

REPUBLIC OF SOUTH AFRICA

PROHIBITION OR RESTRICTION OF CERTAIN CONVENTIONAL WEAPONS BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 29636 of 23 February 2007)
(The English text is the official text of the Bill)*

(MINISTER OF DEFENCE)

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BILL

To enact the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects into South African law; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Republic—

- is committed to international humanitarian law, and particularly the law on armed conflict;
- recognises the general principle of the protection of the civilian population against the effects of hostilities;
- also recognises the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited;
- further recognises the principle that prohibits or restricts the use in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering;
- acknowledges the need to prohibit the use of weapons which inflict excessive injury or suffering on combatants or renders their death inevitable;
- acceded to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 and its original three Protocols on 13 September 1995, Protocol IV on 13 October 1995 and the amended Protocol II on 26 June 1998; and
- is obliged in terms of international law, and in particular international humanitarian law, to incorporate the Convention and its Protocols into South African law by means of national legislation, and to further provide for appropriate penal sanctions,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Definitions

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1. In this Act, unless the context indicates otherwise—
 - “**anti-handling device**” means an anti-handling device as defined in the Schedule to the Anti-Personnel Mines Prohibition Act, 2003 (Act No. 36 of 2003);
 - “**blinding laser weapon**” means a weapon specifically designed, as its sole combat function or as one of its combat functions, to cause permanent blindness to the naked eye; 25
 - “**booby-trap**” means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act;
 - “**civilian objects**” means all objects which are not military objectives; 30
 - “**component part**” means any identifiable component designed or adapted to form an essential and integral part of any weapon prohibited by this Act;
 - “**concentration of civilians**” means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads; 35
 - “**Convention**” means the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, acceded to by the Republic on 13 September 1995, and its Protocols;
 - “**Department of Defence**” means the Defence Secretariat, the South African National Defence Force and any auxiliary service defined in the Defence Act, 2002 (Act No. 42 of 2002); 40
 - “**employee of the Department of Defence**” means a member of the South African National Defence Force appointed in terms of the Defence Act, 2002 (Act No. 42 of 2002), or an employee of the Department of Defence appointed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994); 45
 - “**explosive ordnance**” means all conventional munitions containing explosives that have not been covered by existing Protocols of the Convention other than Protocol V on Explosive Remnants of War;

- “**export**” means to supply another person outside the Republic with prohibited or restricted weapons, whether or not that is done in exchange for currency or any other commodity or benefit;
- “**import**” means to bring prohibited or restricted weapons into any part of the Republic or to cause such weapons to be so brought in, whether or not that is done in exchange for currency or any other commodity or benefit; 5
- “**incendiary weapon**” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target; 10
- “**information**” means any recorded information regardless of form or medium;
- “**manufacture**” includes the design, development, production and assembly of prohibited weapons;
- “**military objective**” means any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation offers a definite military advantage, but does not include military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; 15
- “**mine**” —
- (a) means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle; and 20
- (b) includes mines laid to interdict beaches, waterway crossings or river crossings; but
- (c) excludes anti-ship mines used at sea or in inland waterways; 25
- “**minefield**” means a defined area in which any number of mines have been placed, and includes areas which simulate minefields;
- “**Minister**” means the Minister of Defence;
- “**other devices**” means manually emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time; 30
- “**permanent blindness**” means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery;
- “**place**”, in relation to a mine, means to use, locate, emplace or situate a mine in a manner that would or could cause an explosion by the presence, proximity or contact of a vehicle, person or animal; 35
- “**police official**” means—
- (a) a member of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);
- (b) a person designated by the Minister for Safety and Security as a police official; 40
- (c) a military police official appointed by the Chief of the Defence Force in terms of section 30 of the Defence Act, 2002 (Act No. 42 of 2002); or
- (d) any other member of the South African National Defence Force deployed in a joint operation in cooperation with the South African Police Service;
- “**premises**” includes any land, building or structure or any vehicle, vessel, aircraft or other means of conveyance; 45
- “**procure**” means to obtain a prohibited weapon through purchase, forfeiture, donation, cession, transfer or discovery;
- “**prohibited weapons**” means weapons referred to in sections 5 and 8;
- “**protocols**” means the Protocols to the Convention, namely the: 50
- (a) Protocol on Non-Detectable Fragments (Protocol I), 10 October 1980;
- (b) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996);
- (c) Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980; 55
- (d) Protocol on Blinding Weapons (Protocol IV to the 1980 Convention), 13 October 1995;

- “**remotely delivered mine**” means a mine not directly placed but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft, excluding mines delivered from a land-based system from less than 500 metres, provided that those mines are used in accordance with Article 6 and other relevant Articles of Amended Protocol II; 5
- “**restricted weapons**” means weapons referred to in sections 6 and 7;
- “**this Act**” includes any regulations made in terms of section 14;
- “**transfer**” includes the—
- (a) transfer of title to and control over prohibited or restricted weapons;
 - (b) selling, hiring, letting, lending, borrowing, donating, giving, purchasing, receiving or parting with or gaining possession of prohibited or restricted weapons; and 10
 - (c) transit of prohibited or restricted weapons into, out of or through the territory of the Republic by any means;
- “**unexploded ordnance**” means explosive ordnance that has been prepared for use and may have been fired, dropped, launched, or projected but failed to explode; 15
- “**weapons**” means all conventional weapons referred to in the Convention.

CHAPTER 1

OBJECTS AND APPLICATION OF ACT

Objects of Act 20

2. The objects of the Act are to—
- (a) enact the Convention into law as contemplated in section 231(4) of the Constitution of the Republic of South Africa, 1996;
 - (b) ensure that the Republic complies with the Convention;
 - (c) prohibit the use, stockpiling, production, development, acquisition and transfer of prohibited weapons; 25
 - (d) provide for the reporting on the Republic’s compliance with the Convention to Parliament, and to the Secretary General of the United Nations.

Extraterritorial application of Act, and jurisdiction

3. (1) If an offence is committed in terms of this Act, a court of the Republic may try any— 30
- (a) South African citizen contemplated in the South African Citizenship Act, 1995 (Act No. 88 of 1995);
 - (b) person who is a permanent resident as contemplated in the Immigration Act, 2002 (Act No. 13 of 2002); 35
 - (c) juristic person incorporated or registered in the Republic; or
 - (d) person who was arrested in the territory of the Republic, in its territorial water or on board a ship or aircraft registered or required to be registered in the Republic,
- charged with that offence, notwithstanding the fact that the act or omission to which the charge relates was committed outside the Republic. 40
- (2) If an offence is committed in terms of this Act by a person other than a person referred to in subsection (1), a court of the Republic may try that person, notwithstanding the fact that the act or omission to which the charge relates was committed outside the Republic, if— 45
- (a) that act or omission affects or is intended to affect a public body, business or any other person in the Republic;
 - (b) that person is arrested in the territory of the Republic, in its territorial water or on board a ship or aircraft registered or required to be registered in the Republic; and 50
 - (c) that person is not extradited by the Republic or if there is no application to extradite that person.
- (3) Any offence committed outside the Republic as contemplated in subsection (1) or (2) is, for the purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed— 55

- (a) at the place where the accused is ordinarily resident or, in the case of a person contemplated in subsection (2), where the accused was arrested; or
- (b) at the principal place of business of the accused.

CHAPTER 2

PROHIBITIONS OR RESTRICTIONS, OFFENCES AND PENALTIES 5

Anti-personnel mines

4. This Act is not applicable to anti-personnel mines, which are prohibited in terms of the Anti-Personnel Mines Prohibition Act, 2003 (Act No. 36 of 2003).

Non-detectable fragments

- 5. No person may— 10
 - (a) use, place, possess, procure, manufacture, stockpile, transfer, deal in, import or export any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays; or
 - (b) possess, procure, manufacture, stockpile, transfer, deal in, import or export a component part of a weapon contemplated in paragraph (a). 15

Mines, booby-traps and other devices

- 6. (1) No person may use or direct any mine, booby-trap or other device—
 - (a) which is designed or of a nature to cause superfluous injury or unnecessary suffering;
 - (b) which employs a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations;
 - (c) in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either— 25
 - (i) such mine, booby-trap or other device is placed on or in the close vicinity of a military objective; or
 - (ii) measures are taken to protect civilians from their effects;
 - (d) either in offence, defence or by way of reprisals, against the civilian population or against individual civilians or civilian objects; 30
 - (e) in an indiscriminate manner—
 - (i) which is not on or directed against a military objective, and in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be used; or 35
 - (ii) which employs a method or means of delivery which cannot be directed at a specific military objective; or
 - (iii) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. 40
- (2) No person may use booby-traps or other devices—
 - (a) which are in any way attached to or associated with— 45
 - (i) internationally recognised protective emblems, signs or signals;
 - (ii) sick, wounded or dead persons;
 - (iii) burial or cremation sites or graves;
 - (iv) medical facilities, medical equipment, medical supplies or medical transportation; 50
 - (v) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
 - (vi) food or drink;
 - (vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots; 55

- (viii) objects clearly of a religious nature;
- (ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (x) animals or their carcasses;
- (b) in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material. 5
- (3) No person may use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.
- (4) No person may use remotely delivered mines unless they are, to the extent 10 feasible, equipped with an effective self-destruction or self-neutralisation mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.

Incendiary weapons 15

7. No person may—
- (a) make the civilian population, individual civilians or civilian objects the object of attack by incendiary weapons;
 - (b) make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons; 20
 - (c) make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimising, 25 incidental loss of civilian life, injury to civilians and damage to civilian objects; or
 - (d) make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves 30 military objectives.

Blinding laser weapons

8. (1) No person may—
- (a) use, possess, procure, manufacture, stockpile, transfer, deal in, import or export blinding laser weapons; or 35
 - (b) possess, procure, manufacture, stockpile, transfer, deal in, import or export a component part of weapons contemplated in paragraph (a).
 - (2) Any person employing laser systems shall take all feasible precautions to avoid the incidence of permanent blindness to the naked eye.

Offences and penalties 40

9. A person who contravenes section 5, 6, 7 or 8 is guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding 15 years or to both a fine and such imprisonment.

Surrender of prohibited weapons and forfeiture to State

10. (1) Any person in possession of any prohibited weapon or component part 45 immediately before the commencement of this Act must, within six months from the date of commencement of this Act, notify a police official of such possession.
- (2) In the event of any military operational deployment outside the Republic, any person in possession of any prohibited weapon or component part must notify a military police official or any other person designated by the Chief of the South African National 50 Defence Force for this purpose.
- (3) The police official must register the notification in the manner prescribed and must arrange for the collection of the prohibited weapon or component part without delay.
- (4) Any person referred to in subsection (1) or (2) who fails to give the notification and remains in possession of a prohibited weapon or component part after the period 55

prescribed in subsection (1) has expired is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding 15 years or to both a fine and such imprisonment.

(5) All weapons and component parts collected in terms of this section shall be forfeited to the State.

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CHAPTER 3

REPORTING ON COMPLIANCE WITH CONVENTION

Reporting

11. The Minister must—

- (a) gather, record and disseminate information in order to supervise compliance with the Convention and must report on an annual basis on the Republic's compliance with the Convention—
 - (i) through the Minister of Foreign Affairs, to the Secretary-General of the United Nations; and
 - (ii) to Parliament within two weeks after the Minister has made the report contemplated in subparagraph (i).
- (b) monitor the Republic's compliance with the Convention.

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Power to require information

12. (1) The Minister may require information from any person if the information is necessary for—

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- (a) the administration and enforcement of this Act; and
- (b) compliance with the Convention.

(2) The Minister may, by written notice served on any person, require that person to provide such information as may be necessary within the period and in the manner and form specified in the notice.

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(3) If a person, without reasonable excuse, refuses to provide the information in compliance with subsection (2), the Minister may apply to court for an order requiring the person to provide the information.

(4) On hearing the application, the court may order the person to provide the information if the court concludes that, in the circumstances of the case, the production of the information is necessary to ensure South Africa's compliance with the Convention.

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CHAPTER 4

GENERAL PROVISIONS

Guidelines for training

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13. The Minister must ensure that—

- (a) general guidelines are issued in respect of the training of any official performing a function in terms of this Act or the Convention; and
- (b) military instructions and operating procedures relevant to the Convention and this Act are issued, and that members of the South African National Defence Force receive training commensurate with their duties to comply with this Act.

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Regulations

14. (1) The Minister may, by notice in the *Gazette*, make regulations regarding—

- (a) anything that may or must be prescribed in terms of this Act; and
- (b) any administrative or procedural matter which it is necessary to prescribe in order to give effect to the provisions of this Act.

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(2) Regulations made by the Minister prescribing the matters stated in section 10(3) must be made in consultation with the Minister for Safety and Security.

(3) The Minister must cause a copy of regulations made under this section to be tabled in Parliament as soon as possible after publication thereof.

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Delegation of power and assignment of duty

- 15.** (1) The Minister may—
- (a) delegate any power, in whole or in part, conferred upon him or her under this Act, except the power to make regulations in terms of section 14; and
 - (b) assign any duty, in whole or in part, imposed upon him or her in terms of this Act, to—
 - (i) the Secretary for Defence;
 - (ii) the Chief of the South African National Defence Force; or
 - (iii) an employee of the Department of Defence holding a position or rank of at least Director, Brigadier-General or Rear Admiral (Junior Grade).
- (2) A delegation or an assignment in terms of subsection (1)—
- (a) must be in writing;
 - (b) is subject to such terms and conditions as the Minister may impose; and
 - (c) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty in question.

Short title and commencement

- 16.** (1) Before the commencement of this Act, the Minister must publish a notice in the *Gazette* setting out the English text of the provisions of the Convention as in force at such commencement.
- (2) This Act is called the Prohibition or Restriction of Certain Conventional Weapons Act, 2007, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PROHIBITION OR RESTRICTION OF CERTAIN CONVENTIONAL WEAPONS BILL, 2007

1. BACKGROUND

1.1 South Africa signed and ratified the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (the Convention). The Convention seeks to implement the international humanitarian law principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited. The Convention therefore identifies specific categories of conventional weapons and places prohibitions or restrictions on their use.

1.2 The Convention further provides that each State Party should take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Convention on territory under its jurisdiction or control. In view of this provision, South Africa is under an obligation to promulgate enabling legislation in order to give effect to this Convention.

1.3 Section 231(4) of the Constitution of the Republic of South Africa, 1996, states that any international agreement becomes law within this country when enacted into law by national legislation. A self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

1.4 By promulgating the Prohibition or Restriction of Certain Conventional Weapons Bill, the Republic will have fulfilled its obligations under the Convention.

2. MAIN OBJECTS

2.1 The main object of this Bill is to place the necessary restrictions or prohibitions on specific categories of conventional weapons and thus fulfil South Africa's obligations under the Convention.

2.1.1 Definitions

The Bill creates consistency with the Convention by using the same definitions and thereafter adding those definitions that are necessary to eliminate misinterpretation in the implementation of the Bill.

2.1.2 Prohibitions or restrictions

The Convention requires that restrictions or prohibitions be placed on specifically identified categories of conventional weapons. This Bill provides for restriction or prohibition of those identified conventional weapons. The Bill also ensures that a distinction is drawn between categories of conventional weapons that are prohibited and those that are restricted.

The Bill provides for the prohibition of the following conventional weapons:

- Non-detectable fragments;
- blinding laser weapons.

The Bill provides for restrictions on the use of the following conventional weapons:

- Mines, booby-traps and other devices;
- incendiary weapons.

2.1.3 Penal sanctions

Penal sanctions are included to discourage violations of the Convention. Any contravention of the Bill will be punishable by either a fine or imprisonment, or both.

2.1.4 Extra-territorial application of legislation

The Bill seeks to address transgressions by South African persons acting outside the borders of the Republic. South African courts are competent to prosecute South African citizens who contravene the provisions of the Bill outside the borders of the Republic, and the contravention will be deemed to have occurred within its borders.

2.1.5 Reporting on South African compliance with Convention

The Convention requires every State Party to report annually to the Secretary of the United Nations on its compliance with the obligations of the Convention. The Bill thus places the obligation on the Minister of Defence to report on South Africa's compliance, via the Minister of Foreign Affairs.

2.1.6 Miscellaneous

The Bill provides that the Minister may make regulations and delegate powers and duties in respect of compliance with South Africa's obligations under the Convention.

3. CONSULTATION WITH KEY STAKEHOLDERS

3.1 The committee that was charged with the responsibility of drafting the Bill consulted with all stakeholders that were considered key to the drafting of the Bill. These stakeholders included the following:

- Department of Foreign Affairs.
- South African Police Service.

In order to add the necessary international perspective to the Bill, the drafting committee consulted consistently with the International Committee of the Red Cross (ICRC).

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Defence are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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

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