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THE 1998 SADC INTERVENTION IN LESOTHO:

INTERNATIONAL LAW PERSPECTIVES

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I. Introduction

On the 22 September 1998 the South African National Defence Forces entered the Mountain Kingdom of Lesotho after the Prime Minister of Lesotho, Pakalitha Mosisili, filed a request for military assistance to the Southern African Development Community.

Since the Second World War there have been numerous instances of troops being sent to another state allegedly upon invitation of the government. As in virtually all instances of military presence and action of one state's troops in another state's territory the question as to the legality of such a mission has to be dealt with against the background of contemporary public international law. During the East - West cold war and in the light of progressing decolonialization the world community became more and more sensitive about cross-border political influence and military action.

Whether a state's extraterritorial action is in accordance with international law must be determined by applying well-established principles of public international law such as, *inter alia*, the principle of non-intervention, the prohibition on the use of force and the principle of self-determination. Although conduct of a state short of military force might well constitute illegal intervention in the internal affairs of another state the scope of the present paper is confined to the assessment of military cross-border activities only.

Within the 20th Century international law, both conventional and customary, has undergone a significant development regarding the use of force and interference in other states' internal affairs.

Serving the predominant goals of the Charter of the United Nations to maintain world peace and security and to promote friendly relations among nations, the prohibition of the use of force in international relations is regarded as the cornerstone in the United Nations system. International law consequently aims to control the use of force and uses a distinction between legitimate and illegitimate use of force. Nevertheless, the prohibition on the use of force remains the general rule from which state may deviate only under exceptional circumstances.

Further efforts to restrict recourse to military force have been made in several United Nations Resolutions and Declarations adopted by the General Assembly, most notably the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[1], the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations[2], and the 1974 Resolution on the Definition of Aggression[3].

Moreover, the principle of non-intervention encompassing either intervention by military force or by other means has been incorporated into the constitutive legal framework of regional organizations, for example, into the Charter of the Organization of African Unity and in the Charter of the Organization of American States.

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1 UN GA res. 2131 (XX) 1965, reprinted at (1966) 60 *AJIL* 662.

2 UN GA res. 2625 (XXV) 1970, reprinted at (1971) 65 *AJIL* 243.

3 UN GA res. 3314 (XXIX) 1974, reprinted at (1975) 69 *AJIL* 480.

The present paper is intended to focus on instances in which the legitimacy of intervention involving the use of force is in question.

A brief outline of the course of events which culminated in South African and Botswana defence forces crossing the border of the Mountain Kingdom will be given in the first section of this article. In the particular case of Lesotho, the relevance of the invitation or request respectively made by the Prime Minister will be taken into consideration. That will inevitably give rise to questions as to the authority of the Prime Minister to ask for foreign military support and to questions as to the legal status of the Southern African Development Community (SADC) and the powers it is entitled to exercise. Where it seems useful reference will be made to analyses of and lines of reasoning concerning similar incidents.

II. The Factual Situation

(1) History

Lesotho was formerly Basutoland, a dependency of the United Kingdom. In 1868, at the request of the Basotho people's chief King Moshoeshoe I the territory became a British protectorate. Basutoland was annexed to the Cape Colony (now part of South Africa) in 1871 but detached in 1884. It became a separate British colony and was administered, as well as Bechuanaland, now Botswana, and Swaziland, as one of the High Commission Territories in

southern Africa. Basutoland became independent as Lesotho on 4 October 1966 after a first general election establishing a full internal self-government had been held on 29 April 1965, and after Moshoeshoe II was recognized as King. The subsequent development up to date is one characterized to a high degree by political instability and by extreme economic and social difficulties. Numerous attempts aiming at the replacement of the government by unconstitutional means had been launched as well as acting governments frequently resorted to forcible means to secure its position.[4] For example, in 1970 Chief Leabua Jonathan, member of the Basotho National Party and then Prime Minister, declared a state of emergency, suspended the Constitution and arrested several opposition party members. In January 1974 a coup attempt by alleged supporters of the Basotho Congress Party (BCP) failed. The BCP was supported by the Lesotho Liberation Army (LLA) which was responsible for terrorist attacks in Lesotho during the late 1970s and the 1980s. The South African Government consistently denied allegations that it supported the LLA.

Although Lesotho was economically dependent on South Africa and the official policy was one of 'dialogue' with its neighbour, Chief Jonathan repeatedly expressed criticism of the South African Government's policy of apartheid, and supported the then banned African National Congress of South Africa (ANC). In December 1982 South African forces launched a major assault on the homes of ANC members in Lesotho's capital Maseru, killing more than 40 people. In August 1983 South Africa threatened to impose sanctions unless Lesotho expelled or repatriated 3,000 South African refugees.

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[4] *The Europa World Yearbook 1998* vol II 39ed (1998) 2089-2092.

Another raid driven by South African commando troops in December 1985 left 9 people killed in Maseru. Subsequently, South Africa imposed a blockade on the border with Lesotho from the beginning of 1986, impeding vital supplies of food and fuel.

A successful coup led by military leaders on 20 January 1986 overthrew Chief Jonathan's Government which had been in power since Lesotho's independence was achieved. The Military Council, chaired by Major-General Justin Lekhanya, announced that executive and legislative powers were to be vested in King Moshoeshoe, assisted by the Military Council and by a Council of Ministers.

In fact, from 1986 till 1993, the country was under military rule frequently shaken by skirmishes about the Chairmanship of the Military Council. In March 1990 the Military Council officially assumed the executive and legislative powers previously vested in the King, and Moshoeshoe was exiled in the United Kingdom. In another coup organized by army officers Lekhanya was deposed, and Elias Phitsoane Ramaema succeeded Lekhanya as the Chairman of a reorganized Military Council. Ramaema affirmed that elections will be held as previously planned under Lekhanya. Eventually, the general elections took place on 27 March 1993 after Moshoeshoe returned from exile in July 1992. The Basotho Congress Party secured all of the 65 seats in the new legislative National Assembly. Although international observers pronounced the elections to have been generally 'free and fair' the Basotho National Party rejected the result alleging that there had been widespread irregularities. Dr Ntsu Mokhele became the new Prime Minister. A mutiny in

November 1993 in the national army, the Royal Lesotho Defence Force, was apparently triggered by a proposal to place the military under the command of a senior member of the LLA - a government attempt to integrate its former armed wing with the RLDF. Skirmishes escalated into more serious fighting, and it was widely speculated that the mutiny reflected broader political differences within the military. Mediation efforts were undertaken involving representatives of Botswana, Zimbabwe, South Africa, the Commonwealth, the Organization of African Unity (OAU) and the United Nations (UN). Unrest flared up in August 1994 and led to the King announcing that he had dissolved the National Assembly, dismissed the Government and suspended sections of the Constitution citing 'popular dissatisfaction' with the BCP's administration. The King also denounced as treason Mokhele's appeal for external assistance in quelling army unrest earlier in the year. The suspension of the constitutional government was widely condemned outside Lesotho. Presidents Ketumile Masire of Botswana, Nelson Mandela of South Africa and Robert Mugabe of Zimbabwe led diplomatic efforts to restore the elected government, supported by the OAU and the Commonwealth. In late September 1994 the King of Lesotho and the Prime Minister signed an agreement guaranteed by Botswana, South Africa and Zimbabwe providing for the restoration of Moshoeshoe II as reigning monarch and for the immediate restitution of the elected organs of government; the political neutrality of the armed forces and of the public service was to be guaranteed, and consultations were to be undertaken with the expressed aim of broadening the democratic process. On 15 January 1996 King Moshoeshoe was killed in a car accident and Crown Prince David Mohato

Bereng Seeiso succeeded his father, resuming the title King Letsie III on 7 February. In July 1997 violent clashes between supporters of two opposing groups within the Basotho Congress Party occurred .As a result of the intense rivalry within the party, and in contradiction to Mokhele's earlier stated intention to retire, he resigned from the BCP and formed a new political party, the Lesotho Congress for Democracy (LCD), to which he transferred executive powers. Opposition leaders denounced the move as a 'political coup', declaring that Mokhele should have resigned from his position as Prime Minister, sought a dissolution of the National Assembly and held new elections. However, some 38 members of the National Assembly joined the LCD, while the BCP staged a parliamentary walk-out protest at the formation of the new ruling party. In January 1998 Mokhele resigned as leader of the LCD and was made Honorary Life President of the party. In February Pakalitha Mosisili was elected to replace him as party leader.

(2) The 1998 Elections

Later that month the National Assembly was dissolved in preparation for general elections, scheduled to take place on 23 May 1998. The Lesotho Congress for Democracy secured 79 of the 80 seats while the Basotho National Party won one seat. This landslide victory bears a strong resemblance to the 1993 election's results.[5] Emotions ran high amongst the opposition parties'

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[5] Roger Southall in Electronic Mail & Guardian quoted from http://www.mg.co.az/news/98oct1/5oc-southall.html on 11 Nov 1998.

supporters and promptly the LCD was accused of election fraud.[6] Suspicion of the elections being manipulated was hardened by recounting the votes, and by auditing the Lesotho voters' roll which had revealed some peculiarities. Some of these peculiarities may be due to the voting system applied - the first-past-the-post electoral system which clearly over-represents winning parties. However, up to now no body of irrefutable evidence has been procured upon which the conclusion could be drawn that the May elections had been rigged. The election result is quite in conformity with the 1993 results. There was a 72% turnout of the registered voters in 1993, and 74% in 1998. The proportion of the votes cast for the BCP in 1993 was 75%, and 71% for the BCP and LCD together in 1998 (calculated together because of the LCD having broken away from the BCP in 1997); the BNP vote in 1993 was 23% and 24% in 1998.[7] Further criticism focused on a report furnished by a Commission which was appointed to undertake inquiries into whether irregularities occurred at the elections. The Lesotho government and opposition parties agreed to establish this Commission to investigate the allegations. It was headed by the South African Judge Pius Langa. However, the official report ('Langa Report') published on 17 September 1998 caused even higher tensions between the conflicting parties. The Report did not reveal gross irregularities such as systematic electoral fraud but expressed the need for streamlining the electoral process and for deepening democracy. Accordingly, the Report did not call for

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6 William Boot 'Tensions high after Lesotho election fraud' in Electronic Mail & Guardian quoted from http://www.mg.co.za/news/98aug1/7aug-lesotho.html on 5 Nov 1998.

7 Roger Southall (n5).

the annulment of the elections and made no suggestions as to the election being repeated under international supervision as the opposition demanded relying on evidence supposedly produced in an interim edition of the Report. It has been argued that both the Langa Report and the elections have been 'doctored'. Protests against the Mosisili government intensified and the danger of a coup being mounted by the military was considered to be imminent. The remaining military appeared to be siding with the opposition movement that claimed that the elections held last May - swept by the ruling Lesotho Congress Party - were rigged.

(3) The Letter of Request

The political crisis was the result of the above-mentioned general election, and dissatisfaction had spilled over into unrest and finally led to an uprising in the Lesotho Defence Force. At this point the Head of Government, Prime Minister Pakalitha Mosisili, called for military intervention 'to stabilize the situation'. On 16 September 1998 Mosisili asked regional heads of state for military assistance. He especially referred to Southern African Development Community agreements. The relevant letter was addressed to presidents Nelson Mandela of South Africa, Robert Mugabe of Zimbabwe, Festus Mogae of Botswana and Joachim Chissano of Mozambique. The letter as read out in

(South Africa's) Parliament on Tuesday, 22 September 1998, by acting President Mangosuthu Buthelezi reads as follows:[8]

> 'In my capacity as prime minister and head of government of the kingdom of Lesotho, I wish to urgently request your excellencies, heads of state of Botswana, Mozambique, South Africa and Zimbabwe, to come to the rescue of the government and the people of Lesotho.
>
> The only intervention I can and do request urgently is of a military nature.
>
> Since returning from the SADC (Southern African Development Community) meeting in Mauritius, I have come back into a city and a government held at ransom by the demonstrators of the BCP, BNP and MFB (opposition parties), with their leaders urging them on.
>
> Yesterday before my arrival into Lesotho over 80 government vehicles were taken by force from civil servants and impounded in the palace premises. Several others, including ministers' vehicles, were stoned by the rampaging demonstrators.
>
> This morning the situation has worsened. Most workers, civil servants and employees of parastatal organizations, are being stopped from going to work.

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[8] Quoted from http://www.anc.org.za/anc/newsbrief/1998/news0922 on 15 November 1998.

More vehicles have been confiscated. The rampaging demonstrators are congregating at various offices literally denying workers entry and threatening to occupy government offices. They have made public statements that they are closing parliament and all government business from today.

Further serious threats being made including abducting ministers, killing the prime minister, deputy prime minister and foreign minister any time. Ministers are not able to enter offices safely for obvious reasons.

The most serious tragedy is that the police, and in particular the army, are at best, spectators.

The mutiny in the LDF (Lesotho Defence Force) is taking root. The brigadier who has been forced to be commander, has had to go into hiding because the mutineers have attempted forcing him to announce a coup. He has so far refused and fears for his life.

In this instance, we have a coup on our hands.

It is against this background that I submit a formal and urgent request for your excellencies in accordance with SADC agreements to put together, quickly, a strong military intervention, to help Lesotho to return to normalcy.

I will appreciate your excellencies' timely intervention before it is too late.

Sincerely,

PB Mosisili (MP), Prime Minister.'

(4) The Intervention

On Tuesday, 22 September 1998, 600 troops of the South African National Defence Forces (SANDF) crossed the border to Lesotho at the Caledon River at 5 am in a peacekeeping operation called Boleas. On Wednesday the South African Forces were joined by another reinforcing 200 troops of the Botswana Defence Force both acting under the auspices of the Southern African Development Community. In South Africa's first intervention since the end of apartheid, nine SANDF members had been killed and many more were wounded; a figure disputed by the Lesotho Defence Forces as conservative. The intervention was ordered by South African Home Affairs Minister Mangosuthu Buthelezi and came at the written request of Lesotho's Prime Minister Pakalitha Mosisili after a revolt by junior military officers and amid opposition strikes that paralyzed the capital, Maseru.[9]

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[9] Quoted from http://www.cnn.com/world/africa/9809/23/Lesotho/03/index.html on 23 September 1998.

Presumably, and undisputed so far, Mosisili did not consult with King Letsie III before making his appeal.[10]

Mr Buthelezi ordered the intervention in his capacity as acting president while Nelson Mandela and his deputy, Thabo Mbeki, as well as the foreign affairs minister were abroad. The troops entered the country to quell the military uprising amongst the Lesotho Defence Force. The taskforce met heavy resistance when it stormed the capital in a bid to end two months of anti-government riots.[11]

In less than 48 hours after the intervention was launched, Maseru had suffered extensive destruction. Looting started and anger against South Africa soon erupted: South African stores were set alight, and cars with South African number plates were stoned.

By intervening in Lesotho the Southern African Development Community (SADC) turned Lesotho's internal conflict into an international one. SADC, represented by South Africa and Botswana, involved itself in the domestic affairs of Lesotho, and not everybody is appreciating that.

The following considerations as to the legality of the actions taken are intended to clarify the position of modern international law by studying the meaning and interrelationship of basic theoretical principles of international law.

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[10] Lesotho's Constitution obliges the Prime Minister to do so although the Prime Minister does not have to secure the King's agreement to the proposed action; The Consitution of Lesotho (1993) Chapter VIII Article 92.

[11] Quoted from http://www.africanews.org/south/lesotho/stories/19980922_feat1.html on 22 September 1998.

III. The Principle of Non-Intervention

One of the oldest duties of states, enshrined in both customary international law and numerous multilateral conventions, is the basic obligations of a state to obstain from intervention in the internal and external affairs of any other state, or in the relation between other states.[12] The general principle of non-intervention has been embodied in Article 2(7) of the Charter of the United Nations. Although the prohibition on intervention contained in Article 2(7) of the UN Charter is only directed at the Organs of the United Nations, instructing them to respect 'domestic affairs',[13] a general prohibition on intervention is a well-established principle of public international law.[14]

Both the 1965 General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[15] and the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations[16] are regarded as reflecting the customary international law on intervention. Paragraphs 1, 2, 3 and 5 of the 1965 Declaration were

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12 Gerhard von Glahn *Law Among Nations - An Introduction to Public International Law* 5ed (1986) 151.

13 Louise Doswald-Beck 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *BYIL* 189.

14 T Oppermann in R Bernhardt (ed) *Encyclopedia of Public International Law* vol II (1995) 1436.

15 See note 1.

16 See note 2.

incorporated almost verbatim into the Section on the Principle of Non-Intervention in the 1970 Declaration.

Nonetheless, few terms in international law have led to more acrimonious arguments than the prohibition of intervention. Intervention under present-day international law is understood as 'dictatorial interference by a state in the affairs of another state for the purpose of either maintaining or altering the actual condition of things',[17] rather than the mere interference per se.[18] The Principle of Non-Intervention in the 1965 and 1970 Declarations overlaps with that on the Prohibition of the Use of Force in Article 2(4) of the UN Charter and in the 1970 Declaration.[19] Intervention by military force constitutes both the ultimate form of intervening into another state's affairs and use of force prohibited by virtue of Article 2(4) of the UN Charter. Moreover, such action were to be regarded as an 'act of aggression', a term used in Article 1(1) and Article 39 of the UN Charter. When the United Nations started to function the quest for the definition of 'aggression' had become central to the entire work of the Organization.[20] The determination under Article 39 of the UN Charter as to whether certain conduct of a state constitutes an 'act of aggression' or not is clearly singled out as a prerequisite for the use of the particular competencies provided in Chapter VII of the UN Charter, and therefore is a key concept in the UN scheme for the maintenance of

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17 LFL Oppenheim *International Law - A Treatise* vol I *Peace* 8ed by H Lauterpacht (1955) 305.

18 von Glahn (n12) 152;
DJ Harris *Cases and Materials on International Law* 5ed (1998) 890.

19 Doswald-Beck (n13) 207-08; Harris (n18) 890.

20 AM Rifaat *International Aggression* (1979) 222.

international peace and security.[21] In 1974 the General Assembly adopted the Resolution on the Definition of Aggression.[22] The general definition in Article 1 of the so-called Consensus Definition follows the pattern of Article 2(4) of the UN Charter; like Article 2(4) it expressly outlaws and condemns the use of armed force by a state against another state.

Furthermore, the principle of non-intervention has been embodied in the Charter of the Organization of African Unity[23] and in the Charter of the Organization of American States[24] as one of the underlying principles to be respected by the member states of these regional organizations.

What can be derived from virtually all these Conventions and Declarations is the conclusion that although a state's interference in another state's affairs may not amount to the use of force, it may nonetheless be contrary to international law as intervention, *i.e.* under certain circumstances a state's exertion of political or economic influence may constitute unlawful intervention.[25] However, as pointed out before, the present paper is meant to focus on instances of military intervention.

International law regards civil strife as strictly a domestic matter beyond the legal purview of other states.[26] Therefore, military interference in

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21 JA Frowein in B Simma (ed) *The Charter of the United Nations - A Commentary* (1994) 613.

22 See note 3.

23 See Article III(2); reprinted at (1963) 2 *ILM* 766.

24 See Article 3e as amended by the Protocol of Cartagena De India; reprinted at (1986) 25 *ILM* 529.

25 Harris (n18) 890.

26 CC Joyner 'The United States Action in Grenada - Reflections on the Lawfulness of Invasion' (1984) 78 *AJIL* 131 at 138.

the domestic affairs of another state such as happened in Lesotho may be classified as *prima facie* illegal intervention. However, it has been held that even interventions occurring in their most unambiguous form might be justified if certain preconditions are met, *i.e.* there are exceptions recognized to the general principle of non-intervention.[27] Grounds of justification that had been invoked by intervening states vary from the request of the constitutional government, to the maintenance of exclusion of socialism or communism within or from a region, to the defence of nationals, to the existence of a treaty right of intervention.[28] Apparently, in the present case the SADC's/SANDFs' action was said to fall squarely within the first-mentioned category of grounds on which military intervention may be justified. In order to determine whether the intervention can actually be regarded as being lawful or not, the grounds of justification referred to need to be examined thoroughly.

(1) Military Intervention by Invitation

States claim the right to intervene in another state at the request of that state's government.[29] More concrete, there are no legitimate grounds for foreign intervention to aid in suppressing the civil conflict, unless such assistance

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27 See von Glahn (n12) 152; Oppenheim/Lauterpacht (n17) 305; TJ Jackamo 'From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention' (1992) 32 *VirgJIL* 929 at 954-55.

28 Harris (n18) 890; Oppermann (n14) 1438.

29 Michael J Levitin 'The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention' (1986) 27 *HarvILJ* 621 at 633.

comes with the consent of the state in question. Of all the doctrines available to legitimize military interventions this has been the most abused. In several instances an invitation has been offered to justify interventions: the Soviet Union in Hungary in 1956, the United States in Lebanon in 1958, the Soviet Union in Czechoslovakia in 1968, the United States in Vietnam, the Soviet Union in Afghanistan in 1979, Libya in Chad in 1980 and the United States in Grenada in 1983. This doctrine has been open to abuse for many reasons: the law is particularly confused, the facts are especially difficult to ascertain, and the law is eclipsed by value-intensive policy considerations.[30] Given the categorical prohibition on the use of force contained in Article 2(4) of the UN Charter there is scant textual basis for a doctrine of intervention by invitation. Nonetheless, Joyner states the contemporary international law applying to this particular problem as follows: 'There is no question about the legality of an external intervention occasioned by an explicit invitation that has been genuinely proffered by the legitimate government of a state; that legality is well grounded in international law.'[31] That is recognized, albeit negatively, in the 1974 Resolution on the Definition of Aggression where one instance of aggression is stated to be 'the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement.'[32] Although Joyner's observation might reflect the present-day legal convictions of the majority of scholars it is not very helpful since it gives rise to at least two great

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30 Levitin (n29) 633-34.

31 Joyner (n26) 138.

32 Article 3(e) of the Resolution.

difficulties: Firstly, the person who made the request must be proved to be the legitimate representative of the state. Secondly, there have been instances of intervention where there was not only serious doubt as to the legal capacity of the allegedly inviting body to request military aid but, moreover, as to the existence of an invitation as such, e.g. those in Hungary 1956, the Dominican Republic 1965, Afghanistan 1979 and Grenada 1983. When such consent is alleged some difficulty may be experienced in determining whether it is voluntary, and what degree of pressure may be regarded as vitiating such consent.[33]

(a) Legal Capacity of the Inviting Body

On 16 September 1998 Pakalitha Mosisili in his capacity as the acting Prime Minister of Lesotho addressed a request for military assistance to the Heads of State of Botswana, Mozambique, South Africa and Zimbabwe.[34]

It is the basic principle of state representation in international law that the government speaks for the state and acts on its behalf. Governments conclude agreements on behalf of the state in international relations, and any representation on behalf of a state is done by its government. The apparent exclusiveness of government representation of a state would logically lead to the conclusion that a state could not violate international law if the government of another state invited such intervention, for the interests and affairs of that

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[33] Ian Brownlie *International Law and the Use of Force by States* (1963) 317.

[34] See letter above.

state would be synonymous with those of the government.[35] The identification of the 'government' of a state as that state's valid representative would thus be the primary task. Therefore, in the case of Lesotho the question arises whether Prime Minister Pakalitha Mosisili represented a *bona fide* lawful authority. Determining who constitutes the 'lawful authority' is sometimes difficult in situations of factional strife, widespread political unrest and in civil war situations.[36] In particular, the existence of *de facto* control is generally the most important criterion in dealing with a regime as representing the state. As shown above, after the May 1998 elections the state of Lesotho was - once more - shaken by a military mutiny and by violent riots and unrest. The opposition parties accused the winning LCD of fraud and election rigging and, thereby, questioned its authority. Up to now no conclusive evidence has been presented to prove these allegations. If the fairness of the electoral process is assumed as done by Lesotho's Independent Electoral Commission (IEC) and in the Langa Report, the LCD's overwhelming victory can be considered as wholly consistent with the tendency of the British-style plurality electoral system to over-represent the winners, just as it did in 1993.[37] At the end the LCD obtained 98% of the seats in Lesotho's National Assembly with approximately 60% of the votes cast. The fact that neither the IEC nor the Langa Report could clear the LCD convincingly of electoral fraud allegations

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35 Doswald-Beck (n13) 191.

36 RJ Beck 'International Law and the Decision to Invade Grenada: A Ten Year Retrospective' (1993) 33 *VirgJIL* 765 at 799.

37 Roger Southall in Electronic Mail & Guardian quoted from http://www.mg.co.az/news/98aug1/14aug-lesotho2.html on 8 Nov 1998.

gives rise to some doubts about its entitlement to represent Lesotho legitimately. These doubts harden by taking into account that Lesotho was beset by civil strife, and the imminent threat of a military coup or mutiny respectively. Some commentators dispute a regime's right to represent the state and to invite foreign military assistance under such circumstances. For example, Louise Doswald-Beck states: 'The reasons given for such doubts are variously stated to be the inability of a shaky regime to represent the State as its government, a conflict with the principle of self-determination or a violation of the duty of non-intervention in the internal affairs of another state.'[38] However, by arguing in favour or in disfavour of a certain government to represent the state emphasis is put on the factual situation rather than on the legal status the government holds according to domestic law of the state concerned. Under contemporary international law a government is entitled to be recognized as the *de facto* government or at least the effective regime if the entity is one which manifests most of the attributes of sovereignty. The general rule is that a new governmental regime will be recognized if it has effective control over the territory which it claims to represent, it has the ability to represent the state in question on the international stage and it is likely to maintain its control.[39] Accordingly, a regime that is in fact in power has some entitlement to international respect even if it does not have 'good title'.[40]

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38 Doswald-Beck (n13) 189.

39 RMM Wallace *International Law* 3ed (1997) 83.

40 DF Vagts 'International Law under Time Pressure: Grading the Grenada Take-Home Examination' (1984) 78 *AJIL* 169 at 171.

Akehurst describes the traditional view on rendering military help to established authorities as follows:

> 'States have often argued that help given to the established authorities in a domestic conflict is always legal. The theory underlying this argument is that the government is the agent of the state, and that therefore the government, until it is definitely overthrown, remains competent to invite foreign troops into the state's territory and to seek other forms of foreign help, whatever the effect which that help may have on the political future of the state.'[41]

In contrast to that he argues that this idea is a fallacy: The fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would be uncertain without it, and consequently there is doubt as to which side would ultimately establish itself as the legal representative of the state. The competence of the government to act in the name of the state is the very thing which is called into question when a mutiny takes place or widespread civil unrest occurs.[42] Already in 1960 Wright argued:

> 'International Law does not permit the use of force in the territory of another state on invitation either of the recognized or the insurgent government in times of rebellion, insurrection or civil

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41 MB Akehurst *A Modern Introduction to International Law* 6ed 284-85.

42 Akehurst (n41) 285.

war. Since International Law recognizes the right of revolution, it cannot permit other states to intervene to prevent it.'[43]

The position of the United Kingdom concerning cases of 'temporary difficulties' within a country was stated as follows:

'Nevertheless, the UK did not consider that [the Principle of Non-Intervention] in any way prejudiced the right of a legally constituted and internationally recognized government to seek and receive from a friendly State assistance in preserving or restoring internal law and order. Of course, any government which responded to such a request for assistance would have to satisfy itself that the response was proper, and it would have to expect its actions to come under the closest scrutiny of the international community. His Government believed, however, that it would be wrong to suggest by an unduly broad definition of "civil strife" that there were no circumstances in which a government in temporary difficulties could seek and receive assistance from a friendly State which it trusted to render aid with full respect for the territorial integrity and political independence of the recipient State...'.[44]

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43 Q Wright 'Subversive Intervention' (1960) 54 *AJIL* 521; However, to consider the situation in the Mountain Kingdom of Lesotho prior to the SADC intervention as rebellion, insurrection, civil war or even revolution would be unrealistic and exaggerating.

44 U.K. Representative in the 1967 Special Committee on Principles of International Law, UN Doc. A/AC.125/SR.57 at page 5.

In order to determine where the line between lawful and unlawful intervention should be drawn it seems reasonable to have a look at past interventions which were said to have taken place at the request of the government of the invaded state. Examples of interventions where the existence of an invitation was undisputed are those in Lebanon and Jordan in 1958, Stanleyville in 1964 and Chad in 1968.[45] The US involvement in Vietnam cannot be seen as a case of an unquestionable invitation as there was disagreement as to the right of the South Vietnamese Government to speak for an independent state. Instances of intervention where both the existence of an invitation and the legal capacity of the (allegedly) inviting regime to request military aid were seriously called into question are those in Hungary in 1956, the Dominican Republic in 1965, Afghanistan in 1979 and Grenada in 1983.

(b) Cases from the Past

(i) Hungary

The events in Hungary in the autumn of 1956 passed through two stages. On 23 October 1956 demonstrations took place in Budapest against the Hungarian Government calling, *inter alia*, for Imre Nagy to be brought into the Government.[46] Fighting broke out and, by 2 a.m. on the following day Soviet tanks appeared in Budapest. Nonetheless, later that day it was announced by Radio Budapest that a new government was to be formed under Imre Nagy and

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45 Doswald-Beck (n13) 213.

46 JES Fawcett 'Intervention in International Law - A Study of Some Recent Cases' (1961-II) 103 *Recueil Des Cours* 343 at 383.

that Soviet forces were assisting in the restoration of order.[47] Nagy made a comment that he did not issue any invitation to the Soviet authorities to intervene. Although an agreement had been reached between the Nagy Government and the Soviet authorities as to the withdrawal of Soviet troops from Hungary by 31 October, on that very day the second stage of the action began with the introduction of more Soviet troops into Hungary. Thereafter, on 1 November Hungary's new Government announced the end of the single-party rule, the formation of an all party government, free elections, and denounced the Warsaw Pact. Moreover, the new government called for assistance of other states to defend it. In the first days of November 1956 Soviet forces built up in Hungary and a full-scale attack was launched on Budapest on 4 November.[48] On the same day the Nagy Government was overthrown and Janosz Kadar announced that he had formed a government in place of that of Nagy and that he had requested the second intervention of Soviet troops.[49] To justify the intervention the Soviet Government primarily relied on the consent of the Hungarian Government to the introduction and employment of Soviet troops to quell the popular uprising. Repeatedly it stressed that there had been a Hungarian Government request for military assistance.

The United Nations Special Committee on the problem of Hungary was not able to reach any conclusion on the question whether any request for military assistance had been made by the Hungarian Government at the beginning. Nagy denied that he made any request to the Soviet Union, and at

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47 Harris (n18) 890.

48 Fawcett (n46) 384.

49 Ibid.

the time of the intervention until it was deposed the legality of the Nagy Government could not be contested under the Hungarian constitution. Accordingly, the United Nations Special Committee observed that:

> 'The act of calling in the forces of a foreign state for the repression of internal disturbances is an act of so serious a character as to justify the expectation that no uncertainty should be allowed to exist regarding the actual presentation of such a request by a duly constituted government.'[50]

Furthermore, with regard to the invitation issued by Kadar - in the aftermath of which the Government of Nagy had been ousted, and the new Government under Kadar had been established - there is a fairly good consensus that the Kadar Government at the time of the request was neither the constitutional government nor a legitimate agent of the state according to the rules of recognition of governments, and therefore it was not entitled to represent Hungary. Von Glahn wrote:

> '...because the Kadar government, which had asked for Soviet assistance under the terms of the Warsaw Pact, represented not a legitimate government in Hungary but a puppet regime established by the very state whose military aid and intervention were requested.'[51]

The case vividly demonstrates the problems arising by allowing intervention at the request of the government, namely that of determining which is the

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50 Report of the UN Special Committee on the Problem of Hungary, 1957: A/3592, 266.

51 Von Glahn (n12) 156.

legitimate government and whether it in fact made a request or not. The situation in Hungary was, of course, an extreme example of one country repressing virtually the entire population of another, rather than one where a government seeks and obtains assistance merely to end protests and unrest, and to restore law and order. A draft resolution condemning the intervention was submitted by the U.S. and was adopted on 4 November 1956 by a large majority in the United Nations' General Assembly.[52] The Soviet Union's attempt to justify its action in Hungary by relying on an obscure invitation made by an entity the legal capacity of which was more than just doubtful had not been accepted by the international community.

(ii) Grenada

Another well-known example for an 'invitational intervention' is the case of the U.S. intervention in Grenada in 1983.[53]

Grenada, formerly a U.K. colony in the Caribbean, became an independent state in 1974. Maurice Bishop who after a successful *coup d'etat* became Prime Minister of the 'New People's Revolutionary Government' established links with Cuba and the USSR. In October 1983, disagreement within Bishop's party led to his government being ousted by a more radical left-wing government. The situation collapsed on 19 October when Mr Bishop, who had been kept under house arrest since 12 October, was freed by a crowd of several thousand. The army sent reinforcements to suppress the protests, and Mr Bishop and

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52 UN GA res. 1004; U.N. Doc. A/Res 1393; see MM Whiteman *Digest of International Law* vol 5 *Rights and Duties of States* (1965) 667-702.

53 See on this instance: Beck (n36) 765.

several former Ministers were summarily executed. A number of civilians were killed when government forces fired on the crowd. A curfew was ordered, with forces empowered to shoot on sight.[54] On Friday, 21 October, the leaders of six members of the Organization of Eastern Caribbean States (OECS) met in Barbados and agreed to request the military assistance of Barbados, Jamaica and the United States in order to stabilize the situation and to restore order on Grenada.[55]

The OECS is an association of seven Caribbean micro-states - Antigua, Dominica, Montserrat, St. Kitt-Neavis, St. Lucia, St. Vincent and the Grenadines - and Grenada for the purposes of self-defence, economic integration and development, and foreign policy co-ordination.[56] The OECS governments had been concerned over the extensive military build-up in Grenada over the last few years, and felt increasingly threatened by Grenada's radicalism and military potential.

On October 25, 1983, United States military forces supported by troops from several other Caribbean states invaded Grenada and quickly took control of the island after fighting with Grenada forces.[57] To justify its intervention the United States relied on three grounds: the protection of U.S. nationals; a request to intervene from the Organization of Eastern Caribbean States, of

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54 See Doswald-Beck (n13) 235.

55 Beck (n36) 781-82.

56 Treaty Establishing the Organization of Eastern Caribbean States, 18 June 1981, Article 3; reprinted at (1981) 20 *ILM* 1166, 1168.

57 Joyner (n26) 131.

which Grenada was a member; and a request from the Governor-General of Grenada.[58]

According to Grenada's constitution, the queen of the U.K. was nominal Head of State and was represented by a Governor-General, whose functions were largely ceremonial.[59] The legal status of the King of Lesotho, King Letsie III, might bear some resemblance to that of Grenada's Governor-General. Considering the Grenada situation the problem arises of whether such an invitation, *i.e.* one given by the ceremonial Head of State directly against the interests and wishes of the *de facto* seat of power, could have any validity. However, in the case of the SADC intervention in Lesotho the request was not made by the King but rather by the acting government.

There was serious doubt as to whether the intervention in Grenada was actually a result of an invitation by any authority in Grenada,[60] *i.e.* as to whether the U.S. Government decision to intervene was as much motivated by an alleged request as has been relied on afterwards to justify the intervention. This intervention has been characterized as illegal by the vast majority of states, and by most scholars.[61] None of the justification standing alone was considered sufficient to legalize the intervention. The U.S. concern for its nationals in Grenada has been regarded by some as to be by far the strongest

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58 Beck (n36) 768.

59 Constitution of Grenada, 7 February 1974, Sections 19 and 57, reprinted in *Constitutions of the Countries of the World* by GH Flanz (ed) Binder VII at 57-68.

60 Beck (n36) 798.

61 UN GA res. 38/7, GA o. R., 38th Sess., Supp. 47, p. 19 (1983); Beck (n36) 765; Doswald-Beck (n13) 189; Levitin (n29) 650-51; Joyner (n26) 131; for a different opinion see JN Moore 'Grenada and the International Double Standard' (1984) 78 *AJIL* 145.

argument to support the American use of force.[62] However, in reality it did not prove to be very helpful since there was no case of United States citizens being endangered at all. Moreover, it was held that even if they would have been in imminent danger of being taken hostage, the U.S. could not lawfully intervene to the extend it did. It has become widely accepted that the UN Charter does not prohibit so-called 'humanitarian intervention' by a use of force as long as the latter is strictly limited to what is absolutely necessary to save lives.[63] This exception to the general prohibition on the use of force and to the principle of non-intervention respectively has been invoked in particular by states to justify certain missions to rescue their own nationals being in danger within the territory of another state. It is, however, not a right to topple a government or to take actions beyond the actual rescue mission.[64] Accordingly, the United States would have been only allowed to remove its own nationals, nothing more. But the mission 'urgent fury' was apparently intended to be more than a mere operation to rescue U.S. nationals.[65] Therefore, it was not possible no justify the intervention solely on the grounds of 'humanitarian intervention'. The second line of argumentation by U.S. officials to justify the intervention - referring to the OECS' request to intervene - gives rise to some questions too. Both the legal capacity of the OECS to use force and the competence of the OECS to invite foreign military assistance from a non-member state were

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62 Beck (n36) 804.

63 L Henkin 'International Law: Politics, Values and Functions. A General Course on Public International Law' (1989-IV) 216 *Recueil Des Cours* 9 at 153.

64 Henkin (n63) 153-54.

65 Levitin (n29) 650.

problematic. And again there was some doubt as to the relevance of the OECS request for the U.S. decision to intervene. Three propositions had been made in support of the competence of the OECS: firstly, that the OECS is an 'regional arrangement' in the meaning of Article 52 of the UN Charter and that the action taken by the organization was in accordance with the UN Charter; secondly, that the OECS acted in response to the Governor-General's request; and thirdly, that the OECS was empowered by Article 6 of the OECS treaty by virtue of which the Heads of the Member governments may make such recommendations and give such directives as is deemed necessary for the achievement of the purposes of the OECS.[66]

(2) Regional Arrangements

By virtue of Article 52 of the UN Charter states are entitled to conclude or to enter regional arrangements to deal with matters of international peace and security. Article 52 of the UN Charter provides:

> 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.'

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[66] Article 6 of the OECS treaty to be found in (1981) 20 *ILM* 1166, 1168.

In the Grenada case, one may share the view that the OECS was a legitimate regional arrangement under Article 52 of the UN Charter. Whether or not the same can be held about the Southern African Development Community will be assessed lateron. Article 52(2), however, obliges members of regional arrangements to make 'every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.'

Moreover, action taken by regional organizations without prior authorization by the Security Council will, in principle, only be legitimate if it does not amount to 'enforcement action'.[67]

However, there are circumstances under which a regional arrangement may legitimately resort to the use of force in a manner consistent with the Purposes and Principles of the Charter of the United Nations: (1) in collective self-defence in accordance with Article 51 of the UN Charter; (2) in so-called enforcement action with prior authorization of the Security Council in accordance with Article 53 of the UN Charter; (3) or, as already mentioned in relation to individual state action, after the invitation of a lawful and competent authority of the state the sovereignty of which is about to be interfered with.[68]

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67 Article 53 (1) of the UN Charter; G Ress in Simma (n21) 732; Wallace (n39) 261.

68 Beck (n36) 803.

(a) The OECS and Grenada

Neither the OECS nor the U.S. could validly justify its by invoking the exceptions (1) and (2): The offensive against Grenada was not occasioned literally by self-defence against armed attack. The strict test under international law legally sanctioning such a military response is the present of some real and immediate (imminent) imperilment to a state. Taking into consideration the events prior to the intervention, such a threat was scarcely imminent.[69] With regard to the second argument it is an undisputed fact that the OECS decided to implement military measures and to invite the U.S., Barbados and Jamaica in its own capacity, *i.e.* without prior authorization of, or consultation with the Security Council as required by virtue of Article 53(1) of the UN Charter. Article 53(1) Clause 2 Phrase 1 which provides that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council' constitutes a decisive factor for the division of powers between the Security Council and regional organizations.[70] The intervention launched by the OECS with the support of Barbados, Jamaica and the U.S. is an instance of action being taken under the auspices of a regional organization.

Article 53 of the UN Charter does not define 'enforcement action', and although there is some disagreement as to the fact what measures are meant by the notion of 'enforcement action', there is a fairly good consensus that the use

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69 Joyner (n26) 133-34.

70 Ress in Simma (n21) 732.

of force directed against a sovereign state has to be regarded as enforcement action.[71] Thus, the use of force by the OECS constitutes enforcement action in the very meaning of Article 53 of the UN Charter.

In the absence of a UN Security Council authorization the use of force by the OECS and the invitation addressed to other states to participate in its use of force could not be justified solely by relying on the OECS treaty. Article 103 of the UN Charter provides:

> 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Even by a broad interpretation of the particular Articles[72] the fact remains that a regional arrangement such as the OECS cannot by treaty acquire the lawful authority to use force in a manner otherwise prohibited by the UN Charter.[73] Accordingly the only ground remaining to be invoked for justification of the OECS's action as well as the participation of the U.S. is the somewhat dubious request by the Governor-General to intervene. At this point it becomes apparent that not only the U.S. relied upon the Governor-General's request but so did the OECS. The validity of the justifications given by the United States is mainly contingent on whether there was a request by a lawful authority of Grenada because the validity of the invitation issued by the OECS to the U.S. itself might depend on the Governor-General's invitation issued to the OECS.

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71 T Buergenthal/HG Maier *Public International Law in a Nutshell* (1985) 61.

72 Article 6 and Article 8 of the OECS treaty (n66).

73 Levitin (n29) 649.

Firstly, as already mentioned, the causal significance of the Governor's request for the decision of the OECS and the U.S. to intervene was highly suspect. Furthermore, his authority under Grenada law to represent the state as he did was doubted since a number of People's Laws had been promulgated superseding the 1973 Constitution and thereby limiting the Governor's competencies to minor advisory and ceremonial matters. Hence, it had been concluded that the Governor's request can only be regarded as a simply private appeal for action which can not be relied on to validate external military intervention into the domestic affairs of a sovereign state.[74] Since the permissibility of intervention at the invitation of the *bona fide* lawful authority is an exception to the general rule of non-intervention there is no room for doubts or uncertainties about the competence of the inviting body. The instances of the Soviet Union's intervention in Hungary and the OECS/U.S. intervention in Grenada are vivid examples of the complex interplay of the principle of non-intervention, the right of self-determination of a people, the concept of state sovereignty and independence, and the competencies vested in, or exercised by, regional organizations.

(b) The Southern African Development Community (SADC)

In the present case of the September 1998 intervention in Lesotho - similarly to the 1983 Grenada intervention - it also has to be dealt with the legal status of, and the competencies vested in, a regional organization. The military operation

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[74] Beck (n36) 800-01; Joyner (n26) 139.

was ostensibly carried out under the auspices of the Southern African Development Community (SADC).

The SADC has been established on 17 August 1992 by the member countries of the Southern African Development Co-ordination Conference (SADCC). The Treaty signed at Windhoek contains a stipulation according to which the SADC is to replace the SADCC.[75] The SADCC was already instituted in 1980 when the Heads of State or Government of nine South African Countries adopted a Declaration - 'Southern Africa: Towards Economic Liberation' - which formed the basis for the creation of the institution.[76] Comprised of a loose association of states with a quasi-legal personality, its aim amongst others was to pursue policies to facilitate the economic development and independence of these countries in Southern Africa, and to achieve the integrated development of the region. Due to major changes that have taken place regionally and internationally[77] the SADCC was forced to reconsider its position. When establishing SADC it has been expressed that under the SADCC 'progress towards reduction of the region's economic dependence, and towards economic integration, has been modest. The Organization has, so far, not been able to mobilize to the fullest extent possible, the region's own resources, for development.'[78] The greatest contribution SADCC has made to regional development has been stated in

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75 Article 44 of the SADC Treaty; to be found at (1993) 32 *ILM* 116.

76 Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, Zimbabwe.

77 Most notably, the end of the Cold War; see also the Declaration Regarding Establishment of SADC at (1993) 32 *ILM* 265 at 267.

78 Declaration (n77) 269.

terms of 'forging a regional identity and a sense of a common destiny among the countries and peoples of Southern Africa.'[79] Unlike the SADCC, the SADC Treaty provides the Community with the capacity to enforce decisions taken by its supreme organ, the Summit of Heads of State or Government. The original Members States of the SADC were Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe. Mauritius, the Democratic Republic of Congo and the Seychelles joined the Community subsequently. The Republic of South Africa was accepted as a Member of SADC in 1994 after the abolition of apartheid, and after its transition into a democratic society had been initiated and furthered.

Similarly to the Intergovernmental Authority on Drought and Desertification (IGADD) in the east, to the Economic Community of West African States (ECOWAS), to the Maghred Union (UMA) in the north and to the Economic Community of Central African States (ECCAS), the main purpose of SADC is to achieve economic development through regional integration.[80] Soon it became obvious that this goal cannot be served without security, peace and stability. The Declaration Regarding Establishment of the SADC which was also signed on 17 August 1992 in Windhoek already expressed confidence that recent developments - the independence of Namibia and the transition in South Africa - 'will take the region out of an era of conflict and confrontation, to one of co-operation; in a climate of peace, security and stability. These are prerequisites for development...'

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79 Declaration (n77) 269.

80 J Cilliers 'The Evolving Security Architecture in Southern Africa' (1996) 26 No. 1 *Africa Insight* 13 at 18.

The Windhoek Declaration called, among others, for 'a framework of co-operation which provides for [...] strengthening regional solidarity, peace and security, in order for the people of the region to live and work together in peace and harmony...[81] The region needs, therefore, to establish a framework and mechanisms to strengthen regional solidarity, and to provide for mutual peace and security.'[82] Article 4 of the SADC Treaty commits the Organization to the principles of:

- sovereign equality of all Member States;
- solidarity, peace and security;
- human rights, democracy and the rule of law;
- equity, balance and mutual benefit; and
- the peaceful settlement of disputes.

To '...promote and defend peace and security...' is one amongst other SADC objectives enumerated in Article 5 of the SADC Treaty. On 28 June 1996 the Summit of Heads of State or Governments of the SADC met in Gaborone, Republic of Botswana, to establish the SADC Organ on Politics, Defence and Security.[83] A Protocol on Politics, Defence and Security has been concluded at this Summit meeting which mentions the guiding principles for the Organ, *inter alia*, as being:[84]

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81 See the Declaration (n77) 270.

82 See the Declaration (n77) 272.

83 *Official SADC Trade, Industry and Investment Review* (1997).

84 There are more principles and objectives listed in the 1996 Protocol but only those recited here seem to be relevant for the present case.

- Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
- Peaceful settlement of disputes by negotiation, mediation and arbitration; and
- Military intervention of whatever nature shall be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the Organization of African Unity (OAU) and the United Nations.[85]

The SADC Organ on Politics, Defence and Security is bound to the following objectives:

- Protect the people and safeguard the development of the region, against instability arising from the breakdown of law and order...;
- Mediate in...intra-state disputes and conflicts;
- Where conflict does occur, to seek to end this as quickly as possible through diplomatic means. Only where such means would fail would the Organ recommend that the Summit should consider punitive measures;
- Promote peace-making and peace-keeping in order to achieve sustainable peace and security; and

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[85] See http://www.sadc-usa.net/reference/protocol/organ.html (20 Oktober 1998).

- Co-ordinate the participation of Member States in international and regional peace-keeping operations.[86]

Moreover, the Protocol provides for the institutional framework of the Organ on Politics, Defence and Security which shall operate at the Summit level, and shall function independently of other SADC structures. Establishing the Organ has given some effect to the ambitious intentions of the SADC to provide for peace, security and stability. By virtue of Article 22(2) of the SADC Treaty each Protocol approved by the Summit becomes an integral part of this Treaty. SADC has decided to separate political and security considerations from 'SADC proper' by providing for a separate structure for the Organ. Nonetheless, the Organ in a subsidiary part of SADC and therefore also bound to the principle drawn up in the SADC Treaty, including the sovereign equality of all Member States, the peaceful settlement of disputes and the observance of human rights, democracy and the rule of law. Whereas the regional economic development leg of SADC is generally well established the Organ committed to political, defence and security co-operation is still in its infancy.[87] At present, the Organ essentially exists only at the level of the Heads of State or Government. The Inter-State Defence and Security Committee (ISDSC) which has been established in 1983 was incorporated into the Organ as one of its institutions. The ISDSC is composed of a ministerial council and several sub-committees.[88] It is a forum where ministers of SADC states responsible for

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86 See http://www.sadc-usa.net/reference/protocol/organ.html (20 Oktober 1998).

87 M Malan/J Cilliers 'SADC Organ on Politics, Defence and Security: Future Development' (1997) No. 19, *Institute for Security Studies Papers* 2

88 Cilliers (n80) 20-21.

defence, home affairs, public and state security, consider several issues relating to their individual and collective defence and security. It is chaired at present by the Ministers of Defence of the various SADC countries. The relevance of the ISDSC within the SADC cannot be outlined unequivocally. Apart from that, the question whether SADC as a whole is to be regarded as a regional arrangement or agency within the meaning of Article 52 of the UN Charter seems to be more important. The definition of such a regional arrangement or agency as suggested by Hummer and Schweitzer reads as follows:[89]

> 'It [the regional arrangement] refers to a union of states or an international organization based upon a collective treaty or a constitution and is consistent with the Purposes and Principles of the United Nations, whose primary task is the maintenance of peace and security under the control and within the framework of the UN....
>
> Its members...must be so closely linked in territorial terms that effective local dispute settlement by means of a specially provided procedure is possible.'

As integral part of an regional arrangement or agency SADC's Organ on Politics, Defence and Security would have been entitled to take 'enforcement action' in accordance with Article 53 of the UN Charter. It is beyond any doubt that the intervention launched on Lesotho constitutes enforcement action in the very meaning of Article 53 of the UN Charter. However, since there was no authorization neither by the United Nations nor by the Organization of African

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[89] W Hummer/M Schweitzer in Simma (n21) 699 and 707.

Unity the claim brought forward by several politicians that the intervention was in accordance with several SADC agreements cannot be invoked to justify the action by relying on Article 53 of the United Nations Charter.

(c) Authorization and Acquiescence

On the other hand one may argue that mere acquiescence by the Security Council might justify the SADC intervention under Chapter VIII by virtue of Article 53 of the UN Charter. In other words, authorization can, it could be argued, be inferred from the Security Council's failure to pass a resolution condemning the enforcement action. In fact, during the Cuban missiles crisis in 1962 the U.S. State Department lawyers relied principally on such an extensive interpretation of 'authorization', with mere acquiescence amounting to authorization. As Meeker[90] put it:

> 'The Council did not see fit to take any action in derogation of the quarantine. Although a draft resolution condemning the quarantine was laid before the Council by the Soviet Union, the Council subsequently, by general consent, refrained from acting upon it, and instead chose to promote the course of a negotiated settlement...
>
> Authorization may be said to have been granted by the course which the Security Council adopted.'

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[90] LC Meeker 'Defensive Quarantine and the Law' (1963) 57 *AJIL* 515.

However, this approach is inconsistent with the intention of the drafters of the Charter of the United Nations since the states represented at the San Francisco Conference were perfectly well aware that authorization by the Security Council required an express, positive vote, and that the veto of a single permanent member could prevent the Security Council from giving its authorization[91]; they foresaw, too, that the veto might be used in an excessive and unreasonable way. In order to compensate for the weakness of the Security Council's decision-making process a compromise settlement had been reached which enabled action to be taken in individual or collective self-defence without Security Council authorization in accordance with Article 51 of the UN Charter. The drafters of the Charter showed political wisdom in not giving regional agencies a general power to take military action without clear Security Council authorization, because otherwise it would have been too easy for states to evade the prohibitions on the use of force in Article 2(4) of the UN Charter.[92] Moreover, the failure by the Security Council to condemn a regional action might be caused by the veto of a permanent member, even though all the other members wished to condemn the action in question - to talk in these circumstances of acquiescence by the Security Council is rather artificial.

The crisis in Liberia is a particularly interesting example of systematic co-operation between the United Nations and a regional organization. The armed intervention carried out in Liberia by the ECOMOG (Monitoring Group) of the Economic Community of West African States (ECOWAS) has been

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91 MB Akehurst 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States' (1967) 38 *BYIL* 218.

92 Akehurst (n91) 219.

undertaken without receiving prior authorization of the Security Council. The Security Council's reaction to the activities of ECOMOG as the 'intervention force of ECOWAS' has been ambiguous, because it reacted by issuing a statement by its president, which 'commended' those efforts of ECOWAS, and by imposing a 'general and complete embargo on all deliveries of weapons and military equipment to Liberia until the Security Council decides otherwise'. Thus, on the one hand, the United Nations Security Council gave its support to ECOWAS as a regional organization. On the other hand, the question remains as to whether the Liberian Case represents a good example of systematic co-operation between the United Nations and a regional organization, as envisaged in Chapter VIII of the UN Charter. Strictly speaking, the ECOMOG (ECOWAS) intervention has not been undertaken in accordance with the UN Charter scheme for regional arrangements. In order to avoid uncertainties as to the validity of 'enforcement action' carried out by regional arrangements or agencies, and in order to provide for a clear and continuous application of Article 53 of the UN Charter it seems necessary to keep to the text of this provision. Mere approval or commendation cannot be interpreted as (prior) 'authorization' in the meaning of the UN Charter. Therefore, the authorization given by the Security Council under Article 53 of the UN Charter must be express and positive. Presumably, due to the apparent lack of an UN authorization SADC representatives did not even make an attempt to justify its action by referring to that UN Charter provision.

(3) Security Council Action under Chapter VII of the UN Charter

It is clear from the text of Article 39 of the UN Charter that the Security Council plays a pivotal role and exercises a very wide discretion under the UN scheme for the maintenance and restoration of international peace and security:

> 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.'

However, this does not mean that the powers of the Security Council are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. Its powers cannot go beyond the limits of the jurisdiction of the Organization at large. In particular, Article 24 of the UN Charter provides:

> '1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for

the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.'

Accordingly, the primary responsibility for the maintenance of international peace and security lies with the Security Council. Article 39 of the UN Charter is particularly significant as indicating an exclusive responsibility of the Security Council. The Security Council plays the central role in the application of both parts of Article 39 of the UN Charter. It is the Security Council that makes the determination that there exists a threat to the peace, a breach of the peace, or an act of aggression justifying the use of the 'exceptional powers' of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (*i.e.*, opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 of the UN Charter with a view to maintaining or restoring international peace and security. The determination under Article 39 of the UN Charter as to whether a certain conduct of a state constitutes a threat to the peace, a breach of the peace, or an act of aggression is clearly singled out as a prerequisite for the use of the particular competencies provided in Chapter VII of the UN Charter, and therefore is a key concept in the UN scheme for the maintenance of international peace and security.[93] However, a definition of the situations justifying measures under Chapter VII that could have served as a guideline for the application of Article 39 has never been embodied in the

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[93] Frowein in Simma (n21) 613.

Charter.[94] In 1974, after more than 20 years of debate within the United Nations, the General Assembly adopted the Resolution on the Definition of Aggression.[95] As a General Assembly resolution it is not binding upon the Security Council, although it was intended to provide the Security Council with recommendations for determining an aggressor under Article 39 of the UN Charter.[96] However, there are several obvious reasons why the SADC intervention in Lesotho cannot be regarded as being action taken in accordance with the provisions contained in Chapter VII of the UN Charter. First and foremost, no Security Council recommendation or decision concerning any reaction to the situation in Lesotho in 1998 was actually made. Accordingly, neither a single state nor a group of states was authorized by the Security Council to take actions under Chapter VII of the UN Charter. Moreover, the preconditions for such a Security Council recommendation or decision under Article 39 of the UN Charter were not met by the situation in the Mountain Kingdom of Lesotho. There was a purely domestic conflict but none which could constitute a threat to the peace, breach of the peace or act of aggression in the meaning of Article 39 of the UN Charter. Although an internal armed conflict might constitute a 'threat to the peace' according to the settled practice of the Security Council and the common understanding of the United Nations membership in general, there were no indications that the internal conflict

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94 Harris (n18) 949.

95 G.A. res. 3314 (XXIV) 1974 reprinted at (1975) 69 *AJIL* 480; see SM Schwebel 'Aggression, Intervention and Self-Defence in Modern International Law' (1972-II) 136 *Recueil Des Cours* 411 at 419.

96 Rifaat (n20) 278.

might have spilled over to become an international one, *i.e.* one between subjects of international law. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 of the UN Charter may include, as one of its species, internal armed conflicts.[97] However, the situation in Lesotho in September 1998 cannot be characterized as civil war, and Lesotho was not in such a state of deterioration which could be considered to be similar to the cases of Congo, Liberia or Somalia.

(4) Individual and Collective Self-Defence

A state or a group of states may justify military or non-military measures which might otherwise be illegal if it can prove that these measures were taken in self-defence. The state or the group of states, of course, would have to show that the fundamental preconditions of self-defence were met, *i.e.* that it was responding to a delict by another state posing an immediate danger to its security or independence in a situation which affords no alternative means of protection. Lastly, the response must have been reasonable, limited to the necessity for

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[97] Harris (n18) 755.

protection, and proportionate to the danger.[98] Measures of self-defence taken by a state are strictly protective or preventive in purpose: The predominant purpose is not to influence another state's policy but to safeguard one's own essential rights.

The right of self-defence in international law was formulated well before 1945. The scope of the right was wide and included both anticipatory self-defence and intervention to protect nationals. Article 51 of the UN Charter is less generous. It provides that:

> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

The United Nations Charter distinguishes between collective security, which is to be undertaken by the Security Council acting under Chapter VII, and collective self-defence, which may be exercised by states under Article 51 of the UN Charter without United Nations authorization. Collective self-defence refers to the right of each state to use force in defence of another state. The

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[98] DW Bowett *Self-Defence in International Law* (1958) 148-49.

force is therefore employed on behalf of another state. Therefore, collective self-defence refers, strictly speaking, to collective defence rather than self-defence. Article 51 of the UN Charter is the legal basis of collective agreements such as the NATO Alliance in which an attack on one member is treated as an attack on all.[99] All measures adopted by Member States in self-defence must be reported to the Security Council and the use of force in individual or collective self-defence may only be employed until the Security Council has taken appropriate measures to maintain international peace and security. The customary international law right of collective self-defence was examined in the *Nicaragua* case (*Merits*)[100]:

> '...the Court finds that in customary international law [...] there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.'

Regardless of whether the situation in Lesotho prior to the SADC intervention could have been considered as an 'armed attack' on Lesotho, and regardless of whether certain above-mentioned requirements of (either the customary or the UN Charter right) of self-defence were met, obviously one fundamental precondition of self-defence in international law had not been fulfilled: A state

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99 Wallace (n39) 259.

100 *Case Concerning Military and Paramilitary Activities in and against Nicaragua - Nicaragua v United States* 14 ICJ Reports 1986 paras 199-200.

may intervene to assist the incumbent government if the rebels are supported by another state and such support is sufficiently substantial to amount to an armed attack.[101] In such a case the intervening state acts in support of the incumbent government in the exercise of the right of collective self-defence against foreign aggression. However, in the Lesotho situation the civil unrest and the simultaneous army uprising was purely a domestic matter without another state being involved in the first place. Moreover, the situation could not have been considered as constituting an armed attack in the meaning of contemporary international law. Because of the lack of a delict by another state in terms of international law prior to the SADC intervention neither the SADC nor the Republic of South Africa could base its justification for that intervention on the grounds of individual or collective self-defence.

IV. Political Dimension

However, besides relying mainly on the letter of request issued by the Prime Minister of Lesotho, several more or less persuasive grounds of justifications were given. For example, Minister of Home Affairs and then Acting President Buthelezi held in the National Assembly on 22 September 1998:

> 'This employment was authorized with due regard to the Republic of South Africa's obligations arising out of agreements reached in the Southern African Development Community (SADC), to

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[101] J Dugard *International Law - A South African Perspective* (1994) 325.

> prevent the unconstitutional overthrow of lawful governments by the military of other forces. I want to stress that the employment is effected, as a combined operation together with the Botswana Defence Force, as an SADC intervention and not a South African operation.
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> SADC has made it clear on many occasions that *coups d'etat* in the region cannot be tolerated by member states, and that a military force in any state cannot take it into its hands to assume a political function.'

According to Fink Haysom, Legal Advisor in the Office of the President, South Africa was even obliged, through the SADC, 'to oppose military *coups d'etat* in the region. SA's participation in this intervention was nothing less than its shouldering its part of SADC's commitment to long-term stability and democracy in the region.'[102] These statements bear some resemblance to a recommendation given by SADC working group on conflict resolution during the negotiations for establishing the SADC security organ:

> 'Where there has been a breakdown in „law and order" in any member state, the SADC may decide on the basis of sufficient consensus to intervene in an internal crisis of a member country...'

This would have set the scene for an interventionist SADC regional regime. The principle of full consensus implied that the SADC could decide to intervene in the internal affairs of a member state against the wishes of that

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[102] F Haysom 'Defending regional democracy' November 1998 *Salut - The official monthly magazine of the South African Department of Defence* 51.

country's government. Immediately, criticism of that concept has been voiced:[103]

> 'This is heavy stuff indeed. Should South Africa readily accede to such interventionist agreements? In the past we have intervened in the internal affairs of many of our neighbouring countries. Our relative strength dictates that when military intervention is required, it will be the South African National Defence Force that will have to act. Inevitably such intervention punishes the weaker Lesothos and Swazilands of the region...'

Eventually, when the SADC Organ on Politics, Defence and Security was launched in June 1996 the clause permitting intervention was not adopted with its wide scope as initially recommended. As being one of the guiding principles of the Organ it was agreed upon that 'military intervention of whatever nature shall be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the Organization of African Unity and the United Nations'. Nevertheless, the reservations expressed by Gumbi and Cilliers turned out to become diplomatically fragile reality which has to be dealt with carefully.

According to a South African spokesman, South Africa's recent intervention in Lesotho's prolonged post-election conflict was motivated by desire for peace. It has been held that 'a dangerous situation was developing which could explode resulting in serious consequences for Lesotho and South

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103 L Gumbi/J Cilliers 'South Africa, SADC and a regional security regime' (1994) 34 No. 4 *Africa Institute Bulletin* 1 at 2.

Africa'[104] because 'the Kingdom of Lesotho is our immediate neighbour and is completely surrounded by South African territory. Any spillover of the rebellion, or further deterioration in the security situation, could have had direct consequences for South African citizens - especially those in communities close to the Lesotho border.'[105]

Noteworthy, when the rebel insurgencies broke out in the Democratic Republic of Congo (DRC) in late August, South Africa stood up as a moral force against military intervention, maintaining a no-interference stand. Instead, President Mandela argued for negotiations between President Kabila and the rebels. On the other hand, Angola, Namibia and Zimbabwe sanctioned military intervention in the Congo in order to support President Kabila. South Africa's representatives outlined four key reasons for their non- intervention position then:

- that such conflict should be resolved by negotiations aimed at reaching an inclusive settlement;
- that South Africa was prepared to exert a wide range of pressures on the relevant parties to join the talks;
- that South Africa opposed outside military intervention by its own or other forces in other countries' internal conflicts;

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104 'Statement on Lesotho by the Deputy Minister of Foreign Affairs, Mr Aziz Pahad, to the National Assembly' in Government Communication and Information System (GCIS - ed) *Statements from Governmental Role Players* (4 November 1998).

105 T Sutton-Pryce/C Baudin /N Allie 'Baptism of Fire for SANDF' November 1998 *Salut - The official monthly magazine of the South African Department of Defence* 28.

- and finally, that South Africa would consider intervening militarily in another country in the region only as part of a joint SADC force acting with the express authority of both the Organization of African Unity (OAU) and the United Nations.

All, indeed, seemingly principled postures against military intervention against another country's sovereignty. Barely weeks later, however, the same South Africa was in Lesotho trying to 'quash' a mutiny against the incumbent leadership. One might argue in favour of the South African involvement in the Lesotho intervention that there was a more pragmatic defining reason to explain why South Africa did not wish to intervene militarily in the Congo, whereas it had seen some sense in doing so in Lesotho: Congo President Laurent Kabila was prone to see any military intervention by other SADC states as action in support of him against his opponents, so intervention was unlikely to promote inclusive politics there; in the case of Lesotho, however, both government and opposition would come to see SADC military intervention as an incentive to negotiate between themselves an inclusive settlement. In fact, on 2 October 1998 Lesotho's conflict parties reached an agreement on:[106]

- the holding of fresh elections within a time frame of 15-18 months and to respect and abide by its outcome;

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[106] 'Memorandum of Agreement reached in Maseru on 2 October 1998' in Government Communication and Information System (GCIS - ed) *Statements from Governmental Role Players* (5 October 1998).

- the review of the electoral system with a view to ensuring greater inclusive participation in the political affairs of Lesotho;
- work together to create levels of security and stability which are necessary to ensure free and fair elections;
- work together to restore stability in the country and desist from any action that may compromise the professionalism of the security forces;
- consult all political parties which contested the 1998 elections in order to enable their participation in these processes.

Lateron, on 2 November 1998 the Lesotho Parliament passed the Interim Political Authority Bill which is based on that agreement. In terms of this Bill an Interim Authority, composed of two members each of the twelve political parties, had to be established to bring that agreement into force, and to prepare for the holding of general elections within a period of eighteen months. South Africa's Deputy Minister of Foreign Affairs, Mr Aziz Pahad, praised this Bill as a 'triumph for stability and democracy'. His statement continues:

> '...[this Bill] confirmed our view that unless the coup in Lesotho was ended and the security situation normalised, it would be impossible to deal with the political problems. In welcoming this development we must express our congratulations to the Lesotho Government and the opposition parties. We must also acknowledge the important role played by the SADC facilitating

team led by Minister Mufamadi and the invaluable role of the SADC interventionist forces.'[107]

Despite the political results gained through the SADC intervention South Africa's participation was clearly in contradiction to its position concerning military intervention into another state's internal affairs formulated with respect to the Congo crisis. First and foremost, whilst the decision to intervene had been made and the intervention itself was carried out, the absence of both UN and OAU authorization was seemingly no remarkable obstacle for the Republic of South Africa not only to participate but to play the major role in the intervention. Furthermore, the intervention had been ordered at a time when South Africa's President, Deputy President and Foreign Affairs Minister were all overseas. South Africa's Minister of Home Affairs, Mangosuthu Buthelezi, after telephone consultations with Mandela and Mbeki decided to take military action in his capacity as Acting President. Be that as it may, making this decision in the absence of South Africa's two top men and without informing or consulting either the UN or the OAU might have made at least a disconcerting impression on the international community.

Moreover, it has been widely speculated that King Letsie feared 'Lesotho would be sacrificed in a battle for diplomatic pre-eminence in the region between South Africa and Zimbabwe' as the two leaders battle for supremacy in the SADC region. Nelson Mandela then was the chair of SADC while Robert Mugabe chaired the SADC Organ on Conflict Prevention, Management and Resolution. The implication was that South Africa might

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[107] Statement on Lesotho (n104).

have been stung by Zimbabwean criticism of it for not sending forces to the Congo. Consequently, critics of the intervention held that South Africa's main motive for the intervention was to show other states in the region, especially Zimbabwe, that it has the willingness and the powers to claim a position amongst the major role players in the Southern African region; and that South Africa had chosen little Lesotho as the stage on which to do so.

V. Conclusion

The September 1998 intervention in Lesotho serves as a further example for the dubiousness of military operations in another state's territory carried out without having the express authority of the international community represented by the United Nations. On the one hand, the intervention cannot be justified by relying on the international law standards embodied in the Charter of the United Nations. On the other hand, there seems to be a common consensus that military intervention into another state at the request of its government could be deemed lawful if certain preconditions are met. According to the lack of normative guidelines for drawing up clear-cut preconditions, the principle that a state may validly consent to external military intervention is as open to abuse as decades ago when Soviet troops invaded Hungary. Once we move beyond the paradigm case of a recognized and effective government inviting intervention for sharply limited ends, it is extremely difficult to define precisely the cases in which invited interventions

will be generally accepted. Previous state practice in this area is of only limited utility, since in most cases the reaction of states was strongly colored by Cold War considerations.

The Lesotho intervention did not attract the international community's attention to a degree worth mentioning. Nonetheless, South Africa has taken a bold step into Lesotho which has involved much violence, exacted great human and material costs, and promises uncertain rewards. Especially with regard to South Africa's cross-border raids into Lesotho in the 1980s more restraint and diplomatic sensitivity on the part of South Africa in dealing with the 1998 Lesotho crisis would have been desirable. The fact that new elections will be held is only a short term success of the intervention. In order to derive and to secure long term benefits both South Africa and SADC will have to demonstrate that they are willing to support Lesotho on its way towards democracy. Otherwise the impression might emerge that South Africa's only intention was to protect its own economic interests in Lesotho.

In any case it should be realized that military intervention, if used at all, should be a last resort. The recourse to military intervention is exceptionally rendered lawful if the intervening state is acting on the grounds of, and within the limitations of, self-defence. Furthermore military intervention is justified if it is based on a decision of a competent organ of the international community, e.g. the Security Council of the United Nations. Under these circumstances military intervention might still be used to secure or to restore compliance with international law.