



INTERNATIONAL ISSUES

Diplomatic Privileges Act 71 of 1951, as amended in South Africa prior to Namibian independence  

Summary: This Act ([SA GG 4668](#)) covers diplomatic immunity, rights and privileges.

Repeals: The Act repeals the *Diplomatic Immunities Act 9 of 1932*.

Applicability to SWA: The Act was made applicable to South West Africa by the RSA State President Proclamation 63 of 5 May 1989 ([RSA GG 11861](#)). Section 2 of that Proclamation states “The Act, as amended by Part II of this Schedule, shall apply in the Territory.” The Proclamation does not make any reference to the amendments made to the original Act in South Africa, but references in the Proclamation to text which is to be substituted indicate that the Proclamation referred to Act 71 of 1951 as amended in South Africa prior to 1989. The wording of the Proclamation does not appear to make future amendments to the Act automatically applicable to South West Africa.

Transfer of administration to SWA: The Administrator-General acquired authority to administer this Act in South West Africa by virtue of *RSA Proc. 63 of 1989*. This did not qualify as a “transfer proclamation” in terms of the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977, which defines “transfer proclamation” in section 1 as “a proclamation *by the Administrator-General* by which the administration of the affairs of the territory in relation to any matter is transferred from a Minister of the Republic to the Administrator-General” (emphasis added). Therefore, the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977, was not applicable to this Act. The Act was repealed in South Africa prior to Namibian independence by the *Diplomatic Immunities and Privileges Act 74 of 1989* ([RSA GG 11928](#)). This repeal was not expressly applicable to South West Africa and does not seem to have applied by virtue of the wording of *RSA Proc. 63 of 1989*; furthermore it does not repeal *RSA Proc. 63 of 1989*. Thus, *Act 71 of 1951* appears to have remained in force in South West Africa.

Amendments: The following pre-independence South African amendments were applicable to SWA –

- *Commonwealth Relations Act 69 of 1962* ([RSA GG 264](#))
- *Diplomatic Privileges Amendment Act 61 of 1978* ([RSA GG 6016](#))
- *Diplomatic Privileges Amendment Act 39 of 1985* ([RSA GG 9790](#))
- *Restoration of South African Citizenship Act 73 of 1986* ([RSA GG 10327](#))
- *Transfer of Powers and Duties of the State President Act 97 of 1986* ([RSA GG 10438](#)).

The *Diplomatic Privileges Proclamation 63 of 1989* ([RSA GG 11861](#)) amends the Act as it applied to SWA.

Regulations: The Act makes no provision for regulations.

Cases: *Clear Enterprises (Pty) Ltd v Minister of Finances & Others* 2019 (2) NR 578 (HC) (concerning diplomatic immunity of SACU: diplomatic immunity means immunity from being prosecuted or sued; agents with diplomatic immunity are not subject to the jurisdiction of the nation’s courts and cannot be subjected to legal process; application of section 2(1); impact of failure to issue certificate or notice in terms of section 4(4); the competent remedy in this case would be for the complainant to approach the SACU Council with a request to place the dispute before the *ad hoc* tribunal of SACU; Court also notes in passing that there are two classes of acts - *acta jure imperii* (acts done in conducting sovereign activities) and *acta jure gestionis*, (acts done in conduct of private acts) – and that diplomatic immunity applies only to the first category of acts).

The yearly publication of the list of conferees and those removed from the list of immunity, should be strictly adhered to... (para 51, commenting on compliance with section 4(3) of the Act).

Commentary: Office of the Attorney-General, “Frequently Asked Legal Questions”, Volume 3, April 2017, available [here](#) (section 3.1 motivates the view that diplomatic immunity does not apply in respect of labour law cases).

Related international agreements:

Convention on the Privileges and Immunities of the United Nations, 1946

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973

General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU), 1965

***Additional Protocol to the OAU General Convention on Privileges and Immunities, 1980*

Treaty of the Southern African Development Community (SADC), 1992

Protocol to the Treaty establishing SADC on Immunities and Privileges, 1992

Vienna Convention on Diplomatic Relations, 1961

Vienna Convention on Consular Relations, 1963.

Geneva Conventions Act 15 of 2003

Summary: This Act ([GG 3109](#)) gives effect to certain conventions concluded at Geneva on 12 August 1949 and to the protocols to those conventions. It was brought into force on 1 October 2004 by GN 207/2004 ([GG 3290](#)). The conventions are –

- †*Geneva Convention for the Amelioration of Condition of Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 1949*
- †*Geneva Convention for the Amelioration of Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 1949*
- †*Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 1949*
- †*Geneva Convention relative to Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949.*

Regulations: Regulations are authorised by section 9 of the Act, but none have yet been promulgated.

RELATED MATTERS

Proc. 7/1997 ([GG 1605](#)) announces the signing and ratification of the Fourth ACP-EU Convention of Lomé (which has since expired).

Proc. 24/1997 ([GG 1723](#)) announces the signing and ratification of the SADC Protocol on Transport, Communications and Meteorology.

Proc. 7/1997 ([GG 1605](#)) announces the consent and ratification of the Protocol on the accession of three additional members of the European Union to the Fourth ACP-EU Convention of Lomé (which has since expired).

Proc. 6/1998 ([GG 1803](#)) announces the accession to the memorandum of understanding on road transportation in the Southern African Customs Union.

Proc. 10/1998 ([GG 1862](#)) announces the signing and ratification of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

Agreements relating to double taxation and fiscal evasion are announced in Proc. 1/1999 ([GG 2032](#)) (Germany), Proc. 4/1999 ([GG 2033](#)) (France), Proc. 3/1999 ([GG 2034](#)) (Sweden), Proc. 6/1999 ([GG 2035](#)) (India), Proc. 5/1999 ([GG 2036](#)) (Mauritius), Proc. 10/1999 ([GG 2037](#))

(South Africa), Proc. 7/1999 ([GG 2038](#)) (Romania) and Proc. 8/1999 ([GG 2039](#)) (Russian Federation).

Note: There are two Proclamations numbered “Proc. 1/1999” in the 1999 government gazettes – one in [GG 2022](#) and one in [GG 2032](#). The Proclamation pertaining to double taxation and fiscal evasion with respect to Germany appears in [GG 2032](#) and is listed as “Proc. 9/1999” in the Quarterly Return for January-March 1999.

Proclamation 7 of 2000 ([GG 2359](#)) publishes a bilateral transport agreement between Zimbabwe and Namibia, and regulations relating to this agreement are contained in GN 156/2000 ([GG 2359](#)). GN 59/2001 ([GG 2509](#)) publishes for information the United Nations Security Council Resolutions relating to Sanctions against UNITA. GN 116/2001 ([GG 2548](#)) deals with the SADC Protocol on Trade, in connection with Schedule 1 of the Customs and Excise Act 20 of 1998.

CASES CITING ARTICLE 144

(Note that some other cases cite international law applicable to Namibia without explicit reference to art 144 as the basis for their applicability. Those cases are not listed here.)

Cultura 2000 v Govt of the Republic of Namibia 1992 NR 110 (HC), reversed in part by *Government of the Republic of Namibia v Cultura 2000 & Another* 1993 NR 328 (SC) (both judgments cite Art 144)

Kauesa v Minister of Home Affairs 1994 NR 102 (HC), which was overruled on other points by *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC) (Art 144 cited only in High Court judgment)

Sikunda v Government of The Republic of Namibia (2) 2001 NR 86 (HC)

Government of the Republic of Namibia & Others v Mwilima & Others 2002 NR 235 (SC)

S v Mushwena & Others 2004 NR 35 (HC); *S v Mushwena & Others* 2004 NR 276 (SC)

Note that the Supreme Court ruling in this case was reversed in part by *S v Likanyi* 2017 (3) NR 771 (SC); see also *S v Munuma & Others* 2016 (4) NR 954 (SC) and *S v Lifumbela & Others* 2022 (1) NR 205 (SC) (paras 266-275). However, these subsequent cases do not cite Art 144.

S v Koch 2006 (2) NR 513 (SC)

Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment & Tourism 2010 (1) NR 1 (SC)

Alexander v Minister of Justice 2010 (1) NR 328 (SC) (ICCPR cited to support substantive guarantee of liberty in Constitution)

NS v RH 2011 (2) NR 486 (HC) at 526E-529B, which discusses in *dicta* the subsidiarity principle in Art 21(b) of the UN Convention on the Rights of the Child incorporated into Namibian law by virtue of Art 144 of the Namibian Constitution

JT v AE 2013 (1) NR 1 (SC) (best interests standard applied in case concerning father’s access to child born outside marriage)

South African Poultry Association v Ministry of Trade & Industry 2015 (1) NR 260 (HC)

Matador Enterprises (Pty) Ltd v Minister of Trade and Industry & Others 2015 (2) NR 477 (HC)²¹¹

Luehl v Minister of Home Affairs and Immigration 2021 (4) NR 1104 (HC) (unnecessary to discuss the monist versus dualist approach to international law under art 144 because it is plain from the preamble of the Child Care and Protection Act that the United Nations Convention on the Rights of a Child and the African Charter on the Rights of a Child which are relevant to this case are binding on Namibia and “an integral part of Namibian law” (at paras 73-76)).

COMMENTARY

PC Szasz, “Succession to treaties under the Namibian Constitution”, *South African Yearbook of International Law*, Volume 15 (1989)

Gerhard Erasmus, “The Namibian Constitution and the Application of International Law” in D Van Wyk et al (eds), *Namibia Constitutional and International Issues*, University of Pretoria: VerLoren van Themaat Centre for Public Law Studies, 1991

Legal Assistance Centre, *Gender & International Human Rights Law*, 2005, available [here](#)

²¹¹ Upheld on the basis of different reasoning in *Minister of Trade and Industry v Matador Enterprises (Pty) Ltd* 2020 (2) 362 (SC), which does not mention Art 144.

- FX Bangamwabo, “The implementation of international and regional human rights instruments in the Namibian legal framework” in N Horn & A Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, 2008, available [here](#)
- Oliver C Ruppel, “The protection of children’s rights under international law from a Namibian perspective” in Oliver C Ruppel (ed), *Children’s Rights in Namibia*, Konrad Adenauer Stiftung, 2009, available [here](#)
- N Horn, “International human rights norms and standards: The development of Namibian case and statutory law” in N Horn & A Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, 2008, available [here](#)
- Onkemetse Tshosa, “The status of international law in Namibian national law: A critical appraisal of the constitutional strategy”, *Namibia Law Journal*, Volume 2, Issue 1, 2010, available [here](#)
- Dunia P Zongwe, “Equality has no mother but sisters: The preference for comparative law over international law in the equality jurisprudence in Namibia” in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa*, Cape Town: Pretoria University Law Press, 2010
- Onkemetse Tshosa, “The status of international law in Namibian national law: A critical appraisal of the constitutional strategy”, *Namibia Law Journal*, Volume 2, Issue 1, 2010, available [here](#)
- Francois-Xavier Bangamwabo, “The justiciability of socio-economic rights in Namibia: Legal challenges and opportunities”, *Namibia Law Journal*, Volume 5, Issue 1, 2013
- Office of the Attorney-General, “Frequently Asked Legal Questions”, Volume 2, May 2016, available [here](#) (section 1 discusses the provisions of the Namibian Constitution on international agreements and case law on their position in terms of domestic law; section 3 discusses the “precautionary principle” relating to environmental impact which is found in many international instruments)
- Office of the Attorney-General, “Frequently Asked Legal Questions”, Volume 3, April 2017, available [here](#) (section 1.1 discusses the procedure for withdrawing from international instruments)
- Ndjodi Ndeunyema, “The Namibian Constitution, International Law and the Courts: a Critique”, 9(2) *Global Journal of Comparative Law* 271-296, 2020, available [here](#).

See also *Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977* (**ARBITRATION**).

See *Reciprocal Service of Civil Process Act 27 of 1994* and *Enforcement of Foreign Civil Judgements Act 28 of 1994* (**COURTS**).

See also *One-Stop Border Posts Control Act 8 of 2017* (**CITIZENSHIP AND IMMIGRATION**).

See also *International Co-operation in Criminal Matters Act 9 of 2000* and *Prevention of Organised Crime Act 29 of 2004* (**CRIMINAL LAW AND PROCEDURE**).

See also *Reciprocal Enforcement of Maintenance Orders Act 3 of 1995* (**MAINTENANCE**).

See also *Namibia Red Cross Act 16 of 1991* (**SOCIAL WELFARE**).

See also *Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014* (**TERRORISM**).