The freedom of a soldier, as referred to in an old soldiers song, is evident in the degree of self-discipline which he applies willingly and voluntarily and which he maintains as a principle of honour.

4.3 THE DEMORALIZATION OF THE SOVIET ARMED FORCES

It is one of the most elementary principles of military service that only the soldier who is convinced of the necessity to fight, and who is aware of his tasks, responsibilities and capabilities will put his life at stake in the performance of his duty. The most intensive political propaganda and indoctrination and the threat of the most dreadful punishment will lose its impact on the soldier's will to fight, once he recognises that the political values he was called upon to defend are hollow, and do not correspond with the reality and his basic moral values. It is not so much defeat in battle which demoralises forces, than the loss of confidence and the often sudden awareness of having served and suffered for a criminal and corrupt cause. That happened in Germany in 1945 and is happening at this time in all the former communist countries in the world. A Russian senior officer is quoted as having said:

> *We curse those 'durakis' stupid idiots who pulled our great and beautiful country so deep in the dirt for more than 70 years. We demand to live in conditions of human dignity as we can see it here in the West and we demand to apply these values now in our home country, Russia.*[16]

The enforcement of formal discipline and loyalty through draconic punishments and extreme disciplinary measures is not a long term solution to maintain morale in any armed forces. The futility of these measures can be seen in the horrifying reports coming from Germany and the CIS countries of the former Soviet Union.

The German magazine 'DER SPIEGEL' last year published an article which summarised the demoralisation process in the former Soviet Forces in a dramatic, frightening analysis.

The demoralisation of the once most prestigious Soviet *West Group of the Armed Forces* (Honorary title "The military Avantguard of Socialism" consisting of four Army Groups of about 350 000 men in Germany resulted, within three months after Germany's Unification, to the dismissal of the Commander in Chief, Army General Snetkov and three of his deputies.

The official reason given by the Soviet Ministry of Defence was that a Colonel and Officer Commanding of a Tank Regiment had defected to Germany, taking a number of his latest anti-tank weapons with him. During a press conference in December 1990 the Soviets admitted that in 1990 alone 152 soldiers deserted and 120 had sought political asylum in Germany. The unofficial German numbers are much higher.

In 1991 the German Federal Office for Criminal Investigation (BKA) registered 30 criminal acts a week committed by Soviet soldiers which included theft, burglary and selling of arms and equipment.

Analysing the erosion of discipline, obedience and loyalty the main reason was identified as the totally discredited so-called socialist reality, which the soldiers were taught to believe would conquer the world.[17]

The draconic disciplinary methods, for which the Russian Army was well known, have been to be useless and are replaced by arbitrariness and criminal mistreatment, which culminates in rape, beating, torture and in several cases in murder. The Soviet High Command published for 1990 a total number of 216 cases of suicides and unnatural deaths in their military camps in Germany alone. Press reports are reporting a number of 700 - 800 cases which can be attributed to the situation.

The oath of allegiance sworn by Soviet soldiers, proved to be clearly unsubstantive during the operations in Afghanistan. The high number of desertions and the low fighting morale led to a complete reliese of all forces within the first months of that campaign.

The lesson from these examples is quite clear. Loyalty and duties of the soldier, may they be demanded by an oath of allegiance, any other pledge or code of conduct and even by the law, must be in accordance with the ethical basis of military service and with the moral values generally accepted by the society. The demand for loyalty and obedience can, in a democracy, only be justified by the commitment of the State not to abuse its powers. This commitment should be embodied in the constitution together with the manifestation of parliamentary control of the Defence Force.

4.4 THE BRITISH EXAMPLE

Considering the detrimental effects of formal commitments, whether they are as drastic as that of the German Third Reich or those of communist regimes, the question is: is it at all necessary to subscribe to a form of codification of moral standards?

The British example, which has made its impact in South Africa, is quite enlightening to look at.

Colonel Clive Lea-Cox, a former British Army officer with some service in the South African Army, summarises the British situation as follows:

> *The British Army does not have a Code of Conduct per se, although behaviour is regulated by Queen's Regulations and regimental traditions. It must be remembered that legal control is through the Manual of Military Law and in particular the Army Act of 1955.*
>
> *On recruitment a member of the permanent force, called a Regular, is attested by a recruiting officer. This is in fact swearing allegiance to the Queen as head of State.*
>
> *An officer on commissioning, receives a commission signed by the Queen.: "... You are therefore carefully and diligently to discharge your duty and you are in such manner and on such occasions as may be prescribed by Us to exercise and well discipline in their duties such officers, men and women as may be placed under your orders from time to time and use your best endeavours to keep them in good order and discipline. And we do hereby command them to obey you as their superior officer and you to observe and follow such orders and directions as from time to time you shall receive from Us or any of your superior officer according to the rules and discipline of war.*
>
> *One should be aware that the above law and regulations are re-inforced with a strong regimental ethic (tradition), which has been developed from generation to generation. Traditions are fostered not only in the officers mess but also in the warrant officers and sergeants mess and to a lesser degree in the corporals mess. All persons in authority in a Regiment are taught these traditions and infringement of accepted behaviour or norms can result in discharge of the Army. An officer can be asked to resign his commission. Basically discipline is seen as self-discipline as against imposed discipline and this applies to all ranks.*

Whilst Queen's Regulations and Military Law regulates in the necessary detail the behaviour of the soldier, the general commitment of the soldier to serve the State is appropriately regarded as a mutual commitment, which clearly binds the soldier to exercise his duties within the framework of the national and international law and which prevents the State ("The Queen") from abusing its position.

In **South Africa** members of the permanent force within the SADF, on recruitment, are not always sworn in with an oath of allegiance or a formal pledge for their military service. As in Britain, the SADF does not have a formal Code of Conduct, although some units or corps have such a code for internal use or as part of their regimental traditions which elucidates rules of behaviour.

However, it is tradition in the SADF, at formal parades, to read after prayers, the preamble to the constitution. This can be interpreted as a pledge to serve those aims and values as contained in the preamble.

On commissioning an officer receives a **Deed of Commission**, signed by the State President. The officer is '*to serve his country with loyalty, courage, dignity and honour, to discharge his duties and responsibilities with zeal and diligence and to set a good example to those placed under his command.*'

These acts in conjunction with the Military Disciplinary Code (MDC) is in the eyes of those who are familiar with the military law sufficient legal protection to prevent abuse or exploitation of any person subject to the Military Disciplinary Code. A code of conduct in respect of legal protection is therefore superfluous.

In our opinion this viewpoint does not serve the realities in a turbulent society such as South Africa. Neither the ethical nor the legal aspects of military service are sufficiently addressed or strongly entrenched to create mutual trust between the military and the public.

5.0 THE LEGAL BASIS OF MILITARY SERVICE IN A DEMOCRACY

Having discussed the ethical limitations to military authority, it is clear that these limitations are critical factors for the motivation and the will to fight of a soldier. As I have already indicated, however, that human nature requires the guidance of rules and regulations, which are based on a moral and cultural value system and which make it possible to correct and even prevent misconduct and offenses against the system.

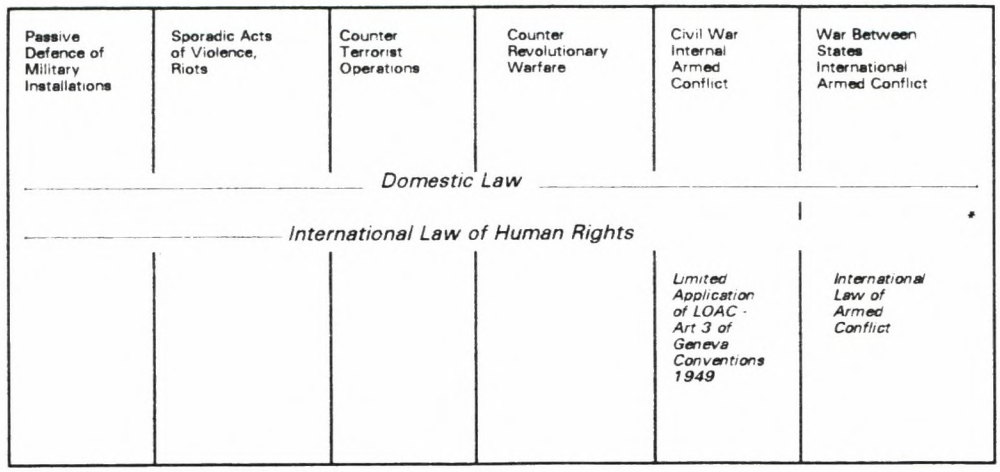
5.1 LEGAL LIMITS TO OBEDIENCE

In the authoritarian military environment which is based on the values of responsibility and obedience, the law must balance the strict duty to obey and set limits.

These limits are derived from

- **the unimpeachable human dignity;**
- **the constitutionally manifested aim of military service; and**
- **the observance of the law, both domestic and international.**

Irrespective of the capacity within which troops are employed, they must always operate within the law. If the conflict is international the international law of armed conflict must be observed. If the operation falls short of international armed conflict, then the internal, national law of the State, together with any provisions of international law by which the State are bound, must be followed. International law applying to such operations is to be found in treaties aimed at protecting basic human rights and in the Geneva Convention. The full range of operations in which troops could be involved and the law which governs such operations is illustrated in the following diagram:[18]



* The application of Human Rights Law is shown with an interrupted line to indicate that in time of "War or other public emergency threatening the life of the nation" a State may derogate from its obligations.

It is for the individual soldier and his leader vital to know what law applies in a given set of circumstances and what are the legal limitations, which are applicable and which will guide the soldier in his operational duties. These legal limits must indicate conditions where disobedience to orders is permissible and even obligatory. There is, however, a considerable difference between these legal restrictions and active resistance.

Any act of the democratic state, whether public or undercover (such as intelligence operations), are controlled by the law. Consequently the military officer is bound and controlled by the law. He is, strictly speaking, only authorised to issue orders which are within the framework of the existing law.

For obvious reasons military operations require that orders have to be obeyed and executed immediately. There is often no time to consider or evaluate the legitimacy of an order. For this reason it is generally accepted that a soldier, first and foremost, has to obey the order. It is, however, his basic right and in some cases even his duty, even after having followed the order, to report the incident and to request a redress of wrongs, if he feels he has been given an unlawful order.

This means that his superior, who issued the order, would be held responsible for his actions.

In a democratic / -parliamentary controlled Defence Force the institution of a Parliamentary Ombudsman on defence can be called upon to investigate incidents of this nature and initiate corrective action. There are, of course, various other ways and means in a democracy which can be used to correct wrong doings of authorities. They are, however, beyond the scope of this paper.

Although the following considerations are based on the German legal concept for the Armed Forces, they are nevertheless applicable in most armies of democratic countries. In some countries like South Africa these legal limitations are not codified but accepted on ethical, moral and logic grounds.[19]

5.2 WHEN IS DISOBEDIENCE PERMISSIBLE?

The soldier is a servant of the state, in other words, he serves the public good. Any orders given in the **private interest** of the superior are not covered by this objective and the subordinate can refuse to obey the order. This includes orders, which serves an activity not covered in the constitution as a role of the Defence Force, i.e. **running a business or party - political activities.**

Public relations work of the Defence Force is in the interest of the integration of the defence force in the society. That also includes international sport activities such as Olympic games. Soldiers deployed in this field of work are fully subjected to the principles of military order and obedience.

A soldier as a '*Citizen in Uniform*' is entitled to the **protection of his personal dignity**. A Bill of Rights will ensure his human and citizen rights. To respect and protect this dignity is the responsibility of the state which includes the members of the Defence Force. No operational requirement can ever justify the violation of this right. Therefore an order which violates the dignity of the soldier cannot claim obedience i.e. ridiculing a soldier or requesting unnecessary, humiliating duties.

This restriction also includes orders which may, unjustifiably, place the life of the soldier in danger.

5.3 WHEN IS DISOBEDIENCE OBLIGATORY?

Disobedience of an order is obligatory when an order demands that the soldier commit a **crime**. Both national and **international law** such as the Geneva Conventionare relevant. An order to murder, rape or mistreat civilians, to plunder, burn and destroy civilian property, to mistreat, torture or kill prisoners, to refuse medical assistance **must be refused**.

> In cases like this, both parties are fully responsible - the superior who issues the order and the subordinate who executes it, provided they are, according to the circumstances, aware they are committing a crime.
>
> The final responsibility always has to be accepted by the highest authorities, which are in control of the forces involved.

Nowhere in military history are there examples that armies who respected and adhered to these principles have suffered of a loss of motivation, or displayed an unacceptable performance in combat. Even in the case of defeat by an enemy, who has made use of ruthless and criminal methods, they earned the respect of their nation and even of the enemy in maintaining their honour.

In peacetime these limits do not prevent realistic training for war, but ensure that the conditions for the soldier and superior are fair and just. This is the primary factor in the quest for mutual trust and confidence.

I am of the opinion that a code of conduct should confirm the ethical and moral values .

I am also of the opinion, that certain amendments to the Defence Act and the MDC in this respect can only strengthen the case for the Armed Forces, provided they are supporting a democratic constitutional dispensation.

A code which defines, in clear layman's language the rights and duties of military superiors and subordinates, can only establish trust and confidence of the public in their armed forces.

6.0 CONCLUSION

In some quarters the opinion has been raised that too much respect for and consideration to the ethical and moral values only restrict the will to fight of the soldier and the army. Historic analysis clearly indicates the opposite. Ruthlessness and brutality is, in most cases, a clear indication of cowardice. A person, who is not able to show courage in the face of the armed enemy, will only too quickly turn his intimidating power and fury against defenseless civilians, women and children.

A code of conduct, an oath of allegiance and leadership principles, which confirm the moral and ethic principles of the soldier and which emphasise the legal and political restrictions which military

power has to acknowledge, can only enhance combat efficiency of armed forces, which proudly support and defend the democratic constitution of a Post Settlement South Africa.

REFERENCES

1 The Citizen, 23.Sept 1991.

2 Brendan Seery in Weekend Argus, 30 November 1991.

3 CP, MP Koos v.d.Merwe quoted in The Citizen, 23 Sept 1991.

4 The Star, 24 Sept 1991.

5 It is in fact quite surprising that none of the South African military magazines, ie Paratus and the officially independent Armed Forces Journal ever commented on or published articles of authority on vital military professional subjects. If, however, on a rare occasion, something appeared on a slightly sensitive subject connected to the SADF environment, the author usually covered himself under a '*Nom de Plum*'. Overseas military professional periodicals boast with military authors of any rank and do not hesitate to discuss political and professional subjects even in a controversial form. It shows the standard of creativity and openness which also applies to the military in a democracy.

6 Ulrich de Maiziere: Soldatische Tugenden und militärische Verantwortung in unserer Zeit. in De Officio, p 230, Hannover, 1985.

7 Ibid., U.de Maiziere, p 231.

8 Any sort of criticism or even condemnation of unacceptable behaviour such as the actions of the shadowy CCB unit or the recent incidents of 32 Battalion at Phola Park (Sunday Times editorial, April 12, 1992) are rather seen as acts of disloyalty. Any statements to the extent that violations of the law are unacceptable for the Defence Force and against the Code of Honour have never been made. Generals in command of the operations refuse to comment or even to accept responsibility in public, usually shielding behind the 'sub judice' requirement. However soldiers and officers of the SADF would have regarded it as an act of loyalty to them, if only one superior would have accepted his responsibility and either condemned or defended the action in public, thus restoring mutual trust and confidence.

9 Colonel M. Ferguson, US Defence Attache to Pretoria in a memorandum dd 8 July 1991: "*There are certain core values that must guide all members of the defence establishment as we serve the nation. These values - encapsulated in the phrase "Duty, Honour, Country" - apply in peace and in war, for the institution as well as the individual and are central to the military profession....The core values are loyalty, duty, selfless service and integrity.*"

10 This is quoted from the German Military Law (Soldatengesetz) par 11: "Der Soldat muss seinen Vorgesetzten gehorchen. Er hat ihre Befehle nach besten Kräften vollständig, gewissenhafdt und unverzüglich auszuführen."

11 For more detail on this subject see Paul-Bolko Mertz, *Parliamentary Control of Defence* in South African Defence Review, Issue no 2, 1992.

12 Mission oriented command tactics or "Auftragstaktik" has its origin in German approach to operational art, and developed over a long time since the late 18th

century. It has been adopted by almost all armies in western democracies. The US FM 100-5, edition 1985 refers directly to the German terminology of *Auftragstaktik*.

The manual on Command and Control of Armed Forces / HDv 100/100 Truppenführung explains the principle as follows (par 604):

*'**Mission oriented command** and control is the first and foremost command and control principle in the Army, of relevance in war even more than in peace. It affords the subordinate commander freedom of action in the execution of his mission, the extent depending on the type of mission to be accomplished. The superior commander informs his subordinate of his intentions, designates clear objectives and provides the assets required. He gives orders concerning the details of mission only for the purpose of CO-ordinating actions. Apart from that, he only intervenes if failure to execute the mission endangers the realization of his intentions. Subordinate commanders can thus act on their own in accordance with the superior commander's intentions. They can immediately react to developments of the situation and exploit opportunities.'*

13 Die Weltwoche, 13/92, 26. March 1992, Hanspeter Born, *Balsam auf die Seele der Abgespannten*

14 There are numerous publications, which discuss the value and impact of an Oath of Allegiance. In particular the German literature, which analyses the history of the military coup of the 20th July 1944 against Hitler, evolves around the moral and ethical impact of an oath of allegiance. Most prominent are Hermann Weinkauf: Vollmacht des Gewissens, R C v Gersdorff, Soldat im Untergang, and H Bücheler, Hoepner. The brief summary is based on H Walle, *Gehorsam im Konflikt* in De Officio p 134 - 141.

15 Ibid, p 138.

16 Der Spiegel, 10/1991 p "Sie haben den Rückzug nicht gelernt" Another account of the horrifying demoralisation of the former Soviet Forces was recently published in the Swiss weekly 'Die Weltwoche, Nr 12, March 19, 1992, Josef Neidhardt: 'Ein Heer ohne Staat'. The author reports of Russian soldiers who are selling everything on which they can lay their hands in order to get food: Petrol,ammunition, arms, spare parts and their own services. In Moldavia a weapon depot was stormed by soldiers, who cleared it out: 1 million rounds of ammunition, several thousand automatic rifles and 30 rocket launchers were stolen.

17 Ibid. The other reason given were:

- The defeat in Afghanistan and the defeat of the Soviet trained and equipped Iraqis in the Gulf war,
- The forced withdrawal from Germany, in the eyes of many of officers this is a retreat without being beaten in an open field battle,
- The humiliating circumstances of the transit of their forces through countries once their allies in the former now defunct Warsaw Pact,
- The fear of possibly be deployed against their own people on repatriation.
- Finally the fear of a pending civil war to be fought with nuclear weapons.

18 British Army Manual of Military Law, chapter 5,p 5-2.

19 Brigadier Ben de Wet Rose (rtd) in a memorandum discussing the introduction of and need for a Code of Conduct for the SADF. On the subject of legal limits to obedience he comments: "*Provision is made (in the MDC) for the punishment of any person subject to the Code for Disobeying a lawful command given by a superior in the execution of his military duties.(Section 19 MDC) As military courts follow the rules of evidence as applicable in civil courts, authority for what constitutes a lawful command inter alia can be found in the decisions in R v Smith (1900) 17 SC 561 and R v werner and Anor 1947 (2)AD828.*" There is no section or article in the military law of South Africa, which spells out the standards of a lawful order and the conditions when an order can or even must be refused.

20 The legal restrictions as referred to are derived from the German Military Law, par 11. The detail of the implications of this law is subject to intensive training, which every soldier, NCO and officer has to undergo repeatedly. The knowledge alone at all level of the military hierarchy serves as an accepted balance against arbitrariness, mistreatment and abuse.

ARMED FORCES IN A DEMOCRATIC SOCIETY

FOUNDATIONS AND CONDITIONS FOR TRAINING AND EDUCATION OF THE CITIZEN IN UNIFORM*

By Klaus Abel, Colonel in the General Staff, Ministry Of Defence, Germany

1.0 INTRODUCTION

The principles of order of armed forces and the principles of liberty of democratic states seem to exclude each other. Therefore it is particularly appealing - after discussing a few central subject areas to fix the position of armed forces in a democracy, notably the legal framework, parliamentary control, integration in society - to turn to the armed forces themselves and look at the result, namely the people that serve in the so constructed armed forces. Before I do, I should point out that the circumstances described in the following have no general applicability. They relate only to the particular situation of the Federal Republic of Germany, its specific security situation and defence constitution. In brief, I will attempt to present to you our concept. I cannot and will not deal with questions of applicability to your country or your armed forces.

2.0 ON THE LEGAL FRAMEWORK

Legislative competence for the tasks of national defence and the protection of the civilian population in the Federal Republic of Germany is vested solely in the federal government. Under the constitution, the armed forces are established to defend the federation (Article 87a, Basic Law). Alongside the armed forces, Germany has established the federal defence administration, which is responsible for personnel management and directly satisfying the material requirements of the armed forces (Article 87b, Basic Law).

Together, the armed forces and the - civilian - federal defence administration form the Bundeswehr, which is under the control of the Federal Minister of Defence.

Under our constitution, the executive is bound by law and justice and particularly by the basic rights of all citizens. The citizen retains these rights also during military service to the extent that they must not be restricted as a result of the necessities of military service. In other words, while the serviceman is bound in a special power relationship with the state, which makes restrictions of his basic rights permissible and necessary, he still remains a citizen. Thus, for instance, the absolutely unrestrictable principle of inviolability of the dignity of man, the basic right to freedom of expression, which is absolutely indispensable in any kind of democratic order, and the basic right to legal protection against infringement of the law by state action, so very important especially in a relationship of power, continue to remain in effect fully also for soldiers.

To that extent the soldier does not become the object of state action. As a member of the armed forces bound to the state in a special relationship of duty and loyalty, he both enjoys the basic rights and at the same time stands up for them. A few words on the restrictions of basic rights:

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Restriction is not the same as loss! The essence of each basic right remains inviolable. It is something to which every soldier is entitled. The pertinent regulations are contained in the Legal Status of Military Personnel Act (Soldatengesetz). A few examples of permissible restrictions and special conditions:

- the right of freedom of expression, to the extent it is necessary to shield subordinates or fellow servicemen from political influence, or

- the right of free movement where it is incompatible with the requirements of military readiness and availability.

- The right to privacy is taken account of by a very liberal organization of the forces' internal service (Article 2, para 1 of the Basic Law).

The judicial basic right to legal guarantees in the event of deprivation of liberty pursuant to Article 104 of the Basic Law is ensured by the provision that before disciplinary detention is imposed, an independent judge must have approved the measure.

- A serviceman's particular duties, namely to

- stand up for the basic democratic order,

- loyally serve the Federal Republic of Germany and bravely defence the laws and the liberty of the German people,

demand obedience if the armed forces are to remain effective and the primacy of political control is to be preserved.

The precise limits to which a serviceman is bound to obedience are laid down in the Legal Status of Military Personnel Act. This act obliges each superior to expressly observe the law of the land and the rules of international law whenever he gives an order, and limits his authority to the essential measure. Each military commander is responsible for the orders he issues. At the same time, he is duty-bound to obey the orders he himself is issued as well as the existing laws.

An order that serves no duty-related purpose need not be obeyed, while an order that, if obeyed, would involve committing an offense must be disobeyed. For that every soldier, and especially of course every superior, is immediately and personally responsible.

No serviceman is ever excused by an order requiring him to commit a crime.

These regulations are a visible expression of how the armed forces in Germany are bound by the constitution. At the same time they determine the contents of military training to enable the armed forces to accomplish their mission.

2.1 SUMMARY

The soldier must fulfill his duties but these duties are to be anchored in the law. The soldier is to be committed to the law no less than to his military mission. In this sense we view the soldier as a citizen in uniform.

3.0 ON PARLIAMENTARY CONTROL

The concentration of military power in the armed forces makes it absolutely necessary for them to be integrated into the democratic constitutional state and at once put entirely under the control of the executive and parliament.

Probably the most effective and most visible political control of the Bundeswehr by parliament, that is the practical exercise of the primacy of political control, takes place through the annual allocation of the financial means in the budget.

The budget, which has to be approved every year, must show the numerical strength of the armed forces and the main features of their organization.

Special control functions are exercised by a defence committee within the German parliament. It prepares all the major acts of parliament that affect the armed forces and monitors government activities in this area.

Parliament also appoints a parliamentary commissioner for the Bundeswehr, whose job it is to exercise parliamentary control and safeguard the soldiers' basic rights. He is directed by parliament or the defence committee to perform parliamentary reviews in the Bundeswehr. He also has the power himself to initiate investigations, notably when he receives requests from service members. He has access to all armed forces installations and all files at any time.

Anyone in the forces is entitled to take his case directly to the parliamentary commissioner for the Bundeswehr without going through ordinary channels. This institution has been highly instrumental in establishing a balanced relationship between the Army and society in Germany.

The Bundeswehr's obligation to observe the law is also monitored through the general administration of justice. The constitution guarantees everyone the right of recourse to the ordinary courts of law if ever a law is violated by the executive branch of government. There is no special system of military justice in Germany in peacetime.

The primacy of political control also becomes apparent in the leading role played by the civilian minister of defence. In peacetime, he has power of command over the armed forces. He is thus the military superior of all service personnel. Beside this highest military directive power of a civilian minister there is no independent military top authority being exercised by a military person. There is hence no military supreme commander.

What is more, as a member of the cabinet, the minister of defence is entirely subject to parliamentary control. In a state of defence the power of command passes to the federal chancellor.

Besides this institutionalized control, the armed forces are also under the careful observation and critical eye of the public and the media.

In summary, it can be said that parliamentary control over the Bundeswehr is exercised comprehensively and effectively, that it forces the service members of all grades to exhibit a high degree of transparency of thought and action and that at the same time it forces parliament to feel responsible for the armed forces and the soldiers serving in them.

Before I deal with the **integration of the Bundeswehr in society**, it seems to me necessary to describe the **mission and capabilities of the Bundeswehr** and thus of its soldiers. The principal mission of the armed forces is defence. Defence within the meaning of the law is limited to warding off an armed attack on the Federal Republic of Germany or one of its allies.

The use of Germany's armed forces for any purpose "*other than defence*" requires explicit authorization by the constitution. These other purposes for which the armed forces in Germany may be used, include, for example:

a. in a state of tension or defence, to protect civilian property within Germany also against civilian trespassers and to perform traffic control duties;

b. to provide assistance in the event of natural disasters or particularly grave accidents, whenever such assistance is necessary to quickly overcome the state of emergency and it has been requested by a federal state from the federal government. In such cases, control over the disaster relief operation remains in the hands of the civilian authorities; the military units employed in the operation are subordinated to civilian authority for the performance of the mission.

In other words:

The principal political task of the armed forces is the protection of Germany's territorial integrity, the security of its citizens and the free democratic order against external dangers and the effective performance of alliance commitments. On that basis, the **mission of the Bundeswehr** can be defined as follows:

In cooperation with other German governmental, social and economic forces

1. *to protect German territory and German citizens both nationally and together with the armed forces of the allies against the threat or use of force from outside;*

2. *as mandated by the constitution, to perform sovereign tasks as part of the executive branch of government;*

3. *to contribute to the discharge of German alliance commitments;*

4. *to contribute to Germany's ability as a political player and ally by the provision of adequate military facilities;*

5. *to make a contribution to European stability through the maintenance of balance in the field of security, through intensified collaboration with allies and close cooperation with all European partners;*

6. *after a clarifying amendment of the Basic Law, to take part in collective operations beyond the confines of the NATO area under the Charter of the United Nations (Chapter VII) when demanded by German interests and German co-responsibility for the preservation of peace, humanity and international security.*

It is the aim of the federal government to reach a constitutionally binding and unambiguous decision that allows the Bundeswehr to be used under a mandate from the United Nations or similar organizations.

After this, as I think necessary, excursion, now to the question of the **integration of the Bundeswehr in society**. The legal framework I described creates the necessary conditions for unrestricted integration. The constitution expressly wants the soldier to be politically active (Article 137 of the Basic Law). He may be and remain an active member of a political party. He retains the right to vote and to be elected. In fact about 1500 soldiers hold political mandates. For a full-time mandate a soldier is released from his duties.

From all this it is clear that the status of citizen lives on in the status of citizen in uniform. Drafting recruits to duty stations near home, assignment in civilian-related occupations, and liberal duty,

leisure time, leave and furlough arrangements and quartering-in-barracks regulations underline this political intention. But, is that integration?

Integration must not be confused with legitimation. In view of the constitutional mission of the armed forces, there is no doubt of the latter. Also, the broad discussion conducted in the media in connection with a law suit prosecuted through several stages of appeal over whether soldiers may be called potential murderers, does not basically question the legitimacy of armed forces. However, the comments and letters to the editor do reflect a certain negative attitude of part of our population.

Nor must integration be confused with acceptance. In spite of saying "*yes, we need armed forces*", many of our citizens have difficulty, in view of the dramatic changes in the security environment, in agreeing to a still large number of military personnel, tanks, ships and aircraft, seeing annually some 150 000 young men being drafted and supporting reserve training for about the same number of citizens every year.

Integration does require information and transparency. In both areas the armed forces have done a great deal. But, again and again they come close to explaining and justifying their reason for being.

Integration shows only in part in the manner armed forces are evident in public. Usually, the soldier of the Bundeswehr does not go out in uniform. He considers his uniform not as a dress of honour but as service clothing which he doffs after duty. Not even on the way to and from work is the uniform worn regularly. Therefore the Bundeswehr is not as publicly visible as would correspond to its size. But to regard this as a measure of the degree of integration would be wrong.

To summarize this chapter on integration:

Politicians and the representatives of official institutions say "*yes, the Bundeswehr is integrated in society*". Also the Bundeswehr in its majority feels integrated. But many of its members feel rather only accepted by the public, without much inner appreciation or national enthusiasm, considered necessary, just like the police or fire department, for instance. The long period of non-war in Central Europe and the dissolution of the Warsaw Pact without a shot having been fired, have blinded the public to the fact that the military profession is not a profession like any other but does involve the risk of life and limb. The soldiers of the Bundeswehr do not demand to be loved, but because of their special service for society want to be respected and not just suffered. These wishes are based on the examples of such countries as Switzerland and Israel, but also Norway and Finland, for instance.

In all, it may be said that the matter of integration of armed forces in society is of great importance.

In the last chapter I will deal with the question of how the legal, political and societal conditions and requirements are translated into reality and practice in training and service in the armed forces and what principles apply for leadership and education of leaders and the led.

These conditions and the mission of the Bundeswehr require forming young citizens who have grown up in a predominantly hedonistic environment and are primarily responsible only for themselves, into soldiers who feel responsible in a free democratic order, respect the system of values expressed in our constitution, fit themselves into the community of soldiers, master their weapon systems, in other words are able to fight and also willing to fight. In this they are to allow themselves to be immediately led by noncommissioned officers who, being only slightly older than themselves, have an advantage of only a few more months of service experience over them. Their officers, after about two years of service with troops, have studied for up to four years at a university of the Bundeswehr, from where they have graduated with a diploma fully recognized in the civilian sector and who regard their 12 years of obligation - if they do not plan to become permanent-career officers - as a period of transition into a civilian career.

These, not rarely permanent, tensions between legal obligations, personal wishes and necessary military efficiency have been overcome with remarkable success ever since the creation of the Bundeswehr in 1956 by the concept of "*Innere Führung*", sometimes translated as leadership and civic education or moral leadership.

This term eludes a brief definition and needs to be explained. It embodies the basic concept:

- for the internal order of the Bundeswehr for one thing; and
- for the integration of the armed forces in the state and society for another.

Internally, the nature and forms of leadership must be determined by the dignity of man as the basis of the constitutional order. The current state of political and social affairs in the Federal Republic of Germany as well as the results of change in the military-technological field have to be taken into account. But modern leadership also means that the conditions of everyday military life as determined by forms of organization, principles of personnel management, and by infrastructure, respect man as an independent, responsible being.

Externally, the armed forces as a whole and their individual members are to fit into the order of state and society. They are to consider themselves as an integral part of society and also to be seen that way by others. This aspect is to take account of the concern that the armed forces might develop into an independent power of their own and become a "state within a state", a danger latent in any armed force.

Put more briefly, based on enduring principles of modern leadership and adult education, *Innere Führung* is a constantly evolving leadership philosophy that harmonized military requirements and constraints with the rights of the individual and the developments in the state and society.

In other words, *Innere Führung* aims at reconciling the contrast between citizen and soldier by the concept of the "citizen in uniform" and balancing the tension between the individual's rights of liberty and the requirements of the armed forces based on the principle of order and obedience.

What *Innere Führung* specifically means and seeks to achieve in everyday military life is laid down in a number of laws, directives and service regulations.

With the concept of *Innere Führung*, a comprehensive system has been created for the German armed forces. As a principle of leadership it shapes command and control, training and education at all echelons and in all segments of the armed forces in peace and in war. It is a constituent part of service as a whole, determines the culture of the armed forces and hence the interpersonal relations, and applies to all service personnel in each and every situation. As a principle of leadership, *Innere Führung* particularly determines the way leadership is practiced by superiors. I should like to stress here the duty of a superior to set an example by how he accomplishes his mission and to devote his personal attention to his subordinates.

And last but not least *Innere Führung* is also an area of training, because it can be taught and learned as part of the comprehensive task of leadership. In leadership and troop training the foundations of the concept of *Innere Führung* are imparted and the conditions created for the concept to be implemented in everyday military life.

The translation of *Innere Führung* into military service practice takes place in different areas of application.

1. **Leadership in peacetime and in war** - It is based on both the example set by the military superior and his credibility, and takes account of legal, social and educational conditions.

2. **Military order and military law** - It establishes the legal framework for military leadership and forms the foundations for the demands made on the individual's devotion to duty, discipline, and willingness to perform.

3. **Political education** - It imparts knowledge, explains situations and enables the development of judgment in keeping with the model of the citizen in uniform.

4. **Care and welfare** - Here a fair balance is sought for the soldier between the requirements of the military mission and his legitimate personal interests.

5. **Conditions of service and training** - Training as a peacetime priority task must be realistic. Leadership and training methods must fit the life and career experience of the soldier and correspond to the principles of adult education. A superior is equally expected to display exemplary conduct and ability, be present personally and show a willingness to explain things, just as he is to share privations with his subordinates in practical training.

These areas of application are closely related and necessitate each other. Thus, *Innere Führung* is active in a comprehensive sense in every kind of military leadership activity.

To be equal to these tasks, the concept of *Innere Führung* must be constantly adapted to the developments in society and the state and the **requirements of the armed forces** and be developed further. To that end it is necessary to identify, analyze, evaluate and translate into action the societal, political, social, technological, scientific and military developments that are taking place.

The concept is so designed as to be timeless; merely the forms it takes in the various fields of application are subject to a continuous process of evolution.

Finally, a few remarks on training.

Our citizens as well as our allies expect the Bundeswehr and its soldiers to prepare for the tasks that result for the armed forces from the Basic Law.

Therefore, a directive by the Chief of Staff of the Bundeswehr reads:

> *The operational readiness of the Bundeswehr requires that training be the foremost task of the armed forces in peacetime.*

Training as the broader term includes the tasks of **development and education.**

Training in the armed forces aims to enhance the character and the mental and physical capabilities of the soldier and to impart him the knowledge and skills he needs to carry out his mission reliably and to withstand the stresses and strains of war.

The basic idea is that the active soldiers, above all the regular soldiers and the temporary soldiers - in the Army they account for some 50 percent, in the Air Force for some 70 percent and in the Navy for some 80 percent of all military personnel:

- train the conscripts for the functions they are to perform during basic military service and later on as reservists;

- maintain or improve the proficiency of recalled reservists;

- create the organizational conditions for the training of the cadres who are needed for the smooth augmentation of units upon mobilization; and

- guarantee the reaction capability of the armed forces against surprise attack.

The high degree of mechanization and specialization in the armed forces requires leaders and specialists to receive varied, differentiated and highly qualified training.

Our conscripts' and reservists' civilian vocational knowledge, capabilities and skills help us to save training costs and training time. Giving them military assignments related closely to their civilian occupations increases their motivation and challenges them to perform well.

The fact that a high proportion of the contents of military training courses are usable in a civilian occupation is not the least of the reasons why the armed forces remain attractive as a choice of occupation for young men, compared to the private economy and the civil service. To this purpose the training system of the Bundeswehr is closely linked with the education and training system of the Federal Republic of Germany. The Legal Status of Military Personnel Act requires that in addition to military specialist training all soldiers receive instruction in civics and international law. The objective is to strengthen the soldier's awareness of the law and make him realize his position as a soldier in the state and in society. This naturally includes instructing him about his rights and duties in the Army. Civic instruction or political education imparts to the soldier of the Bundeswehr the values and standards of the free democratic basic order, those of *Innere Führung*, and his many rights as a soldier, for instance the right to instruction on coping, participation in the armed forces, the right to lodge complaints and the possibility to appeal to the Parliamentary Commissioner for the Bundeswehr. This instruction and its application in the service help the soldiers as citizens in uniform to recognize the reason and necessity of their service for peace, for freedom and the law, to experience it daily and to practice it together with their fellow soldiers.

This instruction in the "what for" of their service enables our servicemen to compare our system of state and government with the systems of other countries, thus precluding hatred of other people, nations or classes.

The foundation for the military service of all soldiers - that is to say also of the officers and non-commissioned officers - is laid by general basic training of up to 6 months' duration. In this phase of training the young people come into contact with the armed forces for the first time, thus often experiencing also a drastic change in their social environment, such as life in communal quarters, the reglementation of bedtime and wake-up time, personal hygiene, meals, order and discipline. Therefore it is important that unaccustomed requirements, such as discipline, hardships, the duty of comradeship and the imparting of basic skills are prepared and presented in a methodically effective manner and in such a way that their meaning is evident.

Privates receive, as a rule, subsequent to general basic training, **special basic training** for the function in which they will be employed. This is followed by collective training in their parent companies and battalions/regiments, corresponding to the operational missions of these units.

Officer and non-commissioned officer training aims at developing the qualification for superior, that is to say for leader, instructor and educator.

Special features of the training of leaders in the Bundeswehr are the universities of the Bundeswehr and the sponsoring of non-commissioned officers to become journeyman and masters of their various trades, qualifications that are recognized in the civilian employment system in every respect. For these two categories of personnel the end of their term of service obligation does not mean unemployment or retirement but the beginning of a new - civilian - career.

To this end the Bundeswehr maintains two universities, one in Hamburg and one in Munich. Currently, these universities offer a broad spectrum of courses of study in civilian disciplines of the sciences and humanities[1].

The universities of the Bundeswehr are subject to the civilian-university law of the Federation and *Länder* and to their supervision. The professors and lecturers are all civilians. The academic degrees and diplomas correspond in every respect to those of the civilian universities in Germany. This kind of militarily sponsored academic training is unique among nations.

In similar and comparable fashion, non-commissioned officers, too, acquire attractive vocational qualifications as journeymen or masters - sometimes technicians - of their respective trades.

Thus, recognizing that the integration of the training system of the Bundeswehr with the social and technological developments of our country is an essential condition for recruiting the necessary young people, the armed forces have in past years developed an ever more tightly knit network of vocational training and further training as part of the military occupational specialty training.

Problematic, however, is the group of the "*fighters*".

The civilian-occupational portions of a military occupational specialty education are imparted both in the armed forces themselves (Air Force and Navy) and in civilian training facilities and private firms (Army).

On the one hand the mixed military/civilian system of training uses civilian qualifications - where they exist - as entry requirements on which to build or which to improve or supplement in military training. On the other, civilian-vocational basic qualifications are imparted to begin with, or existing ones are developed further.

An inter-service concept is scheduled to be completed during this year.

Even in the changed security environment **exercises** continue to be indispensable. They are the most demanding and complex form of military training, setting a broad spectrum of objectives for all soldiers. Live exercises at platoon and company level are the rule. Exercises of large formations should not be totally dispensed with, as their value, in addition to their training effect, lies in demonstrating the presence and defence readiness of the armed forces. The conduct of exercises must, however, comply with environmental protection requirements and the agreements achieved in arms control negotiations.

3.1 SUMMARY

Training and service in the Bundeswehr for the prevention of wars and for defence are performed as required and in accordance with NATO-fixed targets in conformance with constantly updated regulations that are based on precepts of our defence constitution. The translation of these regulations into actual training is done by responsible superiors who are accountable to parliamentary democracy and the public.

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[1] The following courses of study are offered by the Bundeswehr universities:
- Economic and oganizational sciences
- Economics and business administration
- Pedagogics
- Political and social sciences
- History
- Political science
- Mechanical engineering
- Electrical engineering
- Information science
- Aeronautical and space engineering
- Economic engineering
- Geodesy
- Civil engineering
- Sports science

4.0 CONCLUSION

In my discourse on the subject I have described the path chosen by Germany in integrating its armed forces and establishing their internal order. That path has many things in common with the solutions other states in the free world have adopted to control armed power.

The constitutional integration of the Bundeswehr in the executive branch of government and the unrestricted claim of every serviceman to the benefits and rights conferred by our liberal and democratic basic order have proved the correct decision for no less than 36 years now. The concept of *Innere Führung* has stood the test even during the fundamental political changes in Europe. It ensures each individual soldier virtually all the civil rights and liberties and creates at the same time the basis needed by the armed forces for fulfilling their constitutional mission.

In view of Germany's unification a year ago and the associated build-up of an all-German force, the concept of *Innere Führung* has been impressively instrumental in conveying the basic ideas and values of democracy to that part of Germany which until then had been communist. The concept has been presented to officers and representatives from a whole number of foreign armies in recent years, and many have undergone training in aspects of it at German military institutions. The Bundeswehr has promoted the understanding of democracy in the Federal Republic of Germany and also allowed life in a democratic state to be experienced in the armed forces. Nevertheless, the ideas behind the concept of *Innere Führung* are only one way of resolving the tensions that exist between democracy, armed forces and society. Other ways are conceivable as well.

Essential will always be the people who bear responsibility in the armed forces. They are primarily the non-commissioned officers and the officers up to company commander. They determine the impression which the young conscript forms of the institution that demands of him the performance of a very personal civic duty that occupies several months of his life. Therefore it is so very important that these leaders be selected, trained and educated carefully. The more senior officers and non-commissioned officers can only readjust, correct and newly motivate through helping supervision in an effort to tie the conscripts to the armed forces also subsequently, as willing reservists.

CIVIL-MILITARY RELATIONS IN POST-INDEPENDENT AFRICA

1. INTRODUCTION: ARMED FORCES AND SOCIETY

2. MILITARY INTERVENTION: THE RECORD

3. MECHANICS AND MOTIVATIONS

4. MILITARY RULE AND DISENGAGEMENT

5. CONTROL STRATEGIES: THEORY

6. MILITARY SUBORDINATION IN AFRICA: PRAXIS

7. CONCLUSIONS

Dr Simon Baynham
23 April 1992

THE ROLE OF THE ARMED FORCES IN A NEW SOUTH AFRICA IN THE CONTEXT OF INTERNATIONAL LAW*

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1.0 INTRODUCTION

Lawyers educated and brought up in our tradition generally eschew policy considerations as being irrelevant to the study and application of rules of law. Political scientists, administrators and policy framers often regard law as a source of mystification, either to be ignored or used as a justification, as an *ex post facto* excuse, for decisions already implemented.

Neither approach will serve the needs and purposes of the new order which the South African body politic is urgently trying to create.

For lawyers, the new constitutional order - with a written constitution as the source of the highest law in our country and with a bill of rights prescribing the fundamental rights of the citizen - will pose challenges where their function will be to recognise law as congealed politics, replete with policy options and where controversial judgments will have to be delivered.

Conversely, policy framers will have to recognise that their discretion will be regulated and therefore limited by legal norms - national and international - which will have a direct effect on the way that they order their work. Power relations in our society will be regulated by the constitution; inter-state relations, especially those concerned with the use of military force, will be deeply affected by international law, which will occupy a central role in the philosophy of the new order.

2.0 FROM PARIAH-STATUS TO PRINCIPLES

The state of South Africa has been a founder member of the United Nations since 1945. But since 1946, the organised representative of the state - the government - has been virtually under siege in the international community because of the policies of racialism and apartheid. The mobilisation of the international community against apartheid has involved the creation of new rules of law not least in the area of the international protection of human rights but also encompassing the laws of international organisations, the laws of war, notions of state responsibility and international criminal law.

The paradoxical result of the world-wide struggle against apartheid is that the international community has been enriched in the corpus of law to a remarkable extent and these rules now form part of the patrimony of mankind. By elaborating such basic concepts as genocide, slavery, crimes against humanity and self-determination and applying them to the south African situation, the United Nations organs have developed rules which can now apply to other situations where there is gross and systematic violation of human rights.

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In a similar vien, the laws regulating recourse to force have been affected by the evolution of the international standard concerning the prohibition of colonialism (and the assimilation of racist regimes denying internal self-determination to colonialism), the extent to which states can use forcible measures to maintain colonialism and the legal status of public bodies representing 'peoples' combating racist or colonial rule as alien occupation. Finally, the recognition that national struggles against 'colonial domination, foreign occupation and racist regimes' are international armed conflicts for the purpose of the humanitarian laws of war, and not civil wars, has enormous implications for the laws of war.

These developments may not have been well-received in apartheid South Africa. There may even be doubts as to the extent to which they apply in different contexts. But they are part of our history and will affect the way in which our future is moulded. This is especially true of the concept of equality which, since the adoption of the Universal Declaration of Human Rights in 1948, has underpinned, the protective provisions of human rights conventions by forbidding invidious discrimination under the Racial Discrimination and Women's Conventions of 1965 and 1979 respectively, and by permitting affirmative action to redress structured discrimination.

These developments provide the necessary backdrop to any discussion on the role of international law when we consider our relations with the international community after a legitimate constitutional order has been established in our country. Renewed membership of the United Nations and its organs and specialised bodies, entry into the Organisation of African Unity and the playing of a proper role in other regional and international bodies will entail special leadership responsibilities for South Africa and the implications of these duties and opportunities must be a matter of public debate and discussion.

Our internal legal order will be based on the rule of law, not rule by law. In a similar rein, without discounting the element of national interest as one of the motivating factors for a state's behaviour, a free South Africa must display a deep attachment to international norms of behaviour based on law. In this way, we can repudiate the behaviour of the past and insert the new morality where hegemony, domination and overlordship give way to good neighbourliness, mutual respect and solidarity.

Our constitutional order must also reflect the relation between international law and national law.

3.0 THE CONSTITUTION AND INTERNATIONAL LAW

The South African Law Commission, in its recent report on constitutional options, in an otherwise comprehensive survey of options for the constitution, does not touch on the nature of the relation between national law and international law and does not provide any similar statement of policy as found in many modern constitutions. Article 96 of the Constitution of the Republic of Namibia, which has as its heading '*Foreign Relations*', provides a statement of the public policy which will guide the state in its international relations.

It is therefore suggested that the constitution of a post-settlement South Africa should have a more comprehensive chapter on international relations which would emphasise our country's presentation of itself as a responsible member of the international society supporting the aims and policies of international organisations. The article would emphasise the 'international law friendly' character of the constitution. It would also assist the courts and support their resort to international law, where appropriate, in solving problems.

Such a provision would affirm the state's devotion to the ideal of peace and friendly co-operation founded on international peace and morality and, in particular, respect for the rules of international law in its relations with other states.

Secondly, the state, in its international relations, shall be governed by the principles of national independence, respect for human rights, the rights of peoples to self-determination and

independence, equality among states, the peaceful settlement of disputes and the promotion of international peace and co-operation.

Of special importance in the region of southern Africa would be the stipulation that the state shall strictly observe the principles of non-interference in the internal affairs and good neighbourliness in relation to South Africa's neighbouring and other states.

In order to control the discretion of the executive to use our armed forces (as the Defence Act now permits) outside our borders and in the light of the experience of our neighbours, the constitution should state categorically that except for the purposes of self-defence as determined by the Charter of the United Nations or in pursuit of any special request by the United Nations or a regional organisation, no military contingent under the direction or control of the state may be deployed outside the state without the authorisation of the National Assembly.

The effect of such a provision would be to provide the executive with standing authorisation to commit armed forces for purposes authorised by the constitution in advance. In other contingencies, such as the provision of assistance to a state faced with a rebellion, public policy would dictate that the permission of the National Assembly would be required for such a venture.

Finally, there is issue as to what the status of the rules of international law would be in our national system. Apart from the respect due to such rules, a provision in the constitution concerning the 'reception' of international law would enable individuals to rely on these rules before our courts, a matter of some importance in disputes involving human rights.

Traditionally, there is a distinction drawn between rules of customary international law and obligations arising out of treaties. International law is not of the same nature as national law, the most important difference being the absence of an international legislature, though resolutions of international organisations have begun to play an important part in the formation of customary rules.

Customary international law derives from the practice of states. State practice may give rise to customary international law when it is uniform, consistent and general, and if it is coupled with a belief that the practice is obligatory, rather than simply a matter of habit. South Africa will be bound by existing rules of customary international laws but the persistent objection of the state to an emerging rule can absolve it from the scope of that rule.

Treaties are agreements between states by which states undertake voluntarily to be bound. They can be bilateral, such as the Nkomati Accord of 1984 between South Africa and Mozambique or multilateral, such as the Charter of the United Nations or the Charter of the Organisation of African Unity.

A treaty only gives rise to an obligation providing a state expresses its willingness to be bound. As a result, Protocols I and II of 1977 additional to the Geneva Conventions of 1977, cannot bind South Africa until we ratify or accede to them. However, there is an interplay between these two sources whereby rules of customary international law may develop because of widespread practice arising out of the treaties. This development is best exemplified in the Nicaragua Case in 1986 where the International Court of Justice found that, independently of the Charter, the customary international law concerning the non-use of force and non-intervention had developed in such a manner that the Court could apply it. Such an approach still bases the acceptance of rules on the 'will' of a state but the foundation of obligations may take into account other bases, such as natural law, community expectations and, as reflected in Article 36 of the Statute of the International Court of Justice, 'general principles of law recognised by civilised nations' (sic), which provision allows judicial institutions much leeway to fill gaps in the law.

The common law determines the 'reception' of international law into the South African legal system. At present, rules of customary international law, as identified by our judges, may be applied providing that they do not conflict with an internal statute or a binding internal rule.

Treaties do not create rights or impose obligations, even if duly ratified, unless they have been implemented by national legislation into the internal legal system.

For the sake of clarity and in order that rules of international law will enjoy a higher status, it is proposed that the constitution should include specific provisions relating to international law and its reception. Firstly, in relation to customary international law, the constitution should provide that, unless otherwise provided by the constitution or any Act of Parliament, rules of customary international law shall be binding on the state and shall form an integral part of South African law. Such rules shall directly create rights and duties for the inhabitants of the state and shall take precedence over existing ordinary laws of the state.

In relation to treaties, we must recognise that although the executive will formally ratify treaties, the National Assembly must have a role in providing its advice and consent, certainly in relation to treaties which may change our internal laws. This procedure will, in common with other modern constitutions, be regulated by the constitution. But once this procedure has been followed, such international agreements should become an integral part of the law of South Africa.

It may be possible to entrench human rights treaties in a stronger form as the supreme law of the land, enjoying a similar status as the constitution in order to ensure that the full panoply of human rights standards become part of the higher law of South Africa. In any event, there ought to be duty on the government of the day to present all existing human rights treaties to the National Assembly, together with a statement of its policy towards them.

For the future, every new human rights treaty should be formally placed before parliament so that the government of the day could explain why it is not to be ratified by the state or when such ratification is to occur. In this way, the onus is placed on the government to justify inaction, in a situation where international rules of law are of a much higher standard than national rules.

4.0 INTERNATIONAL LAW AND THE USE OF ARMED FORCE

Historically, states had recourse to war as an instrument of policy and international law was only concerned with the consequences of such an exercise. The discretion of the state to have recourse to war has not limited in any way, so that wars of national aggrandizement, for spheres of influence and colonial expansion littered the international landscape. It is only in this century that international law has attempted to regulate this area. Firstly, recourse to war in the formal sense was abolished in 1928, except in self-defence. But states evaded this proscription by using forcible measures falling short of 'war' in the technical sense. As a result, in the post 1945 arrangements following the adoption of the Charter of the United Nations, international law sought to regulate the 'use of force' by members of the international community in two ways.

First, by stipulating a paramount obligation not to use force to settle disputes. This has only limited exceptions. Secondly, by having at its disposal a procedure whereby the community itself may use force against a wrongdoer. These are known respectively as the rules on the '*unilateral use of force*' and the rules of '*collective security*'.

The general presumption against the use of force is found in Article 2 of the Charter under which all members of the United Nations are obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. In addition, member states '*... shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations*'.

This provision has been described as the cardinal rule of international law and the cornerstone of peaceful relations among states. Consensus declarations of the United Nations have expanded, exemplified and clarified the meaning and application of this provision. The most important is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (GA Res 2625(xxv) of 1970, which the International Court of Justice identified as part of customary international law. The declaration describes a war of aggression as constituting a crime against peace, for which there is responsibility under international law. Propaganda for wars of aggression is forbidden. Conversely, it could be argued that the right to peace requires the positive education of military personnel concerning the illegal use of force and the right to disobey orders which violate basic rules of law.

The declaration imposes a duty to refrain from the threat or use of force to violate existing international boundaries or as a means of solving international disputes including territorial disputes and problems concerning the frontiers of states. In the Organisation of African Unity, in which a post-settlement South Africa will play an important role, frontiers imposed by colonial powers in the nineteenth century have to be accepted by member states, as the African variation of the Latin American *uti possidetis* rule and a special mechanism of arbitration and conciliation has been set up to deal with adjustment of boundaries where arbitrary lines on the map have divided linguistic and ethnic groups from each other. However, the wars in the Horn Africa and elsewhere illustrate that this process of peaceful adjustment has not been dealt with sensitively.

In addition, the declaration forbids the use of reprisals solving the use of force. South Africa's forcible interventions in Lesotho, Botswana, Mozambique and Swaziland were either presented as a variation of reprisals or as acts of 'hot pursuit', a concept rightly condemned by the General Assembly and the Security Council as having no warrant either in customary international law or under the Charter.

Of particular significance for South Africa is the prohibition of organising or encouraging the organisation of irregular forces of armed bands, including mercenaries, from incursion into the territory of another state. The International Court of Justice in the Nicaragua Case in 1986 gave special attention to this prohibition when it investigated the facts concerning US assistance to the Contras in Nicaragua and Nicaraguan assistance to the guerrillas in El Salvador.

In a similar view, as part of the duty of non-intervention in the internal affairs of another state, every state is prohibited from organising, instigating, assisting or participating in acts of civil strife and terrorist acts in another state or acquiescing in organised activity within its territory towards the commission of such acts, when the acts referred to involve a threat or use of force. Training irregular forces from another state, providing a manual for assassination (as in the Nicaragua Case) or providing arms to one party in a civil war would be examples of such illicit acts. Normally, a government is only responsible for its own acts or the acts of its organs. But if a government knowingly or recklessly allows its territory to be used for any prohibited act, it becomes accountable and responsible in international law. A nod is not as good as a wink, here.

The use of force to deprive peoples of their equal rights and their right to self-determination is forbidden and, subsequently, international law identified a right to assist such peoples in their struggle, although it could be argued that such a right stopped at the level of assistance and did not encompass the violation of the territory of the state against which assistance was provided.

Finally, the declaration denies the acquisition of valid title over any territory which has been the object of acquisition through the use or the threat of the use of force.

Alleged difficulties and ambiguities concerning the interpretation of Article 2(4) of the Charter arise from two conflicting interpretations. The first, propounded by writers posits an approach which is intent on preserving the discretion formerly enjoyed by powerful states to use force in order to achieve individual objectives. Therefore, these argue that if the action does not threaten the territorial independence integrity or the political independence of the state against which the intervention has taken place, then the action is not illegal. Such action would involve the protection

of nationals in a foreign state, humanitarian intervention or 'police action', such as mine-sweeping operations in an international waterway or the freeing of hostages in a foreign country, without the consent of the local sovereign.

The response to such an approach is that Article 2 must be construed strictly, if international law is to be respected. Measures of self-help or self-protection can only be carried out by larger and more powerful states against smaller and less powerful states and such intervention has been abused for ulterior reasons.

5.0 SELF-DEFENCE

The Charter provides for the basic right to self-defence if an armed attack occurs against a state. The right to self-defence can be exercised either on an individual or collective basis. The Charter requires an 'armed attack' before the right to self-defence can be utilised. The Charter does not refer to the '*use or threat of force*' as in Article 2 or to a '*threat to the peace, breach of the peace or act of aggression*' as in Article 39. The authorisation to use force as a reactive measure in self-defence is determined by a condition of fact which is comparatively clear, objective, easy to prove, difficult to misinterpret or fabricate.

Preemptive strikes are forbidden, therefore, and could constitute an act of aggression. Protection of nationals who are attacked while they are abroad, removing 'nests' of terrorism, dealing with minor cross-border raids, do not come within the ambit of self-defence. Article 51 also places responsibility on the party acting in self-defence to inform the Security Council of the United Nations and the Security Council is given authority to act subsequently. The defensive measures taken must be commensurate with and in proportion to the armed attack which gave rise to the exercise of the right to self-defence in the first place.

The object of self-defence is precisely to put an end to the armed attack; it would not be permissible for a state, in the course of its defence, to seize and keep the resources and territory of the attacker.

Collective self-defence is the right of a third state to come to the defence of the attacked state. This right may arise under treaty, as with the North Atlantic Treaty Organisation or, as the World Court laid down in the Nicaragua Case, on a request addressed by that state to the third state. In the absence of either situation, the intervening state would be guilty of impermissible use of force.

The use of force for the protection of nationals abroad is contrary to the Charter of the United Nations. Forcible self-help by states to protect human rights in another state is so prone to abuse and so deeply associated with national self-interest that unilateral decisions by states to intervene can be considered to be a breach of the Charter. Effective machinery on the international level to govern the remedial use of force in human rights situations, preferably through the Security Council, needs to be established and South Africa could play an important part in developing this line of thinking.

6.0 INTERVENTION

Since the second world war, there have been numerous instances of troops being sent to another state allegedly upon the invitation of its government. A legitimate government may invite the forces of another state on its territory for any lawful purpose under international law, that is, not for genocide, wars of aggression or denial of self-determination. However, intervention by invitation normally occurs in the context of civil war, when two competing governments claim to be the 'legitimate' government. In such circumstances, to allow intervention by invitation serves only to encourage dictational intervention by other states, often occurring under cover of a fabricated invitation. For this reason, the General Assembly of the United Nations adopted the consensus