

SERIOUS CRIMES OF INTERNATIONAL CONCERN ACT, 2023

No. 22



of 2023

ARRANGEMENT OF SECTIONS

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An Act to criminalise serious crimes of international concern, and other related crimes.

Date of Assent: 29.11.2023

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Serious Crimes of International Concern Act, 2023, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and commencement

2. In this Act, unless the context otherwise requires —

Interpretation

“conventional international law” means a convention, treaty or other international agreement to which Botswana is a party and for the time being in force;

“Geneva Conventions” means the four Geneva Conventions adopted on 12 August 1949, the additional protocols to those Conventions and any future amendments to the Conventions; and

“property” has the meaning assigned to it under the Proceeds and Instruments of Crime Act.

Act No. 14 of 2018

Genocide

3. (1) A person who, in Botswana or elsewhere —

- (a) commits genocide; or
- (b) conspires or agrees with another person to commit genocide, whether the genocide is to be committed in Botswana or elsewhere,

commits an offence and is liable to the penalty specified in subsection (3).

(2) For the purposes of this section, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, and includes —

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

(3) A person who is convicted of genocide —

- (a) which involves murder shall be sentenced to death, except where extenuating circumstances are proved; and
- (b) which involves any other offence under this section shall be subject to the penalty imposed in accordance with the laws of Botswana.

4. (1) A person who, in Botswana or elsewhere, commits a crime against humanity commits an offence and is liable to the penalty specified in subsection (4).

(2) For the purposes of this section, a “crime against humanity” means any of the following crimes when committed intentionally as part of a widespread or systematic attack directed against any civilian population —

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of a population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this section;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid; and

Crimes
against
humanity

- (k) other inhumane offences of a similar character which intentionally cause great suffering, or serious injury to body or to the mental or physical health of persons.
- (3) For the purposes of this section —
- “attack directed against any civilian population” means a course of conduct involving the multiple commission of offences referred to in subsection (2) against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
 - “deportation or forcible transfer of a population” means the forced displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without lawful grounds permitted under international law;
 - “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time;
 - “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - “extermination” includes the intentional infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
 - “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - “the crime of apartheid” means inhumane acts of a character similar to those referred to in subsection (2), committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and
 - “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of an accused person, but does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

- (4) A person who is convicted of a crime against humanity —
 - (a) which involves murder shall be sentenced to death, except where extenuating circumstances are proved; and
 - (b) which involves any other offence under this section shall be subject to the penalty imposed in accordance with the laws of Botswana.
- 5. (1) A person who, in Botswana or elsewhere, commits a war crime is liable to the penalty specified in subsection (4).
- (2) For the purposes of this section, a “war crime” means —
 - (a) grave breaches of the Geneva Conventions, and includes any of the following offences against persons or property protected under the provisions of the relevant Geneva Convention —
 - (i) willful killing,
 - (ii) torture or inhuman treatment, including biological experiments,
 - (iii) willfully causing great suffering, or serious injury to body or health,
 - (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,
 - (v) compelling a prisoner of war or any other protected person to serve in the forces of a hostile power,
 - (vi) willfully depriving a prisoner of war or any other protected person of the right to a fair and regular trial,
 - (vii) unlawful deportation or transfer or unlawful confinement, and
 - (viii) the taking of hostages;
 - (b) serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, and includes any of the following offences —
 - (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,
 - (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives,
 - (iii) intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict,
 - (iv) intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict,

- (v) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,
- (vi) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives,
- (vii) killing or wounding a combatant who, having laid down his or her arms or having no longer any means of defence, has surrendered at his or her discretion,
- (viii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury,
- (ix) the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,
- (x) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, where such buildings, monuments, hospitals and places are not military objectives,
- (xi) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical treatment of the person concerned nor carried out in his or her interest, and which cause or may cause death to or seriously endanger the health of such person or persons,
- (xii) killing or wounding treacherously individuals belonging to a hostile nation or army,
- (xiii) declaring that no quarter will be given,
- (xiv) destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war,
- (xv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of a hostile party,
- (xvi) compelling the nationals of a hostile party to take part in the operations of war directed against their own country, even if they were in the hostile party's service before the commencement of the war,

- (xvii) pillaging a town or place, even when taken by assault,
 - (xviii) employing poison or poisoned weapons,
 - (xix) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
 - (xx) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which do not entirely cover the core or are pierced with incisions,
 - (xxi) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in any annex to the Statute,
 - (xxii) committing outrages upon personal dignity, in particular humiliating and degrading treatment,
 - (xxiii) committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined under section 4(3), enforced sterilisation, or any other form of sexual violence in contravention of the Geneva Conventions,
 - (xxiv) utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations,
 - (xxv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law,
 - (xxvi) intentionally using the starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as those provided for under the Geneva Conventions, and
 - (xxvii) conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities; and
- (c) in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions, and includes any of the following offences committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause —
- (i) violence to life and person, in particular murder, mutilation, cruel treatment and torture,
 - (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment,

- (iii) the taking of hostages, and
- (iv) the passing of sentences and the carrying out of executions without a previous judgment pronounced by a lawfully constituted court, affording all judicial guarantees which are generally recognised as indispensable.

(3) Subject to the provisions of subsection (2), subsection (2) (c) applies to armed conflicts not of an international character and shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(4) A person who is convicted of a war crime —

- (a) which involves murder shall be sentenced to death, except where extenuating circumstances are proved; or
- (b) which involves any other offence under this section shall be subject to the penalty imposed in accordance with the laws of Botswana.

6. (1) A person who, in Botswana or elsewhere, commits a crime of aggression is liable to the penalty specified in subsection (4).

Crime of
aggression

(2) For the purposes of this section, a “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

(3) For the purposes of subsection (2), “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, and any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression —

- (a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) the bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) the blockade of the ports or coasts of a State by the armed forces of another State;
- (d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

- (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; and
- (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.
- (4) A person who is convicted of a crime of aggression -
- (a) which involves murder shall be sentenced to death, except where extenuating circumstances are proved; or
- (b) which involves any other offence under this section shall be subject to the penalty imposed in accordance with the laws of Botswana.
- 7. A person who —**
- (a) attempts to commit;
- (b) counsels or procures the commission of;
- (c) orders, incites, solicits or induces the commission of;
- (d) aids or abets or otherwise assists in the commission or attempted commission of;
- (e) is an accessory after the fact in relation to; and
- (f) intentionally contributes in any other way to the commission or attempted commission of,
- an offence under this Act, commits an offence and is liable to the same penalty as the penalty for the offence.
- 8. A person who conspires in Botswana to commit an offence under this Act, in or outside the territory of Botswana, or who conspires outside Botswana to commit an offence under this Act in Botswana commits an offence and is liable to the same penalty as the penalty for the offence.**
- 9. (1) It shall not be a defence to an offence under this Act for a person charged with the offence to plead that he or she committed the act constituting such offence pursuant to an order by a Government or a superior, whether military or civilian unless —**
- (a) the person was under a legal obligation to obey the order of the Government or the superior in question;
- (b) the person did not know that the order was unlawful; and
- (c) the order was not manifestly unlawful.
- (2) For the purposes of this section, orders to commit genocide, a crime against humanity or a war crime shall be regarded as being manifestly unlawful.**
- 10. (1) A military commander or a person effectively acting as a military commander shall be liable for an offence under this Act committed by forces under his or her effective command and control or as the case may be, under his or her effective authority and control, as a result of his or her failure to exercise control over such forces where —**

Other ancillary offences

Conspiracy

Superior orders not a defence

Responsibility of commanders and other superiors

- (a) he or she either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offence; and
- (b) he or she failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of such offence or to submit the matter to the competent authorities for investigation or prosecution.

(2) A superior or subordinate not described in subsection (1) shall be liable for an offence under this Act committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control over such subordinates where —

- (a) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offence;
- (b) the offences concerned activities that were within the superior's effective responsibility and control; and
- (c) the superior failed to take necessary and reasonable measures within his or her power to prevent or repress the commission of the offence or to submit the matter to the competent authorities for investigation and prosecution.

(3) A person liable under this section for an offence under this Act shall, for the purposes of this Act, be regarded as having aided, abetted, counseled or procured the commission of that offence.

11. Where an act constituting an offence under this Act is committed by any person outside the territory of Botswana, proceedings may be instituted against that person for that offence in Botswana, if —

- (a) the person is a citizen or permanent resident of Botswana;
- (b) the person has committed the offence against a citizen or permanent resident of Botswana; or
- (c) the person is, after the commission of the offence, present in Botswana.

12. The Prescriptions Act or any other statutory limitation shall not be applicable to offences under this Act.

13. (1) An offence under this Act shall be considered to be crime for which an arrangement may be made for international assistance in criminal matters under the Mutual Assistance in Criminal Matters Act.

(2) For the purposes of section 3 of the Mutual Assistance in Criminal Matters Act, the International Criminal Court established under the Rome Statute of the International Criminal Court shall be regarded as a foreign country.

14. (1) An offence under this Act shall be considered to be an extradition crime for which extradition may be granted or obtained under the Extradition Act.

Jurisdiction

Statute of imitations not applicable to crimes under this Act
Cap. 13:01

International assistance in criminal matters
Cap. 08:04

Extradition
Cap. 09:03

(2) For the purposes of section 3 of the Extradition Act, the International Criminal Court established under the Rome Statute of the International Criminal Court shall be regarded as a country.

General penalty

15. Any person who contravenes the provisions of this Act for which no penalty is otherwise provided in this Act or under any other law and is convicted of an offence shall be liable to a fine not exceeding P100 000, or to a term of imprisonment not exceeding 20 years, or to both.

Regulations

16. The Minister may make regulations for the better carrying out of the provisions and purposes of this Act.

Repeal of the Rome Statute of the International Criminal Court Act, 2017 Act No. 1 of 2023

17. The Rome Statute of the International Criminal Court Act, 2017, is hereby repealed.

PASSED by the National Assembly this 10th day of August, 2023.

BARBARA N. DITHAPO,
Clerk of the National Assembly.