

Chapter 2

The legislative framework: The Constitution and Defence Act

It is often said the first task of the state is to provide for the security of its citizens. The state, in simple terms, protects its citizenry from domestic enemies through the provision of a system of justice and against foreign aggression by raising and maintaining armed forces. The head of state is traditionally the commander-in-chief of the armed forces. Since the authority and responsibilities of that post is today generally codified in national constitutions, it is fitting that some space in such documents also be devoted to the common defence. Neither the state nor the military has any inherent right to exist. Both are called into being by the will of the people and exist at their pleasure. In modern terms, the state exists to act in the public good. The military exists to protect the national constitution against overthrow by foreign enemies. At home, that task is fulfilled by the courts, with the support of the police and the country's internal security service. Of these the best named is arguably the German BfV, a name that loosely translates as Federal Office for the Protection of the Constitution. This is surely one establishment that would have problems misinterpreting its role and function as enforcing either state security or propping up the incumbent regime.

All Acts of Parliament, passed from 1994 onwards are available online from either www.polity.org.za or www.info.gov.za in .PDF-format. Some older Acts are also accessible – and Google remains a good way to track them down in remote parts of the Internet.

What does the 1996 Constitution say on defence?

The 1996 Constitution devotes a chapter (Chapter 11) to the security services. The chapter stipulates some general principles applicable to all security services before giving specific prescriptions for the SA National Defence Force, the SA Police Service and the Intelligence Services. Other than prescribing certain norms, the provisions also grant each security service exclusivity in its domain, meaning that the SANDF is constitutionally South Africa's only lawful military.

Governing principles

198. The following principles govern national security in the Republic:

- a. National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
- b. The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or

national legislation.

- c. National security must be pursued in compliance with the law, including international law.
- d. National security is subject to the authority of Parliament and the national executive.

Establishment, structuring and conduct of security services

199. (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions -

- 1. prejudice a political party interest that is legitimate in terms of the Constitution; or
- 2. further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

Table 2.1: General principles applicable to all security services.

Defence force

200. (1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Political responsibility

201. (1) A member of the Cabinet must be responsible for defence.

<p>(2) Only the President, as head of the national executive, may authorise the employment of the defence force -</p> <ul style="list-style-type: none"> a. in co-operation with the police service; b. in defence of the Republic; or c. in fulfilment of an international obligation. <p>(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of -</p> <ul style="list-style-type: none"> a. the reasons for the employment of the defence force; b. any place where the force is being employed; c. the number of people involved; and d. the period for which the force is expected to be employed. <p>(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.</p> <p>Command of defence force</p> <p>202. (1) The President as head of the national executive is Commander-in- Chief of the defence force, and must appoint the Military Command of the defence force.</p> <p>(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.</p> <p>State of national defence</p> <p>203. (1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of -</p> <ul style="list-style-type: none"> a. the reasons for the declaration; b. any place where the defence force is being employed; and c. the number of people involved. <p>(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.</p> <p>(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.</p> <p>Defence civilian secretariat</p> <p>204. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.</p>

Table 2.2: Specific constitutional provisions regarding defence

Some parts of the 1993 Interim Constitution remain in effect through a series of transitional arrangements in the schedules to the current basic law. What effect do they have on defence?

Some of the parts of the 1993 Constitution retained have a bearing on defence. Among the prescriptions retained is Section 227(1) that dealt with the functions of the SANDF. These were spelt out as:

- service in the defence of the Republic, for the protection of its sovereignty and territorial integrity;
- service in compliance with international obligations of the Republic with regard to international bodies and states;
- service in the preservation of life, health or property;
- service in the provision or maintenance of essential services;
- service in upholding law and order in support of SAPS; and
- service in support to departments of state for socio-economic upliftment.

Is there a law of general application governing defence?

Yes, the Defence Act, 42 of 2002.

Broadly, what does the Defence Act of 2002 address? How is it different from the 1957 Defence Act?

The detail of the act will be discussed in later chapters. Broadly speaking, it expands on the provisions in the Constitution in laying down the powers and functions of the minister, the Defence Secretary and Secretariat, the Chief of the SANDF, defence intelligence and the services. It differs from the 1957 edition on its emphasis on constitutional values, a respect for human rights and the principle of voluntarism. By contrast, the 1957 law was based on conscription and rode roughshod over rights.

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Table 2.3: The layout of the 2004 Defence Act

What does it leave unsaid?

The Act, as presently constituted, makes no provision to compel Reservists to report for duty or stay under arms during hostilities. Neither does it protect mobilised Reservists against their creditors, nor keep their employment secure, nor exempt them from taxation when they are putting their very lives at risk on behalf of all of South Africa. Legislation to provide creditor and employment protection is being prepared. It is submitted that the amended legislation should include a provision exempting personnel deployed in areas or

on duties of a sufficiently life-threatening nature from taxation. If we expect our sons and daughters to sacrifice their lives when necessary, they have the right to expect a gesture of gratitude on our part.

What other Acts of Parliament affect defence?

Other than the Defence Act, about 20 others pieces of legislation affect the DoD/SANDF directly, and another 10 impinge on defence. There are a further number of laws that do not expressly mention the SANDF, such as the Disaster Management Act, but it is inconceivable that they will be put into effect without the assistance of the military in its collateral role.

Acts, other than the Defence Act, affecting the DoD/SANDF

- South African Military Ombud Bill (not tabled by March 2007)
- Military Disciplinary Bill (not tabled by March 2007)
- Certain Conventional Weapons Bill (not tabled by March 2007)
- Armaments Corporation of South Africa, Limited Act, 51/2003
- Anti-Personnel Mines Prohibition Act, 36/2003
- Regulation of Interception of Communications & Provision of Communication-Related Information Act, 70/2002
- Intelligence Services Act, 65/2002
- South African Maritime & Aeronautical Search & Rescue Act, 44/2002
- National Conventional Arms Control Act, 41/2002
- Burundi Protection Support Act, 3/2002
- Termination of Integration Act, 44/2001
- Military Veteran's Affairs Act, 17/1999
- Military Discipline Supplementary Matters Act, 16/1999
- Defence Special Tribunal Act 81/1998
- Regulation of Foreign Military Assistance Act, 15/1998
- Demobilisation Act, 99/1996
- Intelligence Services Control Act, 40/1994
- National Strategic Intelligence Act, 39/1994
- Non-Proliferation of Weapons of Mass Destruction Act, 87/1993
- Security Forces Board of Inquiry Act, 95 of 1993
- Defence Special Account Act, 6/1974

Acts affecting the DoD/SANDF as part of the broader Public Service

- Preferential Procurement Policy Framework Act, 5/2000
- Public Finance Management Act, 1/1999
- Public Service Act, 103/1994

- Protection of Information Act, 84/1982
- National Key Points Act, 102/1980
- State Liability Act, 20/1957

Acts affecting the DoD/SANDF as an entity

- Explosives Act, 15/2003
- Implementation of the Rome Statute of the International Criminal Court Act, 27/2002
- Firearms Control Act, 60/2000
- Promotion of Administrative Justice Act 3/2000
- Promotion of Access to Information Act, 2/2000
- In addition, there a panoply of labour, tax and other laws apply to the SANDF as an employer, such as the Occupational Health and Safety Act, 85/1993, etc.¹
- In the case of the SA Military Health Service, there are also a slew of laws regulating medicines and the medical and associated professions.

Other acts of interest

- Protection of Constitutional Democracy against Terrorism & Related Activities Act, 33/2004
- Electronic Communications Security (Pty) Ltd Act, 68/2002
- Disaster Management Act, 57/2002
- Africa Institute of South Africa Act, 68/2001
- Nuclear Energy Act, 46/1999
- National Nuclear Regulator Act, 47/1999
- State of Emergency Act, 64/1997

Acts that deliberately exclude the SANDF and Intelligence Services from their operation

There are a number of Acts of Parliament that deliberately exclude the SANDF (and Intelligence Services) from their ambit. They include the:

- Labour Relations Act, 66/1995
- Basic Conditions of Employment Act, 75/1997
- Employment Equity Act, 55/1998

¹ In September 2005 Business Day reported that South African companies were compelled by law to keep up to 170 types of records for minimum periods ranging from six months to 40 years -- while some records must be kept indefinitely. According to recent research conducted by law firm Mostert, Opperman Goodburn, in certain industries such as the financial services sector, companies are obliged to keep 460 types of records prescribed by company and accounting laws. The research entailed an audit of more than 2000 laws, regulations and official notices. (Sanchia Temkin, SA companies 'snarled up by record-keeping', Real Business Supplement, Business Day, September 13, 2005) Many of these also apply to the public service, including the Department of Defence.

How do the following Acts affect the DoD or SANDF?

Military Disciplinary Bill

In February 2007, the Minister of Defence announced that the Military Discipline Bill had been finalised and was scheduled “to serve before Cabinet during April 2007 for approval.” Once the Bill has been approved it was envisaged that it would be introduced in Parliament during the second half of that year². By January 2008 that had not happened.

Certain Conventional Weapons Bill

The Prohibition or Restriction of Certain Conventional Weapons Bill deals with the prohibition or restriction in use of non-detectable fragments, mines and booby traps, incendiary weapons and blinding lasers. This “long overdue”³ Bill was finally approved by Cabinet and certified by the State Law Adviser for introduction in Parliament in early 2007; roughly 12 years after South Africa had acceded to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. The Bill was tabled in Parliament on April 12 and came up for adoption in the National Assembly in August 2007.

The law follows a requirement in the convention that requires signatories to pass enabling domestic legislation. The convention contains four protocols that need to be embodied in domestic law. The first is the prohibition on the use of weapons that generate fragments that cannot be detected with X-Rays, while the second restricts the use of mines, booby traps and similar devices that cause excessive injury and further restricts their use to military targets only. The third restricts the use of incendiary weapons against civilians and against military targets located within a high concentration of civilians, and the fourth prohibits the use of blinding lasers.

The Bill consists of four parts:

- Chapter One covers the objects of the Bill and its extraterritorial jurisdiction. The Bill therefore seeks to address transgressions by South Africans acting outside the borders of the country.
- Chapter 2 deals with the restrictions and prohibitions set out in the convention. Non-compliance is punishable with a fine, imprisonment or in certain instances both. The chapter also provides for the surrender of prohibited weapons and their forfeiture to

² Oral reply to a question in Parliament, February 20, 2007.

³ A DoD official addressing the National Assembly’s Portfolio Committee on Defence on the Bill, May 22, 2007.

the state. Persons affected will have to hand over the weapons within six months of the law coming into effect. Special provisions apply for the SANDF.

- Chapter 3 requires the Minister of Defence to report on compliance with the convention to the UN and the powers bestowed upon him to gather information for that purpose.
- Chapter 4 contains general provisions relating to guidelines for training South African military personnel on the prohibitions and restrictions contained in the Convention and Bill. It also allows for regulations and bestows powers of delegation upon the minister.

The nongovernmental Parliamentary Monitoring Group noted in its minutes of the May 22, 2007 that MPs were “very concerned” about the impact restrictions would have on the ability of military personnel to protect themselves in conflict. “A great deal of discussion ensued over the merits of the Bill on this matter,” the PMG added.

South African Military Ombud(sman) Bill

An Ombudsman is an “official whose duty is to investigate public complaints against the actions of a government.”⁴ The system originated in Sweden. The word is Swedish for “representative”. The first such office was established in 1809 by the Swedish Riksdag (parliament) to act as a control on the way government conducted its affairs by upholding the rights of the individual against maladministration and bureaucratic abuse.

“Ombudsmen carry out their duties in two ways: first, they investigate complaints from members of the public; secondly, they keep a watching brief on the agencies and institutions under their supervision (such as government offices, prisons, and courts) and instigate investigations of their own.”⁵

The South African Military Ombudsman Bill was not part of the DoD’s Legislative Program for 2007 and the department seems in no hurry to enact this Bill, an initiative of the Portfolio Committee on Defence.⁶ The Committee drafted the Bill in light of the unhappy experience resulting from the placing of a military Ombud in the Office of the Public Protector. The Bill will establish an independent (from the Public Protector) military “ombud” answerable to Parliament and the Minister of Defence.

7. Functions

(1) The Military Ombud is competent:

(a) to investigate, on his or her own initiative or on receipt of a complaint from a member of the SANDF or an employee of the Department, any alleged:

(i) maladministration in the SANDF or the Department;

⁴ Ombudsman, Microsoft Encarta, 2005.

⁵ As above.

⁶ Oral reply to a question in Parliament, February 20, 2007.

(ii) abuse of power or unfair, capricious, discourteous or other improper conduct or undue delay by a member of the SANDF or an employee of the Department;

(iii) improper or dishonest act or omission by a member of the SANDF or an employee of the Department;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage by a member of the SANDF or an employee of the Department; or

(v) act or omission by a member of the SANDF or an employee of the Department which results in unlawful or improper prejudice to any other member of the SANDF or employee of the Department.

(2) The Military Ombud must oversee and ensure the observance of constitutional rights in the SANDF and the Department.

(3) The Military Ombud must launch investigations at the request of Parliament, through the appropriate parliamentary committee.

(4) ...

(5) ...

(6) ...

(7) ...

8. Jurisdiction

(1) Any of the following persons may bring a complaint to the attention of the Military Ombud, subject to the provisions of section 12:

(a) a member of the SANDF

(b) an employee of the Department

(c) a former member of the SANDF

(d) a former employee of the Department

(e) an immediate family member of the persons referred to in (a) to (d) above.

(2) The Military Ombud may not investigate any complaint or matter relating to:

(a) a military judge or a military court

(b) any matter to be determined by collective bargaining

(3) The Military Ombud may refuse to deal with a complaint if he or she has reason to believe that it is in the public interest to refuse. In order to determine this, he or she may consider:

(a) whether the complaint has a bearing upon state security;

(b) whether the complaint is related to the issue of obedience to lawful orders;

- (c) whether the complaint is frivolous or vexatious;
- (d) whether the complainant lacks sufficient personal interest in the matter;
- (e) the age of the complaint;
- (f) the amount of time that has elapsed between the occurrence of the cause for complaint and the reporting of the complaint; or
- (g) the need for judicious and efficient use of the resources of the Military Ombud.

9. Powers

- (1) In conducting an investigation, the Military Ombud will determine the procedure to be followed.
- (2) At any time prior to or during an investigation, the Military Ombud may request the assistance of any member of the SANDF and/or any employee of the Department to assist him or her in the performance of his or her functions.
- (3) Members of the SANDF and employees of the Department must co-operate with the work of the Military Ombud, which includes providing him or her with access to facilities, members, employees, information, and relevant documents.
- (4) Any person who fails or refuses to assist the Military Ombud in the performance of his or her functions commits an offence, and will be liable to a fine not exceeding R40,000 or to imprisonment not exceeding 12 months, or to both such fine and such imprisonment.
- (5) The Military Ombud may be denied access to information in exceptional circumstances for reasons of security.

12. Procedure

- (1) The office of the Military Ombud does not replace the grievance procedures laid down in section 61 of the Defence Act 42 of 2002 and in section 134 of schedule 1 of the Defence Act 44 of 1957 ('the Military Disciplinary Code'.)
- (2) A person who has lodged a complaint in terms section 61 of the Defence Act or in terms of the Military Disciplinary Code may approach the Military Ombud only once he or she has utilised the standard grievance procedures...

Table 2.4: Extracts from the Military Ombud Act.

The DoD's answer to a question on progress with the Bill on February 20, 2007 added: "In considering the Bill, the department has consulted with other relevant role players such as the Department of Justice and Constitutional Development and the Office of the Public Protector. During these consultations some concerns were expressed with regard to the constitutionality of the proposed Bill and on how the office of the Military Ombud will co-exist with that of the Public Protector. These concerns were communicated to the Portfolio Committee on Defence prior to its visit to Canada late last year [2006]. At the time, the Committee indicated that they would wish to pursue the debate around the Bill on their return from the Canada trip. As such the tabling of this Bill has been held in abeyance pending further consultations with the Committee and other role players in this regard." A good example of obfuscation!

Armaments Corporation of South Africa, Limited Act, 51/2003

The law replaces the 1968 Armscor Act. The legislation was amended in 2005 to remove the Chief of the SANDF and the Secretary for Defence from the corporation's board. It establishes Armscor as an agency of the DoD, reporting to the Minister of Defence.

Objectives of Corporation

3. (1) The objectives of the Corporation are to meet-
- (a) the defence materiel requirements of the Department effectively, efficiently, and economically; and
 - (b) the defence technology, research, development, analysis, test and evaluation requirements of the Department effectively, efficiently and economically.
- (2) The Corporation must adhere to accepted corporate governance principles, best business practices and generally accepted accounting practices within a framework of established norms and standards that reflect fairness, equity, transparency, economy, efficiency, accountability and lawfulness.

Table 2.5: Armscor's objectives

Of further interest are Armscor's functions (s4), measures to ameliorate conflicts of interest (s14) and the ownership of intellectual property (s22).

Anti-Personnel Mines Prohibition Act, 36/2003

South Africa was a founder-signer of the 1997 Landmine Ban Convention, commonly known as the "Ottawa Treaty" that sought to outlaw the use, stockpiling, production and transfer of anti-personnel landmines. This legislation introduced the treaty into South African law. As a result, South Africa may only hold limited stocks of APM under limited circumstances. In August 2005 National Assembly Portfolio Committee on Defence chairman Prof Kader Asmal chastised the Department of Defence for still not having promulgated an implementation instruction for the Act. However, the SANDF already destroyed most of its anti-personnel landmines in the late 1990s in solidarity with the treaty.

Regulation of Interception of Communications & Provision of Communication-Related Information Act, 70/2002

As is the case with this type of legislation, the law prohibits the interception of communications, electronic, postal, or other, except in certain circumstances by certain agencies. The SANDF is identified as one such agency.

Intelligence Services Act, 65/2002

The Act confirms the continued existence of the NIA and SASS and creates the SA National Intelligence Academy. It allows for the secondment to the SANDF of NIA or SASS personnel in the event of war or a state of emergency.

South African Maritime & Aeronautical Search & Rescue Act, 44/2002

The Act incorporates the International Convention on Maritime Search and Rescue, 1979, and Annex 12 to the Convention on International Civil Aviation, 1944, into South African law. It also establishes the South African Maritime and Aeronautical Search and Rescue Organisation (SASAR) under the aegis of the Department of Transport. The SANDF is a constituent member of SASAR. The organisation is tasked with searching for, assisting and, where appropriate, effecting a rescue operation for survivors of aircraft crashes or forced landings, the crew and passengers of vessels in distress, survivors of maritime accidents or incidents, and survivors of any military aircraft or vessel accident or incident if such aircraft or vessel is not engaged in an act of war. The organisation must further co-ordinate the evacuation of a seriously injured or ill person from a vessel at sea where the person's condition is such that he or she must obtain medical treatment sooner than that vessel would be able to get him or her to a suitable medical facility. Of necessity, this may involve the SA Air Force, SA Navy or SA Military Health Service.

National Conventional Arms Control Act, 41/2002

Like the APM Prohibition Act essentially a moral law, the NCACA was enacted at a time a perception existed that people associated with the old order were destabilising neighbours and other states through illegal arms exports. The Act therefore creates the NCAC Committee to regulate the marketing, import and export of weapons and associated services. It also establishes a structure, the Directorate Conventional Arms Control, within the Defence Secretariat to assist the committee. S13 of the Act prohibits the trade in conventional arms by anyone other than those registered with the DCAC and in possession of the relevant permits. S15 provides guidelines to the NCACC when permits should or should not be granted.

The DCAC administers the following permits as directed by the NCACC⁷:

Armaments Development and Manufacturing Permit: A company must register with the DCAC and possess an armaments development and manufacturing permit before it may develop, manufacture or trade in conventional arms.

Marketing Permit: Conventional arms related products require marketing permits issued by the DCAC. The marketing permit is the only authorisation required to market the product internationally.

Contracting Permit: A company requires a contractual authorisation from the NCACC before it is permitted to negotiate a contract on conventional arms transfers with a client. The contractual authorisation conveys political approval for such negotiations to take place.

Export Permit: The DCAC will issue an export permit for an arms transfer once the NCACC has granted contractual authorisation. Normal End User Certificate criteria are applicable in all arms transfers.

Import Permit: The DCAC will issue an import permit to a South African importer to import armaments or materials and components required in the manufacture of armaments.

⁷ DCAC, [www.mil.za/def sec/dcac.htm](http://www.mil.za/def_sec/dcac.htm), accessed, May 25, 2005.

Transit Permit: The DCAC will issue a transit permit to authorise the conveyance of conventional arms through South African ports or over its territory to neighbouring states or any destinations outside South Africa.

End-User Certificate (EUC): Following international criteria DCAC will verify the End User by endorsing the End User Certificate in respect of armaments, materials or components required in the manufacture of armaments.

Delivery Verification Certificate (DVC): In compliance with international criteria and on request of industry, DCAC will issue an official statement that certain defence material has arrived at its approved end destination.

DCAC issues permits within the following time scales.

- Contracting approval: 4 - 10 weeks
- All other permits: 1 - 4 weeks

(The above timescales are a guide only and may vary considerably depending on the sophistication of the equipment involved, non-proliferation concerns applicable or the end-user country).

The following supporting documents are required when processing an export application: -

- Copy of clients' order or Letter of Credit;
- Original END-USER CERTIFICATE (separately authenticated) and/or
- Original END-USER STATEMENT (if required and in consultation with the Non-Proliferation Council)
- A Non-Proliferation Council export authorisation for items that are classified as dual-use goods.

Product Categorization

DCAC will deal with military material requiring permits according to the product categorization system described below:

CATEGORIES

Category A : SENSITIVE MAJOR SIGNIFICANT EQUIPMENT (SMSE)

This category comprises conventional implements of war such as explosives, large calibre arms and automatic weapons, guns, missiles, bombs and grenades, tanks, fighter aircraft, attack helicopters and naval vessels that could cause severe casualties and / or major damage and destruction.

Category B : SENSITIVE SIGNIFICANT EQUIPMENT (SSE)

This category comprises all types of infantry hand held and portable assault weapons and associated ammunition of a calibre smaller than 12,7mm.

Category C :`NON-SENSITIVE EQUIPMENT (NSE)

This is a general category and comprises all support equipment usually employed in the direct support of combat systems or operations, but cannot kill or to destruct. Included are all forms of electronic equipment, radio and communication equipment; systems such as flight control, tactical observation, propulsion, missile tracking and guidance, weapon-firing sights; transport equipment for logistical support and various

other miscellaneous equipment.

Category D : NON-LETHAL EQUIPMENT (NLE)

This category is limited to purposely designed demining, mine clearing and mine detecting equipment, and all non-lethal pyrotechnical and riot control products.

Category E : NOT FOR SALE (NFS)

This category comprises all defence or related products that are not for sale, eg all landmines.

Category G : GENERAL SERVICES

General services include any service of whatever nature or form to any institution of a foreign country that has a relevance to rendering aid, advice, or assistance or training in relation to conventional arms but excluding contractual after sales and warranty services.

Table 2.6: The conventional arms control regime

Burundi Protection Support Act, 3/2002

This act was a money bill releasing R130 million to the DoD in FY2001/2 from the National Revenue Fund to defray expenditure incurred in the provision of protection support services to returning opposition leaders participating in the Transitional Government of the Republic of Burundi. It is a rare example of the type.

Termination of Integration Act, 44/2001

As the name suggests, this law ended the integration of non-statutory forces into the SANDF, a process that started in 1994.

Military Veteran's Affairs Act, 17/1999

The MVAA creates a number of structures to oversee the interests of veterans of the World Wars and Korea, the SADF and the Non-Statutory Forces. One of the fora established is the Advisory Board on Military Veterans' Affairs. The Minister of Defence appoints the chair and between two and four members, nominated by recognised military veterans' organisations, to serve on the structure, after consultation with the Chief of the SANDF. Also established within the Defence Secretariat by the Act is the Office for Military Veterans' Affairs, to act as a secretariat for the above board. The office also has a wide mandate to investigate, consult and advise on veterans' matters.

Military Discipline Supplementary Matters Act, 16/1999

The Act brings the military justice system in line with the current Constitutional order by bringing about a "separation of powers" so that military commanders are not witnesses, prosecutors and judges in the same case.

Objects of Act

2. The objects of this Act are to—

- (a) provide for the continued proper administration of military justice and the maintenance of discipline;
- (b) create military courts in order to maintain military discipline; and
- (c) ensure a fair military trial and an accused's access to the High Court of South Africa.

Table 2.7: The objects of the Military Discipline Supplementary Matters Act

Defence Special Tribunal Act 81/1998

This law contains a rarity -- a time clause: "...this Act shall cease to have effect on 31 December 2001." Its purpose was to enable the Labour Court to act as a special tribunal in the adjudication of disputes that was expected to rise out of the implementation of certain transitional arrangements in respect of military institutions or the rationalisation of the Department of Defence.

Regulation of Foreign Military Assistance Act, 15/1998

Another law with a moral tone, the RFMA, defines and prohibits mercenary activities and all types of military assistance to foreign governments or groups, bar those authorised by the Minister of Defence and the NCACC in terms of this Act. The Act was a result of government embarrassment at the hands of private military companies, such as the now-defunct Executive Outcomes (EO) operating from South African soil as well as a number of scandals involving the unregulated export of arms by state and other agencies. EO assisted the Angolan government in breaking the back of the Unita rebel movement in the early 1990s. It then assisted the government of Sierra Leone in dealing with insurgents there. Its activities, however, ran counter to South African foreign policy that places a premium on negotiated and non-violent conflict resolution.

PREAMBLE

The Constitution of the Republic of South Africa, 1996, provides in section 198(b) that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation. In order to implement aspects of this provision and in the interest of promoting and protecting human rights and fundamental freedoms, universally, it is necessary to regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident in the Republic and foreign citizens who render such assistance from within the borders of the Republic.

Definitions

“foreign military assistance” means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of-

- (a) military assistance to a party to the armed conflict by means of-
 - (i) advice or training;
 - (ii) personnel, financial, logistical, intelligence or operational support;
 - (iii) personnel recruitment;
 - (iv) medical or para-medical services; or

<p>(v) procurement of equipment;</p> <p>(b) security services for the protection of individuals involved in armed conflict or their property;</p> <p>(c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;</p> <p>(d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict</p> <p>“mercenary activity” means direct participation as a combatant in armed conflict for private gain</p> <p>Prohibition on mercenary activity</p> <p>2. No person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.</p> <p>Rendering of foreign military assistance prohibited</p> <p>3. No person may within the Republic or elsewhere—</p> <p>(a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorisation to offer such assistance in terms of section 4;</p> <p>(b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5.</p> <p>Criteria for granting or refusal of authorisations and approvals</p> <p>7. (1) An authorisation or approval in terms of sections 4 and 5 may not be granted if it would—</p> <p>(a) be in conflict with the Republic’s obligations in terms of international law;</p> <p>(b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;</p> <p>(c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;</p> <p>(d) support or encourage terrorism in any manner;</p> <p>(e) contribute to the escalation of regional conflicts;</p> <p>(f) prejudice the Republic’s national or international interests;</p> <p>(g) be unacceptable for any other reason.</p> <p>(2) ...</p> <p>(3) ...</p>
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Table 2.8: Selected extracts from the Regulation of Foreign Military Assistance Act

As a result of practical experience, particularly that gained in attempting to prosecute or secure convictions under the Act, amendments were to be made in 2005 to “tighten” the legislation. French national Francois Richard Rouget, 43, also known as “Sanders” was the first person convicted under the Act in July 2003. He was sentenced to a prison term of five years or a R100,000 fine in a plea bargain for recruiting mercenaries to fight in Ivory Coast. Former SA Air Force pilot Carl Alberts was the second convict, sentenced to a two year prison term or R20,000 fine in February 2004. Half the sentence was suspended. The most famous “victim” of the Act was Sir Mark Thatcher, son of the former British Prime Minister, who paid a R3 million fine in April 2005 for his role in funding an alleged *coup d’etat* in Equatorial Guinea. At the time of writing several other South Africans implicated in the affair were awaiting trial under the Act. Despite these apparent successes, government wanted the Act revised as it was struggling to prosecute South Africans serving in other militaries or as security guards, and the like, in Iraq, after 2003, under existing provisions.

Art 47. Mercenaries

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Table 2.9: Extract from the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

Demobilisation Act, 99/1996

The Act provided for the demobilisation of “some members of former non-statutory forces” (NSF) and the payment of a gratuity to them. Those targeted were generally those on the NSF certified personnel register who were either too old or too infirm to serve in the SANDF or were disinclined to do so.

Intelligence Services Control Act, 40/1994

The law places Defence Intelligence, along with the other intelligence services under the supervision of the Parliamentary Joint Standing Committee on Intelligence and the Inspector-General of Intelligence.

National Strategic Intelligence Act, 39/1994

Defence Intelligence derives its right to exist from the Defence Act. But as part of the intelligence community, military intelligence needs to heed a number of statutes, including the National Strategic Intelligence Act. The law allocates specific responsibilities to particular intelligence services and also calls into being the National Intelligence Coordinating Committee (Nicoc).

Non-Proliferation of Weapons of Mass Destruction Act, 87/1993

The Act established the South African Council for the Non-Proliferation of Weapons of Mass Destruction (NPC) as an interdepartmental committee that controls the transfer of weapons of mass destruction and dual-use goods according to South Africa's responsibilities as a signatory to the International Missile Technology Control Regime (MTCR). The NPC secretariat is based in the Department of Trade and Industry.

The Act, amended in 1995 and again in 1996, empowers the Minister of Trade and Industry to make policy on a wide variety of issues, affecting the technology required to produce nuclear, chemical or biological weapons.

2 Determination of policy

(1) Subject to subsection (2), the Minister may, by notice in the *Gazette*, determine the general policy to be followed with a view to-

- (a) the institution of measures and the taking of initiatives to prevent the proliferation and development of weapons of mass destruction;
- (b) the encouragement of bilateral and multilateral efforts to eliminate weapons of mass destruction;
- (c) the promotion of free trade with the international community and the minimization of government intervention therein;
- (d) the imposition of a prohibition, whether for offensive or defensive purposes, on the development, production, acquisition, stockpiling, maintenance or transit of any weapon of mass destruction;
- (e) control of the use, transit or export of dual-purpose capabilities;
- (f) the imposition of a prohibition on all nuclear explosions and tests;
- (g) the discouragement of other states to proceed with nuclear explosions and tests;
- (h) the retention of the right of the Republic to the development, maintenance and promotion of-
 - (i) defensive capabilities;
 - (ii) conventional military capabilities which are not dependent upon any toxic, infective or nuclear effects as a means of warfare;
 - (iii) capabilities necessary for domestic law enforcement and riot control;
 - (iv) capabilities in respect of industry, agriculture, research, medicine, pharmaceutical industry and other peaceful purposes.

(2) The policy contemplated in subsection (1) shall be determined by the Minister after consultation with the Council and with the concurrence of-

- (a) each Minister charged with the administration of any law which in the opinion of the Minister relates to non-proliferation; and
- (b) the Minister of Finance.

(3) Subject to subsection (2), the Minister may at any time, by like notice substitute, withdraw or amend the policy determined in terms of subsection (1).

4 Establishment of South African Council for Non-Proliferation of Weapons of Mass Destruction

(1) There is hereby established a Council to be known as the South African Council for the Non-Proliferation of Weapons of Mass Destruction.

(2) The Council shall consist of-

- (a) a chairperson and vice-chairperson, who, in the opinion of the Minister, shall be persons with applicable knowledge or experience with regard to matters connected with the objects of the Council;
- (b) an officer of the Department of Foreign Affairs designated by the Minister of Foreign Affairs, and an officer of the Department, designated by the Minister;
- (c) two persons designated by the Minister of Defence;
- (d) a person from the chemical industry;
- (e) a person from the biological industry;
- (f) a person from the space industry;
- (g) a person from the nuclear industry;
- (h) an employee of or the holder of an office at the Atomic Energy Corporation designated by the Minister of Minerals and Energy; and
- (i) such other members as the Minister may deem necessary and who shall have applicable knowledge or experience with regard to matters connected with the objects of the Council,

who shall be appointed by the Minister.

5 Objects of Council

The objects of the Council are, subject to the Import and Export Control Act, 1963 (Act 45 of 1963), the Armaments Development and Production Act, 1968 (Act 57 of 1968), and the Nuclear Energy Act, 1999, and in co-operation and consultation with Armscor and the Minister of Minerals and Energy (acting as the national authority with regard to the implementation of the Safeguards Agreement between the Republic and the International Atomic Energy Agency for the application of the safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons), to control, register and inspect controlled goods, and to verify the import, export, re-export, transit and end-use of controlled goods.'

13 Controlled goods, permits and registration

(1) The Minister may, on the recommendation of the Council, whenever he deems it necessary or expedient in the public interest, by notice in the *Gazette* declare goods which may contribute to the design, development, production, deployment, maintenance or use of weapons of mass destruction, to be controlled goods.

(2) The Minister may in such notice-

- (a) prohibit the import, export, re-export or transit of such goods;
- (b) limit or control the import, export, re-export or transit of such goods, and determine that the import, export, re-export or transit of such goods may only take place under a permit issued by the Council;
- (c) make the import, export, re-export or transit of such goods subject to end-use requirements;
- (d) require a declaration to the Council in accordance with the provisions of an international convention, treaty or agreement contemplated in section 27 with regard to the manufacture, procurement in any manner, use, operation, stockpiling, maintenance, transport, import, export, transit or re-export of such goods;
- (e) prohibit the manufacture, procurement in any manner, use, operation, stockpiling, maintenance, transport or disposal by any means of such goods;
- (f) make the manufacture, procurement in any manner, use, operation, stockpiling, maintenance, transport or disposal by any means of such goods, subject to a permit issued by the Council.

(3) Any person who is in control of any activity with regard to controlled goods or who has in his possession or custody or under his control controlled goods, shall-

- (a) register with the Council in the prescribed manner; and
- (b) if the Council so requests, make a declaration furnishing all information requested by the Council.

(4) A permit contemplated in subsection (2) may lay down conditions with regard to-

- (a) the quantities of controlled goods provided for by the permit;
- (b) the end-use requirements and the verification of such end-use requirements of controlled goods;
- (c) the states or territories to which controlled goods may be exported or from which controlled goods may be imported;
- (d) the re-export from a state to which controlled goods originating in the Republic, are destined for export;
- (e) the period for which the permit is valid;
- (f) the ports, airports or border posts which may be used for the import, export, re-export or transit of controlled goods.

(5) The Council may at any time, if it has reason to believe that the holder of a permit has contravened or failed to comply with any condition under which the permit was issued, suspend or revoke such permit summarily, and notify the holder of the permit within 30 days in writing of the reasons for such suspension or revocation.

(6) A suspension under subsection (5) shall remain in force until the holder of the permit has taken measures to the satisfaction of the Council to remove the reasons for the suspension, in which case the

Council may cancel the suspension.

(7) The Minister may at any time suspend or revoke a permit if he deems the activity authorized by the permit to be in conflict with public interests.

(8) The holder of any permit which has been revoked or has lapsed due to the expiry of the period of validity thereof, shall at the written request of the Council forthwith return that permit to the Council.

(9) The Minister may, on the recommendation of the Council, whenever he deems it necessary or expedient, by notice in the *Gazette*-

- (a) for a specified time or indefinitely, prohibit the trade in controlled goods with a specific state or territory or with a specific person domiciled in the Republic or in any other state or territory outside the Republic;
- (b) for a specified time or indefinitely, prohibit the performance of any act specified in the notice, by a person in the Republic, or by such person in co-operation with a specific person, state or territory outside the Republic;
- (c) for a specified time or indefinitely, prohibit or limit the export of controlled goods.

16 Seizure of goods

(1) The Council may direct an inspector to seize or cause to be seized-

- (a) all controlled goods for which a permit is needed, but in respect of which no application for a permit has been received by the Council;
- (b) all controlled goods which do not comply with the conditions of a permit;
- (c) all controlled goods prohibited under section 13;
- (d) all controlled goods limited under section 13 or the quantity thereof that exceeds the set limit;
- (e) any book, document, data or thing which may afford evidence of any offence in terms of this Act,

and to remove from the premises concerned any such controlled goods, book, document, data or thing, or any quantity thereof, or if he considers it necessary to leave it there, to affix any identification mark or seal which is considered necessary on such goods, book, document, data or thing or the container thereof.

(2) Pending a decision regarding the disposal of any controlled goods under section 17, an inspector may remove or cause to be removed such goods, book, document, data or thing seized under subsection (1) to a place of safekeeping designated by the Council.

(3) An inspector shall furnish the owner or person in control of, or who has in his custody, anything seized in terms of subsection (1), with a receipt.

17 Disposal of goods

(1) Subject to section 23 and the Hazardous Substances Act, 1973 (Act 15 of 1973), the Council may, after 30 days from the date of a notice to this effect in the *Gazette*, cause to be disposed of or destroyed in the prescribed manner any controlled goods, book, document, data or thing seized in accordance with the provisions of an international convention, treaty or agreement with regard to non-proliferation, or seized under section 16 or 26(2).

(2) Any disposal or destruction contemplated under subsection (1) shall, in the case of an appeal noted under section 18, be suspended and shall not take place or resume until the result of such an appeal has determined that such disposal or destruction may take place or resume.

(3) The Department may recover costs incurred in the seizure, safekeeping or disposal of any controlled goods, book, document, data or thing from any person who has been found guilty of an offence under this Act with regard to such goods, book, document, data or thing.

21 Confidentiality

(1) A member of the Council, a member of any committee of the Council, any officer or employee of the Department, an inspector or any other person who is or was concerned in the performance of any function in terms of this Act, shall not disclose, transmit or make known to any person, whether within or outside the Republic, any information which he obtained in the performance of such a function or cause such information to be disclosed, transmitted or made known, except-

- (a) to the Minister;
- (b) to any person who of necessity requires it for the performance of his functions in terms of this Act or any other law;
- (c) where he of necessity supplies it in the performance of his functions in terms of this Act;
- (d) where it is required in terms of any law or as evidence in any court of law;
- (e) to any competent authority within the Republic, or, with the written consent of the Council, to any authority outside the Republic which requires it for the institution, or an investigation with a view to the institution, of any criminal prosecution;
- (f) by or on the authority of the Minister or the Council.

(2) (a) If the Minister is of opinion that the disclosure of certain information may compromise the functions of the Council, or the interests of the industry, he may direct that any proceedings, excluding court proceedings, be held *in camera*.

(b) If any court is of opinion that the disclosure of certain information may compromise the functions of the Council, or the interests of the industry, it may direct that any proceedings before it be held *in camera*.

The Act also contains a copy of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction as a schedule.

Security Forces Board of Inquiry Act, 95 of 1993

This law was a consequence of the Goldstone Commission of Inquiry into *inter alia* the activities of the Civil Cooperation Bureau, an apartheid-era “hit squad.” It established a Security Forces Board of Inquiry to investigate allegations of serious, meaning Criminal Procedure Act 51/1977 Schedule 1 offences, levelled against members of the police, defence force and prisons service and make a report to the State President (as he then was) regarding its findings. Its continued utility is doubtful.

Defence Special Account Act, 6/1974

The Defence Special Account Act, No 6 of 1974, as amended, establishes a fund to finance “special defence activities” and equipment purchases. The statute allows for the “roll-over” of funds from one financial year to the next. The multi-billion rand strategic defence package has been financed through this fund.

ACT

To provide for the establishment of a Special Defence Account and for matters connected therewith.

1 Establishment of Special Defence Account

There is hereby established an account to be known as the Special Defence Account (hereinafter referred to as the account) which shall, notwithstanding anything to the contrary in any other law contained, be credited with-

- (a) -
- (b) moneys appropriated by Parliament by an Appropriation or other Act for the requirements of the Department of Defence if the Minister of Defence in consultation with the Minister of Finance deems it necessary in the public interest, and thereupon such moneys shall be deemed to have been appropriated by law for the account;

- (c) interest derived from the investment of moneys standing to the credit of the account;
- (cA) the proceeds derived from the sale, in accordance with the provisions of any law, of defence matériel, as defined in section 1 of the Armaments Corporation of South Africa, Limited Act, 2003 (Act 51 of 2003), which have been purchased in accordance with the provisions of section 2 (2) (a) of this Act;
- (d) refunds of expenditure incurred on the account at any time; and
- (e) moneys accruing to the account from any other source.

2 Accounting for and utilization of moneys in the account

(1) (a) Subject to the provisions of this Act, the moneys in the account shall be State moneys for the purposes of the Public Finance Management Act, 1999 (Act 1 of 1999), and the accounting officer of the Department of Defence shall be charged with the responsibility of administering and accounting for the moneys in the account received by him or her and moneys paid from the account by him or her in connection with the special defence activities and purchases of the Department of Defence referred to in paragraph (a) of subsection (2) and the expenditure referred to in paragraph (b) of that subsection

(b) The Chief executive officer of the Armaments Corporation of South Africa, Limited, established by section 2 of the Armaments Development and Production Act, 1968 (Act 57 of 1968) (hereinafter referred to as the Corporation), shall be charged with the responsibility of administering and accounting for moneys paid from the account by the Corporation in connection with its special defence activities and purchases referred to in subsection (2) (a) of this section.

(c) The provisions of the Armaments Corporation of South Africa, Limited Act, 2003 (Act 51 of 2003), shall, subject to the provisions of section 5 of this Act, apply in respect of the expenditure incurred by the Corporation from the account and the administration of and accounting for the moneys paid therefrom by it, to the exclusion of the provisions of the Public Finance Management Act, 1999, but, in so far as the auditing by the Auditor-General in terms of the said section 5 is concerned, the provisions of the Public Audit Act, 2004 (Act 25 of 2004), shall apply.

(2) The moneys in the account shall-

- (a) be utilized to defray the expenditure incurred in connection with such special defence activities in connection with the functions contained in the Defence Act, 2002 (Act 42 of 2002), and purchases of the Department of Defence and the Corporation as the Minister of Defence may from time to time approve;
- (b) if the account has been credited with moneys referred to in section 1 (b), also be utilized to defray any expenditure which would normally have been defrayed by the Department of Defence out of moneys appropriated by Parliament.

(3) Payments for the said special defence activities and purchases of the Department of Defence shall be made by the Department of Defence, and payments for the said special defence activities and purchases of the Corporation shall be made by the Corporation.

(4) Notwithstanding anything to the contrary in any law contained, the banking account for moneys in the account shall be kept in the Paymaster-General's Account of the National Treasury, and the payments referred to in subsection (3) shall be made from the latter account: Provided that the Director-General: National Treasury or any person in the National Treasury designated by him or her, may authorize a person or persons employed by the Department of Defence in the Defence Secretariat or the Corporation to sign warrant vouchers necessary for the said payments.

3 Investment of balances

Any moneys standing to the credit of the account which are not required for immediate use or as a reasonable working balance, shall be invested with the corporation established by section 2 of the Corporation for Public Deposits Act, 1984 (Act 46 of 1984), and may be withdrawn when required for use.

4 Unexpended balance in the account

Notwithstanding anything to the contrary in any other law contained, any unexpended balance in the account at the close of any financial year, including accrued interest on investment balances and other receipts, shall be carried forward as a credit in the account to the next succeeding financial year.

5 Audit

The account shall be audited by the Auditor-General.

7 Utilization of certain appropriated moneys

Any moneys appropriated by Parliament for the financial year 1973-'74 for the Defence Special Equipment Account referred to in section 6, shall be deemed to have been so appropriated for the account, and any such moneys which may have been utilized in terms of the Defence Special Equipment Account Act, 1952 (Act 8 of 1952), prior to the commencement of this Act, shall be deemed to have been utilized under section 2.

How do the following Acts affect the DoD or SANDF as part of the Public Service?

Preferential Procurement Policy Framework Act, 5/2000

The Act establishes a framework for government's preferential procurement policy, as mandated by s217(2) of the Constitution. This essentially allows government to accept tenders, other than the lowest bidder, if submitted by the "previously disadvantaged", a term that broadly covers everyone except white men.

Public Finance Management Act, 1/1999

This fine and fearsome law is the basis of financial accountability and responsibility in government and publicly-owned companies. It holds ministers, MECs (members of executive council, i.e. provincial cabinet ministers), directors-general and provincial heads of department, as well as parastatal chief executives responsible for state funds on pain of criminal sanction. This Act is dealt with, in more detail, in the chapter on budgeting.

Public Service Act, 103/1994

The Public Service Act along with the Public Service Labour Relations Act, 1994, provides for the organisation and administration of the public service, the establishment and disestablishment of government departments; and the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of cabinet ministers, provincial premiers, MECS and civil servants. The Acts do not govern personnel appointed under the Defence, SA Police Service and Intelligence Services acts.

Protection of Information Act, 84/1982

The statute, which replaced the Official Secrets Act, 16 of 1956, attempts to protect official secrets⁸ and certain other information from unauthorised publication by prohibiting anyone from obtaining or disclosing it. The Act also declares any "work of defence", described as arsenals, military establishments or factories, as well as telegraph, telephone, radio and signal stations "prohibited places." Other prohibited places include those "where armaments or any model or documents relating to them are to be found," which arguably includes most museums. The old-style Act makes it an offence for "any

⁸ A cynic would retort that it protects officials, not secrets.

person” to approach such places for “any purpose prejudicial to the security or interests of the Republic”. It further makes it a punishable offence to obstruct or interfere with guards at prohibited places, or to harbour or conceal certain persons or for failing to report information relating to enemy agents. The Act has extra-territorial application – and is ripe for the rewriting.

1 Definitions

(1) In this Act, unless the context otherwise indicates-

'agent' means any person who is or has been or is reasonably suspected of being or having been directly or indirectly used by or in the name of or on behalf of any foreign State or any hostile organization for the purpose of committing in the Republic or elsewhere an act prejudicial to the security or interests of the Republic, or who has or is reasonably suspected of having committed or attempted to commit such an act in the Republic or elsewhere in the interests of any foreign State or any hostile organization;

'armaments' means armaments as defined in section 1 of the Armaments Development and Production Act, 1968 (Act 57 of 1968);

'document' means-

- (a) any note or writing, whether produced by hand or by printing, typewriting or any other similar process;
- (b) any copy, plan, picture, sketch or photographic or other representation of any place or article;
- (c) any disc, tape, card, perforated roll or other device in or on which sound or any signal has been recorded for reproduction;

'hostile organization' means-

- (a) any organization declared by or under any Act of Parliament to be an unlawful organization;
- (b) any association of persons or any movement or institution declared under section 14 to be a hostile organization;

'model' includes any design, pattern or specimen;

'prohibited place' means-

- (a) any work of defence belonging to or occupied or used by or on behalf of the Government, including-
 - (i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft;
 - (ii) any telegraph, telephone, radio or signal station or office; and
 - (iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto;
- (b) any place where armaments or any model or document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the Government of the Government or of any foreign State;
- (c) any place or area declared under section 14 to be a prohibited place;

'security matter' includes any matter which is dealt with by-

- (a) Comsec as defined in section 1 of the Electronic Communications Security (Pty) Ltd Act, 2002 (Act 68 of 2002);
- (b) the Intelligence Services or the Academy as defined in section 1 of the Intelligence Services Act, 2002 (Act 65 of 2002); or
- (c) the Office as defined in section 1 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002),

or which relates to the functions of Comsec, the Intelligence Services, the Academy or the Office or to the relationship existing between any person and Comsec, the Intelligence Services, the Academy or the Office.

(2) In this Act, unless the context otherwise indicates-

- (a) any reference to the disclosing or receiving of anything includes a reference to the

- (b) disclosing or receiving of any part or the substance, effect or description thereof; any reference to the obtaining or retaining of anything includes a reference to the obtaining or retaining of any part or the copying or causing to be copied of the whole or any part thereof, whether by photography or otherwise;
- (c) any reference to the disclosing of anything includes a reference to the transmission or transfer thereof; and
- (d) any reference to any offence or prosecution under any provision of this Act includes a reference to an offence or a prosecution under the provisions of section 18 of the Riotous Assemblies Act, 1956 (Act 17 of 1956), read with the relevant provisions of this Act.

2 Prohibition of certain acts in relation to prohibited places

Any person who approaches, inspects, passes over, is in the neighbourhood of or enters any prohibited place for any purpose prejudicial to the security or interests of the Republic, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 20 years.

3 Prohibition of obtaining and disclosure of certain information

Any person who, for purposes of the disclosure thereof to any foreign State or to any agent, or to any employee or inhabitant of, or any organization, party, institution, body or movement in, any foreign State, or to any hostile organization or to any office-bearer, officer, member or active supporter of any hostile organization-

- (a) obtains or receives any secret official code or password or any document, model, article or information used, kept, made or obtained in any prohibited place; or
- (b) prepares, compiles, makes, obtains or receives any document, model, article or information relating to-
 - (i) any prohibited place or anything in any prohibited place, or to armaments; or
 - (ii) the defence of the Republic, any military matter, any security matter or the prevention or combating of terrorism; or
 - (iii) any other matter or article, and which he knows or reasonably should know may directly or indirectly be of use to any foreign State or any hostile organization and which, for considerations of the security or the other interests of the Republic, should not be disclosed to any foreign State or to any hostile organization,

shall be guilty of an offence and liable on conviction to the penalty prescribed in section 2.

4 Prohibition of disclosure of certain information

(1) Any person who has in his possession or under his control or at his disposal-

- (a) any secret official code or password; or
- (b) any document, model, article or information-
 - (i) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place or relates to a prohibited place, anything in a prohibited place, armaments, the defence of the Republic, a military matter, a security matter or the prevention or combating of terrorism;
 - (ii) which has been made, obtained or received in contravention of this Act;
 - (iii) which has been entrusted in confidence to him by any person holding office under the Government;
 - (iv) which he has obtained or to which he has had access by virtue of his position as a person who holds or has held office under the Government, or as a person who holds or has held a contract made on behalf of the Government, or a contract the performance of which takes place entirely or partly in a prohibited place, or as a person who is or has been employed under a person who holds or has held such office or contract, and the secrecy of which document, model, article or information he knows or reasonably should know to be required by the security or the other interests of the Republic; or
 - (v) of which he obtained possession in any manner and which document, model,

article or information he knows or reasonably should know has been obtained by any other person in any of the ways referred to in paragraph (iii) or (iv) and the unauthorized disclosure of such document, model, article or information by such other person he knows or reasonably should know will be an offence under this Act,

and who-

- (aa) discloses such code, password, document, model, article or information to any person other than a person to whom he is authorized to disclose it or to whom it may lawfully be disclosed or to whom, in the interests of the Republic, it is his duty to disclose it;
- (bb) publishes or uses such code, password, document, model, article or information in any manner or for any purpose which is prejudicial to the security or interests of the Republic;
- (cc) retains such code, password, document, model, article or information when he has no right to retain it or when it is contrary to his duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or
- (dd) neglects or fails to take proper care of such code, password, document, model, article or information, or so to conduct himself as not to endanger the safety thereof,

shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, or, if it is proved that the publication or disclosure of such secret official code or password or of such document, model, article or information took place for the purpose of its being disclosed to a foreign State or to a hostile organization, to the penalty prescribed in section 2.

(2) Any person who receives any secret official code or password or any document, model, article or information, knowing or having reasonable grounds to believe, at the time when he receives it, that such code, password, document, model, article or information is being disclosed to him in contravention of the provisions of this Act, shall, unless he proves that the disclosure thereof to him was against his wish, be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

5 Prohibition of certain acts prejudicial to security or interests of Republic

(1) Any person who, for the purpose of gaining or assisting any other person to gain admission to any prohibited place, or for any other purpose prejudicial to the security or interests of the Republic-

- (a) without lawful authority uses or wears any military, police or other official uniform of the Republic, or any uniform worn by a person employed at or in a prohibited place, or any uniform so closely resembling any of the said uniforms as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform;
- (b) orally or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes any false statement or omits any relevant fact;
- (c) forges, alters or tampers with any passport or any official pass, permit, certificate, licence or other similar document (hereinafter in this section referred to as an official document), or uses or has in his possession any forged, altered or irregular official document;
- (d) impersonates or falsely represents himself to be a person holding, or in the employment of a person holding, office under the Government, or to be or not to be a person to whom an official document or a secret official code or password has been duly issued or disclosed, or, with intent to obtain an official document or any secret official code or password, whether for himself or for any other person, knowingly makes any false statement; or
- (e) uses or has in his possession or under his control, without lawful authority, any official die, seal or stamp of the Republic or any die, seal or stamp so closely resembling any such official die, seal or stamp as to be calculated to deceive, or counterfeits any such official die, seal or stamp, or uses or has in his possession or under his control any such counterfeited die, seal or stamp,

shall be guilty of an offence and liable on conviction to a fine not exceeding R5 000 or to imprisonment for

a period not exceeding five years or to both such fine and such imprisonment.

(2) Any person who-

- (a) retains for any purpose prejudicial to the security or interests of the Republic any official document, whether or not completed or issued for use, when he has no right to retain it or when it is contrary to his duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof;
- (b) allows any other person to have possession of any official document issued for his use alone, or without lawful authority or excuse has in his possession any official document or secret official code or password issued for the use of some person other than himself, or, on obtaining possession of any official document, whether by finding or otherwise, neglects or fails to hand it over to the person or authority by whom or for whose use it was issued or to a member of the South African Police Service; or
- (c) without lawful authority or excuse manufactures or sells, or has in his possession for sale, any die, seal or stamp referred to in paragraph (e) of subsection (1),

shall be guilty of an offence and liable on conviction to the penalties prescribed in subsection (1).

6 Obstructing persons on guard at prohibited places

Any person who obstructs, knowingly misleads or otherwise interferes with any person engaged on guard, sentry, patrol or other similar duty in relation to any prohibited place shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

7 Harboursing or concealing certain persons and failing to report information relating to agents

Any person who-

- (a) knowingly harbours or conceals any person whom he knows or has reason to believe to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits any such persons to meet or assemble in any premises in his occupation or under this control;
- (b) having harboured or concealed any such person, or permitted such persons to meet or assemble in any premises in his occupation or under his control, wilfully omits or refuses to disclose to any member of the South African Police Service any information it is in his power to give in relation to any such person; or
- (c) knowing that any agent or any person who has been or is in communication with an agent, whether in the Republic or elsewhere, is in the Republic, fails forthwith to report to any member of the South African Police Service the presence of or any information it is in his power to give in relation to any such agent or person,

shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

8 Communication with agent proof of certain facts

(1) If in any prosecution upon a charge under section 3, or upon a charge under section 4 (1) in connection with the publication or disclosure of a secret official code or password or a document, model, article or information as referred to in that section, it is proved that the accused-

- (a) has been in communication, or has attempted to communicate, with an agent in the Republic or elsewhere; or
- (b) is an agent or is being or has been or is reasonably suspected of being or having been directly or indirectly used by a foreign or international body or institution, or has entered or is within the Republic in contravention of any law,

it shall, unless the contrary is proved, be presumed that the document, model, article or information referred to in section 3 has been prepared, compiled, made, obtained or received, or the secret official code or password or the model, article, document or information referred to in section 4 (1) has been published or disclosed, as the case may be, for purposes of the disclosure thereof to a foreign State or to a hostile organization.

(2) For the purposes of subsection (1)-

- (a) a person shall, unless he proves the contrary, be presumed to have been in communication with an agent if-
- (i) he has, in the Republic or elsewhere, visited the address of an agent or associated with an agent; or
 - (ii) in the Republic or elsewhere, the name or address of or any other information regarding an agent has been found in his possession or under his control, or has been supplied by him to any other person or has been obtained by him from any other person;
- (b) any address, in the Republic or elsewhere, reasonably suspected to be an address used for the receipt of communications intended for an agent, or at which an agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, shall be deemed to be the address of an agent, and any person who addresses communications to such address shall be deemed to have been in communication with an agent.

9 Proof that certain information may directly or indirectly be of use to foreign State or hostile organization

If in any prosecution against any person for an offence under section 3 it is proved that he is an agent or that he is or has been or is reasonably suspected of being or having been directly or indirectly used by or on behalf of any foreign or international body or institution or that he has entered or is within the Republic in contravention of any law and that he has prepared, compiled, made, obtained or received any document, model, article or information other than that referred to in section 3 (a), or any document, model, article or information relating to a place, article or matter other than that referred to in section 3 (b) (i) or (ii), it shall, unless the contrary is proved, be presumed that such document, model, article or information may directly or indirectly be of use to a foreign State or a hostile organization.

10 Proof of purpose prejudicial to security or interests of Republic

(1) In any prosecution under this Act upon a charge of committing an act for a purpose prejudicial to the security or interests of the Republic, it shall, if, from the circumstances of the case or the conduct of the accused, it appears that his purpose was a purpose prejudicial to the security or interests of the Republic, be presumed, unless the contrary is proved, that the purpose for which that act has been committed, is a purpose prejudicial to the security or interests of the Republic.

(2) If in any prosecution under this Act upon a charge of publishing or disclosing any secret official code or password or any document, model, article or information for a purpose prejudicial to the security or interests of the Republic, it is proved that it was published or disclosed by any person other than a person acting under lawful authority, or by an agent or by a person who is or has been or is reasonably suspected of being or having been directly or indirectly used by any foreign or international body or institution or who has entered or is within the Republic in contravention of any law, it shall, unless the contrary is proved, be presumed that the purpose for which it was published or disclosed is a purpose prejudicial to the security or interests of the Republic.

11 Extra-territorial application of Act, and jurisdiction

(1) Any act constituting an offence under this Act and which is committed outside the Republic by any South African citizen or any person domiciled in the Republic shall be deemed to have been committed also in the Republic.

(2) Any offence under this Act shall, for the purposes of determining the jurisdiction of a court to try the offence, be deemed to have been committed at a place where it actually was committed and also at any place where the accused happens to be.

12 Authority of attorney-general required for institution of criminal proceedings

No trial or preparatory examination in respect of any offence under this Act, except any contravention of section 6, shall be instituted without the written authority of the attorney-general having

jurisdiction in the area concerned.

13 Criminal proceedings may take place behind closed doors

Any court may, if it appears to that court to be necessary for considerations of the security or the other interests of the Republic, direct that any trial or preparatory examination in respect of an offence under this Act, shall take place behind closed doors or that the general public or any section thereof, shall not be present thereat, and if the court issues any such direction, the court shall have the same powers as those conferred upon a court by section 154 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and the provisions of subsections (1), (4) and (5) of the said section 154 shall apply *mutatis mutandis*.

14 Prohibited places and hostile organizations

The President may, for the purposes of this Act, by proclamation in the *Gazette* declare-

- (a) any place or area to be a prohibited place if he is satisfied that information with respect to that place or area, or the loss, damage, disruption or immobilization thereof, could be of use to a foreign State or a hostile organization; or
- (b) any association of persons, movement or institution outside the Republic to be a hostile organization if he is satisfied that that association of persons, movement or institution incites, instigates, commands, aids, advises, encourages or procures any person in the Republic or elsewhere to commit in the Republic an act of violence for any purpose prejudicial to the security or interests of the Republic, and may, in like manner at any time repeal or amend any such proclamation.

National Key Points Act, 102/1980

Responsibility for this Act migrated from the DoD to the Department of Safety and Security in 2004. As it stands, it allows the responsible minister to declare any premises, building, installation, industrial complex, land portion or water surface a National Key Point (NKP) or NKP complex. The minister, in making a decision in this regard is meant to be guided by whether or not the loss, damage, disruption or immobilisation of the facility would prejudice the Republic. The minister may also declare something a NKP when whenever he considers it necessary or expedient for the safety of the Republic or in the public interest.

This Act grants the minister wide powers and enables him to take over some ownership duties and to regulate anything that in his opinion is necessary to achieve the objective of the statute, including ordering the proprietor of the NKP to improve security at the owner's cost.

Previously, a “declaration” by the minister took the form of a letter to the owner. The owner was prohibited, by the Act, from disclosing the facility’s status. The law also exempted the minister from reporting to Parliament on the administration of the Act, which also provided for the establishment of a special account to help pay for the safeguarding of NKPs, for the appointment of persons to advise the minister and to assist him in the exercise of his powers under the Act, and so forth.

Many of this Act’s prescriptions were by 2007 obsolete – let alone unconstitutional – and it was passed time for repeal or rewriting.

To provide for National Key Points and the safeguarding thereof and for matters connected therewith.

1 Definitions

In this Act, unless the context otherwise indicates-

'**area**' means any soil or water surface, whether with a building, installation or structure thereon or not, and includes any place;

'**incident**' means any occurrence arising out of or relating to terroristic activities, sabotage, espionage or subversion;

'**owner**', in relation to a place or area declared a National Key Point under section 2, includes-

- (a) the person registered as the owner of the land constituting such place or area;
- (b) the person who by virtue of any right acquired from a person referred to in paragraph (a), lawfully occupies such place or area;
- (c) Where the person referred to in paragraph (a) or (b) is deceased, a minor, insolvent, insane or otherwise legally incompetent, an executor, administrator, guardian, trustee, liquidator, curator or other person who controls the estate and assets of that person or represents him;
- (d) where the State owns or occupies such place or area, the head of the department under the control of which the place or area is;
- (e) any person under whose control or management such place or area is;

'**place**' means any premises, building, installation or industrial complex;

2 Declaration of any place or area as a National Key Point

(1) If it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest, he may declare that place or area a National Key Point.

(2) The owner of any place or area so declared a National Key Point shall forthwith be notified by written notice of such declaration.

2A Declaration of National Key Points as a National Key Points Complex

(1) When in the opinion of the Minister it will contribute to the safeguarding of two or more National Key Points if certain steps in respect of their security are taken jointly by their owners, he may declare those Key Points a National Key Points Complex irrespective of whether one of the Key Points adjoins any other irrespective of whether the steps contemplated will be taken at or on any of the Key Points.

(2) The owner of a Key Point included in a Key Points Complex shall forthwith be notified thereof by written notice, as well as of the name and address of each of the other owners of Key Points included in the Key Points Complex.

(3) The inclusion of a Key Point in a Key Points Complex shall not exempt the owner of that Key Point from any obligation in terms of this Act.

3 Duties of owner in relation to Key Point or Key Points Complex

(1) On receipt of a notice mentioned in section 2 (2), the owner of the National Key Point concerned shall after consultation with the Minister at his own expense take steps to the satisfaction of the Minister in respect of the security of the said Key Point.

(2) If the said owner fails to take the said steps, the Minister may by written notice order him to take, within a period specified in the notice and at his own expense, such steps in respect of the security of the said Key Point as may be specified in the notice.

(3) (a) If the said owner without reasonable cause refuses or fails to take the steps specified in the

said notice within the period specified therein he shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(b) If the said owner refuses or fails to take the steps specified in the said notice within the period specified therein, the Minister may take or cause to be taken the said steps irrespective of whether the refusal or failure took place with or without reasonable cause and irrespective of whether the owner was charged or convicted in connection with that refusal or failure, and the Minister may recover the cost thereof from that owner to such extent as the Minister may determine.

(4) (a) The Minister may after consultation with the owners of Key Points included in a Key Points Complex order them by written notice to take, within a period specified in the notice and at their expense, such joint steps in respect of the security of that Key Points Complex as may be specified in the notice, and to determine within a period specified in the notice on the proportion in which each shall be responsible for the cost thereof.

(b) If the owners are unable to determine within the period specified the said proportion, the Minister may determine that proportion.

(5) If an owner referred to in subsection (4) without reasonable cause refuses or fails to take the steps for which he is responsible within the period specified in the notice, or delays, frustrates or renders them impossible, irrespective of whether any other owner with or without reasonable cause refuses or fails to take the steps for which he is responsible within the period concerned, or delays, frustrates or renders them impossible-

(a) the first-mentioned owner shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;

(b) the Minister may take or cause to be taken those steps, as well as the steps which any other owner was unable to take as a result of the first-mentioned owner's refusal or failure to take the said steps, irrespective of whether the owner has been charged or convicted in connection with that refusal or failure, and the Minister may recover the cost of those steps from all the owners on whose behalf they were taken in the proportion in which they were responsible for the cost or to such extent as he may determine.

(6) The Minister may at any time amend any period or steps in terms of a notice under this section, and the owner or owners concerned shall forthwith be notified thereof by written notice.

3A Power of Minister to take over duties of owners

(1) The Minister may at any time, on behalf of and with the consent of the owner of a National Key Point or the owners of National Key Points included in a National Key Points Complex, take or cause to be taken any or all of the steps which in his opinion are or may become necessary in respect of the security of that Key Point or Key Points Complex, and the owner or owners shall be liable for the cost thereof to such extent as the Minister may determine.

(2) When the Minister takes or causes to be taken steps under subsection (1) of this section or section 3 (3) (b) or 3 (5) (b), he may take over the obligations of the owner or owners concerned arising from any contract or contracts with a third party or third parties, with the consent of that third party or those third parties, if in the opinion of the Minister the fulfilment of the contract or contracts will contribute to the security of the Key Point or Key Points Complex concerned.

3B Special Account for the Safeguarding of National Key Points

(1) There is hereby established an account to be known as the Special Account for the Safeguarding of National Key Points (hereinafter referred to as the account), into which shall be paid-

(a) moneys appropriated by Parliament for the account;

(b) moneys appropriated by Parliament by an Appropriation Act or any other Act for the requirements of a State department and which the Minister who administers that department, with the concurrence of the Minister of Finance directs to be utilized for the security of a particular Key Point or Key Points Complex;

(c) moneys recovered or received from the owner of a Key Point in terms of this Act;

- (d) moneys received by way of a refund of expenditure incurred on the account;
 - (e) interest derived from the investment of moneys standing to the credit of the account; and
 - (f) moneys which accrue to the account from any other source;
- (2) The moneys in the account shall be utilized to-
- (a) render at the discretion of and on the conditions determined by the Minister financial assistance, including loans at the interest rate contemplated in section 26 of the Exchequer and Audit Act, 1975 (Act 66 of 1975), to an owner in connection with steps taken or to be taken by such owner in respect of the security of a Key Point in terms of this Act;
 - (b) take or cause to be taken the steps contemplated in sections 3 (3) (b), 3 (5) (b) and 3A; and
 - (c) defray expenditure in connection with the safeguarding of Key Points.
- (3) Notwithstanding anything to the contrary in any other law contained, the Minister, with the concurrence of the Minister of Finance, shall designate a person in the service of the State who shall be deemed to be the accounting officer for the account for the purposes of section 15 of the Exchequer and Audit Act, 1975 (Act 66 of 1975).
- (4) A bank account shall be kept for the account at the South African Reserve Bank.
- (5) Moneys standing to the credit of the account which are not required for immediate use or as a reasonable working balance, may be invested in such manner as the Minister may determine with the concurrence of the Minister of Finance.
- (6) Any unexpended balance in the account at the close of any financial year, including accrued interest on investment balances and other receipts, shall be carried forward as a credit in the account to the following financial year.
- (7) The account shall be audited by the Auditor-General.

4 Furnishing Minister with information

(1) The Minister may with a view to the exercise of a power granted to him by this Act, order any person in writing to furnish him within a specified time with any information at his disposal relating to or in connection with any place or area.

(2) Any person who-

- (a) in response to an order referred to in subsection (1) furnishes information which is false or incorrect in any material respect; or
- (b) makes known any information furnished in terms of subsection (1) to any person, except for the purposes of this Act or as a witness in a court of law during a prosecution in terms of this Act,

shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

(3) The provisions of subsection (2) shall not prohibit the disclosure of information-

- (a) by any person in so far as it is strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, the place concerned;
- (b) when authorized by the Minister.

5 Performance of functions in terms of this Act

(1) The Minister may on such conditions as he may determine with the concurrence of the Minister of Finance, appoint such persons as he may consider necessary to assist him in the performance of his functions in terms of this Act.

(2) Any member of the South African Defence Force may be compelled to perform functions in terms of this Act as if they are functions which he can be compelled to perform in terms of the Defence Act, 1957 (Act 44 of 1957): Provided that any functions so performed shall be deemed to have been performed in terms of the said Defence Act.

(3) The Minister may designate any officer of any department of State or provincial administration with the concurrence of the Minister or Administrator administering that department or administration, to perform such functions in terms of this Act as the Minister may determine.

6 Appointment of committees and remuneration of members

(1) The Minister may appoint such persons or committees as he may deem fit to report to him or to advise him or to exercise any power conferred on him under this Act, except a power excluded in terms of section 9.

(2) There shall be paid to any such person or member of any such committee who is not an officer as defined in section 1 of the Public Service Act, 1984 (Act 111 of 1984), such remuneration and allowances as the Minister may determine with the concurrence of the Minister of Finance.

(3) Any such committee shall, subject to the directions of the Minister, determine its own procedure.

7 Indemnity against loss or damage

The State or the Minister or any person in the service of the State shall not be liable for any loss or damage as a result of bodily injury, loss of life or damage to property caused by or arising out of or in connection with any act ordered, performed or executed under this Act.

8 Powers of owner of a National Key Point

The provisions of this Act shall not prevent any owner of any place or area declared a National Key Point from taking or causing to be taken, in addition to any steps required or ordered in terms of this Act, such measures as he may consider necessary for the efficient security of that Key Point and any goods thereon or therein.

10 Offences and penalties

(1) Any person who at, on, in connection with or in respect of any National Key Point performs any act which, if such act would have constituted an offence in terms of the Official Secrets Act, 1956 (Act 16 of 1956), if performed or executed at, on, in connection with or in respect of any prohibited place, as defined in section 1 of that Act, shall be guilty of an offence and liable to the penalties prescribed for that act in that Act.

(2) Any person who-

- (a) hinders, obstructs or thwarts any owner in taking any steps required or ordered in terms of this Act in relation to the efficient security of any National Key Point;
- (b) hinders, obstructs or thwarts any person in doing anything required to be done in terms of this Act;
- (c) furnishes in any manner whatsoever any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there, without being legally obliged or entitled to do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister, or except as may be strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, or as may be necessary to protect, the place concerned,

shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

11 Regulations

(1) The Minister may make regulations as to-

- (a) the employment or the hiring of the services of guards by owners of Key Points, the requirements to be complied with by persons serving as guards at Key Points, and the nature and duration of the training or further training of such persons;
[Para. (a) substituted by s. 1 of Act 44 of 1984.]
- (b) the powers of such guards in respect of the searching of persons, examination and seizure of articles in the possession of persons, arrest of persons and the application of reasonable force, including the use of firearms, to persons, in connection with such persons' presence at or in the vicinity of Key Points;

- (c) in general, the powers of such guards in respect of the security of Key Points;
- (d) -
- (e) in general, anything which in his opinion it is necessary to prescribe so as to achieve the objects of this Act.

(2) Regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith, not exceeding the penalties prescribed in section 10.

12 Entry upon places and areas

The Minister or any person authorized thereto by him may enter upon any place or area so as to-

- (a) exercise any power granted to him by this Act;
- (b) verify any information furnished in terms of section 4;
- (c) gather information;
- (d) check any steps being or to be taken in terms of this Act.

13 Certain provisions bind the State

The provisions of sections 2, 3 (1), 3 (2), 3 (4), 3A and 12 and, to such extent as may be determined by the Minister or any person authorized thereto by him, of the regulations made under this Act, shall bind the State.

State Liability Act, 20/1957

This Act restricts the delictual and criminal liability of the state and its agents in certain circumstances.

How do the following Acts affect the DoD or SANDF as a public entity?

Explosives Act, 15/2003

In theory, it does not. The Act, administered by the Department of Safety and Security, exempts the SANDF from having to comply with its provisions regarding the import, export, storage, use, manufacture and transport of explosives. But since at least the transport of explosives often involves using public roads, it can be deemed the SANDF will comply with its provisions in full or in part.

Implementation of the Rome Statute of the International Criminal Court Act, 27/2002

South Africa has been an enthusiastic supporter of the Rome Statute, which seeks to punish war criminals and those who commit crimes against humanity and/or genocide. Essentially yet another moral law, it binds the SANDF in that the organisation and its members are subject to the court's jurisdiction.

MINDFUL that -

- * throughout the history of human-kind. millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;
- * the Republic of South Africa. with its own history of atrocities, has, since 1991, become an integral and accepted member of the community of nations;
- * the Republic of South Africa is committed to-
 - * bringing persons who commit such atrocities to justice, either in a court of law of the Republic in

terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so. in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute, and
 * carrying out its other obligations in term of the said Statute:

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

Table 2.10: The preamble of the Implementation of the Rome Statute of the International Criminal Court Act.

PART 1: GENOCIDE:

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

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

Table 2.11: The crime of genocide defined.

PART 2: CRIMES AGAINST HUMANITY

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

- (a) Murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;

<p>(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in item 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this item or any crime within the jurisdiction of the Court;</p> <p>(i) enforced disappearance of persons;</p> <p>(k) the crime of apartheid; or</p> <p>(l) other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.</p> <p>2. For the purpose of item 1 of this Part:</p> <p>(a) “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts of conduct referred to in item 1 of this Part against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;</p> <p>(b) “extermination“ includes the intentional infliction of conditions of life, <i>inter alia</i>, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;</p> <p>(c) “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons. in particular women and children;</p> <p>(d) “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;</p> <p>(e) ”torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain arising only from, inherent in or incidental to, lawful sanctions;</p> <p>(f) “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;</p> <p>(g) “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;</p> <p>(h) “the crime of apartheid” means inhumane acts of conduct of a character similar to those referred to in item 1 of this Part, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and</p> <p>(i) “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.</p> <p>3. It is understood-that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.</p>

Table 2.12: Crimes against Humanity defined.

<p>PART 3: WAR CRIMES</p> <p>“War crimes” mean any of the following:</p>

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following conduct against persons or property protected under the provisions of the relevant Geneva Conventions:
- (i) Wilful killing;
 - (ii) torture or inhuman treatment, including biological experiments;
 - (iii) wilfully causing great suffering, or serious injury to body or health;
 - (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) compelling a prisoner of war or other protected persons to serve in the forces of a hostile power;
 - (vi) wilfully depriving a prisoner of war or other protected persons of the rights of fair and regular trial;
 - (vii) unlawful deportation or transfer or unlawful confinement; or
 - (viii) taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following conduct:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities;
 - (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) killing or wounding a combatant who, having laid down his or her arms or having no longer means of defence, has surrendered at discretion;
 - (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
 - (xii) declaring that no quarter will be given;
 - (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the

- war;
- (xvi) pillaging a town or place, even when taken by assault;
 - (xvii) employing poison or poisoned weapons;
 - (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute by an amendment in accordance with the relevant provisions set out in Articles 121 and 123 of the Statute;
 - (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in paragraph (f) of item 2 of Part 2, enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; or
 - (xxvi) conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following conduct committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) taking of hostages; or
 - (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.
- (d) Paragraph (c) of this Part applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following conduct:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United

	Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv)	intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v)	pillaging a town or place, even when taken by assault;
(vi)	committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in paragraph (f) of item 2 of Part 2, enforced sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
(vii)	conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities;
(viii)	ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix)	killing or wounding treacherously a combatant adversary;
(x)	declaring that no quarter will be given;
(xi)	subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, which cause death to or seriously endanger the health of such person or persons; or
(xii)	destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.
	(f) Paragraph (e) of this Part applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organised armed groups or between such groups.

Table 2.13: War Crimes defined

Firearms Control Act, 60/2000

Since this Act binds the State, the SANDF is also subject to its application, in particular its Chapter 11 and sections 109 and 145. Chapter 11 prescribes a fairly rigorous firearms control regime for state institutions, while S109 allows the SA police Service to inspect SANDF premises and arms for compliance with the Act and S145 makes the SANDF subject to any regulations issued by the Minister of Safety and Security. The Act also binds arms manufacturers and gunsmiths, meaning companies such as Denel, Truvello and Republic Arms have to be – and remain – licensed to remain in business.

Promotion of Administrative Justice Act 3/2000

The Act seeks to give effect to the right to administrative action that is lawful, reasonable and procedurally fair – and to the right to written reasons for administrative action (or inaction) as contemplated in section 33 of the Constitution. The NCACC during 2003 applied for exemption from the Act, but this was turned down by the Minister of Justice (then Peneull Maduna). Had the application been successful, the NCACC would not have been obliged to explain to the defence-related industry why applications for permits were being refused.

Promotion of Access to Information Act, 2/2000

This is a law meant to reverse a particularly obnoxious aspect of South African culture, the hankering for obsessive confidentiality and gratuitous secrecy by both public and private institutions. The law insists that unless there are good reasons, state departments must supply information to citizens requesting it. For this reason the DoD was required to appoint an Information Officer, maintain an Information Centre and have available an information manual to the public. This manual is available on the DoD website (www.dod.mil.za).

Yet, indications were in 2005 were that government was reluctant to obey its own law. The Open Democracy Advice Centre said the culture of the country's public service had not transformed sufficiently to support the law. "The results show a correlation between access to information laws and open government internationally, but South Africa seems to be the anomaly," Alison Tilley, the centre's chief operating officer, told Business Day⁹. That year South Africa ranked 10th out of 14 countries included in a study testing the release of information requested. More than 60% of "access for information" requests in the study were simply ignored. Tilley said the results were particularly disappointing because South Africa had "a gold-standard access to information law, an internationally lauded constitution and a complementary framework of policies, such as the *Batho Pele* (Sotho: People First) Principles, which should have ensured us ranking much higher". The study was conducted over six months, during which 140 requests were submitted to 18 institutions. The institutions were selected from national and local government, judicial institutions and parastatals, and included the Presidency, Parliament, the defence, finance and social services departments, and electricity supplier Eskom. The main findings were: mute refusal (no response) — 63%; oral refusal — 2%; written refusal — 1%; inadequate response — 1%; unable to submit information — 15%; and acknowledgment of receipt 13%, Business Day reported.

Protection of Constitutional Democracy against Terrorism & Related Activities Act, 33/2004

This well-named Act (see the reference to the BfV above) repeals and replaces the Apartheid-era Internal Security Act. Before enactment, a number of odious provisions that strongly reminded of the repealed legislation were excised. The result appears to be a law that adequately balances individual rights and the powers needed by investigating authorities to deal with terrorists or those who seek unconstitutional changes in governance. The downside of this is, alas, a complicated piece of legislation with convoluted definitions, as we shall see:

The Act creates a range of offences in three classes:

- Terrorism and related offences,
- Transgressions of international conventions the Republic is party to, and

⁹ Wyndham Hartley, State not living up to information access laws, study shows, Business Day, September 28, 2005.

- Other, related, offences.

Offence of terrorism and offences associated or connected with terrorist activities:

- Offence of terrorism
- Offences associated or connected with terrorist activities

Convention offences:

- Offences associated or connected with financing of specified offences
- Offences relating to explosive or other lethal devices
- Offences relating to hijacking, destroying or endangering safety of a fixed platform at sea, such as an oil rig
- Offences relating to causing harm to internationally protected persons
- Offences relating to hijacking an aircraft
- Offences relating to hijacking a ship or endangering safety of maritime navigation

Other offences:

- Offences relating to harbouring or concealment of persons committing specified offences
- Duty to report presence of person suspected of intending to commit or having committed an offence and failure to so report
- Offences relating to hoaxes
- Threat, attempt, conspiracy and inducing another person to commit offence

The offence of terrorism is suitably short, a one-liner that criminalises “terrorist activity.” Defining a terrorist activity is a proverbial picture – it takes about a thousand words, including several hundred safeguarding democratic activity, including advocacy, protest and industrial action (See Appendix 2). Also excluded is “any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces. in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter...” And its impact on the DoD/SANDF? The Act presumes the military would assist the SA Police Service during any terrorist campaign or incident. As such, they have the power of a “police official” when “employed in co-operation with the South African Police Service in terms of section 201 (2)(a) of the Constitution in the prevention and combating of crime and maintenance and preservation of law and order within the Republic, as contemplated in section 19(1) of the Defence Act, 2002 (Act No. 42 of 2002)...”

Electronic Communications Security (Pty) Ltd Act, 68/2002

This Act establishes a company, the Electronic Communications Security (Pty) Ltd to provide electronic communications security products and services to organs of state –

including, apparently¹⁰, the DoD and SANDF and to ensure that critical government electronic communications are protected and secure.

Disaster Management Act, 57/2002

A slightly odd Act... Where the Protection of Constitutional Democracy against Terrorism & Related Activities Act presumes the assistance of the military, this one does not. Yet, in every disaster in recent memory, in South Africa or elsewhere, the military has played a key role in ameliorating, containing or preventing damage. Is this Act a case of demilitarisation gone too far? In any case, the Act, under the aegis of the Minister of Provincial and Local Government, provides for an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; and, the training and management of disaster management volunteers.

Africa Institute of South Africa Act, 68/2001

An institution answering to the Minister of Arts and Culture, the AISA, on the face of it, has no bearing on defence, until its purpose is considered:

Objectives of Institute

3. The objectives of the Institute are to –
- (a) promote knowledge and understanding of African affairs through leading social scientists acting in concert and across all disciplines and through training and education on African affairs;
 - (b) collect, process and disseminate information on African affairs, give effective advice and facilitate appropriate action in relation to the collective needs, opportunities and challenges of all South Africans; and
 - (c) to promote awareness and consciousness of Africa at grassroots level.

Table 2.14: AISA's objectives

As can be seen, the institution should be a valuable aid to the military towards better understanding our fellow Continentals. Whether it is doing so is not for the author to answer...

Nuclear Energy Act, 46/1999

This Act establishes the South African Nuclear Energy Corporation Limited, a public company wholly owned by the State, tasked, *inter alia*, with implementing and applying the Safeguards Agreement and any additional protocols entered into by the Republic and the International Atomic Energy Agency in support of the Nuclear Non-Proliferation Treaty. The Act also regulates the acquisition and possession of nuclear fuel, certain nuclear and related material and certain related equipment, as well as the importation and export of that fuel, material and equipment.

¹⁰ S20 of the Act allows the Minister of Intelligence to exempt a state organ from the operation of the Act.

National Nuclear Regulator Act, 47/1999

The National Nuclear Regulator Act establishes a National Nuclear Regulator in order to regulate nuclear activities, including the granting of licenses to nuclear-powered vessels or ships carrying radioactive materials, in advance to their visiting South African ports.

State of Emergency Act, 64/1997

The Constitution determines that a state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and when the declaration is necessary to restore peace and order. This Act, then, is that necessary law of general application that allows the President to declare a state of emergency and issue emergency regulations.

Comparison

The South African system compares remarkably well even with the “developed world”. A recent study by Wuyi Omitoogun and MG Len le Roux (Retd) for the Stockholm International Peace Research Institute (Sipri) found that the processes and parameters put in place by the Defence, Public Finance Management and other acts had created a system of defence oversight that was “substantially transparent and in line with the principles of good civil military relations.”¹¹ Sipri is suggesting the country as a worthy example for the rest of the Continent to emulate. Discussions with Omitoogun and other scholars indicate the legislative system is in advance too, of many found in advanced parts of the northern hemisphere. “Good executive and parliamentary approval and oversight procedures exist and ensure the alignment of defence policy with political priorities. This alignment is also ensured by the good interdepartmental cooperation that exists in the national budgetary process. Oversight and control of military expenditure ensure that resources are spent on the activities for which they were planned. The South African DOD is therefore clearly accountable to the minister, Parliament and the public. The military budget fairly reflects the true economic resources devoted to military activities in South Africa,” Le Roux writes.

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