congo, like South Africa, failed to co-operate with the ICC's requests to arrest, detain and surrender Al Bashir to the ICC.<sup>19</sup> All these states are parties to the ICC

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<sup>16</sup> Al Jazeera and News Agencies, 'Sudan Says Will 'Hand over' Al-Bashir to ICC for War Crimes Trial' (*Al Jazeera*, 2021) <<https://www.aljazeera.com/news/2021/8/12/sudan-omar-al-bashir-icc-war-crimes-darfur>> accessed 26 September 2021. See also Maram Mahdi and Otilia Anna Maunganidze, 'Why Has Sudan Decided to Hand over Al-Bashir to the ICC?' (*Institute for Security Studies*, 2021) <<https://issafrica.org/iss-today/why-has-sudan-decided-to-hand-over-al-bashir-to-the-icc>> accessed 26 September 2021.

<sup>17</sup> Cherif M Bassiouni, *Victims' Rights and Participation in ICC Proceedings and in Emerging Customary International Law* (Koninklijke Brill NV 2016) 233-234.

<sup>18</sup> ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) International Review of the Red Cross 719, 720.

<sup>19</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* Judgement of 9 April 2014.

Statute and are bound to co-operate with it. However, they refused appeals by prosecutors of the ICC to hand him over. The Security Council did not sanction these states for their failure to co-operate. As a result of lack of support from the Security Council, the prosecutor stated that she would ‘hibernate investigative activities in Darfur.’<sup>20</sup>

The failure by states, including South Africa, to co-operate with the ICC leads to a slow and frustrating pace in the fulfilment of justice at the ICC.<sup>21</sup> The refusal to comply with the court’s requests tarnishes its reputation and may result in its collapse. Critics of the ICC see it as dysfunctional and worthless to decide on any matter.<sup>22</sup> The postponement of the coming into force of Article 87(7) of the ICC Statute, which requires the ICC to refer some matters to the United Nations Security Council or the Assembly of State Parties, creates an impression that refusal by states to co-operate with the court is condoned. This brings an additional assumption that a decision on a state’s failure to co-operate is usually made on an improper judicial determination.<sup>23</sup> Against these findings, the study proffers the following recommendations to enhance South Africa’s fulfilment of its obligations under universal jurisdiction to assist in ending impunity for serious international crimes by repressing, suppressing and punishing grave breaches.

#### **5.4 Recommendations**

When the ICC makes its decisions, a referral should be made to the UN Security Council or the Council of State Parties (CSP), depending on which of the two bodies referred the matter to the ICC. A referral is made for further decisions on the matter. These two bodies act as the whip for the ICC in that they can impose sanctions as punishment for violations of IHL.<sup>24</sup> When the ICC decided on South African’s failure to arrest and surrender Al Bashir, it must also have included South Africa’s referral to the UN Security Council for further determinations. Nevertheless, this was not done. No ICC matter has been handed over to the UN Security

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<sup>20</sup> See this on United Nations Security Council, *Statement to the UNSC on the Situation in Darfur, Pursuant to Unscr 1583*, 2005 para 4.

<sup>21</sup> In *Prosecutor v Thomas Lubanga Dyilo* Judgement pursuant to Article 74 of the Statute, ICC-01/04-1/06-2842, Judgement of 14 march 2012 on charges of war crimes, took five years. The case of *Prosecutor v Germain Katanga* ICC-01/04-01/07 OA 8, International Criminal Court (ICC), Judgement of 25 September 2009, also took five years to be completed and the case of *Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/12, Judgement of 16 October 2015, ran for over four years and was eventually acquitted.

<sup>22</sup> See Rod Rastan, 'Testing Co-Operation: The International Criminal Court and National Authorities' (2008) 21 *Leiden J Int Law* 431, 431-456.

<sup>23</sup> Goran Sluiter, 'Obtaining Cooperation from Sudan- Where Is the Law?' (2008) 6 *J Int Crim Justice* 871, 6.

<sup>24</sup> Suzgo Lungu and Ntombizozuko Dyani-Mhango, 'Ensuring That State Parties to the Roman Statute Co-Operate with ICC Requests to Arrest and Surrender Suspects: Reflecting on the Role of the Security Council through the Lens of the Responsibility to Protect (R2p)' (2018) 1 *AYIHL* 119.

Council or the CSP for further deliberations. Failure to make a referral leaves the court as a referee that points out the wrong that has been done but does not give any penalties as consequences. This failure undermines the court as a permanent institution of justice for grave violations of IHL and other international crimes.

When Al Bashir came to South Africa, the government was aware that he was accused of committing grave breaches of IHL and that he was not immune from prosecution. South African courts gave orders for his arrest. Decisions by courts should have been regarded as sufficient notice to the government to arrest Al Bashir. However, the government ignored these orders and allowed Al Bashir to depart. The government's inaction was a defeat of the ends of justice. Whether responsible persons must be prosecuted is a difficult question. Notwithstanding, the refusal to arrest, detain and surrender Al Bashir to the ICC made South Africa complicit in his evasion of international justice for crimes committed in Darfur.

Customary IHL binds all states. Most of the provisions in IHL instruments are driven by customary IHL. States may choose to be bound by a treaty or not. However, things are different when it comes to customary IHL because it applies to all states by default. Upon failure to fulfil the mandate given by the ICC to arrest and surrender Al Bashir, South Africa threatened to withdraw from the ICC Statute. It could have withdrawn, although its duty would have remained under customary IHL. South Africa made an impromptu decision of withdrawal without making a thorough enquiry on the ramifications. The experience from its futile attempt to withdraw from the ICC Statute should be a reminder of the due diligence required when making such crucial decisions on critical aspects of international law, such as international criminal justice.

South Africa should continue to invest in the training of its armed forces and civilians on IHL for them to know what to do and what not to do when they find themselves in IHL related situations. This will prevent violations of IHL. It will also assist in avoiding indictments of its members in the ICC or other international criminal tribunal since ignorance of the law is not an excuse.<sup>25</sup> If South Africa fails to continue educating its members of the provisions of IHL and the overriding obligation to respect it, they will find themselves defenceless against acts which, by knowledge, they could have avoided. This is not to say that educating them on IHL will prevent violations. It will help minimise violations of IHL.

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<sup>25</sup> See V. Bernard, 'Time to Take Prevention Seriously' (2014) Weill 689, 690.





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