



PROJECT 25

REPORT ON

STATUTORY LAW REVISION:

LEGISLATION ADMINISTERED BY THE

DEPARTMENT OF

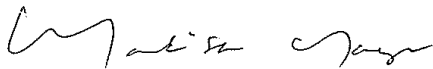
INTERNATIONAL RELATIONS AND COOPERATION

DECEMBER 2014

TO:

**ADV TM MASUTHA, MP: MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973) (as amended), for your consideration, the Commission's Report on statutory law revision: the review of legislation administered by the Department of International Relations and Cooperation (Project 25).

A handwritten signature in black ink, appearing to read "Madisa Maya". The signature is fluid and cursive, with the first name "Madisa" being more prominent than the last name "Maya".

**MADAM JUSTICE MANDISA MAYA
CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION**

Introduction

The South African Law Reform Commission Act 19 of 1973 established the South African Law Reform Commission (SALRC). The current members of the Commission, whom the President appointed in 2013 for a period of five years, are –

The Honourable Madam Justice Mandisa Maya (Chairperson)

The Honourable Mr Justice Jody Kollapen (Vice-Chairperson)

Professor Pamela Schwikkard (Member; resigned January 2014)

Professor Vinodh Jaichand (Member)

Advocate Mahlape Sello (Member)

Mr Irvin Lawrence (Member)

Ms Namhla Siwendu (Member).

The Acting Secretary is Mr JB Skosana. The project leader responsible for this investigation is Advocate Mahlape Sello. The researcher assigned to this investigation is Mr Pierre van Wyk, who may be contacted for any enquiries about this report.

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Summary of findings and recommendations

1. The SALRC has been mandated with the task of revising the South African statute book, with a view to identifying and recommending for repeal or amendment those legislation (or provisions in legislation) that are inconsistent with the equality clause in the Constitution, or which are redundant or obsolete. Pursuant to this mandate, in 2004 the SALRC established that at that time there were 2 800 Acts in the statute book. Of those, 14 statutes (comprising 11 principal Acts and three amendment Acts) are currently administered by the Department of International Relations and Cooperation (DIRCO) (see Annexure B).

2. The following findings and recommendations are made in this report:

2.1. The Treaties of Peace Act 32 of 1921 has fulfilled the purpose for which it was enacted, and is now redundant and obsolete. The Act dealt with a specific international situation at the conclusion of World War 1. It gave legislative effect to the previously colonial relationship between the Union of South Africa and Britain, and contained references to now-obsolete mandates, expressions and designations (e.g. Union of South Africa, Governor-General, and His Majesty the King). These terms or phrases are no longer in use and are irrelevant or have otherwise ceased to serve any purpose in present-day South Africa. Hence, the Treaties of Peace Act 32 of 1921 is redundant and obsolete. The SALRC recommends that the Act be repealed. (See par 2.22.)

2.2 The Treaties of Peace Act 20 of 1948 has similarly fulfilled the purpose for which it was enacted. This Act dealt with a specific international situation at the end of World War II. It contains obsolete mandates, designations and expressions such as “Government of the Union of South Africa” and “Governor-General”. These terms are no longer in use or are irrelevant and have ceased to serve any purpose in present-day South Africa. The Treaties of Peace Act 20 of 1948 is therefore redundant and obsolete, and the SALRC recommends that this Act be repealed. (See par 2.24.)

2.3 The Diplomatic Mission in United Kingdom Service Act 38 of 1961 has also fulfilled the purpose for which it was enacted. The purpose of the Act was as follows:

- a consequential enactment to South Africa’s withdrawal from the Commonwealth of Nations;
- to regulate the appointment of “locally recruited staff in the United Kingdom”; and
- (most importantly) to repeal the High Commissioner’s Act No. 3 of 1911, which provided for the appointment, duties and remuneration of the Union’s High Commissioner in the United Kingdom, and members of his staff.

2.4 Act 38 of 1961 is redundant and obsolete, and has ceased to serve any purpose in present-day South Africa. The Act also contains references to obsolete mandates, designations and expressions, such as the “Union’s diplomatic mission” and “head of the Union’s diplomatic mission”. The SALRC recommends that the Act be repealed. (See par 2.27.)

2.5 The Commonwealth Relations (Temporary Provision) Act 41 of 1961 was intended to deal with the situation after 31 May 1961, when South Africa was no longer a member of the Commonwealth of Nations. Since 1961, South Africa’s position in this regard has changed again. After the end of the apartheid era, South Africa rejoined the Commonwealth of Nations on 1 June 1994. The outdated Act 41 of 1961 contains references to obsolete mandates, designations and expressions – such as “the fact that the Republic is not a member of the Commonwealth”; “Governor-General”; “House of Assembly”; “resolution of the Senate”; and “Table in the Senate” – which are no longer in use or are irrelevant and have ceased to serve any purpose in present-day South Africa. The Commonwealth Relations (Temporary Provision) Act 41 of 1961 is therefore redundant and obsolete. The SALRC recommends that the Act be repealed. (See par 2.30.)

2.6 The Commonwealth Relations Act 69 of 1962 was intended to deal with South Africa’s withdrawal from the Commonwealth of Nations, and to regulate citizenship laws thereof as a consequence. The Act has ceased to serve any purpose in present-day South Africa, and is therefore redundant and obsolete. Laws relating to citizenship and ancillary matters are now governed by legislation administered by the Department of Home Affairs. The SALRC recommends that Act 69 of 1962 be repealed. (See par 2.35.)

2.7 Section 1 of the African Renaissance and International Co-operation Fund Act 51 of 2000 contains the following outdated definitions:

- “‘Department’ as meaning Department of Foreign Affairs”
- “‘Minister’ as meaning Minister of Foreign Affairs”.

2.8 DIRCO intends to repeal Act 51 of 2000 when it promotes the South African Development Partnership Agency Bill in the near future. Hence there is no purpose in amending Act 51 of 2000, and the SALRC has not recommended the repeal of Act 51 of 2000 in the Schedule to the International Relations and Cooperation Laws Repeal and Related Matters Bill (Annexure A to this report). (See pars 2.39 and 2.40.)

2.9 Certain references in the Foreign States Immunities Act 87 of 1981 are no longer relevant. No definitions are given in the definitions section of this Act for the terms “Department” and “Minister”. However, in sections 13 and 17 of the Act, these designations clearly refer to the “Department of Foreign Affairs and Information” and “Minister of Foreign Affairs and Information” respectively. These references are no longer relevant. The SALRC recommends that references to these designations be updated and amended in the Act, so that “Minister” means the “Minister of International Relations and Cooperation”, and “Department” means the “Department of International Relations and Cooperation”. In addition, the Constitution (1996) now provides for the President as head of the State. The SALRC recommends that all instances where the term “State President” appears in the Act should use the term “President” instead. (See par 2.43.)

2.10 The definitions section of the Diplomatic Immunities and Privileges Act 37 of 2001 provides that –

- “‘Director-General’ means the Director-General: Foreign Affairs”
- “‘Minister’ means Minister of Foreign Affairs”.

2.11 In view of the name change of the Department, references to the ministry as “Foreign Affairs” are no longer relevant. The SALRC recommends that the Act be updated and amended to provide that “Director-General” means the “Director-General of International Relations and Cooperation”, and that “Minister” means the “Minister of International Relations and Cooperation”. (See par 2.52.)

2.12 Given that nearly 27 years (at the time of the approval of this report) have passed since the date of assent (3 March 1988) for the Foreign States Immunities Amendment Act 5 of 1988, the question arises whether this amendment Act has perhaps become redundant and ought to be repealed. The SALRC requested the view of DIRCO, in particular, to comment on this question. DIRCO confirmed in May 2014 that there is no longer a need to retain this amendment Act. It is therefore clear that the statute has become redundant, and the SALRC recommends that the Act be repealed. (See pars 2.58 and 2.59.)

2.13 More than 20 years (at the time of the approval of this report) have passed since the date of assent (8 December 1993) for the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. Despite this long period, apparently there has been no indication as to whether the Act would come into operation by proclamation. Hence the question arose whether this Act is perhaps redundant and should be repealed. The SALRC requested the view of DIRCO, in particular, about the retention or repeal of this Act. They responded as follows:

- In July 2012, DIRCO advised the SALRC that it (DIRCO) was in the process of drafting a Bill, which will repeal the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993.
- In October 2013, DIRCO advised that inter-departmental consultations about the Bill were ongoing.
- In November 2014, DIRCO confirmed that the name of the Bill has not been agreed on, and the drafting process is ongoing across the relevant departments.

2.14 The SALRC therefore does not recommend the repeal of the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. (See pars 2.63 and 2.64.)

List of sources

1. Albertyn Cathi “Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against Section 9 of the 1996 Constitution”. Document prepared for the SALRC, February 2006. Available on request from pvanwyk@justice.gov.za and the SALRC library.
2. Centre for Applied Legal Studies of the University of the Witwatersrand, Law and Transformation Programme “Feasibility and Implementation Study on the Revision of the Statute Book”. Document prepared for the South African Law Reform Commission and the German Agency for Technical Co-operation (Deutsche Gesellschaft für Technische Zusammenarbeit GmbH) April 2001. Available on request from pvanwyk@justice.gov.za and the SALRC library.
3. Department of International Relations and Cooperation: See “About the Department” accessed from <http://www.dfa.gov.za/department/index.html> on 8 August 2011.
4. *Hansard House of Assembly Debates*, vol. 108, col. 6056 (8 May 1961).
5. *Hansard House of Assembly Debates*, 1988 Part 2, col. 1393 to 1395 (17 February 1988)
6. Law Commission for England and Wales *Background Notes on Statute Law Repeals* accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008
7. Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984 Chapter 2 accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 28 May 2008

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CHAPTER 1

BACKGROUND AND SCOPE OF PROJECT 25

A Introduction

1 The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (SALRC) are set out in the South African Law Reform Commission Act 19 of 1973, as follows: to do research with reference to all branches of the law of the Republic, and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including:

- (a) the repeal of obsolete or unnecessary provisions;
- (b) the removal of anomalies;
- (c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
- (d) the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body, whose aim is the renewal and improvement of the law of South Africa on a continual basis.

2 History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC (which was then the SALC) began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, ordinances, and proclamations of the former colonies and republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its Project 25 on statute law, which aims to establish a simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act 94 of 1981, which repealed approximately 790 post-Union statutes.

1.4 Immediately after the advent of constitutional democracy in South Africa in 1994, the legislation enacted prior to that year remained in force. However, many pre-1994 provisions do not comply with the country's new Constitution. This discrepancy is exacerbated by the fact that some of the older provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004, the SALRC included in its law reform programme an investigation on statutory law, with the aim of revising all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the new investigation would emphasize compliance with the Constitution. Redundant and obsolete provisions that are identified during this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes existed at that time. These comprised principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer

serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

B WHAT IS STATUTORY LAW REVISION?

1.8 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.¹ Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live” law. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.9 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.² Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or is presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

¹ See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008 (hereinafter referred to as Law Commission for England and Wales *Background Notes on Statute Law Repeals*).

² See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 6.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:³

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. "Section 33 is repealed/shall cease to have effect";
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.12 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows:⁴

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required

³ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 7.

⁴ Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 28 May 2008.

- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.13 Statutory provisions usually become redundant as time passes.⁵ Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of a law and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.14 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act 33 of 1957⁶ mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.⁷ Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

⁵ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 9 and 10.

⁶ With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

⁷ See Law Commission for England and Wales *Background Notes on Statute Law Repeals the Background*, par 8.

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.15 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the Commission, the paper is published for general information and comments. Finally, the SALRC develops a report in respect of each department that reflects the comments on the discussion paper and contains a draft Bill proposing amending legislation.

C THE INITIAL INVESTIGATION

1.16 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of a revision of the South African statute book for constitutionality, redundancy, and obsolescence. The Centre for Applied Legal Studies pursued four main

avenues of research in this study, which was conducted in 2001 and the findings of which were submitted to the SALRC in April 2001.⁸ These four steps are outlined here.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.
2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.
3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.
4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.17 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions:

⁸ "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001. Available on request from pvanwyk@justice.gov.za and the SALRC library.

- (a) the Recognition of Customary Marriages (August 1998);
- (b) the Review of the Marriage Act 25 of 1961 (May 2001);
- (c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- (d) Traditional Courts (January 2003);
- (e) the Recognition of Muslim marriages (July 2003);
- (f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- (g) Customary Law of Succession (March 2004); and
- (h) Domestic Partnerships (March 2006).

D SCOPE OF THE PROJECT

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms, this leg of the investigation is limited to statutes or provisions in statutes that –

- differentiate between people or categories of people in a manner that is not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair, or have the potential to impair, a person's fundamental dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears on the face of it to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with

section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.⁹ However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited, because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, during the investigation certain other anomalies and obvious inconsistencies with the Constitution were identified. The SALRC has made recommendations on how to address these issues.

E CONSULTATION WITH STAKEHOLDERS

1.20 In 2004, Cabinet endorsed the proposal that government departments should be asked to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible only within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and the proposals for legislative amendment or repeal. The SALRC relies on the assistance of departments and stakeholders. This process should ensure that all relevant provisions are identified during this review, and are dealt with responsively and without creating unintended negative consequences.

⁹ Cathi Albertyn prepared a ‘Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution’, specifically for the SALRC in February 2006 available on request from pvanwyk@justice.gov.za.

1.21 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC's preliminary findings and proposals. The next step the SALRC undertakes is the development of a discussion paper in respect of legislation of each department, and upon its approval by the SALRC, the paper is published for general information and comment. Finally, the SALRC develops a report in respect of each department, which reflects the comments submitted on the discussion paper. The report also contains a draft Bill that proposes amending legislation.

1.22 In February 2011 the SALRC submitted its Consultation Paper containing the SALRC's preliminary findings and proposals to the Department of International Relations and Cooperation (DIRCO) for its consideration and requested the DIRCO to confirm whether it supported the provisionally proposed repeals and amendments.

1.23 On 30 May 2011, DIRCO submitted to the SALRC its comments on the SALRC consultation paper. The SALRC then started to develop its draft discussion paper, which reflected the comments received from DIRCO.

1.24 The Commission considered the draft discussion paper on this review at its meeting on 22 October 2011, and approved its publication for general information and comment. Discussion Paper 128 was published for general information and comment on 4 November 2011. The closing date for comment was 31 January 2012.

1.25 Few responses were received on Discussion Paper 128. The SALRC appreciates the comment it received from Prof Erika de Wet, Co-Director of the Institute for International and Comparative Law in Africa at the University of Pretoria and Professor of International Constitutional Law at the University of Amsterdam in the Netherlands; and from Mr Shaun Richter, State Law Advisor, Chief Directorate: Legal Services, Department of the Premier of the Provincial Government, Western Cape.

1.26 The SALRC also acknowledges the valuable assistance it received, particularly from officials in the Office of the Chief State Law Adviser (International Law) at DIRCO during all phases of this review.

1.27 The Commission considered the draft report on this review at its meeting on 6 December 2014. At this meeting the Commission approved the submission of the report to the Minister of Justice and Correctional Services, for referral to the Minister of International Relations and Cooperation to consider implementing the recommendations made in the report. The Commission also approved that the report be published in the public domain in 2015, once the Minister of International Relations and Cooperation and personnel at DIRCO have had an opportunity to read the report.

CHAPTER 2

EVALUATION OF LEGISLATION ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

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CHAPTER TWO

EVALUATION OF LEGISLATION ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

A Introduction

2.1 The Department of International Relations and Cooperation (DIRCO) is the ministry of foreign affairs for the South African government. In addition to managing and overseeing South Africa's diplomatic missions, the Department is responsible for South Africa's relationships and representations with foreign countries and international organisations. In his statement about the appointment of the new Cabinet on 10 May 2009, President Jacob Zuma referred to (among other things) changes in government structures. One such change was that the *Department of Foreign Affairs* would now be called the *Department of International Relations and Cooperation*.¹⁰

¹⁰ In a statement by Minister Maite Nkoane-Mashabane on 14 May 2009, she stated: "The name change to the Department of International Relations and Cooperation is in line with international trends and is informed by the need to give greater clarity on the mandate of the department. In this regard, over and above its normal functions the department will also engage in dynamic partnerships for development and cooperation. ... The renaming of the Department as the Department of International Relations and Cooperation is a deliberate decision on the part of government to ensure a holistic approach to foreign relations which reflects on developmental agenda." <http://www.dfa.gov.za/docs/speeches/2009/mash0514.html> See also Proclamation 44 of 2009 of 1 July 2009 published in *Government Gazette* 32367 about the transfer of administration and powers and functions entrusted by legislation to certain Cabinet members in terms of section 97 of the Constitution; and Proclamation 48 of 2009 of 7 July 2009 published in *Government Gazette* 32387, which in terms of section 7(5)(a) of the Public Service Act 1994 (promulgated under Proclamation 103 of 1994) amended Schedule 1 to the said Act with respect to national departments and the heads thereof.

2.2 The strategic objectives of DIRCO are listed as follows:¹¹

- Through bilateral and multilateral interactions protect and promote South African National interests and values.
- Conduct and co-ordinate South Africa's international relations and promote its foreign policy objectives.
- Monitor international developments and advise government on foreign policy and related domestic matters.
- Protect South Africa's sovereignty and territorial integrity.
- Contribute to the formulation of international law and enhance respect for the provisions thereof.
- Promote multilateralism to secure a rules based international system.
- Maintain a modern, effective and excellence driven department.
- Provide consular services to South African nationals abroad.
- Provide a world class and uniquely South African State Protocol service.

B General observations

2.3 Having regard to the scope of Project 25 within the context of this report (i.e. a review of legislation administered by DIRCO), it is important to note the following:

- (a) The SALRC'S mandate to conduct this investigation is limited to a review of the law. This report is therefore part of a narrowly focused and text-based statutory review process, as indicated in Chapter 1 above.
- (b) DIRCO participated in the SALRC audits of legislation during September 2003 and October 2005. In April 2010, DIRCO provided the SALRC with a list of primary legislation, which is the focus of review in this report. On 6 December

¹¹ See "About the Department" at <http://www.dfa.gov.za/department/index.html> accessed on 8 August 2011.

2010, DIRCO confirmed that there were no further amendments to the original list provided in April 2010.

- (c) Even if a statute administered by DIRCO appears not to contain any provisions that contradict or violate section 9 of the Constitution of the Republic of South Africa, 1996, the execution of such a statute is not necessarily (automatically) in line with the protections afforded by section 9, the equality clause. Therefore, this report does not reflect any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed.

C Evaluation of legislation

2.4 At the time of writing this report, DIRCO is responsible for administering fourteen statutes. The eleven principal statutes and three amendment statutes that are administered by DIRCO are evaluated in this report. The SALRC conducted the current investigation to determine whether any of these statutes or provisions therein should be repealed because of redundancy or obsolescence, or because they may infringe section 9 of the Constitution. The SALRC identified five statutes that should be repealed, and four Acts that should be amended. The recommended repeals and amendments are set out in the draft International Relations and Cooperation Laws Repeal and Related Matters Bill, which is attached as Annexure A to this report. The discussion below provides motivation for these proposals, and explains why the relevant statutes or provisions were identified for repeal or amendment.

2.5 In this chapter, the statutes recommended for repeal are the following:

- (a) The Treaties of Peace Act 32 of 1921;
- (b) The Treaties of Peace Act 20 of 1948;
- (c) The Diplomatic Mission in United Kingdom Service Act 38 of 1961;
- (d) The Commonwealth Relations (Temporary Provision) Act 41 of 1961;
- (e) The Commonwealth Relations Act 69 of 1962; and
- (f) The Foreign States Immunities Amendment Act 5 of 1988.

2.6 The statutes recommended for amendment are the following:

- (a) The Foreign States Immunities Act 87 of 1981; and
- (b) The Diplomatic Immunities and Privileges Act 37 of 2001.

2.7 We noted in Chapter 1 that the SALRC received two comments to its Discussion Paper 128. Mr Shaun Richter, State Law Advisor in the Directorate Legislation of the Chief Directorate: Legal Services at the Department of the Premier of the Provincial Government, Western Cape commented that the contents of Discussion Paper 128 have been noted. He stated that his directorate had especially noted which statutes were earmarked for repeal or amendment, respectively, in the proposed International Relations and Cooperation Laws Repeal Bill. His directorate had no further comment on the matter. Prof Erika de Wet, Co-Director of the Institute for International and Comparative Law in Africa at the University of Pretoria and Professor of International Constitutional Law at the University of Amsterdam in the Netherlands, provided a comprehensive comment to the SALRC on the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993, the Foreign States Immunities Act 87 of 1981, and the Foreign States Immunities Amendment Act of 1988. Her comments are reflected in the discussion of these three Acts below.

D Legislation reviewed and recommended to be retained without amendments required

1 The Foreign States Immunities Amendment Act 48 of 1985

2.8 The long title of the Foreign States Immunities Amendment Act 48 of 1985 explains that the Act amends the Foreign States Immunities Act of 1981, to clarify that the property of foreign states shall not be subject to attachment in order to found jurisdiction. The amendment Act amended section 14(1)(b) of the Foreign States Immunities Act of 1981.¹² The amendment Act was assented to on 12 April 1985 and commenced on 24 April 1985.

¹² Section 14(1)(b) reads as follows:

14(1)(b) the property of a foreign state shall not be subject to any process-

2.9 Amendment Act 48 of 1985 is neither obsolete nor redundant. The SALRC considers that the amendment Act continues to serve a purpose to ensure legal certainty, and we recommend that the amendment Act be retained on the statute book.

2 The Recognition of the Independence of Namibia Act 34 of 1990

2.10 The Recognition of the Independence of Namibia Act 34 of 1990 was assented to on 20 March 1990, and came into operation by promulgation on 21 March 1990. The Act recognises the sovereignty and independence of Namibia and the cessation of South Africa's authority in that country. Namibia's struggle for independence culminated in the passing of Act 34 of 1990, and the country officially became independent on 21 March 1990.

2.11 The SALRC notes in passing that the enacting formula of the Act contains the following wording: "BE IT THEREFORE ENACTED by the State President and the Parliament of the Republic of South Africa...". However and by contrast, the Constitution 1996 provides for the "President" as head of the State. As Francis Bennion explains, the enacting formula of an Act forms part of the unamendable components of an Act.¹³ Therefore, no amendment to the enacting formula of the Act is needed.

2.12 No obsolete or redundant provisions, or provisions that would infringe the constitutional equality provisions and therefore would require amendment, have been identified in this Act. The SALRC considers that the Recognition of the Independence of Namibia Act 34 of 1990 continues to serve a purpose to ensure legal certainty on the sovereignty and independence of Namibia. We recommend that that the Act be retained on the statute book.

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- (i) for its attachment in order to found jurisdiction;
 - (ii) for the enforcement of a judgment or an arbitration award; or
 - (iii) in an action in rem, for its attachment or sale.

¹³ FAR Bennion *Statutory Interpretation* Butterworths: London 2002 at 634.

3 The Transfer of Walvis Bay to Namibia Act 203 of 1993

2.13 In 1990, South West Africa gained independence from South Africa and was officially recognised as Namibia.¹⁴ However, Walvis Bay remained under South African sovereignty.¹⁵ At

¹⁴ Recognition of the Independence of Namibia Act 34 of 1990.

¹⁵ Aspects of the legal statuses of Walvis Bay before its transfer to Namibia are examined in *S v Redondo* 1993 (2) SA 528 (NmS) at 531 and 541. The following is a quote from the judgment:

The central issue in the appeal against conviction relates to the issue whether s 22A(4)(b) of the Sea Fisheries Act applies to the entire national territory of Namibia and its maritime zone, or only to 'the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia' (hereinafter for convenience referred to simply as 'Walvis Bay') and its maritime zone or to no portion of the national territory of Namibia. If, on a proper construction of the relevant statutes, it appears that the aforesaid s 22A(4)(b) of the Sea Fisheries Act does not apply at all to the national territory of Namibia and its maritime zone, or if it is found to apply only to the territory of Walvis Bay and its maritime zone, then the appellant's conviction cannot be sustained because, as already indicated, the facts which would constitute a contravention of s 22A(4)(b) all occurred outside the territory and maritime zone of Walvis Bay... .

Article 1(4) of the Constitution defines the national territory of Namibia as follows:

'The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.'

...

Nonetheless, if the argument under consideration is correct (namely that the Constitution did not regard Walvis Bay as having previously been legally part of the Republic of South Africa and consequently did not recognise the legislative enactments of the Republic of South Africa) it must also apply to the post-independence recognition of the common law in Walvis Bay. This would in my view lead to such absurdity that it could never have been the intention of those bringing the Constitution into being. On this argument there would be a legal vacuum in Walvis Bay and would confront the Namibian Courts with an intractable conundrum of having to decide what laws were in force in Walvis Bay immediately before the date of independence. The only other possible alternative to finding that a legal vacuum existed would be to hold that the common and statute law of South West Africa was applicable. This, however, would only serve to render the impasse more inescapable. The common law of Namibia was determined statutorily by Proc 21 of 1919 under South African authority and, as pointed out by Strydom J in *Binga's* case in the passage quoted above, '(a) great part of our (South West African) statute law originated in the Republic or was South African statute law which was made applicable to the Territory'. This would, in a devious way, result in the recognition of the very law which, on this argument, the Constitution had set its face

midnight on 28 February 1994, sovereignty over Walvis Bay and the Penguin Islands was formally transferred to Namibia.

2.14 The Transfer of Walvis Bay to Namibia Act 203 of 1993 was assented to on 14 January 1994, and came into operation by promulgation on 23 February 1994. The Act provides for the transfer “to Namibia of the territory of and sovereignty over Walvis Bay and the Penguin Islands”. Section 5 of the Act, dealing with issues of citizenship, provides that any person who was a South African citizen and resident in Walvis Bay “shall continue to be a South African citizen” after the date of transfer, and shall be entitled to reside in Walvis Bay.

2.15 The SALRC notes in passing that the enacting formula of the Act contains the following wording: “BE IT THEREFORE ENACTED by the State President and the Parliament of the Republic of South Africa”, whereas the Constitution, 1996, provides for the President as head of the State. As Francis Bennion explains, the enacting formula of an Act forms part of the unamendable components of an Act.¹⁶ Therefore, no amendment to the enacting formula of the Act is needed.

2.16 No obsolete or redundant provisions, or provisions that would infringe the constitutional equality provisions and therefore would require amendment, have been identified in this Act.

against. It has never been doubted, nor challenged in these proceedings, that such common law and statute law was the valid and enforceable common and statute law, 'in force immediately before the date of independence' in South West Africa for purposes of art 140(1) of the Constitution or 'in force on the date of independence' for purposes of art 66(1) of the Constitution. There can, as I see it, be no conceivable reason why the constitutional founders would have been prepared to recognise such law and its continuance for Namibia (excluding Walvis Bay) but not for Walvis Bay itself. On the contrary, if Walvis Bay was, upon independence, to be regarded in Namibian law as part of Namibia in terms of art 1(4) of the Constitution (which of course art 1(4) explicitly decrees) and if, as a necessary corollary, the Courts of Namibia were obliged to exercise jurisdiction over the territory of Walvis Bay (whatever practical difficulties might exist regarding the enforcement of such jurisdiction), it was essential for the constitutional founders to identify what legal regime would apply to this territory. Having regard to the fact that South Africa still occupied, de facto controlled and laid claim to Walvis Bay, it seems to me, with due respect, eminently sensible for the founders (and in the interests of the inhabitants of Walvis Bay) to accept and recognise the continuance after Namibian independence of the laws in force in Walvis Bay before independence. Levy J was accordingly correct in not upholding this leg of the argument.

¹⁶ FAR Bennion *Statutory Interpretation* Butterworths: London 2002 at 634.

The SALRC considers that the Transfer of Walvis Bay to Namibia Act 203 of 1993 continues to serve a purpose, namely to ensure legal certainty about the transfer to Namibia of the territory of and sovereignty over Walvis Bay and the Penguin Islands. We recommend that the Act be retained on the statute book.

4 The Diplomatic Immunities and Privileges Amendment Act 35 of 2008

2.17 The Diplomatic Immunities and Privileges Amendment Act 35 of 2008 amended the Diplomatic Immunities and Privileges Act 37 of 2001 as follows:

... so as to amend the definition of ‘member of family’; to provide that the Minister must make the list of all the names on the register of persons entitled to immunities or privileges publicly available; and to provide that a certificate by the Director-General stating a fact relating to any question as to whether or not a person enjoys immunity or privilege in terms of the said Act is *prima facie* evidence of that fact.¹⁷

2.18 The Act effected amendments that were necessary to ensure clarity and legal certainty about the definition of “member of family” and about the functions and responsibilities of the Minister and Director-General. The SALRC considers that Amendment Act 35 of 2008 continues to serve a purpose to ensure this legal certainty. The SALRC therefore recommends that Amendment Act 35 of 2008 should be retained on the statute book.

E Legislation recommended for repeal on the grounds of obsolescence or redundancy

2.19 The SALRC recommends that the following Acts be repealed as they have become redundant or obsolete:

- the Treaties of Peace Act, 1921 (Act No. 32 of 1921);
- the Treaties of Peace Act, 1948 (Act No. 20 of 1948);

¹⁷ Long title of the amendment Act.

- the Diplomatic Mission in United Kingdom Service Act, 1961 (Act No. 38 of 1961);
- the Commonwealth Relations (Temporary Provision) Act, 1961 (Act No. 41 of 1961); and
- the Commonwealth Relations Act, 1962 (Act No. 69 of 1962).

In its comments on the consultation paper, DIRCO stated that they concur with the Commission, and that the above five statutes can be repealed as they are redundant and/or obsolete.

1 The Treaties of Peace Act 32 of 1921

2.20 The Treaties of Peace Act 32 of 1921 was assented to on 30 June 1921, and commenced on 5 July 1921. Coming into operation soon after the end of World War I, the object of the Act was to provide for the carrying out of treaties of peace with certain countries where there was no reason to continue with a state of war and where a state of peace had been declared. The Act gave powers to the Governor-General “in so far as concerns the Union of South Africa of certain treaties of peace between His Majesty the King and certain other powers”¹⁸ – namely, Austria, Bulgaria, Hungary, and Turkey.

2.21 The Act also sought to extend the operation of the Treaty of Peace and South West Africa Mandate Act 49 of 1919.¹⁹ The latter Act gave effect to the Mandate for South West Africa which was established pursuant to the Treaty of Versailles, by delegating authority for the administration of South West Africa to the Governor-General of South Africa. It was to cease to have effect on 1 July 2010 by its own terms (section 5),²⁰ but it was extended by section 2 of the Treaties of Pact Act 32 of 1921 until such time as it is repealed. In 1993, the

¹⁸ See long title to Act 32 of 1921.

¹⁹ The long title of the Act states: “For carrying into effect, in so far as concerns of the Union of South Africa, the treaty of Peace between His Majesty the King and certain other Powers; and for carrying into effect any Mandate issued in pursuance of the Treaty to the Union of South Africa with reference to the territory of South West Africa, lately under the sovereignty of Germany”.

²⁰ In terms of section 5: “The provisions of this Act shall cease to have effect on the first day of July, nineteen hundred and twenty: Provided, however, that by resolution of both Houses of Parliament the operation of such provisions may be extended for any period mentioned in the resolution”.

Treaty of Peace and South West Africa Mandate Act 49 of 1919 was repealed in its entirety in South Africa by section 36 of the General Law Second Amendment Act 108 of 1993.²¹

2.22 The SALRC recommends that the Treaties of Peace Act 32 of 1921 be repealed, as the Act has fulfilled the purpose for which it was enacted. The Act dealt with a specific international situation at the conclusion of World War I. Also, the Act has been rendered redundant and obsolete because it gave legislative effect to the previously colonial relationship between the “Union of South Africa” and Britain, and included references to now-obsolete mandates, expressions and designations (e.g. “Union of South Africa”, “the Governor-General”, and “His Majesty the King”). These terms and designations no longer exist and are therefore irrelevant, and have ceased to serve any purpose in present-day South Africa. In its comment to the SALRC on the relevant consultation paper, DIRCO supported the SALRC’s recommendation to repeal the Treaties of Peace Act 32 of 1921.

2 The Treaties of Peace Act 20 of 1948

2.23 The Treaties of Peace Act 20 of 1948 was assented to on 25 March 1948, and commenced on 09 April 1948.²² The object of the Act is to provide for the carrying out of treaties of peace between the “Government of the Union of South Africa” and Bulgaria, Finland, Hungary, Italy and Roumania (as it was then named).²³ In terms of section 2, the Governor-General is given the power to “by proclamation make such regulations” to carry out any peace treaty ratified by the Government. In terms of section 3, the Governor-General is also given similar powers “whenever a treaty of peace is concluded between the Government of the Union and any power ... between whom and the Union a state of war exists at the date of commencement of this Act”.

2.24 The SALRC recommends that the Treaties of Peace Act 20 of 1948 be repealed, as the Act has fulfilled the purpose for which it was enacted. It dealt with a specific international situation existing at the time, namely the conclusion of World War II. It refers to obsolete

²¹ See summary by Legal Assistance Centre: Namibia at <http://www.lac.org.na/namlex/Intnl.pdf> accessed on 30 November 2010.

²² See Assembly Debates, Second Reading of Treaties of Peace Bill, 19 March 1948.

²³ See long title of the Act.

mandates, designations and expressions such as “Government of the Union of South Africa” and “Governor-General”, which are no longer in existence and are irrelevant or have otherwise ceased to serve a purpose in present-day South Africa. The Act is therefore redundant and obsolete. In its comment on the SALRC consultation paper, DIRCO supported the suggestion to repeal this Act. The SALRC therefore recommends the repeal of the Treaties of Peace Act 20 of 1948.

3 The Diplomatic Mission in United Kingdom Service Act 38 of 1961

2.25 The Diplomatic Mission in United Kingdom Service Act 38 of 1961 was assented to on 18 May 1961. It commenced on 31 May 1961, the date on which the Republic of South Africa came into being. When the Act was passed, South Africa was expected to leave the Commonwealth of Nations at the end of May 1961. Hence, Act 38 of 1961 was one of several enactments that were passed in consequence of the establishment of the Republic of South Africa. The Act provides in its long title as follows:

To provide for the appointment of locally recruited staff for the office of the Union's diplomatic mission in the United Kingdom, for the repeal of the High Commissioner's Act, 1911, and for matters incidental thereto; and to amend the Government Service Pensions Act, 1955.

2.26 The *Annual Survey of South African Law* summarises the objectives of the Act as follows:²⁴

The imminent departure of the country from the Commonwealth at the end of May, which called for a change in designation of the heads of diplomatic missions in Commonwealth countries, made its passage necessary early in 1961. The Act repeals the High Commissioner's Act, No. 3 of 1911, which provided for the appointment, duties and remuneration of the Union's High Commissioner in the United Kingdom, and the appointment of members of his staff. ... There was, however, need to retain portions of the 1911 Act because of the large body of locally recruited staff in London, some 225 persons, serving a number of Government departments, but, their salaries being borne by the Treasury, appointed under the Direction of the Minister of Finance. Their conditions of service were determined after consultation with the Public Service Commission, though the 1911 Act did not require it. The 1961 Act seeks to preserve the *status quo* in relation to them. Section

²⁴ *Annual Survey of SA Law 1961* at p 14-15. (See also Hansard *House of Assembly Debates*, vol. 108, col. 6056, 8 May 1961.)

1 enables the Minister of Finance or his delegate to appoint such staff, subject to the law governing the public service; and section 3 and 4 contain consequential provisions to preserve retirement and pensions benefits. As regards the High Commissioner himself, the contractual rights of the present incumbent are protected in terms of section 12(2) of the Interpretation Act, No. 33 of 1957; and future appointments will be made to a post on the fixed establishment of the public service, created by the Public Service Commission in terms of the Public Service Act.²⁵

2.27 The SALRC recommends that the Diplomatic Mission in United Kingdom Service Act 38 of 1961 be repealed, as the Act has fulfilled the purpose for which it was enacted. The main purpose of the Act was a consequential enactment related to South Africa's withdrawal from the Commonwealth of Nations, and to regulate the appointment of "locally recruited staff in the United Kingdom".²⁶ However, the Act's purpose was also to repeal the High Commissioner's Act 3 of 1911, which provided for the appointment, duties and remuneration of the Union's High Commissioner in the United Kingdom and members of his staff. Act 38 of 1961 is therefore redundant, obsolete and has ceased to serve any purpose in present-day South Africa. In addition, references to obsolete mandates, designations and expressions such as "Union's diplomatic mission" and "head of the Union's diplomatic mission" render the Diplomatic Mission in United Kingdom Service Act redundant and obsolete. In its comments on the SALRC consultation paper, DIRCO supported the repeal of this Act.

4 The Commonwealth Relations (Temporary Provision) Act 41 of 1961

2.28 The Commonwealth Relations (Temporary Provision) Act 41 of 1961 was assented to on 26 May 1961 and commenced on 30 May 1961. The Act was intended to deal with the situation arising after 31 May 1961 because of South Africa's withdrawal from the Commonwealth of Nations.²⁷ Section 1 of the Act provided that in laws which were still in force in South Africa or the territory of South West Africa immediately before 31 May 1961, references to any Commonwealth country or countries "shall not be affected by reason of the

²⁵ Sections 3 and 4 have since been repealed by section 27(1) of the Government Service Pensions Act 62 of 1965.

²⁶ Section 1.

²⁷ See Assembly Debates, Second Reading Commonwealth Relations (Temporary Provision) Bill, 18 May 1961.

establishment of the Republic of South Africa or of the fact that the Republic is not a member of the Commonwealth".²⁸

2.29 Section 1 of the Act was amended by the General Law Amendment Act 49 of 1996,²⁹ by the deletion of the expression "or the territory of South-West Africa". In addition, section 3 was repealed by the General Law Amendment Act 49 of 1996. The Act currently consists of three sections: 1, 2, and 4.

2.30 The Act was specifically intended to deal with the situation after 31 May 1961, when South Africa was no longer a member of the Commonwealth of Nations. However, more recently this position has changed again, because after the end of apartheid in 1994, on 1 June 1994 South Africa rejoined the Commonwealth of Nations. Also, the Act contains references to obsolete mandates, designations and expressions (e.g. "the fact that the Republic is not a member of the Commonwealth",³⁰ "Governor-General",³¹ "House of Assembly",³² "resolution of the Senate",³³ and "Table in the Senate"³⁴) which no longer exist, or are irrelevant or have otherwise ceased to serve a purpose in present-day South Africa. The Commonwealth Relations (Temporary Provision) Act 41 of 1961 is therefore redundant and obsolete and should be repealed. In its comment on the SALRC consultation paper, DIRCO supported the repeal of this Act.

5 The Commonwealth Relations Act 69 of 1962

2.31 The Commonwealth Relations Act 69 of 1962 was assented to on 15 June 1962 and commenced on 31 May 1962. This Act repealed or amended a number of enactments, to give

²⁸ Section 1.

²⁹ The long title of the Act provides: "To amend or repeal South African legislation, so as to substitute or delete all references to 'South-West Africa'; and to provide for matters connected therewith".

³⁰ Section 1.

³¹ Section 1.

³² Section 2.

³³ Section 2.

³⁴ Section 2.

effect to South Africa's withdrawal from the Commonwealth of Nations. The long title of the Act provides for the amendments of a collection of twelve statutes, as follows:

To amend the Admission of Persons to the Union Regulation Act, 1913, the Companies Act, 1926, the Aliens Act, 1937, the Aliens Registrations Act, 1939, the Work Colonies Act, 1949, the South African Citizenship Act, 1949, the Population Registration Act, 1950, the Merchant Shipping Act, 1951, the Diplomatic Privileges Act, 1951, the Departure from the Union Regulation Act, 1955, the Land Settlement Act, 1956, and the Children's Act, 1960, and to provide for matters incidental thereto.

2.32 According to Kahn, writing in 1962,³⁵ the most important changes effected by the Act related to the law of citizenship:

The 1962 Act brings citizens of Commonwealth countries and Ireland into the definition of alien, and eliminates citizenship by registration which formerly applied to them. Naturalization will henceforth be the only avenue to the acquisition of citizenship by all who are not South African citizens by birth or descent. The requirements for naturalization have been eased, however, by a general reduction of one year in the minimum residence requirements: in the normal case five and not six years' of residence is called for. Finally, the Minister is empowered to grant immediate naturalization to a person admitted for permanent residence who or whose father, paternal grandfather or paternal great-grandfather was born before 1st September, 1900, in any part of South Africa, or was a burgher before that date of the late South African Republic or Orange Free State Republic.

2.33 In promoting its Bill, the South African government at the time stated unequivocally that it expected undivided loyalty from citizens of the Republic. According to Kahn:³⁶

To this end section 19*bis* of the main Act has been amended to allow the Minister of the Interior to deprive a citizen with dual nationality of his South African citizenship if, after 30 May, 1963, he performs some voluntary act which in the Minister's opinion indicates that he has made use of his other nationality. The Minister may later reinstate the lost citizenship.

...

The second step to ensure undivided loyalties was the replacement of section 16 of the principal Act, which had dealt with renunciation of South African citizenship in some detail but had not provided for the cases of all dual citizens. ... On a person's

³⁵ E Kahn "Departure from the Commonwealth: Final Terms" (1962) *Annual Survey of South African Law* at 1.

³⁶ E Kahn "Departure from the Commonwealth: Final Terms" (1962) *Annual Survey of South African Law* at 2.

loss of citizenship by renunciation his minor children also cease to be South African citizens if the other parent is not or does not remain a citizen.

...

The last measure to promote purely local loyalty was the change in the oath of allegiance prescribed for naturalization, requiring of the deponent *inter alia* that he 'unreservedly renounce all allegiance and fidelity to any foreign State or Head of State of whom I heretofore have been a citizen or subject, or to any other External Authority to whom I have heretofore owed any form of allegiance'...

2.34 In the current form of the Commonwealth Relations Act 69 of 1962, only a few provisions remain. These are the long title, section 71 (date of commencement), and section 72 (short title). Those provisions (sections 31 to 60) which refer to amendments of the Merchant Shipping Act 5 of 1951 have now mostly been superseded by further provisions and amendments to Act 5 of 1951.

2.35 Given that the main purpose of Act 69 of 1962 was to deal with South Africa's withdrawal from the Commonwealth of Nations and to regulate the country's citizenship laws as a consequence, the existence of this Act is now irrelevant. The Act has ceased to serve any purpose in present-day South Africa. The Commonwealth Relations Act 69 of 1962 is therefore redundant and obsolete. Laws relating to citizenship and ancillary matters are now governed by legislation administered by the Department of Home Affairs. The DIRCO supported the repeal of Act 69 of 1962 in its comment to the consultation paper. The SALRC therefore recommends that the Commonwealth Relations Act 69 of 1962 be repealed, as the Act has fulfilled the purpose for which it was enacted.

6 The African Renaissance and International Co-operation Fund Act 51 of 2000

2.36 The African Renaissance and International Co-operation Fund Act 51 of 2000 was assented to on 21 November 2000 and commenced on 22 January 2001. In confirmation of South Africa's commitment to the continent of Africa, the Act provides for the establishment of the African Renaissance and International Co-operation Fund. The purpose of the Fund is to

enhance international co-operation with other African countries.³⁷ In terms of the long title, the Act is intended –

To establish an African Renaissance and International Co-operation Fund in order to enhance co-operation between the Republic and other countries, in particular African countries, through the promotion of democracy, good governance, the prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development; to repeal three Acts; and to provide for matters incidental thereto.

2.37 Similarly, the objects of the Fund include: (a) co-operation between the Republic and other countries, in particular African countries; (b) the promotion of democracy and good governance; (c) the prevention and resolution of conflict; (d) socio-economic development and integration; and (e) humanitarian assistance and human resource development.³⁸

2.38 The DIRCO website states that the introduction of the African Renaissance and International Co-operation Fund is historic, for three reasons (quoted verbatim here):³⁹

- For the first time the concept of "African Renaissance", is encapsulated in legislation in South Africa, and, for that matter, by a legislature on the African Continent;
- Secondly, the Act introduces, for the first time, a framework and basis for the South African government to identify and fund, in a proactive way, projects and programmes aimed at the six regulatory framework principles mentioned above, by the granting of loans or rendering of other financial assistance within the African Renaissance framework.
- Thirdly, the Act introduces, also for the first time as far as the South African government is concerned, a mechanism through which donor (third party) funds could be channelled to recipients and/or joint tripartite projects.

2.39 In April 2010 and again in December 2010, DIRCO indicated to the SALRC that DIRCO was in the process of amending the African Renaissance and International Co-operation Fund Act 51 of 2000. The SALRC asked DIRCO to comment on the status of these amendments to

³⁷ See "Establishment of the African Renaissance and International Co-operation Fund" on the website of the Department of International Relations and Cooperation <http://www.dfa.gov.za/foreign/Multilateral/profiles/arfund.htm> accessed on 9 December 2010.

³⁸ Section 4.

³⁹ See <http://www.dfa.gov.za/foreign/Multilateral/profiles/arfund.htm> accessed on 9 December 2010.

the principal Act. In May 2011, DIRCO advised us that it was in the process of promulgating the South African Development Partnership Agency Bill; once promulgated, this legislation would repeal the African Renaissance and International Co-operation Fund Act.⁴⁰ In July 2012, DIRCO advised us that the South African Development Partnership Agency Bill was expected to be submitted to Cabinet for consideration during August 2012. In October 2013, DIRCO advised us that the Bill had been submitted to Cabinet. The Cabinet had recommended certain amendments, which were being considered by DIRCO. In September 2014, DIRCO advised us that inter-departmental consultations are being conducted on the Bill. When the outstanding issues have been resolved, the Bill will be resubmitted to Cabinet.

2.40 Because the South African Development Partnership Agency Bill will repeal the African Renaissance and International Co-operation Fund Act in the near future, there is no point in effecting amendments to the outdated definitions in section 1 of the African Renaissance and International Co-operation Fund Act. These definitions describe “‘Department’ as meaning Department of Foreign Affairs” and “‘Minister’ as meaning Minister of Foreign Affairs”. Because of the anticipated repeal of the African Renaissance and International Co-operation Fund Act, the SALRC has not recommended the repeal of this Act in the Schedule to the Bill.

F Redundant or obsolete provisions recommended for amendment

1 The Foreign States Immunities Act 87 of 1981

2.41 The basic approach of the Foreign States Immunities Act 87 of 1981 has been to proclaim a rule of immunity “of foreign states from the jurisdiction of the courts of the Republic”,

⁴⁰ On 26 February 2012 the then Minister of Defence, Ms Lindiwe Sisulu remarked at the International Cooperation, Trade and Security Cluster (ICTS) media briefing that the South African Development Partnership Agency (SADPA) was then in the concept phase and that the draft Bill for the establishment of the SADPA Fund had been finalised for presentation to Cabinet for approval before being published in the Gazette for public comments. See <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=25353&tid=57843> accessed on 12 July 2012.

and exceptions to that rule. The Act was assented to on 6 October 1981 and commenced on 20 November 1981.

2.42 Section 2 of the Act sets out a general principle that “a foreign state shall be immune from the jurisdiction of the courts of the Republic”.⁴¹ This is followed by a number of sections which set out exceptions to the general rule of immunity, in the following circumstances: waiver of immunity (section 3); commercial transactions (section 4); contracts of employment (section

⁴¹ See *The Shipping Corporation of India Ltd v Evdomon Corporation And Another* 1994 (1) SA 550 (A) at 565:

The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the Full Bench of the Transvaal Provincial Division in the case of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (1980 (2) SA 111 supra). As this survey shows, South African Courts initially applied the doctrine of absolute immunity, but in the *Inter-Science* case the Court (Margo J, Franklin J and Preiss J concurring) decided to follow the world-wide trend and to apply the restrictive doctrine. Shortly thereafter the Legislature stepped in and passed the Foreign States Immunities Act 87 of 1981 which, modelled on the English Act, also does not accord immunity to a foreign state in respect of commercial transactions.

Over the years another area of uncertainty in the application of the doctrine of sovereign immunity has related to the bodies or institutions entitled to claim such immunity on the ground that they were to be regarded as organs or departments or instrumentalities of the State. Illustrative of debate about this in the English Courts are It is not necessary to analyse these cases. In some of them the body or corporation concerned was held to be an organ, or department or instrumentality of a foreign state and, therefore, entitled to sovereign immunity; in others not. Some cases gave rise to sharp differences of judicial opinion. It was clearly a mobile area of the law in which conflicting considerations arose. As Shaw LJ put it in the *Trendtex* case supra at 907b:

'A consequence of the doctrine of immunity is that in protecting sovereign bodies from the indignities and disadvantages of adverse judicial process, it operates to deprive other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement.'

And in deciding these matters the accent fell not so much on the extent to which the separate legal personae of corporation and state could and should be merged, but rather on the extent to which one should extend the protective cloak of sovereign immunity. With the widespread adoption of the restrictive immunity doctrine, however, the scope for the application of the instrumentality principle has been greatly limited since in most such cases the cause of action relates to a commercial transaction entered into by the body or corporation concerned.

5); personal injuries and damage to property (section 6); ownership, possession and use of property (section 7); patents, trade-marks, etc (section 8); membership of associations and other bodies (section 9); arbitration (section 10); admiralty proceedings (section 11); and taxes and duties (section 12).⁴²

2.43 The definitions section of the Act provides no definitions for “Department” and “Minister”. Nonetheless, references in sections 13 and 17 of the Act to these designations as meaning, respectively, the “Department of Foreign Affairs and Information” and the “Minister of Foreign Affairs and Information” are no longer relevant. The SALRC recommends that references to these designations should be updated and amended in the Act. The definitions in the Act should provide that “Minister” means the “Minister of International Relations and Cooperation” and that “Department” means the “Department of International Relations and Cooperation”. In

⁴² In the case of the *Akademik Fyodorov: Government of the Russian Federation and Another v Marine Expeditions Inc* 1996 (4) S A 422 (C) 441, Mr Justice Rose-Innes explains the relevant provisions of the Foreign States Immunities Act 87 of 1981 as follows:

The Russian Government claims immunity as a foreign State from the jurisdiction of this Court in the proceedings for the arrest of the Akademik Fyodorov, of which it claims to be the owner, and from the process for the arrest by the warrant of arrest issued in terms of the order of Court. The law relating to such immunity has been codified in the Foreign States Immunities Act 87 of 1981. The Act adopts what has been referred to as a doctrine of relative foreign State immunity, as opposed to absolute immunity, in that, generally speaking, it grants immunity to foreign States from the adjudicative jurisdiction of the courts and from the processes for enforcement of the orders of the courts in relation to acts performed in the exercise of sovereign authority of a foreign State, but not for acts relating to commercial transactions undertaken by a State. This was the trend adopted by our courts shortly before the Act came into effect. ... The Act provides that a foreign State shall be immune from the jurisdiction of the courts of the Republic, except as provided for in the Act or in any proclamation issued thereunder (s 2(1)). The exceptions to such immunity are set out in ss 3-12 of the Act. The only exceptions which might be relevant to the present case are those provided for in s 4 relating to commercial transactions, s 10 relating to arbitrations and s 11 relating to admiralty proceedings. The provisions of s 14(1)(b) providing for immunity of the property of a foreign State from certain process of the courts and of s 15 relating to the immunity of separate entities might also be relevant.

A foreign State includes the government of that State and any department of that government, but does not include any entity which is distinct from the executive organs of the government of that State and which is capable of suing or being sued (s 1(2)). The Russian Federal Republic is a foreign State. It is so alleged and not disputed in the affidavits before this Court. The Court should in any event take judicial notice that the Russian Federal Republic is a foreign sovereign State. ...

addition, the Constitution, 1996 provides for the President as head of the State. We therefore recommend that references to the “State President” in the Act should be substituted with the term “President”.

2.44 Commenting on the consultation paper in May 2011, DIRCO stated that they have considered the proposed amendments to this Act and they concur with them.

2.45 In January 2012, Prof De Wet (Co-Director of the Institute for International and Comparative Law in Africa at the University of Pretoria, and Professor of International Constitutional Law at the University of Amsterdam in the Netherlands) commented that it is indeed necessary to keep the 1981 Act in place until it is replaced by the 1988 Act:

In the absence of any legislation, legal uncertainty may arise, especially since South Africa will then be bound to give direct effect to the customary international law on immunities (see section 232 of the Constitution). As this well-developed area of public international law is currently developing very fast, as will [be] indicated below, this may confront courts and government organs with a highly uncertain situation.

However, as far as the eventual promulgation of the 1988 Act is concerned, it is important to reconsider the Act in its current form. Due to important developments in recent years, the amendments that were suggested in 1988 may have been overtaken by events.

One of the key issues to address, is whether to waive state immunity where the litigation involves international core crimes (e.g. torture, war crimes, crimes against humanity and genocide), in particular where these crimes were committed in the forum state. Some jurisdictions acknowledge an exception to state immunity under customary international law in these circumstances. Notably in the *Ferrini* case the Italian Court of Cassation waived the state immunity of Germany in relation to compensation claims for international crimes committed during World War II (see *Ferrini v. Germany*, No. 5044/04, 87 (2004) *Rivista di diritto internazionale* 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004)). This case has resulted in litigation before the International Court of Justice (ICJ) and the decision in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* is awaited in the first quarter of 2012. The outcome of the ICJ decision should be taken into consideration by the South African Government, as it may have consequences for the 1988 Act.

On one hand, it may be desirable to include an exception to state immunity for international core crimes (committed in the forum state) in the 1988 Act. Since the adoption of the Statute of the International Criminal Court and its incorporation in domestic law, it is possible to prosecute individuals – including heads of State and other state officials – for the perpetration of international core crimes in domestic courts. Depending on whether the relevant jurisdictional requirements have been fulfilled, such individuals will not be able to rely on immunity from prosecution. It would therefore seem consistent to waive also state immunity in relation to litigation against states for their involvement in core crimes. (It is worth noting that such litigation is a matter [of] state responsibility which is not criminal in nature and entirely different from individual criminal responsibility.)

However, if this route were chosen, various issues affecting legal certainty arise. For example, the issue arises whether the exception from immunity under customary international law should also be applicable to acts that were committed during a state of war, subsequent to which specific treaties regulating compensation for victims were adopted and accepted by the states parties. In addition, the question arises whether the exception would also apply to international crimes that were committed more than 70 years ago (and if so, how far back in time this exception to immunity would be applicable).

These examples are but a few that illustrate the dynamic developments (accompanied by new challenges) that have taken place in the area of immunities in the decades after which the 1988 Act was adopted. It would therefore be necessary to reconsider the 1988 Act in a comprehensive manner in order to ensure that when it is promulgated, it gives a clear account of South Africa's position in relation to these developments.

2.46 On 3 February 2012, the International Court of Justice delivered its judgment in the case of *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*,⁴³ which Professor De Wet expected to be delivered early in 2012. The Court held, among others, as follows:

...

52. The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the "untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees" (Joint Declaration of Germany and Italy, Trieste, 18 November 2008), accepts that these acts were unlawful and stated before this Court that it "is fully aware of [its] responsibility in this regard". The Court considers that the acts in question can only be described as displaying a complete disregard for the "elementary considerations of humanity" (*Corfu Channel (United Kingdom v. Albania)*, *I.C.J. Reports 1949*, p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 112). One category of cases involved the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio by members of the "Hermann Göring" division of the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier (*Max Josef Milde* case, Military Court of La Spezia, judgment of 10 October 2006 (registered on 2 February 2007)). Another category involved members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany. The third concerned members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled and who were similarly used as forced labourers. The Court considers that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 (b) of the Charter of the International Military

⁴³ Available at www.icj-cij.org/docket/files/143/16899.pdf

Tribunal, 8 August 1945 (United Nations, *Treaty Series (UNTS)*, Vol. 82, p. 279), convened at Nuremberg included as war crimes “murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory”, as well as “murder or ill-treatment of prisoners of war”. The list of crimes against humanity in Article 6 (c) of the Charter included “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war”. The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War (e.g., *Von Mackensen and Maelzer* (1946) *Annual Digest*, Vol. 13, p. 258; *Kesselring* (1947) *Annual Digest*, Vol. 13, p. 260; and *Kappler* (1948) *Annual Digest*, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity. . . .

77. In the Court’s opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76). . . .

2.47 Apart from the proposal in par 2.43 above, the SALRC has not identified any obsolete or redundant provisions, or provisions that infringe constitutional equality, in the Foreign States Immunities Act 87 of 1981. We consider that this Act continues to serve a purpose to ensure legal certainty on matters related to the extent of immunity of foreign states from the jurisdiction of the South African courts. The SALRC therefore recommends that Act 87 of 1981 be retained on the statute book, subject to the amendments proposed in par 2.43 above.

2 The Diplomatic Immunities and Privileges Act 37 of 2001

2.48 The Diplomatic Immunities and Privileges Act 37 of 2001 was assented to on 22 November 2001 and came into operation by promulgation on 28 February 2002. The Act repealed the Diplomatic Immunities and Privileges Act 74 of 1989, and sought to address the shortcomings of the 1989 Act. Therefore, Act 37 of 2001 contains provisions which either directly affect South Africa's municipal law or deal with matters not covered by the conventions on diplomatic relations and consular relations.⁴⁴ In terms of its long title, the Act is intended –

To make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives, of the United Nations, and its specialised agencies, and other international organisations and of certain other persons; to make provision regarding immunities and privileges pertaining to international conferences and meetings; to enact into law certain conventions; and to provide for matter connected therewith.

2.49 In terms of section 2(1), "Subject to the provisions of this Act, the Conventions have the force of law in the Republic." Section 1 states that "the Conventions" means the Convention on the Privileges and Immunities of the United Nations, 1946; the Conventions on the Privileges and Immunities of the Specialised Agencies, 1947; the Vienna Convention on Diplomatic Relations, 1961; and the Vienna Convention on Consular Relations, 1963.

2.50 On its website DIRCO summarised the implications of the Act as follows:⁴⁵

The new Act gives effect to South Africa's international obligations by –

- Incorporating the provisions of the Conventions on Diplomatic Relations and on Consular Relations in full in South African legislation;
- Incorporating the provisions of the Convention on Privileges and Immunities of United Nations and of the Conventions on the Privileges and Immunities of the Specialised Agencies in South African legislation;

The Act thus gives effect to the provisions of section 231(4) of the Constitution of the Republic of South Africa, Act No. 108 of 1996 that stipulates that any international agreement becomes law in the Republic when it is enacted into law by national legislation.

⁴⁴ See 'Introduction to the New Diplomatic Immunities and Privileges Act 37 of 2001' http://www.dfa.gov.za/docs/2002/act37_0307.htm accessed on 9 December 2010.

⁴⁵ See 'Introduction to the New Diplomatic Immunities and Privileges Act 37 of 2001' http://www.dfa.gov.za/docs/2002/act37_0307.htm accessed on 9 December 2010.

The Act synchronises the ad hoc practices currently applied to individual organizations in order to introduce equality in the treatment of the various international organizations in South Africa and thus addresses one of the major shortcomings of the [1989] Act.

2.51 Some of the main provisions of Act 37 of 2001 include the conferring of immunities and privileges on persons other than diplomats and consuls, as set out in sections 4 to 6.⁴⁶ In terms of section 7, the conferring of immunities and privileges on any person or organisation in terms of the Act must be published by notice in the *Gazette*. Section 8 allows for the waiver of immunities and privileges. In terms of section 8(1) a sending State, the United Nations, any specialised agency or organisation may waive any immunity or privilege which a person enjoys under the Act. According to section 8(2), the waiver is recognised if made by the “head, or any person who performs the functions of the head, of– (a) a mission; (b) a consular post; (c) an office of the United Nations; (d) an office of a specialised agency; or (e) an organisation”.⁴⁷ In terms of section 9, the Minister is obliged to keep a register of the names of all persons who enjoy immunity for the civil and criminal jurisdiction of South African courts, or immunities and privileges in accordance with the Conventions.⁴⁸ Section 10 empowers the Minister to withdraw immunities, privileges and exemptions. Section 15 gives effect to offences and penalties, and states that a person who “wilfully or without the exercise of reasonable care” obtains or executes any legal process against a person who enjoys immunity is guilty of an offence. Schedules 1 to 4 of the Act reflect, respectively, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 146 Convention on the Privileges and Immunities of the United Nations, and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies.

2.52 The definitions section (section 1) of the Diplomatic Immunities and Privileges Act 37 of 2001 provides that “‘Director-General’ means the Director-General: Foreign Affairs”, and that “‘Minister’ means Minister of Foreign Affairs.” In view of the name change of the department, references to the ministry of “Foreign Affairs” are no longer relevant. The SALRC recommends that the Act be updated and amended to provide that “Director-General” means the “Director-

⁴⁶ These include heads of state, special envoys, the United Nations, specialised agencies, and immunities and privileges pertaining to international conferences or meetings convened in South Africa.

⁴⁸ Section 9.

General of International Relations and Cooperation”; and that “Minister” means the “Minister of International Relations and Cooperation.”

2.53 Apart from the proposal in par 2.52 above, no obsolete or redundant provisions or provisions that infringe constitutional equality provisions have been identified in this Act. The SALRC considers that the Diplomatic Immunities and Privileges Act 37 of 2001 continues to serve a purpose to ensure legal certainty, and we recommend that that the Act be retained on the statute book.

2.54 Commenting on the consultation paper, DIRCO stated that they have considered the proposed amendments to this Act, and they concur with the SALRC’s recommendations.

G Legislation enacted but yet to commence

1 The Foreign States Immunities Amendment Act 5 of 1988

2.55 The Foreign States Immunities Amendment Act 5 of 1988 amends the Foreign States Immunities Act 87 of 1981. Although the amendment Act was assented to 26 years ago (on 3 March 1988), it has yet to come into operation by proclamation. The amendment Act amends six sections of Act 87 of 1981. One amendment to the principal Act is the addition of subsection 2(4), which provides that immunity of foreign states from the jurisdiction of South African courts does not apply in cases where all the parties are sovereign states. Section 9(1)(a) of the principal Act has been amended by the deletion of the word “foreign” in the phrase “has members that are not foreign states”. Similarly, section 10(2)(b) of the principal Act was amended by the deletion of the word “foreign” in the phrase “the parties to the arbitration agreement are foreign states”. Other amendments to the principal Act included sections 13(1) and 13(5) and section 17, which contain references to the former Department of Foreign Affairs and Information. Section 14(1) also provides for an amendment in the principal Act.

2.56 During the second reading debate in the National Assembly on the Foreign States Immunities Amendment Bill, the then Deputy Minister of Foreign Affairs explained as follows

the reasons for the amendments which the Bill sought to effect, and the implications of those amendments:⁴⁹

During the course of 1987 and with reference to the activities of the Secretariat for Multilateral Co-operation in Southern Africa (SECOSAF), South Africa entered into discussions with the TBVC states for the purpose of examining the possible acceptance by these states of uniform legislation in regard to the immunities of foreign states. During the discussions the present legislation was thoroughly gone through and the necessity of bringing about certain amendments was established.

It is those amendments which are contained in the amending Bill before this House. The proposed amendments are of a purely technical nature and do not introduce any new principles into the principal Act.

The underlying philosophy of modern relations between states is the equality of states. This is in terms of customary international law. No state is subject to the jurisdiction of the courts of another state in respect of a dispute between such states, because that would amount to one state deciding a dispute between itself and the other state. The exceptions to the immunities of foreign states for which the principal Act provides are in general only applicable in respect of disputes between individuals or non-state entities, such as companies, in South Africa and foreign states. This basic principle is however not clearly reflected in the Principal Act of 1981.

Clause 1 of the present amending Bill seeks to state this principle unequivocally by inserting a new section 2(4) into the principal Act. The word "foreign" in sections 9 and 10 of the principal Act is also inconsistent with this principle and is therefore deleted by clauses 2 and 3 of the Bill.

The principal Act provides for the service of process on a foreign state and prescribes that service shall be deemed to have been effected when the process concerned is received by the Ministry of Foreign Affairs of the foreign state. This approach makes it difficult in practice to determine the exact date of service, especially where the co-operation of such a state is lacking. In order to accord greater protection to the individual or company, section 13 of the principal Act is amended by clause 4 of the amending Bill so as to fix the date of service as the date of delivery of the process to the foreign ministry. This provides a greater measure of certainty. Provision is also made for South Africa to conclude an agreement with another state in which an alternative procedure may be agreed on.

Clause 5 of the present amending Bill introduces two amendments. Firstly, the word "property" in section 14(1)(b) of the principal Act can be interpreted restrictively as to include only real property. The underlying principle, [principle] however, is that no property of a foreign state, be it real or merely a right or interest, is subject to the provisions of section 14 of the principal Act. In order to remove any possible ambiguity in this regard, the words "or any right or interest" are inserted in subsection 1(b).

⁴⁹ *Hansard House of Assembly Debates*, vol. 108, col. 1393 to 1395 (17 February 1988).

As a foreign state is a *peregrinus* (or alien) in the area of jurisdiction of a South African court, special rules of procedure apply. In addition to the ordinary rules in terms of which such court may have jurisdiction, it is necessary for some property, right or interest of such *peregrinus* to be attached, either to confirm jurisdiction, should it exist, or to found jurisdiction where it does not exist. Section 14(1)(b) of the principal Act deals only with attachment to found jurisdiction and it is necessary to include attachment to confirm jurisdiction. This is the second amend[ment] introduced by clause 5 of the amending Bill. Clause 6 of the amending Bill merely effects consequential amendments which arise from the previous amendment.

In summary, it may be said that the Bill brings about only certain technical amendments to an Act which governs a complicated area of law and which may have far-reaching implications, not only for foreign states in South Africa but also for our own citizens who may be seriously prejudiced if there are flaws in the Act. I trust that in the light of this all hon members of the House will support the amending Bill.

2.57 Given that nearly 27 years (at the time of the approval of this report) have passed since the date of assent to the Foreign States Immunities Amendment Act 5 of 1988, the question arises whether this amendment Act has not perhaps become redundant and should be repealed.

2.58 In February 2011 the SALRC requested the view of DIRCO, in particular, to comment on the retention of this Act. In May 2011, DIRCO commented with regard to the implementation of this Act that due to political considerations the amendment Act had been deemed necessary at the time. DIRCO also stated that the question of whether or not to implement the Act would be reconsidered by the Minister soon. In May 2014, DIRCO commented on the implementation of this Act as follows:

The Amendment Act was indeed the result of our constitutional dispensation pre 1994 when the TBVC states were in existence. South Africa's international engagements were very limited at the time. Engagements with the TBVC states created a number of difficulties, including relating to their legal status in terms of international law. The then South African government regarded the states as equal in status to "foreign" states, while as soon as issues relating to the actions of these states were to be addressed in the courts, several problems were encountered.

At the time it was necessary to make sure that the main Act of 1981 would apply to all states, including the TBVC and it was thought to be the best to remove the word "foreign" before "states" to ensure that it would apply to all states[,] which presumably also included the TBVC states.

A lot of water has flown under this bridge and the DIRCO has come to the realisation after 20 years of international activity and engagement that the Amendment Act is no longer needed. In all the years since 1994, no problems have been experienced with the existing Act, No 87 of 1981. Customary international law in the area of states' international engagements has also been clarified and accepted as state practice. The clarity of international law and practice as it relates to the immunities of states has

also eliminated the need for the other suggested amendments, which at the time, were thought necessary.

It is therefore the submission of DIRCO that there is no need to pursue the Amendment Act anymore.

2.59 In view of DIRCO's above comment, the SALRC agrees that there is no longer a need to implement the amendment Act and it is clear that the statute has become redundant. The SALRC therefore recommends that the Foreign States Immunities Amendment Act 5 of 1988 be repealed.

2 The Application of Resolutions of the Security Council of the United Nations Act 172 of 1993

2.60 The Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 was assented to on 8 December 1993. However, since then – more than 20 years ago at the time of the approval of this report – the Act has yet to come into operation by proclamation. The long title of the Act states that its aim is “to provide for the application in the Republic of certain resolutions taken by the Security Council of the United Nations; and to provide for matters connected therewith.” Section 1 deals with the “application of resolutions of Security Council of United Nations”. This section enables the State President to declare, by proclamation in the *Gazette*, that resolutions taken by the Security Council of the United Nations (UN) apply in the country. A resolution applies to the extent stated in the proclamation, from the dates specified. A resolution will be implemented in the country in such manner as the State President determines. Section 2 sets out the procedure for tabling proclamations in Parliament. Section 3 sets out offences and penalties for failure to comply with provisions in the proclamation. Section 4 is the provision that grants the state exemption from liability in relation to *bona fide* acts performed in accordance with a resolution made applicable in South Africa under section 1.

2.61 As mentioned above, more than 20 years have passed since the date of assent to the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 (on 8 December 1993). Also, there appears not have been any indication of whether the Act would come into operation by proclamation. Hence the question arises whether this Act has perhaps

become redundant and should be repealed. In 2011 the SALRC requested the view of DIRCO, in particular, on the retention of this Act.

2.62 In May 2011, DIRCO remarked as follows in its comments on the SALRC's consultation paper:

Regarding the Application of Resolutions of the Security Council of the United Nations Act, 1993 (Act No 172 of 1993) it is noted that this Act was never put into operation as some of its provisions were regarded as unconstitutional. A subcommittee on sanctions legislation has recently been established as part of an inter-departmental counter-terrorism working group to devise a way forward to ensure that adequate legislation is put in place to address all measures called for in United Nations Security Council (UNSC) resolutions adopted under the Chapter VII of the UN Charter. It is accordingly foreseen that the Application of Resolutions of the Security Council of the United Nations Act, 1993 could be amended to accommodate the implementation of Security Council measures. This will be addressed by the Department in due course.

2.63 In January 2012, Prof De Wet commented on the implications of the absence of legislation governing this issue. She remarked that there is a great need to expeditiously implement this Act in line with South Africa's constitutional and international human rights obligations. She pointed out that as things stand, South Africa, despite being a founding member of the UN, has never incorporated the UN Charter of 1948 (the Charter) into the country's domestic law. As a result, the Charter and obligations resulting from it – notably binding decisions of the UN Security Council under Chapter VII of the Charter – do not have effect in domestic law (see section 231(4) of the Constitution). She explained that this situation was a remnant of South Africa's years of isolation, during which some of the most significant UN sanctions were directed at South Africa itself. Prof de Wet commented as follows:

During the early 1990s, while the new constitutional dispensation was negotiated, the 1993 Act was drafted and assented to. In terms of section 1 of the 1993 Act, the State President could by proclamation in the Government Gazette declare that any resolution of the United Nations Security Council shall apply in the Republic to the extent specified in the proclamation. Any such proclamation was subjected to Parliamentary approval in terms of section 2. The value of the foreseen procedure is that it provides for expedited implementation in the area of international peace and security, while still allowing for some parliamentary oversight.

The fact that the 1993 Act has not yet been implemented means that South Africa still has to rely on issuing specific legislation to enforce United Nations Security Council resolutions, almost 20 years after reasserting itself as a member of the international community. Strictly speaking this would imply that for every binding United Nations Security Council resolution that is adopted, a new implementing Act has to be adopted concurrently. Since this is bound to take years, the efficacy of the United Nations Security Council obligations, which serve the important goal of international peace and security, will be undermined. In addition, protracted implementation can trigger state

responsibility on the international level, since South Africa remains bound by its international obligations, regardless of whether the country has facilitated their implementation domestically.

To overcome this dilemma, one currently has to determine which existing legislation can accommodate expedited implementation of United Nations Security Council resolutions. One existing piece of legislation that can be used for these purposes – in the area of trade sanctions - is the Import and Export Control Act of 45 of 1963. Section 2(2) of the Act empowers the Minister of Trade and Industry to restrict the importation of certain goods to and from South Africa whenever he deems it necessary or expedient in the public interest. It was first used as a vehicle to enforce United Security Council sanctions in 1993 in relation to the former Yugoslavia.

Another prominent area for which specific legislation was introduced, concerns the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004. Section 25 provides for the giving effect to Security Council resolutions adopted in terms of Chapter VII of the United Nations Charter. It obliges the President to give notice in the Government Gazette if the Security Council has identified a specific entity as being involved in terrorist activities, or as an entity against whom United Nations member states must take action specified in United Nations Security Council resolutions with a view to combat or prevent terrorism. Proclamations of this nature are subject to parliamentary scrutiny and Parliament is also empowered to decide on the appropriate way in which domestic effect must be given to such resolutions.

However, the fact remains that the current legal situation obliges the government to determine on an ad hoc basis (in relation to every Security Council resolution that is adopted), whether and under which existing law can the resolution be implemented. This carries with it the risk that in some situations no legislation exists, as a result of which a new Act has to be adopted. This in turn can result in great delays and a violation of South Africa's international obligations. In addition, the situation gives rise to a fragmented approach to the implementation of obligations arising under the Charter.

From a policy perspective it is also desirable to adopt the above Act expeditiously. South Africa is a regional power house, current member of the United Nations Security Council and a founding member of the United Nations. It would strengthen the country's position in these various roles, if it facilitated the effective implementation of Charter obligations – of which United Nations Security Council's resolutions are the most prominent.

The constitutional concerns raised by DIRCO (see par 2.34 on p 20) most likely relates to human rights protection. Since 2002 various United Nations Security Council resolutions and subsequent decisions by Sanctions Committees (sub-organs of the United Nations Security Council) have directly targeted individuals and required, inter alia, the freezing of their assets by member states. In many instances this was done in a manner that did not allow for a fair hearing at any stage (e.g. after the freezing of the assets) and the sanctions were effectively imposed for an indefinite period of time. This gave rise to a conflict between Security Council obligations and various international human rights obligations of countries (notably the right to a fair hearing and the right to property), as protected in inter alia the International Covenant on Civil and Political Rights, the European Convention of Human Rights and the African Charter of Human and Peoples' Rights. It also gave rise to norm conflicts with the constitutional protection of these rights in many countries including South Africa.

Countries are therefore faced with the challenge of harmonizing their international obligations pertaining to international peace and security with fundamental human rights obligations, which stem from both domestic and international law. One way of doing so, would be to include a requirement in the 1993 Act in accordance with which all United Nations Security Council resolutions have to be implemented in a manner consonant with South Africa's international human rights obligations (i.e. those stemming from international law itself).

Although it is well-accepted the United Nations Security Council can limit international obligations of states arising from treaty or customary law, when acting under Chapter VII of the Charter, there is also a strong presumption that the Security Council itself does not intend any of its member states to breach international human rights obligations (i.e. those stemming from international laws itself). This was confirmed recently by the European Court of Human Rights in *Al-Jedda v United Kingdom* (Appl. no. 27021/08, ECtHR judgment, 7 July 2011), with reference to the fact that the protection of human rights (alongside the maintenance of international peace and security) belonged to the purpose of the United Nations.

From the perspective of international law, it would be more appropriate to condition the implementation of United Nations Security Council obligations on their conformity with international human rights obligations, than with domestic constitutional obligations. Formally international law always trumps domestic (constitutional) law. It is well established in international law that countries cannot avoid state responsibility on the international level by claiming the unconstitutionality of international obligations. However, many of the human rights protected in the South African Constitution also find their mirror image in international human rights instruments which the country has ratified. Therefore, by requiring the implementation of Security Council obligations in accordance with South Africa's international human rights obligations – based on the above-mentioned presumption that the United Nations (and its organs) does not intend countries to violate their international human rights obligations – one can ensure human rights protection without triggering state responsibility challenges on the international level.

2.64 In July 2012, DIRCO advised the SALRC that it was in the process of drafting legislation, which will repeal the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. In October 2013, DIRCO advised us that inter-departmental consultations about the Bill were ongoing. In November 2014, DIRCO confirmed that the name of the Bill had not been agreed to, as the drafting process is ongoing across the relevant departments. The SALRC notes the comments made by Prof De Wet.⁵⁰ We also note the

⁵⁰ See also Clara Portela "National implementation of United Nations Sanctions: Towards fragmentation" *International Journal* Vol 65 Issue 1 2009 – 2010 at 13 to 30. Portela remarks, among others, as follows (at 17 *et seq*):

... Targeted sanctions exacerbate the obstacles that obstruct the implementation of sanctions. In addition, UN targeted sanctions pose new challenges to the member states that have to implement them. One difficulty of a legal-technical nature stems from the fact that the UN charter does not impose a particular model on member states for the implementation of security council resolutions. Two methods exist: one

comments by the DIRCO that the DIRCO is attending to the Bill which will repeal the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. The SALRC does therefore not recommend the repeal of Act 172 of 1993.

of them consists of the adoption of a general piece of legislation specifically designed to allow for the transposition of these measures into domestic legal frameworks, which typically takes the form of a so-called “United Nations enabling act.” The other consists of a case-by-case transposition of resolutions into laws, a method that leaves more flexibility to the legislator as to how exactly to implement the measures but has proven to be more time consuming. Prior to targeted sanctions, the problem of the time lag between the release of the security council resolution and the implementing national legislation – which sometimes amounted to as much as two or three years – could easily have been addressed by the adoption of pre-existing enabling legislation. However, with the advent of targeted sanctions, enabling legislation has become insufficient to fully cover the range of measures in the security council’s sanctions toolbox. ... The increasingly technical nature of the legislation required for implementation exacerbates the problem of time lag. Even the European Union, an organization with considerable experience in the implementation of sanctions, needed no less than six months to pass legislation implementing legislation against North Korea. ...

The article is available at http://cadmus.eui.eu/2E40E2AC-1EDC-42AF-85B2-467B687E8ADE/FinalDownload/DownloadId-E1FA12FA912C06F7DA84EE1675206F7A/2E40E2AC-1EDC-42AF-85B2-467B687E8ADE/bitstream/handle/1814/14437/International_Journal_Portela.pdf

ANNEXURES

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Annexure A

THE INTERNATIONAL RELATIONS AND COOPERATION LAWS REPEAL AND RELATED MATTERS BILL

GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend and repeal certain laws of the Republic pertaining to international relations and cooperation; and to provide for matters incidental thereto.

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

Amendment of section 1 of Act 87 of 1981

1. The Foreign States Immunities Act 87 of 1981, is hereby amended-
 - (a) by the insertion in section 1 after the definition of “consular post” of the following definition:

 “Department’ means the Department of International Relations and Cooperation”.

- (b) by the insertion in section 1 before the definition of “Republic” of the following definition:

“Minister’ means the Minister of International Relations and Cooperation”;

Amendment of section 13 of Act 87 of 1981

2. The Foreign States Immunities Act 87 of 1981 is hereby amended by the substitution for the expression “Department of Foreign Affairs and Information” of the expression “Department of International Relations and Cooperation” wherever it occurs in section 13.

Amendment of section 17 of Act 87 of 1981

3. The Foreign States Immunities Act 87 of 1981 is hereby amended by the substitution for the expression “Minister of Foreign Affairs and Information” of the expression “Minister of International Relations and Cooperation” in section 17.

Amendment of section 1 of Act 37 of 2001

4. Section 1 of the Diplomatic Immunities and Privileges Act, 2001, is hereby amended –

- (a) By the substitution in section 1 for the definition of “Director-General” of the following definition:

“Director-General’ means the Director-General: **[Foreign Affairs]** International Relations and Cooperation”;

- (b) By the substitution in section 1 for the definition of “Minister” of the following definition:

“Minister’ means the Minister of **[Foreign Affairs]** International Relations and Cooperation”.

Repeal of laws

5. The Acts specified in the Schedule are hereby repealed.

Short title and commencement

6. This Act is called the International Relations and Cooperation Laws Repeal and Related Matters Act, 201... and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

(Section 5)

No. and year of Act	Short Title
Act No. 32 of 1921	Treaties of Peace Act, 1921
Act No. 20 of 1948	Treaties of Peace Act, 1948
Act No. 38 of 1961	Diplomatic Mission in United Kingdom Service Act, 1961
Act No. 41 of 1961	Commonwealth Relations (Temporary Provision Act), 1961
Act No. 69 of 1962	Commonwealth Relations Act, 1962
Act No. 5 of 1988	Foreign States Immunities Amendment Act, 1988

ANNEXURE B

STATUTES ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

No.	Name of Act, number and year
1.	Treaties of Peace Act No. 32 of 1921
2.	Treaties of Peace Act No. 20 of 1948
3.	Diplomatic Mission in United Kingdom Service Act No. 38 of 1961
4.	Commonwealth Relations Act (Temporary Provision) 4 Act No. 1 of 1961
5.	Commonwealth Relations Act No. 69 of 1962
6.	Foreign States Immunities Act No. 87 of 1981
7.	Foreign State Immunities Amendment Act No. 48 of 1985
8.	Foreign State Immunities Amendment Act No. 5 of 1988
9.	Recognition of the Independence of Namibia Act No. 34 of 1990
10.	Application of Resolutions of the Security Council of the United Nations Act No. 172 of 1993
11.	Transfer of Walvis Bay to Namibia Act No. 203 of 1993

12.	African Renaissance and International Co-operation Fund Act No. 51 of 2000
13.	Diplomatic Immunities and Privileges Act No. 37 of 2001
14.	Diplomatic Immunities and Privileges Amendment Act No. 35 of 2008

ANNEXURE C

Respondents who commented on Discussion Paper 128

1. Professor Erika de Wet, Co-Director and Professor of International Law at the University of Pretoria; Professor of International Constitutional Law at the University of Amsterdam in the Netherlands.
2. Mr Shaun Richter, State Law Advisor, Chief Directorate: Legal Services, Department of the Premier of the Provincial Government, Western Cape.