

SOUTH AFRICA'S CROSS-BORDER RAIDS AGAINST
ALLEGED ANC BASES IN THE NEIGHBOURING
STATES : AN INTERNATIONAL LEGAL ANALYSIS

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TITLE : 'SOUTH AFRICA'S CROSS-BORDER RAIDS AGAINST ALLEGED ANC BASES IN THE NEIGHBOURING STATES: AN INTERNATIONAL LEGAL ANALYSIS'

SUMMARY :

This thesis examines whether South Africa is legally entitled to use force in the form of cross-border raids against the neighbouring states in order to destroy alleged ANC bases in these states. Chapter 1 provides a factual account of those cross-border raids in which South Africa has officially acknowledged the participation of its security forces. The main basis for the entitlement to use force in international law, the right of self-defence (provided for in Article 51 of the UN Charter), is analysed in Chapter 2 and then applied to South Africa's conduct in Chapter 5. Because self-defence is not permitted against a lawful use of force, Chapters 3 and 4 investigate the legality of the ANC's armed struggle and whether the neighbouring states violate Article 2(4) of the UN Charter if (or when) they permit ANC guerillas to use their territories for infiltration into South Africa. Although I argue that the ANC and the neighbouring states are legally entitled to use force against the Republic and, therefore, South Africa cannot avail itself of the right of self-defence, I none the less consider the position were South Africa subjected to an unlawful use of force. Even so, I conclude that South Africa's cross-border raids cannot be justified in terms of Article 51 because they are neither the last resort nor effective in removing the danger of ANC violence and, therefore, are unnecessary. Finally, the analysis of the cross-border raids in the context of South Africa's regional policy is used to support my rejection of South Africa's argument that its raids are acts of self-defence because the role that the raids play in the Republic's destabilization of its neighbours suggests that they are fashioned by goals other than self-defence and, consequently, South Africa does not satisfy the requirement of good faith for the legitimate exercise of the right of self-defence. In addition I discuss other bases which have been raised to legally justify these raids (namely the rights of necessity and hot pursuit) and conclude that South Africa's cross-border raids are contrary to international law.

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SUMMARY

This thesis examines whether South Africa is legally entitled to use force in the form of cross-border raids against the neighbouring states in order to destroy alleged ANC bases in these states. Chapter 1 provides a factual account of those cross-border raids in which South Africa has officially acknowledged the participation of its security forces. I do not investigate the legality of those raids which South Africa has conducted against SWAPO bases in Angola because this would involve the complex issue of the legal status of Namibia which falls outside the scope of this thesis. The main basis for the entitlement to use force in international law, the right of self-defence (provided for in Article 51 of the UN Charter) is analysed in Chapter 2 and then applied to South Africa's conduct in Chapter 5. Because self-defence is not permitted against a lawful use of force, Chapters 3 and 4 examine the legality of the ANC's armed struggle and whether the neighbouring states violate Article 2(4) of the UN Charter if (or when) they permit ANC guerillas to use their territories for infiltration into South Africa. Although I argue that the ANC and the neighbouring states are legally entitled to use force against the Republic and, therefore, South Africa cannot avail itself of the right of self-defence, I none the less consider the position were South Africa subjected to an unlawful use of force. Even so, I conclude that South Africa's cross-border raids cannot be justified in terms of Article 51 because they are neither the last resort nor effective in removing the danger of ANC violence and, therefore, unnecessary. Lastly, the analysis in Chapter 1 of the cross-border raids in the context of South Africa's regional policy is used to support my rejection of South

Africa's argument that its raids are acts of self-defence because the role that these raids play in the Republic's destabilization of the region suggests that they are fashioned by goals other than self-defence and, consequently, South Africa does not satisfy the requirement of good faith for the legitimate exercise of the right of self-defence. In addition I discuss other bases which have been raised to legally justify the raids (namely, the rights of necessity and hot pursuit) and conclude that South Africa's cross-border raids are contrary to international law.

ABBREVIATIONS

AJIL	American Journal of International Law
ANC	African National Congress
BCP	Basuto Congress Party
BYIL	British Yearbook of International Law
CILSA	Comparative and International Law Journal of Southern Africa
EPG	Eminent Persons Group
FRELIMO	Frente de Libertacao de Mocambique
GA Res	(United Nations) General Assembly Resolution
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILR	Israel Law Review
Keesing's	Keesing's Contemporary Archives
LLA	Lesotho Liberation Army
LPF	Lesotho Paramilitary Forces
MPLA	Movimento Popular di Libertacao de Angola
Nkomati Accord	Agreement on Non-Aggression and Good Neighbourliness between the Government of the Republic of South Africa and the Government of the People's Republic of Mozambique
NUSAS	National Union of South African Students
OAU	Organization of African Unity
PAC	Pan African Congress
PCIJ	Permanent Court of International Justice
PLO	Palestinian Liberation Organization
PPF	Progressive Federal Party

RdC	Recueil des Cours d l'Academie de Droit International de la Haye
SAAF	South African Air Force
SADCC	Southern African Development Coordination Conference
SADF	South African Defence Force
SALJ	South African Law Journal
SASOL	South African Coal, Oil and Gas Corporation
SAYIL	South African Yearbook of International Law
SC Res	(United Nations) Security Council Resolution
SWAPO	South West African People's Organization
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UN	United Nations
UN Doc	United Nations Document
UNHCR	United Nations High Commission for Refugees
UNITA	Uniao Nacional para a Independencia Total de Angola
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African People's Union

CHAPTER 1SOUTH AFRICAN CROSS-BORDER RAIDS AGAINST ALLEGED ANC BASES IN THE
NEIGHBOURING STATES1.1 FACTUAL ACCOUNT

What follows is a factual account based on press reports of those raids in which South Africa has officially acknowledged the involvement of its security forces. Many difficulties are encountered when presenting an accurate account of events of this nature. Some facts are, for security reasons, unavailable while those that are available are often conflicting because they have been interpreted for purposes of self-justification by interested parties.

Raid no. 1 : South African raid into Mozambique on 30 January 1981

At 1.30 am a South African elite commando force crossed the border into Mozambique and drove to Maputo, the capital of Mozambique, in vehicles similar to those used by the Frelimo armed forces.(1) They attacked and destroyed three houses in the Matola suburb of Maputo. General Viljoen, the Chief of the SADF, claimed that these houses were the 'planning and control headquarters' of the ANC in Mozambique but Mozambique's official news agency described the houses as merely the residences of ANC members.(2) Officials in South Africa alleged that 30

(1) Heitman South African War Machine 178.

(2) Cape Times 2 2 81.

ANC personnel had been killed while Mozambican authorities stated that only 13 unarmed ANC members and one civilian (a passing motorist) had died.(3) One member of the South African forces was killed after clashes with Mozambique's security forces.(4) The raid lasted one hour and the commando forces were airlifted by helicopter out of Mozambique.(5)

The raid followed a warning by the South African Foreign Minister, Mr Botha, in a letter sent to Mozambican authorities in February 1980 in which he stated:

'The South African government reserves the right to take whatever steps may in its view be necessary whenever and whatever, to protect South African life and property.... The South African government holds the government of Mozambique responsible for the presence of these terrorists on its territory and for their action and calls upon the Mozambican authorities to take effective steps to prevent further hostile acts by insurgents based in its territories.'(6)

Assurances from Mozambican officials that ANC insurgents did not operate from their territory were repudiated by South Africa.

The raid occurred after what General Viljoen claimed as,

'... irrefutable evidence ... that Maputo is used as a springboard for terror against South Africa [as well as] unshakable evidence that the attack on SASOL, the Silverton incident and the attacks on police stations in 1980 were planned in those hiding places in Maputo ... and had been launched from there'(7)

The first of these ANC attacks took place on 25 January 1980 when three alleged ANC members seized and held hostages in the Silverton branch of

(3) Ibid 3 2 81.

(4) Heitman above n 1 178.

(5) Cape Times 2 2 81.

(6) Ibid 31 1 81.

(7) Keesing's (1981) 28 30889.

Volkscas bank. After a shootout with police, the three alleged ANC members and two bank employees were killed. The second attack occurred five months later when fuel tanks were destroyed at the SASOL and Natref oil refineries.(8)

Mozambique's Permanent Representative at the UN described the raid (in a letter to the UN Secretary-General) as an act of aggression not only against the ANC but also against Mozambique.(9) Despite the statement by the Chief of the SADF that: 'Neighbouring states must now realize once and for ever that the housing of anti-South African terrorists contains a danger to their own safety and stability'(10), a Mozambican official, Mr Machango, said that nothing would '... weaken our solidarity with the South African people and the ANC'.(11)

Raid no. 2 : South African raid into Lesotho on 9 December 1982

A small South African commando force entered Lesotho in vehicles and launched 'Operation Blanket' in the early hours of the morning. Twelve residences in and around the capital, Maseru, were attacked during the four-hour raid which left 42 people dead. South African intelligence had identified some of these homes as the planning and control headquarters of the ANC in Lesotho while others were believed to house ANC guerillas who had recently arrived with orders both to assassinate political leaders of the Ciskei and Transkei on 16 December 1982 and to commit acts of 'terror'

(8) Cape Times 23 5 83. The two attacks on police stations took place in early 1980.

(9) UN Doc S/14358.

(10) Keesing's above n 7 30889.

(11) Ibid.

in South Africa during the festive season.(12) In addition, the SADF claimed that the ANC command structure in Lesotho had been responsible for the attacks in the southern and eastern parts of the Cape Province in 1982.(13) Both the ANC and Lesotho dismissed these claims as 'utterly false'.(14)

Of the 42 people killed in this raid, 30 were ANC members, including Mr Ngini, the chief ANC representative in Lesotho. The remaining 12 fatalities were all civilians. The South African authorities alleged that the civilians had been killed in the cross-fire but this was disputed by survivors who claimed that the civilians had been deliberately shot.(15) Four commandos were injured during clashes with the LPF who had gone to investigate the firing in the suburbs.

When King Moshoeshoe II of Lesotho addressed the UN Security Council he maintained that Lesotho had received no prior warning of the raid.(16) However, the South African Ambassador to the United States, Mr Steyn, stated that the South African government '... had warned Lesotho again and again, at the very highest level, that we had definite information that these terrorists were planning [infiltration] into South Africa to commit

(12) Keesing's (1983) 29 32059; London Times 11 12 82.

(13) Only two reported attacks took place in this part of South Africa during 1982: a bomb explosion in the lift of the Cape Town Centre (which housed the President's Council) on 4 June 1982 killed one man and caused extensive damage; and three months earlier, an explosive device damaged the Commissioner's court at Langa. The ANC denied responsibility for these attacks.

(14) Cape Times 10 12 82.

(15) Africa Now January 1983.

(16) UN Doc S/PV 2406.

sustained acts of sabotage, wanton acts of killing [and] murder'.(17)
 Yet, Lesotho denied that its country was a base for the planning of
 'terrorist' attacks against South Africa and King Moshoeshoe II said that
 his government had expelled those ANC 'freedom fighters' it had found to
 be armed.(18)

The UN Security Council unanimously condemned the raid as a '...
 premeditated aggressive act against the Kingdom of Lesotho which
 constituted a flagrant violation of the sovereignty and territorial
 integrity of that country'.(19) In a letter to the UN Secretary-General,
 Mr Botha, the South African Foreign Minister, rejected the Security
 Council resolution and declared that South Africa '... reserved the right
 in the final resort to take effective measures to defend the lives and
 property of its citizens'.(20)

Raid no. 3 : South African raid into Mozambique on 23 May 1983

On 20 May 1983 a powerful car-bomb exploded in Pretoria killing 19
 people and injuring 217 others. After the ANC had claimed responsibility
 for the explosion(21), the South African Minister of Law and Order, Mr Le
 Grange, issued the following statement:

'No government of any neighbouring state, where members of the
 ANC are, or where regional offices or headquarters of the ANC
 are allowed, can expect us as a government to stand with our

(17) Keesing's above n 12 32059.

(18) Ibid.

(19) Para 1 of SC Res 527 (1982).

(20) Keesing's above n 12 32060.

(21) London Times 23 5 83.

hands behind our backs.... we cannot allow it, and we will, at our discretion, and in our interest, plan actions as we may find necessary.'(22)

In this instance, the action planned was a raid into Mozambique. On 23 May 1983 at 7.27 am Impala jet fighters of the SAAF launched a two-minute strike codenamed Operation Bits and Pieces. The SAAF used air-to-ground missiles and machine-gun fire (South Africa denied Mozambican claims that fragmentation bombs had been dropped(23)) to destroy targets in the Maputo suburbs of Matola, Liberdade and Sied. The South African and Mozambican authorities differed in their statements with regard to both the nature of the targets hit and the number of people killed in the raid. The SAAF claimed that the six houses hit included the ANC's command headquarters, the planning offices for guerilla actions in the Transvaal, a transit camp for ANC guerillas about to infiltrate the Republic, as well as two logistic headquarters which supplied weapons and explosives to ANC guerillas.(24) State officials in Mozambique denied that these houses were of any military significance - they merely housed South African refugees.(25) The SAAF at first denied, but a day later conceded, that a jam factory including the creche for children of the factory workers and a private home, had been attacked. South African authorities claimed that 41 ANC members, 17 Mozambican soldiers and 6 civilians had been killed.(26) However, Mozambique stated that only 6 civilians, including 2

(22) Ibid.

(23) Africa Now July 1983.

(24) Keesing's (1983) 29 32539.

(25) Ibid.

(26) African Now July 1983.

women and 2 children had suffered fatal injuries.(27) The Mozambican authorities also dismissed the SAAF allegation that their missile site, identified by the SAAF as centrally located to protect the ANC targets, had been hit.(28) Mozambique claimed that the SAAF had been driven off by Mozambican anti-aircraft batteries.(29)

In response to the international condemnation(30) of this aerial strike, the South African Minister of Defence, Mr Magnus Malan, stated:

'The world and our enemies must see this only as an example of our capabilities and what we are prepared to do to protect our territorial integrity and avenge the letting of innocent blood.'(31)

Raid no. 4 : South African raid into Mozambique on 17 October 1983

This strike occurred a week after several bombs had exploded in Warmbaths, a spa town in central Transvaal, causing extensive damage to petrol storage tanks, rail wagons and a petrol tanker. In addition, two limpet-mines attached to the door of the town hall opposite the spas were discovered, removed and detonated safely.(32) Responsibility for the attack was attributed to the ANC.(33)

(27) Keesing's above n 24 32539.

(28) African Now July 1983.

(29) Ibid.

(30) This included a resolution by the General Assembly which described the raid as an act of aggression: GA Res 38/39C of 5 December 1983.

(31) Cape Times 24 5 83.

(32) London Times 18 10 83.

(33) Keesing's (1983) 29 82539.

At 3.00 am a small task force of the SAAF infiltrated Mozambique and conducted what General Malan, the South African Minister of Defence described as a 'pre-emptive' raid on an ANC office in Maputo. An office suite and a penthouse in a residential building were destroyed after explosive devices were placed on the roof immediately above the office.(34) South African intelligence had identified the office as one of the offices from which '... acts of terror like the one last week in Warmbaths were planned, controlled and supported'.(35) Moreover, General Malan claimed that it had been known for some time that further attacks were being planned from this office.(36) Authorities in Mozambique denied that these premises had any military significance but were only an ANC information office which was open to the public.(37) No fatal casualties were reported, but four ANC members and one civilian (in an adjoining flat) were injured in the attack.

President Machel of Mozambique (who was on a tour of Europe seeking military and technical aid when the raid occurred) condemned the raid as an 'act of terrorism'.(38) The South African Minister of Defence remained steadfast in the face of international condemnation and said:

'Limpet mines and other bombs which explode inside South Africa do not just fall from the skies - they come here with the knowledge and co-operation of some of our neighbouring states. Let me say this: South Africa is now tired of its people being exposed to and threatened by sabotage and terror, for which the ANC then claims responsibility from some obscure office in some or other Southern African state South Africa has conducted

(34) Cape Times 18 10 83.

(35) London Times 18 10 83.

(36) Cape Times 18 10 83.

(37) London Times 18 10 83.

(38) Cape Times 18 10 83.

this sort of operation clinically, using small task groups. I hope that in the interest of peace and stability, countries like Mozambique will take note and act accordingly. It is in the interests of the whole sub-continent.'(39)

Raid no. 5 : South African raid into Botswana on 14 June 1985

At 1.00 am a force of some 70 SADF commandos crossed into Botswana and travelled 15 kilometers to the capital, Gaborone, where they launched simultaneous attacks on certain houses and offices which South Africa alleged were centres of ANC activity in Botswana.(40) The 45-minute raid left 12 people dead and six others injured. South Africa claimed that eight of those killed were ANC members(41) but both Botswana and the ANC denied that these eight were guerillas planning military attacks against South Africa from Gaborone.(42) Although no clashes with the BDF were reported, the commandos did clash with Botswana policemen who had set up roadblocks in an attempt to prevent the South African forces from leaving the country. Two policemen were injured. A UN fact-finding mission assessed the cost of damage to property caused by the raid at over US\$ 190 000.(43)

(39) Heitman above n 1 181.

(40) South African intelligence had identified these premises as safehouses for ANC guerillas in transit to South Africa and as venues for the training of guerillas: Cape Times 15 11 86. The Chief of the SADF stated that the ANC strategy of sabotage in the Transvaal was planned from these premises: Argus 14 11 86.

(41) These included Mr Mtsweni, whom South African security police had identified as being in control of ANC finances and logistics in Botswana and Mr Machobane, identified in South Africa as the man responsible for transporting, training and recruiting ANC members in Botswana: Sunday Times 23 6 85.

(42) Daily News 24 6 85.

(43) Keesing's (1986) 32 24088.

To justify this raid, South Africa claimed that since August 1984, ANC members based in Botswana had planned and executed 36 terrorist strikes across the border into South Africa in which six people had died.(44) General Viljoen stated that the targets hit during the raid had been known (for a considerable period of time) to be the 'nerve centre' of the ANC machinery in Botswana(45) but South Africa had only decided to strike at these bases when the residences of two members of the South African Parliament's House of Representatives had been attacked in the Western Cape on 12 June 1985. These attacks which General Viljoen described as the 'last straw' had precipitated the military strike into Botswana two days later.(46) South Africa's Minister of Law and Order blamed the ANC for the attacks but the organization denied having links with the 'Western Cape Suicide Squads' which had claimed responsibility for these attacks.(47) In an address to the UN Security Council, Dr Chiepe, the Botswana Minister of Foreign Affairs, stated that she could not understand why, if these attacks had been executed by the ANC from Botswana, South Africa's sophisticated intelligence, communications and other resources did not intercept and/or forestall the operation in view of the fact that Gaborone is about 2 000 kilometers from the Western Cape.(48)

South Africa was widely condemned for its raid on Gaborone. The UN Security Council unanimously adopted a resolution condemning the raid as an unprovoked and unwarranted act of aggression against the territorial

(44) Newsweek 24 6 85.

(45) Keesing's above n 43 34088.

(46) Ibid.

(47) London Times 14 6 85.

(48) Daily News 24 6 85.

and national sovereignty of Botswana.(49) However, South Africa's Foreign Minister issued a stern warning after the raid that South Africa would not hesitate to take whatever action it considered to be appropriate for the defence of its people.(50)

Raid no. 6 : South African raid into Zimbabwe, Botswana and Zambia on 19
May 1986

Units of the SADF launched raids on alleged ANC offices and camps in Zimbabwe, Botswana and Zambia. South Africa claimed that the purpose of the raid was to eliminate the ANC's main supply route into the Republic which, according to South African authorities, runs from Zambia through Zimbabwe and across Botswana's border into South Africa.(51)

The raid began just after midnight when a small contingent of the South African army (who, according to sources in Harare, had entered Zimbabwe under the guise of tour operators two days earlier(52)) destroyed two premises in Harare, the capital of Zimbabwe. The first target was the ANC diplomatic office, which South Africa alleged was responsible for co-ordinating the activities of ANC operatives in Zimbabwe and the movement of ANC members between other states in southern Africa.(53) No-one was killed in the bomb explosion inside the office but a nightwatchman suffered minor injuries. In addition, the raiders destroyed an empty house

(49) SC Res 568 (1985).

(50) Cape Times 15 6 85.

(51) Sunday Star 25 5 86.

(52) Sunday Times 25 5 86.

(53) Argus 20 5 86.

in the suburb of Ashdown Park which South African intelligence had identified as a transit facility used by the ANC guerillas responsible for the landmine explosions in the Northern Transvaal area of Messina in 1985.(54) The pamphlets dropped by the security forces at the scenes of the attack contained the following statement:

'[I]t is our right to seek out and destroy these ANC gangsters wherever they may be. Self-defence is not only our right, it is our duty.'(55)

Six hours later South African troops were dropped from helicopters at Mogaditsane, a small village ten kilometers from the capital of Botswana, Gaborone. They attacked a housing complex resulting in the death of a local soccer player and injured two other civilians. Botswana and the ANC denied South African allegations that this housing complex was a 'terrorist transit facility'.(56) During the attack the SAAF helicopters opened fire on the BDF headquarters (situated next to the housing complex) in an attempt to neutralize the striking power of the BDF. One BDF soldier was injured in the attack.

Then at 9.00 am that same morning SAAF jet aircraft (flying low to avoid detection by the Zambian Defence System) bombed buildings on the Makene Plots about 15 kilometers south-west of Lusaka, the capital of Zambia. The Chief of the SAAF, Lieutenant-General Earp described the targets hit as the ANC's 'operational centre and department of information and publicity' which he said had been used for various purposes including

(54) Sunday Times 25 5 83. The house was empty due to an alleged warning by the Zimbabwean Central Intelligence Organization that a South African attack was imminent: Cape Times 20 5 86.

(55) Weekly Mail 23 5 86 - 29 5 86.

(56) Keesing's (1986) 32 34662.

the harbouring of 'terrorists' and weapons en route to South Africa, the planning of the sabotage attack on SASOL in 1980 and the preparation of propaganda against the Republic.(57) However, the Zambian representative for the UNHCR, Mr Saied, stated that the targets hit were the Makeni refugee transit centre (owned and run by the UNHCR) as well as the premises rented to unregistered refugees by their Zambian owner under a private arrangement.(58) Mr Saied claimed that both facilities are for refugees from South Africa, Namibia and elsewhere who are not members of either the ANC or Swapo.(59) The ANC did admit that it kept a 'reference library', a vegetable patch and a creche nearby (none of which were hit) but denied that the organization had any camp or training facilities in Zambia.(60) Of the two people killed and thirteen people injured, none were members of the ANC. During the 30 minute raid, in which the ANC claimed the SAAF dropped cluster bombs(61), no clashes with the Zambian Defence Force occurred.

All three states denied that the ANC was allowed to establish military bases in their territories. The PFP conducted a fact-finding mission and found that none of the three states had received any prior warning of the South African raid.(62) However, South Africa's Foreign Minister said that these countries had been warned on 20 December 1985. On this date

(57) Ibid.

(58) Sunday Star 25 5 86.

(59) Ibid. Mr Saied stated that the UNHCR only provides accommodation for members of liberation movements which, unlike the ANC or SWAPO, do not have accreditation in Zambia.

(60) Keesing's above n 56 34662.

(61) Sunday Star 25 5 86.

(62) Argus 5 6 86.

South Africa's State Security Council issued a statement in which it identified Zimbabwe, Botswana and Zambia as states that had failed to curb 'terrorist' activities and warned these states that South Africa would not tolerate any acts of violence launched from its neighbours.(63) Because this warning was raised in the UN, Mr Botha said these states '... cannot say they did not know'.(64)

The South African government said that the raid was designed not only to destroy the main supply route of the ANC but also to warn the ANC against its alleged plan to increase violence in South Africa on 16 June 1986 (the tenth anniversary of the Soweto uprising).(65) The targets struck had all been identified by South African intelligence as vital to the June 16 campaign.(66)

This raid coincided with the visit of the Commonwealth's EPG which was engaged in sensitive discussions to promote dialogue between Blacks and Whites in South Africa. On the morning of the raid on these states (all three were members of the Commonwealth) the EPG were to meet with the South African cabinet. This precipitated accusations that South Africa had intended to jeopardize the EPG's mission by launching the raid.

The international condemnation of this raid was unanimous. However, the United States and the United Kingdom vetoed a UN Security Council

(63) Ibid.

(64) Ibid.

(65) Sunday Star 25 5 86.

(66) Ibid.

draft resolution condemning the raids and calling for selective economic and other sanctions against South Africa.(67)

South Africa's triple raid occurred four days after the United States had bombed alleged 'terrorist' installations in Libya. President Botha of South Africa affirmed that: '... we will fight international terrorism in precisely the same way as other Western Governments'(68) and claimed that his government was in possession of details of co-operation between the ANC, the PLO and Libya. Quoting the American President, he said that self-defence is not only a right but also a duty; he added:

'[W]hen states provided sanctuary to elements which plan, instigate and execute acts of terror against other states, it was an established principle of international law that the state against which such acts are perpetrated, has the right to resort to acts of self-defence and to carry out pre-emptive strikes.'(69)

For this reason he stated that: 'South Africa would continue to prevail on these neighbouring countries to adhere to international law'(70) and the Republic would strike against ANC targets in other countries '... in accordance with our legal right'.(71)

(67) The representatives of the United States and the United Kingdom did not oppose the resolution in so far as it condemned the raid but refused to bind their governments to international sanctions against South Africa: Keesing's above n 56 34663.

(68) Ibid.

(69) Cape Times 21 5 86.

(70) Argus 21 5 86.

(71) Ibid. 22 5 86.

Raid no. 7 : South African raid into Swaziland on 12 December 1986

At 2.00 am a small contingent of South African security forces forced their way through the Fondlane border post and threatened to shoot a Swazi border official unless he let them into Swaziland. They then made a series of lightning raids on six houses in the Swazi towns of Mondlane and Manzini killing two people - a 13-year old boy and an alleged ANC member. In addition, five people were abducted and taken to South Africa by the security forces who again forced their way through border-gates, this time at Matula.

South Africa claimed that those abducted '... had been taken as a result of information ... of their involvement in activities that affected the security of the Republic of South Africa ...'.(72) The activities referred to by South Africa included the making of 'devilish plans' against South Africa to ensure that the country had a 'Black Christmas'.(73) However, after South Africa had returned the two Swiss nationals (who had been among the abductees) to Swaziland, the Swiss couple denied having had any connections with the ANC.(74)

The Prime Minister of Swaziland, Mr Dlamini reacted to the raid with the following statement:

'We strongly condemn these illegal acts of aggression and ask the government of South Africa to desist from violating our sovereignty and to respect Swaziland's commitment to peace.'(75)

(72) Cape Times 15 12 86.

(73) Argus 23 12 86.

(74) Ibid.

(75) Cape Times 13 12 86.

1.2 THE RAIDS IN THE CONTEXT OF SOUTHERN AFRICAN CONFLICT

INT The cross-border raids are an integral part of an overall strategy that in recent years has characterized South Africa's foreign policy in respect of its neighbours. An analysis of this strategy shows that the raids are designed to retain white minority rule in South Africa. This observation causes one to question the South African contention that the raids are defensive measures aimed at protecting the lives and property of all South Africans.

South Africa's regional policy has had to meet the challenges posed by recent developments (both internationally and regionally) which have threatened the survival of white minority rule in South Africa. The international community has succeeded in isolating the Republic in an attempt to bring pressure to bear on the Pretoria government to meet the demands of the majority of its people. The attempts have included the imposition of selective economic sanctions and there is a growing likelihood that mandatory economic sanctions may be imposed in the near future. Since 1980, South Africa has been the only state in southern Africa ruled by a white minority. The demands of black nationalism which resulted in majority rule in Zimbabwe and the decolonization of the Portuguese territories of Angola and Mozambique, has provided additional inspiration for the Black majority in South Africa to challenge the Pretoria government. The newly independent states have been antagonistic towards the South African government and have provided support for the ANC. Furthermore, these states have attempted to reduce their economic dependence (which was inherited from previous colonial structures) on South Africa and have established the SADCC. The intent of the nine SADCC

members has been to form, with foreign aid, an interdependent association of states to lessen South Africa's '... economic stranglehold of the region'.(76)

These developments present a serious threat to the South African government. Because the states in southern Africa are economically dependent on South Africa, Pretoria and many Western states argue that economic sanctions would be disastrous for the region generally. Therefore, if the attempts by states in southern Africa to reduce their economic dependence are successful, such arguments would be weakened. Moreover, South Africa would be deprived of markets that would be essential for its goods if such sanctions (which many of the southern African states have called upon the international community to impose) became a reality and the goals of the SADCC were achieved. In addition, the support of the neighbouring states for the ANC threaten the security of South Africa. Prior to the independence of South Africa's neighbours, a cordon sanitaire existed and prevented the infiltration of ANC guerillas into the Republic. This buffer no longer exists. Furthermore, the possible success of peaceful and non-racial rule in neighbouring states would also undermine the ideology of apartheid, premised as it is on the belief that blacks and whites cannot rule together in peace (thus justifying white minority rule in South Africa). Peaceful non-racial rule on its borders would illustrate a viable alternative to apartheid in South Africa.(77)

(76) Horowitz in Carter and O'Meara (eds) International Politics in Southern Africa 180.

(77) Hanlon Apartheid's Second Front 42.

South African foreign policy has attempted to confront these threats. Of vital importance has been the maintenance (and possible increase) of the economic dependence of the region on the Republic as this would forestall the imposition of sanctions, provide South Africa with a weapon to discourage the neighbouring states from assisting the ANC and illustrate the 'benefits' of apartheid rule. Because the economic dependence of the region on South Africa is not, as Hanlon convincingly argues, 'natural' or based on cheaper or better goods and services, South Africa has had to adopt a more forceful policy to assert and maintain this dependence.(78) Through the largely successful efforts by South Africa to destabilize its neighbours, the Republic has retained its economic power, re-established a cordon sanitaire to prevent infiltration by the ANC and created unstable conditions in the neighbouring states.

DC-ST The policy of destabilization combines military, economic and political action.(79) South Africa is involved both directly and indirectly in the destruction of economic targets and SADCC projects in the neighbouring states. The capture and killing of South African commandos involved in sabotaging vital transport links and oil supplies in the region confirm allegations that South Africa is directly involved in such action.(80) Moreover, South Africa has made use of groups operating against governments in the neighbouring states to destabilize the region.

(78) Ibid 43.

(79) Ibid 1.

(80) A notable example is the capture of du Toit, a South African commando who, together with two other commandos, attempted to sabotage an oil installation at Cabinda in northern Angola on 21 May 1985. The captured commando told his Angolan captors that he had performed other acts of sabotage in Mozambique in 1983. See generally Hanlon above n 77 63; 4.

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These groups include the MNR which operates against the FRELIMO government in Mozambique. The history of this movement shows how it has been used, first by Rhodesia and now by South Africa to destabilize Mozambique. Although the MNR insists that it is indigenous, growing from the national resistance of the Mozambican people to FRELIMO's marxist rule, it is clear that the catalyst for this movement was the Rhodesian Central Intelligence Organization (CIO).⁽⁸¹⁾ When Mozambique became independent in 1975, the Machel government provided ZANU and ZAPU guerillas with bases for their armed struggle against the Rhodesian government. The CIO required information on the guerillas as well as assistance in destabilizing the Machel administration. For these reasons the CIO established the MNR, initially relying on those Mozambicans who had fled to Rhodesia (some of whom were members of the Portuguese secret police). When Zimbabwe became independent, the South African government replaced the CIO as guardian of the MNR. Military bases were established in the northern Transvaal; the anti-FREMILO radio station (Voz da Africa Livre) that had broadcast from Rhodesia was transferred to South Africa and the MNR leaders were flown to South Africa. The Republic provides the MNR with materiél support and there is much evidence that this support continued despite the signing of the Agreement on Non-Aggression and Good Neighbourliness (otherwise known as the Nkomati Accord) between Mozambique and South Africa whereby the governments each agreed not to support anti-government groups against the other.⁽⁸²⁾ The MNR has attacked many government and economic targets in Mozambique and it has replaced the Frelimo administration in many areas.

⁽⁸¹⁾ Jenkins 'Destabilization in southern Africa' The Economist 16 7 83 19.

⁽⁸²⁾ The documents captured at the MNR base of Caso Banana in 1985 provide evidence of South Africa's materiél support for the MNR as well as Pretoria's involvement in the command of MNR operations. See Keesing's (1986) 32 34085; Argus 22 5 86.

South Africa has admitted providing UNITA with matériel support.(83)

UNITA was one of the original liberation movements engaged in armed struggle with the Portuguese colonial administration of Angola. When the MPLA's victory was imminent, UNITA agreed to fight the MPLA and the South African government's invasion of Angola in 1975 was aimed at installing UNITA in power.(84) However, the attempts were unsuccessful and the MPLA defeated UNITA. Yet, the movement was revived and the subsequent occupation of southern Angola by South African forces provided UNITA with a powerful base from which to challenge the Angolan government. UNITA has launched numerous attacks on military and economic targets in Angola often with the direct assistance of South African forces.(85) The movement has also helped South African forces to destroy the Angolan bases of SWAPO which is engaged in armed struggle against the South African administration of Namibia.

The LLA (the military wing of the BCP) is another movement which South Africa provides matériel support for and the organization is allowed to launch attacks against the government of Lesotho from South African territory.(86) The LLA has been involved in many raids on military and economic installations in Lesotho and has claimed responsibility for attacks on South African refugees living in Lesotho.(87) There is no evidence that the LLA played any role in the 1986 coup and it has vowed to

(83) Newsweek 21 10 85.

(84) Hanlon above n 77 68.

(85) Newsweek above n 83.

(86) Hanlon above n 77 71.

(87) Sunday Times 26 1 86.

continue its armed struggle despite the change in the government of Lesotho.(88)

South Africa has also been charged with providing matériel support to the dissident movements operating against the Mugabe government in the Matabeleland district of Zimbabwe. These charges have included allegations that South Africa has trained and armed Ndebele refugees who (at times with South African commandos) have launched raids on economic targets in Zimbabwe.(89) The anti-Mugabe radio station ('Radio Truth') which calls upon the Ndebele to revolt, is said to broadcast from South Africa.(90) Zambia has accused South Africa of training the armed gang led by Mushala which was active in Zambia in 1982 and to have financed an abortive coup attempt in 1980.(91)

These anti-government forces have created unstable conditions in the neighbouring states. The result has been that most states in southern Africa are preoccupied with their own security and defence and thus hindered from fostering economic development individually and collectively (through the SADCC). Moreover, attempts to reduce their economic dependence on South Africa have been sabotaged by the dissident movements. The transport crisis now facing the neighbouring states is a case in point. In 1980 all seven SADCC rail links were operating; this allowed neighbouring states to transport all their goods for import and export

(88) London Times 21 1 86.

(89) Jenkins above n 81 22.

(90) Cape Times 3 4 86.

(91) Africa Now October 1982.

without having to use South African ports or railways.(92) Yet by 1986 only two of these lines were operative and they are insufficient to meet the needs of the region. The MNR and UNITA (and, on some occasions, South African commandos themselves) have rendered the other five railway lines and the port of Beira and Benguela inoperative.(93) The persistent sabotage of these lines and ports foils attempts to rehabilitate these routes and it forces the states in the region to rely on South Africa. Moreover, the chaos generated by such action serves the South African government's contention that blacks and whites cannot rule together. The need to guard against MNR violence forced Mozambique to sign the Nkomati Accord with South Africa in 1984. This non-aggression pact not only protected South Africa against ANC infiltration from Mozambique but was also a great diplomatic success for Pretoria because it portrayed South Africa as a peacemaker in the region. Yet, the open violations of this accord by the South African government have belied the validity of its claims that it seeks regional peace.

South Africa also uses its economic power over the region in an attempt to secure compliance with its wishes. These economic measures have included trade and transport boycotts(94) and threats to dismiss migrant labourers (whose income is vital for the neighbouring states). A notable example of economic coercion was the blockade of the landlocked kingdom of Lesotho in 1986. Directly after Lesotho had lodged a protest with the UN Security Council concerning an alleged South African raid into Lesotho (in which six ANC members had been killed), South Africa

(92) Weekly Mail 17 10 86 - 23 10 86.

(93) Ibid.

(94) Cf the oil squeeze on Zimbabwe in 1982. See Jenkins above n 81 21-2.

blockaded Lesotho on New Year's day in 1986. South Africa disputed the term 'blockade' arguing that the delays in the delivery of essential commodities were caused by the stringent checks on vehicles entering or leaving Lesotho's borders for suspected ANC infiltration and weapons.(95) This action occurred after repeated refusals by Chief Johnathan, the Prime Minister of Lesotho, to enter into negotiations with Pretoria concerning security measures and to hand over 80 ANC guerillas whose names and addresses South Africa was said to have supplied.(96) The consequences of the economic coercion were severe. On 20 January Johnathan's government ^{BEST} fell in a bloodless military coup. South Africa immediately relaxed the border controls and reached an informal non-aggression pact with the new military council led by General Lekanya. All border restrictions were lifted when the first group of ANC members were expelled in accordance with the pact. The involvement of South Africa in the coup remains contentious, yet the fact that General Lekanya was seen in Pretoria three days before the coup(97) and the favourable consequences for South Africa of the change in government, has done nothing to lessen suspicions.

The above analysis of South Africa's regional policy of destabilization provides the proper context for analysing the motives of the South African government in launching its cross-border raids into the neighbouring states.

The cross-border raids and threats of further military action confirm South Africa's resolve to use military power to command compliance with

(95) London Times 16 1 86.

(96) Ibid.

(97) Weekend Argus 25 1 86.

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its wishes. In view of South Africa's military capability, these raids are modest but they are sufficient to warn neighbouring states of the consequences of prejudicing the security of white minority rule in South Africa both in respect of ANC infiltration and reducing economic dependency. It is no coincidence that raid no. 4 occurred while President Machel was on a European tour to secure economic aid for Mozambique.

Furthermore, the civilians killed and property damaged during the raids cause great dissatisfaction amongst the citizens of the neighbouring states not only with South Africa but also with their own governments for prejudicing their security by allowing South African refugees to live in their countries.(98) This dissatisfaction leads to internal division in the neighbouring states and there is little doubt that it contributed to the success of the military coup in Lesotho. Moreover, the limited military action by South Africa intimidates the neighbouring states and, in the case of Mozambique, was partly responsible for facilitating the signing of the Nkomati Accord (which carries with it certain economic benefits and portrays South Africa as a regional peacemaker).

Reason The cross-border raids are not only important for retaining South Africa's regional power (and the maintenance of white minority rule) but are also valuable for ensuring the South African government's continued support from its white electorate.

Context
(98) The pamphlets dropped by the South African forces during raid no. 6 confirm that this is the intention. In the pamphlets addressed to the people of Zimbabwe, it was stated:

'Unfortunately your government allows these ANC gangsters to terrorise innocent people in our country. For your own safety you should not allow ANC guerillas to occupy houses and offices in your country....'

President Botha's constituency fully supports these cross-border raids. In surveys commissioned by the South African Institute of International Affairs in 1982 and 1984, 80% of the white electorate supported military attacks on 'terrorist' bases in neighbouring states.(99) It follows that this hawkish foreign policy will secure greater support for the South African government. Furthermore, the timing of raid no. 6 shows how the cross-border raids have served domestic political purposes. Four days earlier, members of the ultra-right Afrikaanse Weerstand Beweging (AWB) had disrupted a National Party meeting in Pietersburg and pledged never to allow members of the National party to address meetings in this ultra-right stronghold. One of the AWB's main criticisms of the South African government has been the accusation that Pretoria is '... sacrificing white interests for the sake of appeasing black radicals ...'(100) and '... being too soft on terrorists across the border'.(101) Therefore, it is suggested that this raid sought to stem this criticism and ensure unity amongst the white population.

The argument that the cross-border raids are fashioned by goals other than self-defence is reinforced by the facts surrounding the triple raid in 1986. The raid occurred immediately after the EPG had secured Mandela's support for the planned ceasefire by the ANC in return for genuine negotiation with the South African government. Because the raid was conducted against Commonwealth states and took place on the same morning the EPG were to meet with the government to discuss Mandela's support for the ceasefire, many political commentators argued that

(99) Ibid.

(100) Ibid.

(101) Sunday Times 25 5 86.

Pretoria had deliberately ordered the raid to jeopardize the EPG's peace initiative.(102) The EPG mission failed and the ANC continues its armed struggle.

(102) Battersby 'Did new offer by ANC spark raids?' Cape Times 23 5 86.
Also see the London Times editorial 20 5 86.

CHAPTER 2

SELF-DEFENCE IN INTERNATIONAL LAW

The international law prohibiting the use or threat of force is governed by Article 2(4) of the UN Charter which reads:

'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

The UN Charter admits only two exceptions to this general prohibition: self-defence in terms of Article 51 and enforcement measures authorized by a competent international organ under Chapter VII.(1)

In natural law an individual or a state has a right to defend his person, property or honour against actual or imminent violation.(2) This found expression in traditional international law which permitted a state to use force for the protection of certain essential interests upon which its security depended (such as territorial integrity, political and economic independence, and the lives and property of its nationals).(3) Yet the right to take forcible measures was justified only when the necessity for action was '... instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.(4) Furthermore acts of self-defence could not be '... unreasonable or excessive: since the act

(1) Schwarzenberger International Law and Order 164. Article 107 is now obsolete: Akehurst A Modern Introduction to International Law 225.

(2) Kelsen The Law of the United Nations 792.

(3) Bowett Self-Defence in International Law 189.

(4) Statement of the United States Secretary of State, Daniel Webster, in The Caroline Case (Quoted in Jennings 'The Caroline and McLeod cases' (1938) 32 AJIL 89)

justified by the necessity of self-defence, must be limited by that necessity and kept within it'.(5) This position was confirmed by the Nuremberg and Tokyo military tribunals after the Second World War.(6)

To what extent the UN Charter has altered the traditional right of self-defence is uncertain. Article 51 provides:

'Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense 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.'

Writers are divided as to its import. Some interpret it as merely declaratory of pre-existing customary law(7) but others contend that it restricts the traditional right.(8)

The reference to 'inherent' (or 'natural' in the French text) right indicates that the traditional right of self-defence is retained except to the extent it is qualified in Article 51 itself, or elsewhere in the

(5) Ibid.

(6) Briefly The Law of Nations 420-1. Feinsein 'Self-defence and Israel in international law : a reappraisal' (1976) 11 ILR 536.

(7) Bowett above n 3 184 ff; Goodrich and Hambro Charter of the United Nations 307 ff; Hull and Novogrod Law and Vietnam 111 ff; Stone Legal Controls of International Conflict 244; Waldock 'The regulation of the use of force by individual states in international law' (1952) 81 RdC 498.

(8) Brownlie International Law and the Use of Force by States 269-73; De Lima Intervention in International Law 90; Henkin How Nations Behave 141-2; Kelsen above n 2 797-9; Pompe Aggressive War : An International Crime 100; Skubizeuski in Sørenson (ed) Manual of Public International Law 767.

Charter.(9) Therefore the scope of this right must be determined with reference to Articles 2(4) and 51. It is in the reading of these two provisions that writers disagree.

Those writers who consider Article 51 as merely declaratory of the classical right of self-defence base their argument on a number of contentions. One is that Article 2(4) left the customary right of self-defence unimpaired. For this they draw support from the report of the First Committee Conference at San Francisco which dealt with Article 2(4) that '... the use of force in legitimate self-defence remains admitted and unimpaired [by Article 2(4)]'.(10) With respect to Article 51, advocates of the broader view rely on the intention of the drafters and the phraseology of this provision to support their argument. The travaux preparatoires of the Charter do not, they argue, indicate a conscious intention to limit the traditional right of self-defence to instances of an armed attack only; rather the intention was only to preserve the functioning of regional organizations (to act in collective self-defence) from the exercise of the veto in the Security Council.(11) Bowett says that the opening phrase in Article 51 that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence' shows that it is declaratory of an '... existing right

(9) Knishbacher 'The Entebbe operation : a legal analysis of Israel's rescue action' (1977) 12 Journal of International Law and Economics 62.

(10) Quoted ibid 63. See also Brierly above n 6 417; Schwarzenberger The Fundamental Principles of International Law 335.

(11) McDougal and Feliciano 'Legal regulation of resort to international coercion : aggression and self-defense in policy perspective' (1959) 68 Yale Law Journal 1146; Brierly above n 418; Goodrich and Hambro above n 7 297.

independent of the Charter and not the subject of an express grant ...'.(12) The supporters of this wider interpretation do not construe the phrase 'if an armed attack occurs' as restrictive. They reject the contention that 'if' must be interpreted to mean 'only if' because:

'A proposition that "if A, then B" is not equivalent to, and does not necessarily imply, the proposition that 'if, and only if A, then B.'(13)

Because 'if' may be used to express an hypothesis and not necessarily a condition, they point out that the French text - 'dans un cas où un Membre des Nations Unies est l'objet d'une agression armée'(14) supports their argument that the phrase 'if an armed attack occurs' is only a hypothetical case and not a qualifying condition.(15) Moreover, if it were to be read as a qualifying condition then the same would have to be done to the phrase 'against a Member of the United Nations' thus denying the right of collective self-defence to assist in the defence of a non-member state that is victim of an armed attack.(16) This logical result of the restrictive view would be inconsistent with State practice.(17)

If one follows the broader interpretation of Article 51, states are permitted to exercise the customary right of anticipatory self-defence. On a restrictive interpretation, states would be obliged to wait until 'an armed attack occurs' - a requirement the declaratory school considers

(12) Above n 3 187.

(13) McDougal and Feliciano above n 11 1147 note 261. Also see Bowett above n 3 188.

(14) Translated as 'in a case where a United Nations member is the object of an armed aggression'.

(15) Knishbacher above n 9 65; Brierly above n 6 419.

(16) Brierly above n 6 419.

(17) Ibid 419.

unrealistic and not contemplated by the drafters of the UN Charter. Because '[n]o nation ... would willingly sit by while another prepares its doom'(18) it is unlikely that those who drafted Article 51 '... would have been prepared to disregard the lessons of recent history and to insist that a state should wait for the aggressor's blow to fall before taking positive measures for its own protection'.(19) Indeed where a state learns that another is about to destroy it, the requirement that it must wait for the actual attack would surpass even the requirements for self-defence in most municipal legal systems and may result in the state being so overcome as to be unable to resist the attack.(20) The contention that the drafters did not intend Article 51 to exclude this traditional right to anticipate an attack is supported by the word 'maintain' that appears in the phrase 'until the Security Council has taken the measures to maintain international peace and security'; why else use the word if not to contemplate the situation where peace and security is only threatened not broken.(21) Knishbacher argues that the drafters would have used the word 'restore' if they did not contemplate self-defence in anticipation of an attack.(22)

Yet, even if the drafters of the Charter did not extend to permit anticipatory self-defence, some writers argue:

(18) Franck 'Who killed Article 2(4)?' (1970) 64 AJIL 820.

(19) Greig International Law 894; See Bowett above n 3 191.

(20) Feinstein above n 6 530.

(21) Knishbacher above n 9 65; Brierly above n 6 419.

(22) Knishbacher above n 9 65.

'... should we now confine ourselves to the initial legislative intent, ignoring the critical changes in international realities and military technology since 1945?'(23)

The remarkable increase in the destructiveness of modern weapons (notably nuclear weaponry) would '... make it a form of suicide for a state to wait for one actual act of aggression before responding'.(24) Furthermore the reality that the UN system is unable to provide adequate means of collective security against imminent threats to a state's security would, Waldock argues, render it '... a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow'.(25)

The proponents of the right to launch pre-emptive strikes reject the fears that the right would be abused(26) as unfounded, because a state would still be required to demonstrate the 'necessity' to use force; dispensing with the requirement of an armed attack would not, therefore '... open a Pandora's box'.(27)

Other writers disagree with such a wide interpretation of Article 51. They prefer a restrictive approach arguing that the combined effect of Articles 2(4)and 51 prohibits all use of force except in the exercise of

(23) Shapiro The six-day war and the right of self-defence (1971) 6 ILR 72.

(24) Friedman The Changing Structure of International Law 259; See also Feinstein above n 6 530.

(25) Waldock above n 7 498.

(26) Hingorani suggests that such a right '... will open a floodgate of excuses whereby nations will fulfill their evil designs by raising the boggy of self-defence against apprehended attack' Modern International Law (301).

(27) Hull and Novogrod above n 7 120.

the right of self-defence 'if an armed attack occurs'.(28) Thus the traditional right of self-defence is preserved only when an armed attack occurs. The strict interpretation, they argue, is based on the principle of effectiveness; because Article 51 is an exception to Article 2(4) a narrow construction would be in accordance with the general rule of interpretation which requires that an exception to a principle be interpreted restrictively lest the principle be undermined.(29) Moreover, proponents of the restrictive interpretation contend that the discussions at the San Francisco Conference emphasized the prohibition rather than the permission of force therefore justifying, in their opinion, a narrow interpretation of Article 51.(30)

However, if self-defence only has such meaning as Article 51 gives it(31), how do these writers reconcile this contention with the opening phrase '[n]othing in the present Charter shall impair the inherent right of ... self-defence'? Singh argues that this phrase signifies that:

'... in all those respects in which Article 51 has neither stipulated conditions nor prescribed a procedure modifying natural or customary law, the latter would apply, provided always that the condition relating to an armed attack has occurred.'(32)

Therefore, even on a strict interpretation of Article 51, the traditional requirement of necessity is retained when 'an armed attack occurs'.(33)

(28) Brownlie above n 8 265.

(29) Akehurst above n 1 222.

(30) Brownlie above n 8 269.

(31) Kelsen above n 2 149.

(32) Nuclear Weapons and International Law 117.

(33) Higgins The Development of International Law Through the Political Organs of the United Nations 205; See also Friedman above n 24 256.

On the strict interpretation, the pre-Charter right of anticipatory self-defence is no longer available. The following reasons for denying a state the right to defend itself against imminent attack are provided by Brownlie:

'As a matter of principle and policy, anticipatory self-defence is open to certain objections. It involves a determination of the certainty of attack which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government. This process may lead to a serious conflict if there is a mistaken assessment of a situation. Furthermore, even if a state is preparing an attack it still has a *locus poenitentiae* prior to launching its forces against the territory of the intended victim. N is the state which considers itself to be the object of military preparations forced to remain supine but may take all the necessary precautions short of commencing an attack; it may also appeal to the competent organs of the United Nations or of a regional defence organization, and by doing so will at the very least embarrass the prospective aggressor by advertising the facts of the situation.'(34)

These writers consider it even more important to deny states the right of pre-emptive self-defence in the nuclear age; its potential for abuse, in the context of nuclear warfare, '... might spell disastrous consequences for all'.(35)

Even if one accepts the view that self-defence is only available if an 'armed attack occurs' when does an armed attack occur? Instead of asking whether a right of anticipatory self-defence is available it states, some writers inquire as to when an armed attack may be said to occur. For Dinstein it is quite obvious that:

'... an actual armed attack may be initiated before the first shot has been fired. It is the embarkation on an irreversible course of inevitable action - the crossing of the Rubicon rather than the actual fighting - that casts the die and consummates

(34) Above n 8 258; See also Akehurst above n 1 222; Hingorani above n 26 30; Kunz 'Individual and collective self-defence in Article 51 of the United Nations' (1947) 41 AJIL 878.

(35) Singh above n 32 115.

the armed attack. ... To all intents and purposes, self-defense in such circumstances is not anticipatory; it is just miraculously early.'(36)

Therefore, these writers, while rejecting the traditional right of pre-emptive self-defence, are none the less prepared to concede that modern political and military realities(37) demand that an armed attack be said to occur in instances traditionally construed as imminent or impending.

There is no authoritative basis upon which to decide whether the narrow or wide reading of Article 51 is to be preferred. State practice is inconsistent and there is no decision or advisory opinion by the International Court of Justice on this matter. Accordingly, both interpretations of this article must be considered to be of equal weight when analyzing conduct that is alleged to be in self-defence.

Therefore, a state is required to show that it is the victim of unlawful conduct (in the form of an armed attack or, on the wider interpretation of Article 51, an actual or imminent violation of its 'essential' rights). Where the conduct is not unlawful but is legally justified, a state cannot act in self-defence against it.(38)

In addition a state must show that the use of force was necessary for the purposes of self-defence. This important requirement derives from

(36) In Bassioni and Nanda (eds) A Treatise on International Criminal Law 277; See also Feinstein above n 6 535.

(37) Henkin above n 8 143; Friedmann above n 24 259

(38) The Nuremberg military tribunal held that '... there can be no self-defence against self-defence'. Quoted in Dinstein 'Terrorism and war of liberation applied to the Arab-Israeli conflict : an Israeli perspective' (1973) 3 Israel Yearbook on Human Rights 91; See Schwarzenberger above n 10 341.

customary law; Article 51 is silent on the matter.(39) The law was stated by Webster in The Caroline case as follows:

'It will be for ... [Her Majesty's] Government to show a necessity of self-defence, instant and overwhelming, leaving no choice of means, no moment for deliberation. It will be for it to show, also, that the local authorities of Canada,..., did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'(40)

In other words, a state is required to show that it was necessary not only to use force but also to employ the degree of force and use it in the manner in which it did.

The necessity to use force in response to an armed attack (or an actual or imminent violation of legal rights) will exist only if there are no alternative means of protection.(41) Oppenheim states:

'If an imminent violation or the continuation of an already commenced violation, can be prevented or redressed otherwise than by the violation of another state, this latter violation is not necessary, and not excused or justified.'(42)

However, an appraisal of a state's decision to take forcible measures should make proper allowance for the urgency of the decision and due regard should be had for the '... emergency situation in which rapid decisions have to be taken'.(43) The peaceful alternatives, therefore, must be practical in the circumstances.

(39) See above n 32.

(40) See above n 4.

(41) Bowett above n 3 269; Jenks A New World of Law 29.

(42) International Law 266.

(43) Schwarzenberger above n 10 333.

Provided no alternatives exist, force may be used. However, the entitlement does not extend to any kind or degree of force. Only that amount of force reasonably necessary to protect the state from the danger is permitted. This is often referred to as the rule of proportionality. Bowett interprets Webster's formulation to mean that [t]he measures of self-defence must be reasonable, limited to the necessity of protection and proportionate to the danger'.⁽⁴⁴⁾ But Miller denies that The Caroline Case is authority for the proposition that the force used must be proportional to the danger:

'The requirement that force used in self-defence be no more than necessary to avert the danger, and the requirement that the force be proportionate to the danger are conceptually quite distinct, and the Caroline Case provides no basis for the latter.'⁽⁴⁵⁾

Yet few writers interpret the 'proportionality rule' to mean that the measures must be commensurate with the size and character of the attack.⁽⁴⁶⁾ Indeed most writers who employ the 'proportionality' maxim interpret it to require that the measures should not involve more force than is necessary to secure the permissible objectives of self-defence. Grieg considers it

'... fanciful to test the degree of force used by the amount of force it is designed to counter ... [I]t is probably more in keeping with reality to adopt the proposition that the amount of force should be commensurate with the objectives that a plea of self-defence might reasonably entitle a state to achieve.'⁽⁴⁷⁾

(44) Above n 3 269.

(45) 'Self-defence, international law and the Six-Day War (1985) 20 ILR 69.

(46) Singh above n 32 135.

(47) Above n 19 887; Also see McDougal and Feliciano above n 11 1150-4.

This formulation of the 'proportionality rule' is in keeping with the American doctrine of 'just war' which defines the requirement of proportionality as

'... suggesting that steps taken in self-defence may be directed to eliminating the peril, on the basis that the spirit itself of a right of self-defence is non-existent if it does not allow for the complete removal of the danger which justified the resort to self-defence.'(48)

To demand that the quantum of responding coercion be comparable to that of the initiating coercion is particularly unrealistic in cases of anticipatory self-defence because:

'[h]ere we should have to ask the defending state to evaluate in advance the extent of the imminent attack and the amount of damage which might be caused, and then to ensure that the degree of force used in self-defence does not exceed the hypothetical level of force which might have been used, had the enemy attacked.'(49)

Because the objective of self-defence is prevention and not punishment, the sole criterion for assessment is whether the force used was reasonably necessary to achieve this objective.(50) To avoid confusion, it is preferable not to employ the terminology of 'proportionality' to describe this requirement laid down by Webster.

Yet how do we assess whether the magnitude and intensity of the force used was reasonably necessary for protection? The enquiry will have to identify what the danger is that the claimant's coercion was designed to

(48) Quoted in Feinstein n 6 538.

(49) Miller above n 45 71.

(50) Ibid; Stassen 'Intervention in internal war : traditional norms and contemporary trends' (1977) 3 SAYIL 78.

protect against and whether the force used was confined to (i.e. not excessive) (51) and effective in reducing or eliminating this peril.(52) Where the use of force eliminates or removes the danger and is not excessive for this purpose, it will be reasonably necessary. But where the force is ineffective to prevent the danger, it is difficult to conceive of it as necessary.(53) This question of efficacy is problematic because it involves an investigation into difficult questions of fact. For instance, where the danger persists (subsequent to the force used), it is difficult to determine whether this fact is because the use of force was ineffective or because but for the forcible measures, this danger would have increased. Yet where the danger increased, and there are sound bases for the contention that the use of force was responsible for the increase, it is unlikely that the use of force may be considered necessary.

As in the case of most legal rights, self-defence must be exercised in good faith.(54) In other words, a state must not use the danger (against which the force is claimed to protect) as a pretext for aggressive designs. The statement by Webster that the forcible measures must be limited to the necessity indicates that the use of force '... must not be motivated by, and fashioned after, any goals other than self-defence, pure and simple'.(55)

(51) Knishbacher above n 9 73.

(52) See McDougal and Feliciano quoted in Falk 'International Law and the United States' role in the Vietnam war' (1965-6) 75 Yale Law Journal 1144.

(53) Miller above n 45 70.

(54) Schwarzenberger above n 10 338.

(55) Shapiro above n 23 77.

If the use of force conforms with the requirements outlined in the above discussion, it will be justified as an act of self-defence. In the analysis that follows, the conduct of the ANC, the neighbouring states and South Africa will be assessed in the light of these requirements.

CHAPTER 3THE LEGALITY OF THE ANC'S ARMED STRUGGLE3.1 BACKGROUND(1)

The ANC is the oldest political movement in South Africa. It was founded on 8 January 1912 as the South African Native National Congress (SANNC) in an attempt to unite 'Africans' into a single political force to defend their rights which had been seriously curtailed by the South Africa Act of 1909.(2) The onslaught on 'African' rights continued into the 1930s. The ANC (the title adopted by the SANNC in 1923) opposed the removal of the few rights they had enjoyed during the colonial period by petitioning the authorities and sending deputations. When this form of protest proved futile it was replaced by a more militant, but non-violent, strategy of civil disobedience culminating in the Defiance Campaign of 1952. This campaign followed the institutionalization of apartheid by the National Party after it had come to power in the white general election of 1948. In addition to the civil disobedience against apartheid laws, there was mass action in the form of boycotts, stayaways and marches. The state responded with violence and arrested leaders who were later tried for, but

(1) It is difficult to form a well-based judgement of ANC attitudes, policies and future intentions because in terms of South African law (Cf s 56 of the Internal Security Act No 74 of 1982) it is an offence to quote the views of this organization. The quotes that are permitted for publication are often taken out of context in an attempt by the South African government to discredit the ANC. Moreover, access to material on the ANC is restricted in South Africa.

(2) Act No. 9 of 1909. See generally Lodge Black Politics in South Africa since 1945 2.

acquitted of, treason. In 1960 the South African government declared a 'state of emergency' and banned both the ANC and the PAC.(3)

As an outlawed organization the ANC was left with the choice to give up its struggle or to alter its strategy. It opted for the latter. Clearly non-violent resistance was futile in the face of state repression; armed conflict was inevitable after all protest had been barred by the banning of the organization. Before resorting to armed struggle, however, the ANC spent a year campaigning for its right to exist legally. It called for a national convention on the eve of the declaration of the South African Republic but the government remained uncooperative. On 16 December 1961 the ANC formed Umkhonto we Sizwe (also known as MK), the military wing of the ANC.

For the first two years MK was based in and led from South Africa. The ANC limited its acts of violence to sabotage and avoided civilian casualties. Without an external source of sophisticated explosives, the guerillas mainly used fire-bombs that caused superficial damage. The aim of this strategy was to keep up the morale of ANC supporters and to force the South African government to reach a peaceful solution. Following the arrests of many members of MK's High Command at Rivonia in 1963, the South African police destroyed the underground organizations of the ANC and its military wing.

Those leaders who had avoided capture went into exile and the ANC restructured itself around the exiled leadership. Approximately 2 000

(3) The PAC broke away from the ANC in 1959 because of its opposition to the ANC's non-racial policy.

recruits from South Africa were trained in camps elsewhere in Africa. There was little evidence of ANC activity inside South Africa for the next 13 years. Efforts to resurrect the ANC's network inside the Republic were unsuccessful because of the cordon sanitaire of territories (hostile to the ANC) surrounding South Africa(4) which inhibited the establishment of secure lines of communication between the ANC's base camps in East Africa and the South African population. Moreover these territories prevented the return of trained ANC guerillas to South Africa.

Despite these difficulties the ANC was able to lay the groundwork for its revitalization in 1976. It formed an alliance with the Conference des Organisations Nationales des Colonies Portugaises (CONCP) that allowed the ANC to forge links with FRELIMO and the MPLA which were organizations engaged in guerilla warfare against the Portugese colonial administration in Mozambique and Angola respectively. Their final victory and their continued support for the ANC was vital for the launching of ANC insurgency into South Africa. Diplomatic efforts by the ANC to secure financial assistance and military equipment from Western countries failed but it did secure such support from the Soviet Union. This enabled the ANC to provide for the influx of South African recruits after the Soweto uprising of 1976.

The process of reorganizing the ANC presence in South Africa was facilitated in 1976 when growing state repression provoked the violent

(4) Lodge 'The African National Congress in South Africa, 1976-1983 : guerilla war and armed propaganda' (1983-4) 3 Journal of Contemporary African Studies 160. The territories referred to were the following: the Portugese colonies of Angola and Mozambique; the white minority controlled Southern Rhodesia (later Zimbabwe); South West Africa (later Namibia) which was under South African administration, Bechuanaland (later Botswana) and Basutoland (later Lesotho).

response of many blacks in South Africa. When the uprising had been crushed, thousands went into exile and many were trained in ANC camps located outside the Republic. With the support of the states neighbouring South Africa, the ANC returned many trained and reasonably well equipped guerillas to South Africa.

The guerillas who infiltrated the Republic launched what is known as MK's campaign of 'Armed Propaganda' designed to raise the ANC's popularity amongst black South Africans and demonstrate its competence to challenge the state with violence. For the next five years the ANC carried out numerous attacks against institutions and individuals that symbolized state repression.(5) Attempts were also made to co-ordinate such activity with popular resistance in Black communities.(6) Avoiding civilian casualties, the ANC succeeded in securing the intended admiration and political support of many members of its black audience. This political mobilization of South African blacks was further enhanced by the ANC's influence on potentially sympathetic legal organizations operating inside the Republic and its creation of a network of cells to undertake political duties.(7)

In the light of South Africa's increased military and economic hostility against the neighbouring states, the ANC realized that it could no longer rely on the willingness of these states to permit transit for ANC guerillas. After South Africa and Mozambique signed the Nkomati

(5) See for example the attacks on SASOL discussed in Raid No 1.

(6) Lodge above n 4 164 ff. The sabotage of the Soweto Railway line in 1980 coincided with the stayaway call.

(7) Ibid 173-5.

Accord in 1984, ANC strategists had no choice but to change the tactics of the organization.

The new offensive against white minority rule involves the intensification and coordination of mass political action and armed struggle in a 'people's war' aimed at a popular insurrection in South Africa.(8) With a significant political following inside South Africa and because many of the MK guerillas had remained in the country after infiltration, the ANC has been able to decrease its dependence on the neighbouring states and become self-sufficient within the borders of the Republic.

Developments in the nature of the armed struggle since 1983 indicate a steady implementation of the strategy of 'people's war' in South Africa. Umkhonto we Sizwe has established training camps inside the country and part-time guerilla 'armies' have been formed. This popularization of guerilla activity has resulted in a significant increase in the number of bomb attacks in South Africa. While not discounting the possibility of civilian injuries in the 'cross-fire' the ANC has pledged not to target civilians.(9) However, recent attacks have included strikes on so-called

(8) According to Barrel, the ANC believe that the

'... highly co-ordinated and well-timed combination of military actions by Umkhonto we Sizwe, other armed actions by large "mass combat units" comprising ordinary people, labour mass actions and other militant campaigns by students, women and youth could, at some point in the future, enable it to contend for state power'.

'Weighing up the ANC' Weekly Mail 12 12 86 - 18 12 86 14.

(9) Lodge 'The ANC after Nkomati' 1985 South African Institute of Race Relations Topical Opinion 7.

'soft' targets(10) which indicates that the ANC bureaucracy is losing control (an inevitable consequence of insurrectionary tactics) over its cadres inside South Africa. Moreover the daily assault on unarmed black people by South African security forces has increased the bitterness and rendered the distinction between 'soft' and 'hard' targets largely irrelevant.(11)

The present insurrectionary tactics, which were formally adopted by the ANC at its Consultative Conference held at Kabwe in 1985, have achieved a degree of success. Student action has made 'Bantu Education' largely unworkable and a few areas of the country have been rendered ungovernable after the destruction of government institutions of control and their replacement by community organizations.(12) On the other hand, the South African government has been ruthless in its attempts to suppress these challenges to apartheid rule. State repression has included the declaration of two 'states of emergency' (one of which is still in operation); the detention of thousands of people, including children; the continued occupation by security forces of many black 'townships' and the restrictions on the media and extra-parliamentary organizations. None the less, the ANC retains its strategy of

(10) Cf the explosion at a crowded shopping centre in Amamzimtoti on 23 December 1985 which killed 6 people; the 1986 bomb attacks at bus-stops and a restaurant in Johannesburg; etc. The timing of the attacks indicates that the civilians were the targets and not merely the victims.

(11) For this reason, Tambo (the president of the ANC) did not issue an unequivocal condemnation of the Amamzimtoti attack in 1986. See Lodge 'The African National Congress : Kabwe and after' (1986) 10 International Affairs Bulletin 6; 11-2.

(12) National Union of South African Students Nusas talks to the ANC 14.

insurrection and has called for the intensification of the struggle for people's power.(13)

3.2 LEGAL ANALYSIS

International Law prohibits the use or threat of force. This prohibition is governed by Article 2(4) of the UN Charter which reads:

'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

The prohibition and the more specific rules that can be deduced from it are addressed to states.(14) Unless the ANC constitutes a 'state' for the purposes of Article 2(4), its conduct is not prescribed by international law. It is necessary, therefore, to examine the legal standing of the ANC in international law.

Our concern is the legal status of a non-state entity which challenges the right of an established authority to govern the people of a state. The entity's international legal personality is established by the recognition of the international community. The legal rules that govern the process of recognition are based on state practice.(15) Because recognition is a political decision, the law in this regard is not static; it depends on the political aspirations of the international community at the particular time.

(13) The ANC has adopted the theme 'The Year of Advance of People's Power' for 1987.

(14) Skubizewski in Sørensen (ed) Manual of Public International Law 771.

(15) See generally Brownlie 'Recognition in theory and practice' (1982) 53 BYIL 197 ff.

In traditional international law, recognition means the formal acknowledgement by individual states and/or the established authorities of the military intensity of the challenge presented by the non-state entity. The legal status of the non-state entity vis à vis the recognizing state or incumbent government depends upon the characterization of this challenge. There are three possible characterizations: rebellion, insurgency or belligerency.

If the challenge takes the form of sporadic violence which is capable of suppression by normal procedures of internal security, it should be treated as a rebellion.⁽¹⁶⁾ The conflict is domestic and no international legal status is accorded to the rebels.⁽¹⁷⁾ A more sustained and successful civil revolt that does not meet the requirements of belligerency may qualify as a situation of 'insurgency'; this involves a partial internationalization of the conflict on an ad hoc basis.⁽¹⁸⁾ When recognized as insurgents, the non-state entity acquires limited legal personality vis à vis the recognizing state.⁽¹⁹⁾ Unlike belligerency, it is not a formal status from which further and more general rights may be deduced; it is limited to those rights that have actually and expressly been conceded for reasons of convenience, humanity or economic interest by the recognizing state.⁽²⁰⁾ Because states are free to determine their own relations with the insurgents, it is possible that they may conduct their

(16) Stassen 'Intervention in internal wars : traditional norms and contemporary trends' (1977) 3 SAYIL 68.

(17) Falk Legal Order in a Violent World 118.

(18) Ibid 117-8.

(19) Stassen above n 16 69.

(20) Recognition in International Law 275-6.

relations in accordance with the international law of neutrality and belligerency and thereby make the subjects subject to some of the rules of international law and, to that extent, subjects of international law.(21)

The conditions governing the status of belligerency are outlined by Lauterpacht as follows:

'... first, there must exist within the state an armed conflict of a general (as distinguished from a purely local) character, second, the insurgents must occupy and administer a substantial portion of national territory; third, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.'(22)

If the challenge meets these requirements, the non-state entity may be recognized as a belligerent. It is uncertain whether or not states are under an obligation to recognize insurgents as belligerents if these conditions are met(23) but it is clear that premature recognition would constitute an illegal intervention.(24) The recognition has the effect of granting the belligerent a formal legal status akin to a state waging a war against another state.(25) To this extent the non-state entity becomes a subject of international law.(26) However, it does not possess the other rights of a state; for example, the belligerent community lacks the right to join international organizations and to '... benefit in the normal manner from multilateral conventions concerned with peacetime

(21) Mugerwa in Sorenson above n 14 265.

(22) Lauterpacht above n 20 176.

(23) Stassen above n 16 70.

(24) Mugerwa above n 21 287.

(25) Lauterpacht above n 20 245; Stassen above n 16 70.

(26) Mugerwa above n 21 287.

international relations and activities of states'.(27) The conflict ceases to be domestic and becomes an international conflict regulated by international law.(28)

The purpose of the characterizations is to regulate the intervention by other states in the conflict. When the challenge qualifies as a rebellion or insurgency, states are only entitled to assist the established authority; assistance given to the rebels or insurgents constitutes an illegal intervention.(29) On the other hand, a state that recognizes a non-state entity the belligerent acquires the rights and duties of a neutral state unless it decides to participate in the international conflict by assisting either side.(30)

Numerous developments in the international community have challenged the relevance of this traditional law to contemporary international relations.

Oglesby identifies the recognition of insurgency and belligerency as a product of the balance of power system which characterized international relations in the eighteenth and nineteenth centuries.(31) During this period the emphasis was on national sovereignty; the norm of non-intervention was vital for the system in which fluctuating allegiances were common-place. Yet, by the time of the Spanish Civil War the

(27) Von Glahn Law Among Nations 85.

(28) Falk above n 17 117.

(29) Ibid 118.

(30) Stassen above n 16 70.

(31) Internal War and the Search for Normative Order 115 ff.

international system was rearranging itself into a bi-polar system in which intervention became the order of the day thereby undermining the purpose served by recognition based on the norms of insurgency and belligerency.(32)

Most importantly, the development of the legal norm of self-determination and the extension of this right to certain non-state entities (on behalf of the people they represent) has had a dramatic effect on the role and nature of the international Law regulating civil conflict. The basis for evaluating the challenge to the established authority has moved from the factual character of the conflict to the nature of the non-state entity's cause.(33)

Before discussing the effects of the legal norm of self-determination on the acquisition of international legal personality, we must examine the development of the right of self-determination in international law.*

The desire to shape one's own destiny by deciding who one is to be governed by has long been cherished as a political ideal. It found political expression in the doctrine of popular sovereignty proclaimed by the French revolution.(34) The growth of nationalism supplemented this doctrine by encouraging ethnically homogeneous groups(35) to realize their separate identity and to strive for the creation of a state with a

(32) Ibid.

(33) Falk above n 17 125.

(34) Rigo-Sureda The Evolution of the Right of Self-determination 17 ff.

(35) Lennett & Peart 'The Inqwavuma land deal. A case study of self-determination' (1986) 6 Boston College Third World Law Journal 24.

government of their own choice. Despite the powerful political force of self-determination, it remained an ill-defined concept and outside the domain of international law. The conclusion of the peace treaties after World War I and the mandate system(36) may have made self-determination a concern of international law but it is clear that prior to 1945 no right of self-determination existed in customary international law.(37)

Since the end of the Second World War the concept of self-determination has received increasing emphasis in international legal material and many writers now assert that a right of self-determination has evolved in international law.(38)

The first authoritative legal document to deal with self-determination was the United Nations Charter which exhorted member states to develop friendly and peaceful relations between states '... based on respect for the principle of equal rights and self-determination of peoples ...'.(39) Although self-determination is described as a 'principle' in the English text, the equally authentic French text uses the word 'droit', meaning 'right'(40); it is ambiguous, therefore, whether the drafters intended

(36) Article 22 of the League of Nations Covenant.

(37) Devine 'The Status of Rhodesia in International Law' 1974 Acta Juridica 183; Higgins The Development of International Law Through the Political Organs of the United Nations 91

(38) See, for example: Abi-Saab 'Wars of national liberation and the laws of war.' (1972) 3 Annales D'Etudes Internationales 98-9; Brownlie Principles of Public International Law 576-7; Dinstein 'Collective human rights of peoples and minorities' (1976) 25 ICLQ 102 ff.; Mallison & Mallison 'The juridical basis for Palestinian self-determination' (1984) 1 The Palestine Yearbook of International Law 36 ff.

(39) Articles 1(2) and 55.

(40) Mallison & Mallison above n 38 39.

self-determination to be construed as a principle or a right in international law. Cassese argues that because the 'principle' of self-determination was only mentioned in the context of the purposes and aims of the Organization, it was not treated as the object of a definitive legal obligation to be followed.(41) Yet in Article 73 of the Charter, concerning non-self-governing territories, members who were responsible for the administration of such territories, were obliged to develop self-government for the people of those territories. None the less there was no obligation to grant independence immediately and this has been interpreted by Pomerance to mean that the Charter did not construe self-determination as a legal duty.(42) Self-determination was also referred to in Article 55 and, read with Article 56, it is possible to argue that in the context of human rights, self-determination acquired the quality of a legal right.(43)

The phraseology of the Charter was sufficiently vague to give rise to a controversy as to the legal status of self-determination contained in the relevant Charter provisions. Some states interpreted self-determination to be merely an ideal whereas others contended that its attainment should be a matter of legal obligation.(44) The legal development of self-determination did not, however, stop with the Charter; this is evident from the practice of the United Nations subsequent to 1945.

(41) UN Law/Fundamental Rights : Two Topics in International Law 138.

(42) 'Self-determination today : the metamorphosis of an ideal' (1984) 19 ILR 377.

(43) Mallison & Mallison above n 38; 40. Also see Asomoah The Legal Significance of the Declarations of the General Assembly of the United Nations 182.

(44) Abi-Saab above n 38 98; Brownlie above n 38 576.

The first important step towards the development of these Charter provisions was the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples(45) in which states declared inter alia that:

- '1. The subjection of people to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation;
2. All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

The most significant achievement in the recognition of the right of self-determination by the United Nations was the General Assembly's unanimous Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations(46) in 1970. The General Assembly solemnly proclaimed under the heading of the 'principle of equal rights and self-determination' that:

'... all peoples have the right freely to determine without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples ...'(47)

The legal effect of General Assembly resolutions is a controversial subject. The right of the General Assembly to interpret the Charter is

(45) GA Res 1514 (XV) of 14 December 1960. The vote on the resolution was 87 notes in favour to none opposed, with 12 abstentions.

(46) GA Res 2625 (XXV) of 24 October 1970.

(47) Paragraphs 1 and 2.

disputed by some writers who suggest that an amendment to the Charter is the only method in which the Charter may be interpreted.(48) This question was dealt with by Committee 2 of Commission IV which stated at the San Francisco Conference:

'It is to be understood, of course, that if an interpretation made by an organ of the Organization or by a Committee of Jurists is not generally acceptable, it will be without binding force. In such circumstances, or in cases where it is desirable to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure for amendment.'(49)

Therefore, if a resolution which interprets the Charter is widely accepted it will be an authoritative interpretation.(50) Because the 1970 Declaration of Principles of International Law Concerning Friendly Relations was adopted unanimously and there was a clear intent, as manifested in the Preamble and Conclusion of this resolution to state legal principles in accordance with the Charter, it follows that this resolution is not a recommendation but an authoritative interpretation of the Charter binding on all member states.(51) Indeed by accepting that the principles laid down in the Declaration are principles of the Charter, the states acknowledged that the principles represent their interpretation.

(48) Vallat 'The competence of the United Nations General Assembly (1959) 97 RdC 211.

(49) Quoted in Rorenstock 'The Declaration of Principles of International Law Concerning Friendly Relations : a survey' (1971) 65 AJIL 715 note 5. My emphasis.

(50) Asamoah above n 43 35; Schachter 'The relation of law, politics and action in the United Nations' (1963) 109 RdC 186

(51) Abi-Saab above n 38 99; Brownlie above n 38 576-7; Mallison & Mallison above n 38 576-7. Some writers have argued that GA Res 1514 (XV) above n 45 is also an authoritative interpretation of the UN Charter. (Cf Asamoah above n 43 39 and Brownlie above n 38 576). However, the opposition of states principally affected, namely the Colonial Powers, would, in my opinion, reduce the authoritativeness of this interpretation.

of the Charter obligations.(52) In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties, the unanimous acceptance constitutes an authoritative interpretation of the Charter provisions.(53)

As shown above the vague general references to self-determination in the Charter made it uncertain whether a legal obligation had been created. The UN General Assembly removed such doubts in the 1970 Declaration. The Assembly did not make law in this regard (which is beyond its power) but merely clarified the law; the source of the legal obligation derives not from the Declaration but the UN Charter.(54)

The meaning and scope of this obligation is not as all-embracing as might be desired. Self-determination is ordinarily understood to comprise both an internal and an external element. The first element involves the right of a people to elect and keep a government of its own choice(55) while the external element involves the right to choose independence from a state or union with other states.(56) Although the Charter provisions and the 1970 Declaration contain vague pronouncements as to the nature and

(52) Rosenstock above n 49 715.

(53) Article 31(3)(a) reads as follows: 'There shall be taken into account ...: Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;...' UN Doc A/CONF 32/27. See also Mallison & Mallison above no 38 41; Rosenstock above n 49 715.

(54) Cf art 38(1) of the Statute of the International Court of Justice which lists the sources of law. Mallison & Mallison have argued that the Declaration may be considered a source of law, in itself, because the principles embodied therein constitute '... general principles of law recognized by civilized nations' in accordance with art 38(1)(c) of the above Statute: above n 38 41.

(55) Cassese above n 41 137.

(56) Ibid 137; Bennett & Peart above n 35 26.

scope of the right of self-determination, states did, by implication, define the content of the right in the 1970 Declaration where they declared:

'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'(57)

In terms of the 1970 Declaration, a state will be considered to have conducted itself in accordance with the principle of self-determination if it is a sovereign and independent state with a representative and non-racist government. Therefore, the Declaration only concedes a right of self-determination to a people who have not achieved independence or are ruled by a non-representative or racist regime. The precise meaning of 'representative' is not clear and as part of political theory, it becomes subject to differing ideological perspectives. It is left, therefore, to the state to decide whether or not its government is representative except in the case of racist regimes which are unrepresentative whether the Socialist or Western interpretation of political representation is

(57) Paragraph 7 under the principle of equal rights and self-determination. My emphasis.

followed.(58) In effect, the right of self-determination exists only where racist, colonial or alien regimes govern.(59)

The legal right of self-determination is a collective right which vests in a 'people'; it necessarily affects the legal status of the 'people' and the non-state entities that operate on their behalf.(60) The exercise of the legal right of self-determination renders the entities subjects of international law.(61) Because a 'people' are entitled to resist the forcible denial of their right of self-determination and to seek and receive assistance from other states to exercise their right of self-determination(62), it necessarily follows that the entities representing a 'people' have a locus standi in international law to exercise the right irrespective of territorial control in the traditional sense.(63)

(58) Cassese above n 41 145.

(59) The limited content has been incorporated in legal instruments of which art 1 of the 1st Additional Protocol to the 1949 Geneva Red Cross Convention (which was formally adopted by The Geneva Conference in 1977 is a prime example. The article considers armed conflicts where '... peoples are fighting against colonial domination or alien occupation and against racist regimes' as wars fought in the exercise of the right of self-determination'... as enshrined in the Charter of the United Nations and the Declaration on Friendly Relations'.

(60) Arangio-Ruiz The United Nations Declaration on Friendly Relations and the System of the Sources of International Law 134.

(61) Okeke Controversial Subjects of Contemporary International Law 134.

(62) Paragraph 5 of the Principle of equal rights and self-determination in the 1970 General Assembly Declaration: above n 46. Also see art 7 of the General Assembly Resolution of the Definition of Aggression: GA Res 3314 (XXIX) of 14 December 1974.

(63) Abi-Saab above n 38 101.

The traditional requirements for according legal status to a non-state entity are no longer relevant where a 'people' are resisting the forcible denial of their right of self-determination. The emphasis on territorial control as a prerequisite for the recognition of 'belligerency' works unfairly against a non-state entity which enjoys the overwhelming political support of the population (and, therefore, the right to represent the 'people' in the exercise of their right of self-determination) but because of the modern military technology possessed by the established authority, is unable to gain territorial control. Rather, the 'effectiveness' of such a non-state entity is based on the extent of political support it enjoys amongst the population and thereby excludes from the control of the established authorities.(64) Considerations of humanity have also dictated the necessity of according belligerent status to non-state entities which do not possess the requisite territorial control; this is reflected in developments in international humanitarian law where humane behaviour by either side in a conflict is considered more important than territorial control.(65) Moreover, the traditional regulation of recognition with its prejudice in favour of the established authority (shown by the difficult conditions that have to be met for the non-state entity to enjoy the protection of international law) contradicts the world consensus that exists against colonialism and racism when a non-state entity challenges the forcible denial of self-determination by colonial and racist regimes.

(64) Ibid 97.

(65) Cf art 1(4) of the 1977 Additional Protocol to the Geneva Red Cross Conventions of 1949.

The process of collectivizing recognition has taken precedence over the traditional individual approach; legal status has now become dependent on community approval of the goal for which the non-state entity is challenging the established authority. Abi-Saab explains this new approach:

'Unlike the situation under classical international law - which emanated from, and exclusively regulated interstate relations - legal status can at present derive from collective legitimization as a result of practice and consensus within the framework of international organizations. Such a status has been conferred on wars of national liberation on the basis of the principle of self-determination.'(66)

Because the international community considers the exercise of the right of self-determination to be in the common interest of mankind, the legal status of non-state entities resisting the forcible denial of self-determination has become subject to the collective decision-making of the United Nations.

It is suggested that the ANC has an international legal personality akin to a state for the purposes of launching its armed struggle against the South African government. The reasons for the contentions are as follows: (1) the right of self-determination vests in the black people of South Africa; (2) the ANC is entitled to act on behalf of the black 'people' to exercise the right; (3) the South African government forcibly denies the exercise of the right; and (4) the collective recognition of the ANC by the international community confirms this status.

(66) Above n 38 97. Also see Falk 'International law and the United States' role in the Vietnam war' (1965-6) 75 The Yale Law Journal 1128.

The South African government represents only a white minority; South Africa is not, therefore, possessed of a government representing all its people without distinction as to race or colour. Numerous resolutions of both the UN General Assembly(67) and the Security Council(68) confirm the contention that South Africa is governed by a racist regime against which the right of self-determination is available. Where a state is governed by a racist regime, the 'people' in whom the right of self-determination vests will comprise those individuals who by virtue of their race or colour are not represented by the government.(69) It follows that the black people of South Africa are (because of their 'race or colour') the bearers of the right of self-determination which the South African government is legally obliged to respect.(70)

(67) See for example: GA Resolutions 2671 (XXV) of 8 December 1970; 3411 (XXX) of 28 November 1975; 32/105 N of 15 December 1977; 36/172 A of 17 December 1981; 40/61 of 9 December 1985.

(68) See for example: SC Resolutions 392 (1976); 417 (1977); 473 (1980); 554 (1984); 560 (1985).

(69) Emerson 'Self-determination' 1971 (65) AJIL 467. Also see Devine above n 37 203.

(70) The contention is supported by the resolutions of both the UN General Assembly and Security Council. See, for example: GA Resolutions 2671 F (XXV) of 8 December 1970; 3411 D (XXX) of 28 November 1975; 34/930 of 17 December 1979; SC Resolutions 191 (1964); 311 (1972); 417 (1977); 473 (1980); 544 (1984).

Because the ANC enjoys the overwhelming support of the majority of black people in South Africa(71), the organization is entitled to act on behalf of the black people in pursuit of the exercise of their right of self-determination. The aim of the organization, namely to remove white minority rule and to establish a government representative of all South Africans irrespective of their race or colour(72), shows that its struggle is designed to create conditions for the proper exercise of self-determination in South Africa. In terms of both its representative nature and its mandate the ANC does act on behalf of the black people in South Africa to achieve the exercise of their right of self-determination.

The South African government has argued that apartheid (or, as the government prefers to describe it, 'separate development') fully complies with the international principle of self-determination.(73) However, an examination of the policy of apartheid (in terms of its development and the premises upon which it is based) shows that the South African government does not respect the right of self-determination which vests in

(71) This was the finding of the survey conducted in 1984 by the Division for Group Interaction of the Institute for Sociological and Demographic Research of the Human Sciences Research Council. For full details of this survey see De Kock et al in Van Vuuren et al (ed): South Africa : A Plural Society in Transition 335 ff. Professor Schlemmer, head of the Centre for Applied Social Sciences at the University of Natal reached similar conclusions in his survey amongst black workers. (Cf Sunday Times 23.9.84.). The international community also recognizes the ANC, together with the Pan African Congress, as the '... authentic representatives of the overwhelming majority of the South African people. See para 11 of GA Res. 3151 G (XXXVIII) of 14 December 1973 and para 8 of GA Res 35/206 A of 16 December 1980.

(72) Nusas above n 12 5-6.

(73) Cf the statement of Helgard Muller, the South African Foreign Minister, to the UN General Assembly in 1965. Quoted in Bennett & Peart above n 35 38.

the black majority. Instead, apartheid forcibly denies the black people the proper exercise of their right of self-determination.

The policy of apartheid developed largely in response to international demands that the South African government grant self-determination to the black population of South Africa.(74) The white minority government has always been faced with the problem of how to justify the maintenance of white supremacy and privilege in a state where the majority of its population (the black people) have no political representation and are denied access to the national wealth of South Africa. The strategy adopted has involved a process of racial segregation in which 'white' and 'black' people are separated both geographically and politically.

This process was facilitated in 1913 when the Union Parliament adopted the Black Land Act(75) whereby small portions of South African territory, so-called 'reserves', were set aside for the exclusive occupation of the black population. Then in 1936 the black population were denied that little political representation they had enjoyed in the Union Parliament(76); this deprived the black people of any control over their political destiny. The massive urban influx of blacks into the 'white' urban areas after the Second World War and the demands of capital for cheap black labour presented problems for the newly-elected Nationalist Party who strongly favoured the entrenchment of apartheid. Verwoerd, the

(74) For a brief exposition of the development of apartheid see ibid 28-34.

(75) Act No 27 of 1913.

(76) The Representation of Natives Act No 2 of 1936.

so-called 'architect of apartheid'(77) decided to reverse the flow of blacks by restricting their influx from the 'reserves'.(78) To provide for the black population's political development, the government established certain tribal, regional and territorial authorities.(79) But with the emphasis on decolonization in the international community of the 1950s, the South African government recognized the need to accelerate the process of political development in the reserves. Therefore, in 1959, the South African Parliament passed the Promotion of Bantu Self-Government Act(80) which provided for the division of the 'reserves' into eight national units each of which would serve to be the national homeland for each of the eight ethnic groups which this Act deemed to exist among the black population.(81) The Act envisaged the gradual development of self-government for the respective black national units in their 'homelands'.(82) In 1963 the Transkei 'homeland' became self-governing.

Despite the condemnation of the international community, the South African government persisted in the implementation of its apartheid policy. The National States Constitution Act of 1971(83) made provision for self-

(77) See generally Kenney Architect of Apartheid; H F Verwoerd, an appraisal.

(78) Ibid 97; Bennett & Peart above n 35 31; Pelzer Verwoerd Speaks : speeches 1948-1966 28.

(79) The Bantu Authorities Act No 68 of 1951.

(80) Act No 46 of 1959.

(81) Section 2(1) provided that for the purposes of this Act the black population shall consist of the following national units: (a) the North-Sotho unit; (b) the South-Sotho unit; (c) the Swazi unit; (d) the Tsonga unit; (e) the Tswana unit; (f) the Venda unit; (g) the Xhosa unit; (h) the Zulu unit.

(82) Cf the Preamble of the Act.

(83) Act No 21 of 1971.

governing 'homelands' to become independent and to date four 'homelands' have been granted 'independence'.(84) On independence, those black people whom the South African government has deemed citizens of the particular 'homeland', lose their South African nationality; this, the South African government argues, justifies the exclusion of blacks in the South African Parliament. A government spokesman explains how the independence of all the homelands will facilitate the survival of white rule in South Africa:

'If our policy is taken to its full logical conclusion as far as the black people are concerned, there will be not one black man with South African citizenship ... Every black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.'(85)

The UN General Assembly has condemned the policy of apartheid as inconsistent with South Africa's international obligations to grant self-determination to the black people of South Africa. In 1970 the Assembly denounced

'... the establishment by the racist minority Government of South Africa of "Bantusans" in so-called reserves, as fraudulent, a violation of the principle of self-determination and prejudicial to the territorial integrity of the State and the unity of its people'.(86)

Accordingly, the assembly declared the 'independent states' invalid.(87) The reaction of the UN Security Council has been equally critical. In 1963, the Council condemned the South African government's policy as: '...

(84) The 'Republics' of Transkei, Bophuthatswana, Venda and Ciskei.

(85) Dr Connie Mulder made the statement in Parliament in 1978. Quoted in Bennett & Peart above n 35 38.

(86) GA Res 2671 F (XXV) of 8 December 1970. Also see GA Res 3411 D (XXX) of 28 November 1975.

(87) GA Resolutions 31/6 of 26 October 1976; 32/105 N of 15 December 1977; 34/93 G of 12 December 1979; 36/172 of 17 December 1981.

inconsistent with the principles of the Charter and contrary to South Africa's obligations as a member.'(88)

A legal analysis of the premises upon which the policy of apartheid is based, supports the pronouncements by the United Nations.

Apartheid is premised on a definition of the 'people' in whom the right of self-determination vests in South Africa which is at variance with that determined by the international community and the majority of black people in South Africa. The South African government does not consider the black population as an entity in itself, entitled to exercise the right of self-determination. Rather it believes that:

'... the characteristic cultural features of the various black ethnic groups (peoples) are so vastly different from those of the other segments of the population and, in many instances, so different from one another that it would be impossible to accommodate all these population groups or peoples in a single political system which does not provide for their diversification.'(89)

Racial divisions between black and white people and further tribal divisions amongst the black group form the basis of apartheid policy. The government's stress on tribal divisions reflects the traditional 'divide and rule' tactic in which '... tribal membership was an important tool to divide and structure the population along the lines acceptable to colonial policy.'(90)

(88) SC Res 181 (1963). Also see: SC Res 417 (1977); SC Res 473 (1980); SC Res 554 (1984).

(89) As explained by Heunis United Nations versus South Africa 317-8.

(90) Bennett & Peart above n 35 40.

The division of South Africa's black population into a number of tribal units or 'peoples' for the purposes of self-determination is not legitimate. Anthropologists dismiss the concept of 'tribe' as meaningless.(91) Moreover, the fact that different languages are spoken by black people in South Africa cannot be the sole 'criterion' upon which to distinguish 'peoples' for the purposes of self-determination. Indeed as Bennett and Peart correctly state:

"The social/cultural and linguistic factors used to determine group membership are not necessarily decisive in revealing group affiliation. Differences may be perceived and stressed by one group and dismissed as irrelevant by another. In other words, any such "objective" assessment is coloured by the preconceptions and purposes of the observer. Notionally objective assessments have their limitations both in terms of the vagueness of the concepts used, such as "tribe", and the feasibility of measuring the criteria. This goes to prove that, for purposes of self-determination, the identity of the group must be determined subjectively if the determination is going to be a reliable one.'(92)

The black people, themselves, must determine their identity. Because the majority of black people (through the ANC) disclaim the tribal divisions and classifications imposed by the South African government(93), it is clear that apartheid does not facilitate the proper exercise of the black people's right of self-determination.

There can be no genuine exercise of the right of self-determination where the people in whom this right vests are not entitled to decide how or if they wish to exercise the right. The South African government denies the black people the right to determine their own identity and does not allow them the option of internal self-determination i.e. to

(91) Ibid 40.

(92) Ibid 40.

(93) Cf Nusas above n 12 26-7.

participate in the government of a unitary South Africa. To suggest, as Heunis does(94), that because the particular ethnic group decided to settle for independence, the people of the 'independent homelands' have achieved their right of self-determination is incorrect; the black population as a whole (in whom the right vests) were not consulted and they were not afforded the option of internal self-determination.

Furthermore, it is suggested that the 'secession' of the 'independent states' is contrary to international law. Although a 'people' subject to a racist regime may secede in the exercise of their right of self-determination, secession is not permitted in instances where it would operate to establish miniscule states which are not economically or politically viable(95). In view of the number of people who are deemed 'citizens' and in the light of the size of the rest of South Africa that is reserved for the citizenship of the white minority, the 'independent homelands' are miniscule states. Moreover, because the 'states' are underdeveloped, many of their 'citizens' have to work and live outside their 'state'; this, together with their economic dependence on South Africa, suggests that the 'states' are not economically viable.

It is clear that the black people of South Africa are unable to exercise their right of self-determination within the parameters set by apartheid. Even the South African government has conceded that its policy of apartheid has failed because it does not conform to the wishes of the

(94) Above n 89 328.

(95) Devine above n 37 204.

black majority.(96) Yet the government refuses to lift the prohibitions on the ANC and to enter into negotiations with the representatives of South Africa's black people. No genuine exercise of self-determination can take place in South Africa while the government forcibly denies political freedom to the majority of South Africans; only when the black people are politically free can they decide, for themselves, how they wish to exercise their right of self-determination.

Because the black people of South Africa do not have a government to represent them in their struggle for political freedom, it is necessary that they have a representative body with an international legal status to act on their behalf. The international community, through the UN, recognizes the ANC (together with the PAC) as the authentic representatives of the overwhelming majority of the South African people(97) and confers a measure of international legal status upon both organizations. Representatives of the organizations have been granted observer status at international conferences and meetings of the governing bodies of international organizations and the right to attend and address meetings of both the principal and subsidiary organs of the United Nations(98) (from which the South African government has been excluded).(99) They are also permitted to sign the final acts of drafts

(96) Cf the address of the South African State President in Bloemfontein on 11 September 1985 quoted in Heunis above n 89 321-3.

(97) See above n 71.

(98) Cf para 6(c) of GA Res 2621 (XXV) of 13 October 1970; para 13 of GA Res 3151 G (XXVIII) of 14 December 1973. See generally Heunis above n 89 305-7; Murray 'The status of the ANC and SWAPO and international humanitarian law' (1983) SALJ 405.

(99) Paragraph 11 of GA Res 3151 G (XXVIII) of 14 December 1973.

adopted at international conferences.(100) As a result the ANC and PAC presently enjoy more rights than the South African government in the various organs of the UN.(101)

The scope of the ANC's international legal personality derived from the process of collective recognition is uncertain. Although the South African government is excluded from the General Assembly(102), neither the ANC nor the PAC are permitted to occupy the vacant seat because the organizations do not meet the requirements for effective government.(103) None the less, the ANC does enjoy certain rights normally enjoyed only by the states. It is clear that the international community no longer adheres to the traditional process of recognition in respect of the ANC. In terms of the traditional approach, the ANC can only be recognized as an insurgency movement because the organization does not meet the requisite conditions (namely territorial control) for belligerency. Even if states conducted their relations with the ANC in accordance with the law of neutrality and belligerency, the rights conferred on the ANC by the international community (for example, the right to participate in multilateral conventions) are in excess of those traditionally enjoyed by belligerent communities. Because the rules which govern recognition are based on state practice, it would be incorrect to argue that the failure of states to adhere to the traditional law (in respect of the ANC) is

(100)Cf the draft text of the Law of the Sea Convention adopted at the Third United Nations Conference on the Law of the Sea. See Heunis above n 89 307.

(101)Ibid 307.

(102)GA Res 2113 (XX) of 22 December 1965.

(103)Suttner 'Has South Africa been illegally excluded from the United Nations General Assembly?' (1984) 17 CILSA 296 note 1.

illegal. The traditional rules are, as argued above, no longer relevant particularly where a 'people' are engaged in an armed struggle to exercise their right of self-determination.

For our purposes, we are only concerned with the legal status of the ANC in respect of its armed struggle. To this extent, the ANC do enjoy a legal status akin to a state. As a movement which represents a 'people' in whom the right of self-determination vests, the ANC is entitled to resist the forcible denial of the right by the South African government and seek and receive support from other states for this purpose. The fact that the international community is divided as to the legitimacy of the ANC's armed struggle(104), indicates that the ANC is recognized as a 'state' for the purposes of the international law which governs the use of force. If the ANC did not constitute a 'state' it would not be obliged to refrain from the use of force nor required to justify its prima facie violation of Article 2(4).

Moreover, it is in the interest of the international community that force be regulated; the scope of Article 2(4), therefore, should be as extensive as possible. A wide interpretation of the word 'state' in the article could include international legal entities which do not necessarily meet the traditional criteria for statehood. Regarding the validity of the argument that the Charter obligation is addressed to 'members' only and therefore would exclude organizations such as the ANC,

(104) Cf the dissenting votes of the mainly Western states in the General Assembly Resolutions affirming the legitimacy of the ANC's armed struggle": GA Resolutions 35/206 A of 16 December 1980; 36/172 A of 17 December 1981; 37/169 A of 9 December 1982; 40/61 of 9 December 1985.

there is ample authority to suggest that Article 2(4) has developed into a rule of customary international law which binds all 'states'.(105)

As a 'state' for the purposes of Article 2(4), the ANC is not entitled to use force other than in self-defence. Unless the ANC can justify its prima facie violation of Article 2(4) as an act of self-defence, the armed struggle is illegal.

From the analysis of self-defence in Chapter 2, the ANC may justify its armed struggle as an act of self-defence(106) if it can show the following: (1) that the black people of South Africa are the victims of unlawful conduct (in the form of an armed attack or, on a broader interpretation of Article 51, an actual or imminent violation of their 'essential rights'); (2) that the armed struggle is reasonably necessary for protection; and (3) that the right of self-defence is exercised in good faith.

It is suggested that the government's policy of apartheid constitutes a continuing armed attack against the black people of South Africa. Although the definition of armed attack is not clear, it would appear that force used in violation of Article 2(4) of the UN Charter is sufficient to constitute an armed attack.(107) In the 1970 Declaration on Friendly

(105)Akehurst A Modern Introduction to International Law 219; Harris Cases and Materials on International Law 641; Skubizewski above n 14 745.

(106)The reasons for the contention that 'states' or 'member states' in Article 2(4) do not preclude a 'people' in whom the right of self-determination vests, are equally applicable to Article 51.

(107)Below p 127.

Relations, the General Assembly authoritatively interpreted Article 2(4) to include the obligation to:

'...refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right of self-determination, freedom and independence.'(108)

Because the South African government forcibly denies South African blacks (a 'people' referred to in the Declaration)(109) their right of self-determination, it uses force in violation of Article 2(4); the black people of South Africa, therefore, are victims of a persistent armed attack(110) by the government.

Even if apartheid does not constitute an armed attack, it forcibly violates an essential right of the black people of South Africa. The so-called 'essential rights' that may be protected in terms of the traditional right of self-defence include the rights of territorial integrity, political independence, certain economic rights and perhaps the right that the well-being of a state's nationals resident abroad must be guaranteed.(111) Because rights may over time lose their 'essential' quality, so, too may other rights acquire this quality through developments in international law. The development of self-determination as a legal right and the recognition of the interrelationship between universal peace and self-determination in the Purposes of the United

(108)Para 7 above n 62. For the argument that the declaration constitutes an authoritative interpretation see above p 58.

(109)Above p 62.

(110)The argument that an armed attack is always occurring is important because it will entitle the ANC to use force in self-defence at any time. See below p 132-3.

(111)Bowett Self-Defence in International Law 31 ff; Greig International Law 878 ff.

Nations(112) show that the right has acquired this 'essential' quality. The forcible denial of the right of self-determination will, therefore, constitute a violation of the Black people's essential right by the South African government.(113)

There are good arguments to suggest that the ANC's use of force is reasonably necessary to remove apartheid. The objective of the ANC is to create conditions in South Africa which will allow the black people to exercise their right of self-determination; it is, therefore, necessary to persuade the government to remove apartheid. Because the black people are denied constitutional or peaceful means to challenge apartheid, it is clear that force is the only alternative. After 49 years of peaceful protest, the ANC was banned and the South African government still refuses to negotiate with the representatives of the majority of black people in South Africa.

To the extent that force is the last resort, the armed struggle is necessary. Yet is it reasonably necessary for the ANC to employ the degree of force and use it in the manner in which it does? The answer depends upon the following difficult questions of fact: whether the armed activity is confined to and whether it is effective in reducing or removing the danger.

(112)Cf art 1(2).

(113)The UN Security Council has considered apartheid as seriously disturbing international peace and security and on one occasion, identified it (together with the arms build up to support apartheid) as a threat to international peace and security. See SC Res 392 (1974) and SC Res 418 (1977) respectively.

The fact that the ANC's use of force has involved attacks on so-called soft-targets raises questions of whether the force used is excessive (i.e. not confined to eliminating or reducing the danger). Because it is the South African government that forcibly denies the black people their right of self-determination and thereby presents the danger, the ANC should direct their defensive measures against government structures and personnel.(114) However, the military power of the South African government makes it difficult for the ANC to challenge the government in conventional military terms. On the other hand, attacks on soft targets do not involve direct conflict with the security forces. Such attacks may also (for the reasons given above(115)) be unavoidable because the ANC has been denied bases in the neighbouring states. In any event, attacks on civilians often demoralize and generate insecurity amongst government supporters and may thereby precipitate political reform. Because it may be argued that the manner in which the ANC conducts its armed struggle is unavoidable and necessary it is, therefore, not excessive.

Any assessment of efficacy will require an appreciation of the ANC's strategy of armed struggle. However, as Scott says of guerilla strategy it is:

'... a difficult phenomenon to understand for it involves a variety of political, sociological, psychological, economic and military factors as well as complex interactions among participants.'(116)

None the less a few tentative observations may be made. There are possible advantages for the use of force by the ANC. Because blacks in

(114)Kittrie in Livingston (ed) International Terrorism in the Contemporary World 370-1.

(115)Above p 46-7.

(116)Insurgency v.

South Africa are denied political freedom, the ANC's armed struggle may be seen as an expression of a political opinion. Indeed, such action may serve to highlight the cause of the black people by illustrating their desire for fundamental change and preventing their enforced silence being interpreted as acquiescence in the face of the policies of the South African government. In addition the ANC's use of force may boost the morale of an oppressed people(117) and increase support for the ANC.

But what of the success of such a strategy? It is important to acknowledge that the ANC's struggle is a political one in which force is used to achieve political gains; the success of the strategy should, therefore, be measured in political and not military terms. However, it is difficult to determine whether the armed struggle is a successful strategy. Although the South African government has recently acknowledged that apartheid has failed and that there is a need to reform its policy towards the black majority(118), the extent to which the ANC's use of force has been responsible for these developments is uncertain. Any attempt to measure the extent of influence will depend upon the reasons for the change in the government's attitude. Numerous factors may have influenced the government and it is difficult to deny that the ANC's armed struggle was partly responsible. Indeed, there is little doubt that international pressure (involving the threat of economic sanctions and disinvestment) has played a role. This pressure has been exerted largely because of the South African government's repression of the Black people. If one accepts the argument that an armed struggle normally provokes a

(117) Ibid 97.

(118) above n 96.

government to increase its repression(119) there are grounds to argue that the ANC's use of force has, by precipitating this repression, caused the international community to condemn Pretoria and thus been partly responsible for the potential removal of apartheid.

Without sound bases for imputing bad faith to the ANC's exercise of self-defence, it is suggested that the organization may justify its armed struggle as an act of self-defence.

Even if it is argued that the ANC is not a 'state' for the purposes of Articles 2(4) and 51, its use of force is not illegal because it falls outside the domain of international law.(120)

(119)Scott above n 116 97.

(120)Skubizewski above n 14 771.

CHAPTER 4

THE LEGALITY OF THE NEIGHBOURING STATES' ALLEGED ASSISTANCE TO THE ANC4.1 BACKGROUND

The international community condemns apartheid as an affront on human dignity and demands its immediate removal.(1) These sentiments are even stronger amongst African states because apartheid is premised on the rejection of a black person's self-respect.

In 1963 African states committed themselves in the Charter of the OAU to the complete elimination of racialism and colonialism from the African continent.(2) To this end, the OAU took measures to isolate South Africa (including trade boycotts, the termination of diplomatic and consular relations, the closure of ports to South African ships, etc.(3)) and called on the international community to do likewise. In addition, the OAU established the African Liberation Committee to provide both financial support and training facilities for liberation movements operating against the dependent territories and South Africa.(4) The reasons for granting such assistance were set out by African states in the 1969 Lusaka Manifesto as follows:

(1) In 1980 the UN Security Council described the policy of apartheid as a '... crime against the conscience and dignity of mankind': SC Res 473 (1980).

(2) Nolutshungu South Africa in Africa 259.

(3) Cf Dugard 'The Organization of African Unity and colonialism : an inquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism' (1967) 16 ICLQ 160.

(4) Spence Republic under Pressure 72.

'We do not advocate violence, we advocate an end to the violence against human dignity which is now being perpetrated in [sic] the oppressors of Africa.

If peaceful progress to emancipation were possible, or if changed circumstances were to make it possible in the future, we would urge our brothers in the resistance movements to use peaceful methods of struggle, even at the cost of some compromise on the timing of change.

But while peaceful progress is blocked by the actions of those at present in power in the states of Southern Africa, we have no choice but to give to the peoples of those territories all the support of which we are capable in their struggle against their oppressors'(5)

When the states of southern Africa became independent they shared this commitment. Because the success of the armed struggles against Portuguese colonialism and white rule in Zimbabwe had largely depended upon the support of other African states, the leaders of the newly independent states realized the importance of assisting the ANC. A sense of obligation to support this organization has also been reinforced by the frequent calls of the international community for states to assist the national liberation movements of South Africa.(6) With South Africa's destabilization of the region, the elimination of apartheid has assumed an even greater importance for the Republic's neighbours; as Chissano, the Prime Minister of Mozambique, stated: '... the liberation of South Africa is necessary to safeguard our own independence.'(7)

(5) Quoted in the Cape Times 17 3 84.

(6) See for example para 9 of GA Res 35/36 of 16 December 1980. The UN's annual budget for the ANC and PAC is US\$ 9.7 million (excluding the assistance provided by the UN specialized agencies, the UN Trust Fund for South Africa and the UN Educational and Training Programme: Heunis United Nations versus South Africa 307.

(7) Quoted in Beukes 'Nkomati : the accord and its background' (1983) 9 SAYIL 118.

The neighbouring states, however, are in a difficult position; while they are committed to the removal of white minority rule in South Africa they are also hostages to South Africa's successful attempts to retain apartheid (through its policy of destabilization).(8) Their policy in respect of the ANC reflects this dilemma. States in southern Africa are all (with the possible exception of Malawi) providing the ANC with at least moral and political support. Although Angola and Tanzania have been open about their commitment to allow ANC guerillas to train in their territories(9), other states in the region deny providing the ANC with training or transit facilities. Yet South Africa alleges that these states do allow the ANC to operate from their territories against the Republic.(10)

It is difficult, and it is not the purpose of this research to determine which of the allegations is correct; the legal analysis, therefore, considers both versions as correct.

4.2 LEGAL ANALYSIS

If South Africa's allegation is correct, do the neighbouring states act contrary to international law? South Africa argues that the failure of these states to take adequate steps to prevent the departure from their territories of armed ANC guerillas (trained either in these states or in

(8) See above p 19-24.

(9) New African Magazine July 1983.

(10) There is no suggestion in the allegations that the neighbouring states participate in ANC military operations by deploying their own regular forces or by directing, controlling or organizing the guerillas in their expeditions into South Africa. Nor do these claims include charges that the citizens of the neighbouring states act as volunteers for ANC operations. Therefore, the legality of such conduct is not considered.

other countries further north) who then commit acts of violence against South Africa, constitutes an international delinquency permitting the Republic to take forcible measures in self-defence against its neighbours.

In traditional international law a state was under an obligation to suppress the activities of private persons or agencies within its territory which were aimed at or had the effect of impairing the political independence of a friendly state.(11) Yet the scope of this duty was unclear. Although a state was not required to protect its neighbours from every conceivable kind of revolutionary design directed against them(12), it was obliged to suppress those activities which took the form of hostile military expeditions. Lauterpacht states the traditional position as follows:

'International law imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states ... Apart from this, states are not bound to prohibit, on their territory, the commission of acts injurious to other states.(13)

The basis for the duty was the law of neutrality (in times of war) and intervention.(14)

(11) Bowett Self-Defence in International Law 48.

(12) Lauterpacht 'Revolutionary activities by private persons against foreign states' (1928) 22 AJIL 107.

(13) Ibid 126

(14) Garcia-Mora International Responsibility for Hostile Acts of Private Persons against Foreign States. 50. A neutral state was required to refrain from participation in an international war and this included the obligation not to allow its territory to be used as a base for military operation by either of the belligerents: Akehurst A Modern Introduction to International Law 241. In civil conflicts the rules of intervention prohibited such assistance to rebels or insurgents: Falk Legal Order in a Violent World 118 ff.

A state fulfilled the obligation if it exercised due diligence to suppress the activities.(15) Even if the military operations were not suppressed, a state did not act contrary to international law unless it failed to exercise due diligence to prevent the departure of the armed bands.(16) In other words, the delinquency of the state existed in its failure to exercise due diligence and not in the mere fact that the military expedition was launched from its territory. However, it was unclear what measures of prevention would satisfy the requirement of due diligence.(17) Article 8 of the Hague Convention of 1907 considered a state to have acted with due diligence if it employed 'the means at its disposal'.(18) Accordingly, the standard of due diligence was dependent upon the capacity of the state to prevent the military expedition; only those measures which were reasonable under the circumstances were required.(19)

The position of the duty in contemporary international law is governed by Article 2(4) of the UN Charter. This prohibition on the threat of or use of force has been authoritatively interpreted in the 1970 UN 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(20) which provides:

(15) Alabama Claims Arbitration (1872): quoted in Garcia-Mora above n 14 61.

(16) Bowett above n 11; de Arechaga in Sørensen (ed) Manual of Public International Law 560; Garcia-Mora above n 14 20.

(17) Garcia-More above n 14 63.

(18) Eagleton The Responsibility of States in International Law 89.

(19) Garcia-Mora above n 14 63.

(20) GA Res 2625 (XXV) of 24 October 1970. For the argument that it is an authoritative interpretation of the UN Charter see above p 58.

'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursions into the territory of another State.'

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'

Furthermore, the Declaration formulated the duty to abstain from armed
 ✓ intervention as follows:

'... no State shall organize, assist, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State....'(21)

Therefore, a state which tolerates (without necessarily controlling, organizing, encouraging or financing) the use of its territory by private individuals (be they nationals, refugees or subjects of another state(22)) for committing acts of violence against other states, violates Article 2(4). This duty to prevent the departure of armed bands from the state's territory reaffirms the traditional rule whereby failure to exercise due diligence would constitute an international delinquency.

* The same declaration contains a possible exception to the obligation - under the principle of equal rights and self-determination of peoples, states declared:

(21) Also see the UN Declaration on the Inadmissability of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty: GA Res (XX) of 21 December 1965; Articles 3(f) and (g) of the General Assembly Resolution on the Definition of Aggression: GA Res 3314 (XXIX) of 14 December 1974. On the latter provisions see generally Rifaat International Aggression; Stone Conflict Through Consensus.

(22) Oda in Sørensen above n 16 494; Sinha Asylum and International Law 156-7.

'Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the UN Charter.(23)

The deliberate omission of the word 'armed' to describe the nature of the struggle which such 'peoples' are entitled to conduct (and other states are permitted to assist in) against the forcible denial of their right of self-determination reflects the dissensus that exists amongst states with regard to the legitimacy of these armed struggles.(24) Yet because of this disagreement, it is incorrect to suggest that the paragraph provides the legal basis for an exception to the obligation of a state to exercise due diligence in preventing the departure of guerillas (who use force on behalf of a 'people' in whom the right of self-determination vests) from its territory.(25)

Accepting that ANC guerillas do operate from the territories of the neighbouring states, these states violate Article 2(4) of the UN Charter unless they can show that they have used all the means at their disposal to prevent the guerillas infiltrating the Republic. The mere fact of the infiltration does not constitute the violation; in addition the neighbouring states must fail to take those measures which they can reasonably be expected to adopt against ANC guerillas inside their territories.

(23) Also see art 7 of GA Res 3314 (XXIX) above n 21.

(24) Cf Stone above n 21 80 ff.

(25) It was only because there was consensus that this declaration is an authoritative interpretation of the principles in the UN Charter.

Because the neighbouring states deny South Africa's allegations it is not possible to determine a violation. However, there are certain practical realities that should be considered. For instance, it is unreasonable to expect a state with a small military force to control the entire length of its border. Thus, Gaolitse, the Minister of External Affairs in Botswana, responded to South African claims that Botswana tolerated an ANC presence by stating that her government was unaware of such a presence but if it did exist it was because Botswana, like South Africa, could not '... keep tabs on the entire Botswana border'.(26) She added that the South African government could not, for similar reasons, deny the ANC presence in the borders of the Republic.(27) Moreover, the unstable conditions in many of the neighbouring states make it difficult for them to control all elements in their territories. Mozambique is a case in point. The FRELIMO government is preoccupied with its own security which is threatened by the MNR who control large areas of Mozambican territory. As the Frelimo Minister of State, Cabaco, said, in reply to a question on the ability of Mozambique to control ANC activities: 'If we were able to control every inch of our territory we would not allow ... the MNR to kill people here.'(28) Garcia-Mora suggests that where a state is physically unable to prevent the departure of military expeditions by private persons from its territory, it has not exercised due diligence until it has requested outside assistance (for example, from a regional or world organization) to prevent the departure.(29) However, in the southern African context, such a

(26) Cape Times 21 11 86.

(27) Ibid.

(28) Argus 25 5 83.

(29) Garcia-Mora above n 14 30.

proposition is not viable; even if the neighbouring states wanted to request the assistance of other states, it would be impractical because both the OAU and the UN have encouraged these states to assist the ANC. Therefore, to oblige Mozambique to request the OAU or the UN for assistance to prevent the ANC from using its territory, is not a reasonable means at its disposal. If this physical inability does not invoke the responsibility of the state, it is unfortunate for the victim state. Yet in the context of southern Africa, South Africa, the so-called victim of some of its neighbours' physical incapacity to prevent ANC incursions, encourages little sympathy when it is accepted that Pretoria's policy of destabilization (including matériel support for the MNR) has contributed to this physical inability.(30)

None the less, if it is argued that the neighbouring states do not exercise due diligence in this regard, their conduct will constitute a use of force in terms of Article 2(4) of the UN Charter.

Yet, it has been suggested that Article 2(4) only prohibits the threat or use of force which is directed '... against the territorial integrity or political independence of any state' or is '... in any other manner inconsistent with the Purposes of the United Nations'.(31) In other words, the so-called realist interpretation considers the words of Article 2(4) to have a qualifying effect on the prohibition and thereby admit of instances (other than self-defence or enforcement measures) in which the threat or use of force is permitted. On this argument, the neighbouring states will not violate Article 2(4) if its armed intervention is directed X

(30) Above p 19-22.

(31) The British argument in The Corfu Channel Case (1946) ICJ Reports 295-6; see Stone Aggression and World Order 43.

neither against the territorial integrity nor against the political independence of South Africa and is consistent with the Purposes of the United Nations.

The right of territorial integrity is not synonymous with territorial inviolability.(32) Considerations of equity may exclude the obligation on states to refrain from forcibly violating the territorial integrity of other states. As Judge Hudson stated in the Diversion of Water from the River Meuse Case(33):

'It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party..."He who seeks equity must do equity".'(34)

This formed the basis of Judge Schwebel's dissenting judgement in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua where he stressed the importance of enjoining similar violations of international law by Nicaragua in a legal assessment of alleged violations of Nicaragua's territorial integrity by the United States of America.(35) Therefore, the failure of South Africa to respect the territorial integrity of its neighbours by allegedly organizing or at least providing matériel support to the anti-government forces operating against the neighbouring states(36), may exclude the right of South Africa to assert

(32) Bowett above n 11 31.

(33) PCIJ Series A/B no 70.

(34) Ibid 77.

(35) ICJ Reports (1984) 477.

(36) See above p 19-22.

that its territorial integrity is violated by the conduct of the neighbouring states.

The same can be said in respect of South Africa's right of political independence. Moreover, it is questionable whether South Africa has a right of political independence. It is generally accepted that political independence is synonymous with self-determination and the freedom of the people of a state to choose their own form of government.(37) Because the South African government forcibly denies the black people of South Africa their right of self-determination, it is unlikely that the Republic may avail itself of the right of political independence where the alleged infringement involves the conduct of the neighbouring states in assisting the ANC to create conditions in South Africa for the proper exercise of the black people's right of self-determination.

Furthermore, it may be argued that the use of force by the neighbouring states is consistent with the Purposes of the UN. The central purpose of this organization is to maintain international peace and security to which end members are encouraged

'... to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...'.(38)

Because the UN has been unable to take collective measures effectively (on account of the disagreement amongst the Permanent Members in the Security Council), it has not been possible to maintain international peace through

(37) Fenwick International Law 354; also see Bowett above n 11 43.

(38) Article 1(2) of the UN Charter.

collective measures. This has made it difficult to achieve a peaceful settlement of situations which constitute or may lead to a breach of the peace. Therefore, when attempts to solve such situations by peaceful means have failed, it may be in the interests of the '... principles of justice and international law ...' that force be used to avoid what Stone describes as '... later and indeed more catastrophic use of force ...' (39) which might arise if the situation is not remedied. There is no doubt that situations in which a state forcibly denies a 'people' its right of self-determination constitute a threat to or breach of international peace; therefore, it may not be unjust to take forcible measures after all peaceful means have failed, to assist the people in their struggle for self-determination. Because South Africa refuses to comply with its legal obligation to abolish apartheid (which the UN considers a threat to the peace(40)) despite the demands of the international community, it may be consistent with the Purposes of the UN for the neighbouring states to allow the ANC to use their territories for infiltrating the Republic.

If the realist interpretation of Article 2(4) is not followed, the neighbouring states' conduct in respect of the ANC prima facie constitutes a violation of the Charter. This conduct will be illegal unless these states can justify their use of force as an act of self-defence or, possibly, intervention to protect human rights.

Because the ANC constitutes a 'state' for the purposes of Articles 2(4) and 51, the neighbouring states may justify their possible use of force as an act of collective self-defence.

(39) Above n 31 43.

(40) SC Res 418 (1977). See below p 107.

Article 51 permits a state to use force in individual or collective self-defence. Bowett interprets the right of collective self-defence as follows:

'... the term 'collective self-defence', as used in the Charter, does no more than recognize that members may exercise collectively what is their individual right; it does not create new rights ... The situation which the Charter envisages by the term is that ... situation in which each participating state bases its own right of self-defence. It does not, therefore, generally extend the right of self-defence to any state which desires to associate itself in the defence of a state acting in self-defence.'(41)

However this view is rejected by other writers and finds no support in state practice. Skubizewski states that the preparatory work of the San Francisco Conference shows that the right of collective self-defence '... goes further than the mere application, on a collective plane, of individual self-defence'.(42) Indeed states have undertaken (and have acted on this undertaking) in bipartite and multipartite treaties to defend the other parties from an attack, even if the former state is not itself under attack.(43)

On the latter interpretation of collective self-defence, it is not necessary for the neighbouring states to show that they have a right of individual self-defence which they exercise collectively with the ANC's right of self-defence. The mere fact that the ANC are acting in self-defence is sufficient for the neighbouring states to justify their use of force against South Africa (by assisting the ANC) as an act of collective self-defence.

(41) Above n 11 216.

(42) In Sørensen above n 16 279.

(43) Akehurst above n 14 225. See, for example the North Atlantic Treaty quoted in Harris Cases and Materials on International Law 672.

Even if the ANC do not enjoy a legal personality akin to a state for the purposes of its use of force against South Africa, there are other legal bases to support the suggestion that the neighbouring states do not act illegally when (or if) they permit ANC guerillas to use their territories for infiltrating the Republic.

To the extent that South Africa's policy of destabilization involves the use of force by the Republic against its neighbours, states in the region may justify their assistance to the ANC as an act of individual self-defence.

Provided the allegations that South Africa deploys its commandos in the neighbouring states to commit acts of sabotage and to assist dissident groups in their armed activities against the governments of these states(44), are correct, the Republic acts illegally.(45) South Africa also violates Article 2(4) of the UN Charter if it provides matériel assistance and transit facilities for the dissident movements in the neighbouring states.(46) Although it is unclear what conduct is sufficient to constitute an armed attack, it appears that a violation of Article 2(4) is sufficient particularly where the political, military or economic instability of the victim state makes the use of force a very serious infringement.(47) Because of the frequency of South Africa's alleged use

(44) Above p 19-23.

(45) An argument that the forcible measures are acts of self-defence necessary to discourage the neighbouring states from permitting the ANC to use their territories for infiltrating the Republic is rejected on the basis that South Africa's conduct is unnecessary to protect the country from ANC violence: see Chapter 5.

(46) Above p 19-22.

(47) See below p 128-9.

of force against the militarily weak as well as the economically and politically unstable neighbouring states, it is suggested that these states are victims of a persistent armed attack by South Africa.

To avail themselves of the right of self-defence to justify their armed intervention in South Africa, the neighbouring states must also show that their assistance to the ANC is necessary to protect them from South Africa's armed attack. As discussed in Chapter 1, South Africa's destabilization of the region is designed to ensure the survival of apartheid; unless apartheid is removed, therefore, the neighbouring states will continue to be the victims of South Africa's use of force. Not only is the armed intervention of the neighbouring states the last resort (their demands in the Lusaka Manifesto and in the forums of the OAU and the UN for the elimination of apartheid have proved futile) but (for the same reasons that the ANC's armed struggle is suggested to be effective and not excessive(48)) it is reasonably necessary to remove the danger of apartheid. Moreover, there does not appear to be any bad faith involved to deny the right of self-defence to these states.

In so far as South Africa's policy of destabilization involves economic measures (including economic boycotts, unreasonable border checks to delay the passage of goods(49)) against states in southern Africa, it is also possible for the neighbouring states to rely on individual self-defence to justify their armed intervention in the Republic. However, this justification will only be available if the broader interpretation of Article 51 is followed because it is accepted that economic coercion does

(48) Above p 75-8.

(49) Above p 23-4.

not constitute a use of force in terms of Article 2(4)(50) and, therefore, cannot comprise an armed attack for the purposes of the strict interpretation of the contemporary right of self-defence. The broader interpretation of this right merely requires an unlawful infringement of a state's essential rights (which includes its right to economic independence).(51) Although the sphere of international economic law is limited(52) (and, therefore, may not pronounce on the legality of these economic measures), the illegality of South Africa's economic measures will be established if they are contrary to the trade agreements in existence between the neighbouring states and the Republic.(53) If such an infringement is established, the neighbouring states may argue that their armed intervention is reasonably necessary to protect their economic independence (on the same basis that their conduct is suggested to be reasonably necessary to protect themselves from South Africa's alleged use of force).

If the neighbouring states can justify their assistance to the ANC as an act of individual self-defence, it follows that even on Bowett's interpretation of the right of collective self-defence (namely that each state must have an individual right which it decides to exercise collectively), the states in the region may be exercising a right of

(50) Brownlie International Law and the Use of Force by States 362; Higgins 'The legal limits to the use of force by sovereign states' (1961) 37 BYIL 492.

(51) See Chapter 2.

(52) Bowett above n 11 106-114.

(53) See, for example, the 1969 Southern African Customs Union Agreement to which South Africa, Botswana, Lesotho and Swaziland are parties.

collective self-defence together with the ANC against white minority rule in South Africa.

The neighbouring states may also rely on the so-called right of self-defence to protect 'kith and kin' to justify their use of force against South Africa.

The traditional right of self-defence permitted a state to take forcible measures necessary for the protection of its nationals abroad. Viscount Kilmuir outlined the tests for determining the necessity of such intervention as follows:

'... first, whether there is an imminent danger of injury to nationals; secondly, whether there is a failure or inability on the part of the territorial sovereignty to protect the nationals in question, and, thirdly, whether the measures of protection of the intervener are strictly confined to the object of protecting those nationals against injury.'(54)

The position of this right under the UN Charter is uncertain. On the broad interpretation of Article 51 (in terms of which it is argued that the traditional right of self-defence is not restricted)(55), the armed intervention by one state in the territory of another to protect its nationals resident there, is not prohibited.(56)

Although the traditional right permitted a state to intervene to protect only its own nationals, attempts have been made to extend this protection to a state's 'kith and kin' (members of the same racial,

(54) In his address to the House of Lords after the 1956 British invasion of the Suez Canal area: quoted in Harris above n 43 667.

(55) See Chapter 2.

(56) The British argument to justify their forcible operations against Egypt in 1956; Bowett above n 11 91; Brownlie above n 50 298-301; Greig International Law 879.

religious, linguistic or cultural group) irrespective of the link of nationality.(57) Dugard is the only writer to discuss these developments and what follows is largely a summary of his observations.(58)

The legal basis for extending the traditional right of protection rests on different arguments. Support for disregarding the link of nationality as the only prerequisite for protection is found in recent decisions of the International Court of Justice. Because the right of self-defence to protect nationals abroad is merely an extreme form of diplomatic protection resorted to after all peaceful efforts to urge the host state to protect the nationals in question have failed(59), developments in the law relating to diplomatic protection are relevant to an examination of the present scope of the right of a state to use force to protect its nationals resident in another state. The International Court has held that there are important exceptions to the traditional rule that a state may protect only its own nationals and permitted the United Nations to afford diplomatic protection to one of its officials.(60) Moreover, because the definition of nationality for the purposes of diplomatic protection has always been imprecise in international law(61), the decision by the court in The Nottebohm Case (Second Phase) that '... a

(57) Dugard above n 3 177-8. These attempts are apparent from the arguments of the Arab states to justify their intervention in Palestine: in 1948 the Egyptian government declared that its forces were entitled to enter Palestine to protect Arab inhabitants resident there because '... Egyptians do not regard Palestinian Arabs as strangers since they have been from time immemorial strongly bound by many ties'.

(58) Ibid 177-87.

(59) Bowett above n 11 89.

(60) The Reparation for Injuries Case (1949) ICJ Reports 174.

(61) Brownlie above n 50 300.

social fact of attachment, a genuine connection, of existence'(62) should exist before an individual may be regarded as a national, is significant for arguing for an extension of the term 'nationality' itself to include members of the same racial, religious, linguistic or cultural group as the state acting to protect them. According to Dugard:

"Genuine connections" such as racial and cultural ties may constitute an important factor in the granting of protection: perhaps not sufficient on their own, but adequate in a situation of urgency and gross maltreatment.'(63).

Another argument in support of the extension of the right to include 'kith and kin' is the contention that the word 'inherent' (naturel in the French text) in the opening phrase of Article 51 refers to the right of self-defence recognized by natural law. This right in natural law permitted a state to use force to protect its 'honour'; therefore,

'... it is not unreasonable to regard the maltreatment by one State of the kith and kin of another as an attack on the "honour" of the latter. It might further be argued that self-defence under natural law would be more concerned with the protection of persons linked to a State by natural ties than with those linked to it by the positivistic link of nationality'.(64)

The recognition of such a right would reflect, it is argued, the significant changes that have taken place in modern international law. The treaties concluded after the First World War to protect racial, religious and linguistic minorities, the Mandate system of the League of Nations and the provisions regarding human rights and self-determination,

(62) (1955) ICJ Reports 4.

(63) Above n 3 180.

(64) Ibid 180-1.

indicate that international law concerns itself not only with relations between states but also with the treatment of persons by their own state.

Moreover, the demands of humanity are also important - if it is for humanitarian reasons that a state is permitted to use force to protect its nationals abroad, why should the arbitrary link of nationality prohibit states from adopting forcible measures to protect the lives of its 'kith and kin'?

It is important not to confuse the arguments in favour of extending the traditional right of self-defence with attempts to affirm the traditional right of humanitarian intervention in modern international law. Although the arguments of policy and humanity are similar, there are important factors which require that these two possible forms of justification be kept separate. Firstly, a right of self-defence to protect 'kith and kin' is narrower than humanitarian intervention as the former is not concerned with humanity in general but only with 'kith and kin' and, as a form of self-defence, it is governed by stringent requirements and, therefore, less open to abuse than traditional humanitarian intervention. Secondly, unlike the arguments in support of humanitarian intervention, the primary legal basis for extending the traditional right of self-defence is Article 51, itself.

Although the right of self-defence to protect 'kith and kin' was rejected by the Commission of Investigation into the Greek Frontier Incidents in 1947, Dugard states that an examination of attitudes in the

UN shows that the organization remains uncommitted with respect to the legality of this right.(65)

If such a right does exist, the neighbouring states are entitled to use force against South Africa to protect the black people of the Republic (whom these states correctly consider their 'kith and kin') from the imminent danger presented by apartheid.

The black people of South Africa may be considered the 'kith and kin' of the neighbouring states on the basis of the racial bonds that exist between them. It is interesting to note the reaction of some African states to the United States-Belgian operations in the Republic of Congo in 1964 to free hostages (most of whom were 'white' and not all nationals of the intervening states) held by the rebels. The representative of Ghana condemned the operations in the following statement:

'In international law the United States is no more entitled to intervention than would, say Ghana be entitled to intervention in the southern states of the United States of America to protect lives of Afro-Asian inhabitants of these states.'(66)

Yet the bonds that exist between the black people of South Africa and the neighbouring states are not restricted to racial connections - the bonds of common history and destiny are also important considerations. The black people of South Africa and states in southern Africa share a common history of 'white' oppression and resistance to exploitation. Furthermore because apartheid affects all people in the region (through the policy of destabilization), South Africa's neighbours share the

(65) Ibid 183.

(66) Ibid 179.

determination of black South Africans to remove apartheid. Frequent references to their 'brothers in South Africa'(67) confirm the affinity that exists between the neighbouring states and blacks in South Africa.

Yet are the 'kith and kin' of the neighbouring states in imminent danger? Dugard (writing in 1967) denies that blacks in South Africa are in imminent danger of their lives. He comments:

'While the use of force in self-defence might be justifiable in a situation such as Sharpeville when there was a threat of injury to life, it is not possible to resort to force in protection of kith and kin when the only danger is the continued existence of apartheid.'(68)

This may have been the position in 1967 but 20 years later the situation in South Africa has altered. There is continual state repression and incidents like Sharpeville are now an everyday occurrence.(69) The lethal use of force by the South African security forces to put down resistance to apartheid rule(70) supports the contention that apartheid does threaten the lives of the 'kith and kin' of the neighbouring states.

Furthermore, because of the deprivation of human rights in South Africa, the neighbouring states may be permitted to use force against the Republic (by assisting the ANC) to protect the human rights of South African blacks. This entitlement depends upon whether contemporary

(67) Ibid 179.

(68) Ibid 186.

(69) The South African Minister of Law and Order has stated that 431 people were killed by the South African Police during 'unrest' (ie politically inspired violence) between 1984-5: quoted in the Cape Times 26 4 86.

(70) See generally Haysom 'Licence to kill part 1 : the South African Police and the use of deadly force' (1987) 3 South African Journal on Human Rights 3 ff.

international law recognizes the right of a state to intervene to protect human rights.

The term 'intervention to protect human rights' is preferred to 'humanitarian intervention' because there are fundamental differences between these two notions in modern international law. In traditional law, the right of humanitarian intervention did not depend upon a breach of international law by the state. Indeed, as Devine says:

'It is highly doubtful whether the individual had any rights, not to mention human rights in the traditional system of international law.'(71)

The only prerequisite was the vague notion of 'acts of cruelty' which explains the frequent abuse of this right in previous centuries.(72) However, it is accepted by writers that if this right of humanitarian intervention does exist today, it will exist only where there is a violation of human rights.(73) The distinction is also important because the legal basis for each differs: natural law forms the only basis for the traditional right of humanitarian intervention whereas the UN Charter (and, in some instances, natural law) is argued to admit the right to intervene for the protection of human rights.

(71) 'The Status of Rhodesia in International Law' 1974 Acta Juridica 227. Only if a state perpetrated acts of cruelty against foreign nationals resident in its territory, did it breach international law. This breach allowed the state whose nationals abroad were subject to such cruelty to use force in self-defence (which was often described as the right of humanitarian intervention) against the state which perpetrated the cruel acts.

(72) See Skubizewski above n 42 758-9.

(73) Reisman and McDougal in Lillich (ed) Humanitarian Intervention and the United Nations 169-70; Barrie 'International law and economic coercion - a legal assessment' (1985-6) 11 SAYIL 49.

In order to establish whether a right of intervention to protect human rights does exist,^X we must first examine the legal position of states in respect of human rights.

The United Nations Charter provides a foundation for the protection of human rights. Member states 'reaffirm faith in the fundamental human rights' in the Preamble and consider co-operation 'in promoting and encouraging respect for human rights' as one of the Purposes of the United Nations. The main provisions are Articles 55 and 56, which provide:

55 '... the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

56 All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

The vague wording of these articles makes it uncertain whether they impose legally binding obligations. Accordingly, writers are divided as to the legal effect of these provisions.(74) However, both the UN General Assembly(75) and the International Court of Justice(76) have held that respect for human rights is legally obligatory in terms of the Charter. Even if it is argued that the use of the word 'promote' as opposed, for example, to 'guarantee' or 'safeguard'(77) indicate that Articles 55 and

(74) See Devine above n 71 209.

(75) Ibid.

(76) Advisory opinion on The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1971) ICJ Reports 57 para 1431; The Barcelona Traction, Power and Light Co. Case (Second Phase) 1970 ICJ Reports 32.

(77) Goodrich The United Nations 246.

56 do not involve legal obligation, Akehurst argues that the term 'pledge' implies a legal obligation but he suggests that

'... the obligation is probably not to observe human rights now (...), but to work towards their fulfilment in the future; the vagueness of the language probably leaves a wide discretion to states about the speed and means of carrying out their obligation, and it is notorious that in many countries no perceptible progress, and little imperceptible progress, have been made towards the realization of human rights. On the other hand, a state which deliberately moved backwards as far as human rights are concerned would probably be regarded as having broken Article 56; certainly this is the attitude of most members of the United Nations towards the South African policy of apartheid ...'.(78)

However, nowhere in the Charter are 'human rights' defined and Devine contends that unless concrete content can be given to the provisions, they '... would not operate as norms of international law with binding legal force'.(79) But it is generally accepted that subsequent interpretations have given content to these provisions. Of importance, is the Universal Declaration of Human Rights contained in a General Assembly Resolution of 1948.(80) Although the declaration may not create legal obligations to guarantee the rights enumerated in its paragraphs(81), the rights that it does list are those which Member states 'pledge' to achieve in Article 56

(78) Akehurst above n 14 75.

(79) Devine above n 71 210.

(80) GA Res 217 A(111) of 10 December 1948.

(81) Asamoah The Legal Significance of the Declarations of the General Assembly of the United Nations 189-90.

of the UN Charter.(82) This is clear from the Declaration's preambular paragraphs:

'Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and freedoms. Whereas a common understanding of these rights is of the greatest importance for the full realization of this pledge ...'

Of the many human rights enumerated, the right not to be discriminated against on the grounds of race or colour(83) is of particular relevance to South Africa. Therefore, South Africa, by officially adopting the policy of apartheid (whereby political/civil and economic rights are denied to the majority of its citizens on the grounds of race), violates the UN Charter on the basis that Articles 55 and 56 require either the fulfilment of the human rights or at least (on Akehurst's argument) some sign of progress towards their achievement. This view is supported by the decision of the World Court which held:

(82) Akehurst above n 14 77; Brownlie Principles of Public International Law 553-4; Cattan Palestine and International Law 142. In other words, the Declaration is not the source of the legal obligation but merely interprets the content of the legal obligation provided for in the Charter. Because this Declaration was accepted by the overwhelming majority of states (the resolution was passed by 48 votes to nil, with eight abstentions including South Africa), it is an authoritative interpretation of the 'human rights' which states pledge to achieve in Article 56: see the argument above p 58. Also see Asamoah above n 81; 35 189-91; McDougal & Reisman 'Rhodesia and the United Nations : the lawfulness of international concern' (1968) 62 AJIL 12.

(83) Articles 2 and 7. The term 'race' includes the notion of 'colour'. Vierdag says:

'Among the racial characteristics that may exist, colour is the most easily perceptible in social relations. So racial discrimination is in practice mostly discrimination based on different pigmentation of the skin.'

The Concept of Discrimination in International Law 98. For this reason I shall use racial discrimination to connote discrimination on the grounds of 'colour'.

'To establish ... distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent, national or ethnic origin is a flagrant violation of the purposes and principles of the UN Charter.'(84)

The UN General Assembly has also pronounced on the incompatibility of racial discrimination and the UN Charter: the Declaration on the Elimination of All Forms of Racial Discrimination 1963(85), is a prime example. Moreover, the General Assembly has condemned South Africa's policy of apartheid as being contrary to the UN Charter on numerous occasions(86) and has even considered apartheid a crime against humanity.(87)

In addition, South Africa violates many of the other rights listed in the 1948 Universal Declaration - notably the right to life(88); right to

(84) Namibia case above n 76 57. See Schwelb 'The International Court and the human rights clauses of the Charter' (1972) 66 AJIL 348-50

(85) GA Res 1904 (XVIII) of 20 November 1963. See also the International Convention of All Forms of Racial Discrimination adopted by the Assembly: GA Res 2106 A(XX) of 21 December 1965

(86) Cf. GA Resolutions 44(1) of 8 December 1946; 395(V) of 2 December 1950; 511(VI) of 12 January 1952; 615(VII) of 5 December 1952; 616 B(VII) of 5 December 1952; 721(VIII) of 8 December 1953; 917(X) of 6 December 1955; 1016(XI) of 30 January 1957; 1598(XV) of 13 April 1961; 1663(XVI) of 28 December 1961; 1761(XVIII) of 6 November 1962; 1978(XVIII) of 16 December 1963. Since then the resolutions have continued and become even more frequent: see, for example: GA Resolutions 36/172 of 17 December 1981, 38/11 of 15 November 1983.

(87) The International Convention on the Suppression and Punishment of the Crime of Apartheid: GA Res 3068(XXVIII) of 30 November 1973.

(88) See Haysom above n 70 3 ff.

be free from cruel, inhuman and degrading treatment(89); the right not to be subject to arbitrary arrest or detention(90); the right to freedom of movement, opinion, expression, peaceful assembly and association;(91); etc.(92)

When a state fails to respect human rights, who is (and under what circumstances) permitted to intervene to protect the citizens? There are a number of potential actors whose intervention is legal under particular circumstances. Before elaborating on each, there are certain fundamental policies that will dictate which of the participants are to be preferred. Reisman and McDougal state these policies as follows:

'First, action within the frame of an authorized organization is most preferable; such action would include direct organizational intervention. Second, barring organizational action, a collective intervention is preferable to an intervention by a single State.'(93)

The first entity authorized to perform humanitarian interventions is the UN Security Council. If this Council makes a determination that the

(89) See Dugard Human Rights and the South African Legal Order 130-136. There is ample evidence to substantiate allegations of torture in South African prisons: see Forster and Sandler The Preliminary Report of the Study of Detention and Torture in South Africa. The degrading treatment of South African blacks is evident in much of South Africa's legislation: see the Reservation of Separate Amenities Act No 49 of 1953; the Group Areas Act No 36 of 1966.

(90) South African security legislation provides examples of the government's disregard for this human right: see generally Mathews Freedom, State Security and the Rule of Law 62.

(91) See generally Dugard above n 89 146 ff.

(92) In an international study by the World Human Rights Guide published in The Economist, South Africa received a human rights rating of 22 percent (one of the worst in the world and the lowest of the African states assessed): quoted in The Weekend Argus 7 6 86.

(93) Reisman & McDougal above n 73 188.

deprivation of human rights constitutes a 'threat to the peace' within the meaning of Article 39 of the UN Charter, it may authorize states to take action, including the use of force, against the state that maltreats its citizens.(94) With respect to South Africa the Security Council has frequently condemned the South African government's failure to observe human rights(95) and has considered the situation in South Africa as a '... potential threat to international peace and security'(96) and the policy of apartheid as '... a crime against the conscience and dignity of mankind [that] seriously disturbs international peace and security'.(97) Yet it was only in 1977 that the Security Council declared that '... the policies and acts of the South African Government are fraught with danger to international peace and security'(98) and determined:

'..., having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related matériel constitutes a threat to the maintenance of international peace and security.'(99)

(94) See Chapter VII of the UN Charter: Dugard above n 3 173, Ermascora 'Human rights and domestic jurisdiction' (1968) RdC 439. For other possible jurisdictional bases for the Council's action see Reisman & McDougal above n 73 189.

(95) See for example SC Resolutions 181 (1963); 282 (1970); 333 (1973); 473 (1980); 569 (1985).

(96) SC Res 282 (1970).

(97) Paragraph 3 of SC Res 392 (1976). Also see SC Res 473 (1980).

(98) SC Res 418 (1977) adopted by consensus. Heunis above n 6 380 note 145 suggests that this declaration:

'... is tantamount to stating that the policies and acts of South Africa constitute a threat to international peace and security - the language used by Article 39 of the Charter.'

(99) Paragraph 1.

In accordance with this determination, the Security Council imposed a mandatory arms embargo on South Africa.(100) Thus, the Security Council did not authorize (as it is entitled to do(101)) and has never authorized the use of force against South Africa in terms of Chapter 7 of the Charter. The neighbouring states, therefore, cannot rely on authorization by the Security Council to justify their use of force against South Africa in terms of Chapter 7 of the UN Charter.

Another UN organ that is entitled to enforce respect for human rights by authorizing intervention is the UN General Assembly^X. In the event of the Security Council being unable or unwilling to exercise its primary responsibility for the maintenance of peace, the General Assembly may exercise the same powers as the Security Council under Chapter VII of the Charter.(102) Such action by the General Assembly may be argued not to contravene Article 2(7) of the UN Charter because in terms of this article intervention in the domestic affairs of another state is not prohibited if enforcement measures are applied under Chapter VII.(103) Therefore, because the Security Council has been unwilling (or unable, due to the exercise of the veto) to authorize forcible intervention against South Africa, the General Assembly may (given the authoritative determination that South Africa's internal policies constitute a 'threat to the peace')

(100) Paragraph 2.

(101) In terms of art 42 of the UN Charter.

(102) The Uniting for Peace Resolution (GA Res 377 A(X) of 3 November 1950) which was approved of by the International Court of Justice in The Certain Expenses of the United Nations Case: (1962). ICJ Reports 151. However, the legality of such a power to use force has been disputed by some writers. See Akehurst above n 14 187.

(103) It is also unlikely that the abuse of human rights is a domestic affair. This issue is dealt with below p 114-5.

be entitled to authorize the use of force against South Africa. The General Assembly has adopted resolutions affirming the legitimacy of the struggle of the oppressed people of South Africa and their national liberation movements (i.e. the ANC and PAC) by all available means, (including armed struggle) against apartheid and in the exercise of the right of self-determination for the people of South Africa.(104)) In the same resolutions the Assembly also appealed to all states to provide the necessary assistance to the oppressed people of South Africa and their national liberation movements in their legitimate struggle.(105) Therefore, the neighbouring states may argue that their assistance to the ANC (which amounts to a use of force) is justified because of the authorization by the General Assembly.(106)

A regional organization may also be permitted to authorize such intervention. In terms of Chapter 8 of the UN Charter, a regional organization may take action crucial to the maintenance of international peace and security provided it is consistent with the Purposes and Principles of the UN Charter.(107) None the less the action that a regional organization may take is further limited by Article 53 which requires that coercive activity by such organizations must be authorized

(104) Cf para 1 of GA Res 35/206 A of 16 December 1980. See also GA Res 36/172 A of 17 December 1981.

(105) Paragraph 8 of GA Res 35/206 A of 16 December 1980.

(106) In addition, Reisman & McDougal contend that the other jurisdictional basis for humanitarian intervention being authorized by the General Assembly is '... the broad human rights jurisdiction of the human rights as set out in the Preamble and Articles 1, 55 and 56 of the Charter': above n 73 191. Because this jurisdictional basis is general and does not attach to a specific organ, it will be dealt with below when the possible jurisdictional basis for unilateral action to protect human rights is discussed.

(107) Article 52 of the UN Charter.

by the Security Council. Yet state practice indicates that where humanitarian and security considerations demand immediate action, a regional organization may authorize its members to use force without the authorization of the Security Council but must notify the Council as soon as possible.(108) It is also suggested that the inability of the Security Council to take effective measures to alleviate a threat to the peace (which it has determined exists), supports the contention that the provisions of Article 53 are unrealistic.

The Organization of African Unity has reaffirmed:

'... its full unconditional support of the oppressed people of South Africa in their legitimate struggle to eliminate apartheid and achieve majority rule.'(109)

Whether this undertaking to assist the ANC (recognized by the OAU as a national liberation movement representative of the 'oppressed people of South Africa') and thereby use force without the authorization of the Security Council, justifies armed intervention by the neighbouring states is unclear in the light of state practice and other arguments to support the non-applicability of Article 53 to situations where human rights are disregarded.

In the absence of an authoritative directive, the entitlement of states (individually or collectively) to intervene by force for humanitarian reasons is controversial in contemporary international law. The traditional right of humanitarian intervention permitted a state to use force against a state that mistreated its own citizens '... in a way

(108) Cf the action taken by the Organization of American States in the Dominican Republic in 1965: Reisman & McDougal above n 73 186-7.

(109) OAU Resolution CM 242(XVII) of 1971.

falling so far below the "general standards recognized by civilized peoples" as to "shock the conscience of mankind".(110) In other words:

'A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene.'(111)

Despite its potential for abuse(112), the doctrine of humanitarian intervention was generally accepted as a justification for intervention in customary international law.(113)

The provisions of the UN Charter and particularly the prohibition on the threat or use of force left the position of the traditional right of humanitarian intervention unclear. There is no specific reference to such a right in the Charter and, if Article 2(4) is interpreted to imply that force is only permitted in self-defence or under Chapter VII, the right to use force to protect human rights will only be permissible as an exception to Article 2(4). Indeed it is conceptually difficult to accommodate the right of humanitarian intervention in the notion of self-defence because the right being protected is not that of the intervening state.(114) However, this has not discouraged writers from contending that this customary right has survived the advent of the UN Charter. The number of scholars who support such contentions has increased in recent years

(110) Fonteyne in Lillich above n 73 198.

(111) Brownlie above n 50 338.

(112) Falk above n 14 161.

(113) Fonteyne above n 110 199; Brownlie in Lillich above n 72 142. But see Stockton Outlines of International Law 100; Korowicz Introduction to International Law 235-6.

(114) Greig above n 56 880.

because of the inability of the Security Council to take enforcement measures under Chapter 7.

The argument in favour of the survival of the pre-Charter right of humanitarian intervention rests on a number of assertions. First, Article 56 of the UN Charter explicitly authorizes joint and separate action to promote universal respect for, and observance of, human rights.(115) On a realist interpretation of Article 2(4) (whereby force is permitted if it is not directed against the territorial integrity and political independence of any state and is consistent with the purposes of the UN(116)), the right to use force in the separate action envisaged by Article 56 may not be contrary to Article 2(4). Because the meaning of territorial integrity is uncertain and some writers suggest that it is only violated when force is used to deprive the state of its territory (as opposed to a mere violation of territorial boundaries)(117), it may be correct to argue that forceful action to protect against the abuse of human rights does not effect a territorial change and therefore, is not against the state's territorial integrity. Such action may also not be against the political independence of the state because it need not necessarily include the occupation of the foreign territory and,

(115) My emphasis. Reisman & McDougal above n 72 175.

(116) Above p 87-8.

(117) See Goodrich & Hambro Charter of the United Nations 105; Margo 'The legality of the Entebbe raid in international law' (1977) 34 SALJ 306.

therefore, not affect the political authority of the state.(118) Moreover, many writers contend that the use of force in these circumstances is not inconsistent with the Purposes of the UN as it is designed to maintain international peace and security - a fundamental purpose of the organization.(119) The deprivation of human rights threatens international peace and security. According to Reisman and McDougal:

'It requires little imagination to appreciate that in an intensely interactive and interdependent world, deprivation of the most fundamental human rights may cause empathetic deprivations of an intense level upon others and constitute a threat to the peace.'(120)

Human rights and international peace are recognized in international conventions (upheld by UN General Assembly resolutions) to be inseparable.(121) This is apparent from the Preamble of the Universal Declaration of Human Rights which reads:

'... the inherent dignity and ... equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'(122)

Therefore, it is in the common interest that force be used to protect human rights. The right to use force in the common interest is provided

(118) For a discussion of the right of political independence see Higgins The Development of International Law Through the Political Organs of the United Nations 185. Because political independence is synonymous with self-determination, it follows that where a deprivation of human rights is accompanied by a denial of the right of self-determination, the intervention is not against the political independence of the state: see above p 89.

(119) See generally Reisman & McDougal above n 73 177; O'Brien The Conduct of Just and Limited War 23.

(120) Above n 73 172. Also see Tunkin Theory of International Law 81-2.

(121) Cf the Preamble to the 1965 International Convention on the Elimination of All forms of Racial Discrimination: GA Res 2106 A(XX) of 21 December 1965.

(122) Paragraph 1: above n 80.

for in the Preamble to the UN Charter which requires that states '... ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used save in the common interest'. Accordingly, the intervention to protect human rights is not contrary to the Purposes of the UN.

The argument in favour of the right to use force to protect human rights is reinforced by the ineffectiveness of the Security Council to discharge its functions and the UN's failure to create machinery to ensure the absence of international violence and a minimum of human dignity.(123) This fact of international life demands a more flexible and a fresh appraisal of the Charter provisions. Indeed it has been suggested that if the right to use force to protect human rights is excluded by the UN Charter, it would mean that '... in the absence of "effective international machinery to protect human rights", individuals in several parts of the world have less protection than they had prior to the adoption of the Charter'.(124)

Protagonists of this right do not consider such action to be contrary to Article 2(7) of the UN Charter. This article provides:

'Nothing contained in this present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement measures under Chapter VIII.'

It represents the attempt by the drafters of the UN Charter to retain the independence of a state viz à viz other states and the UN.(125) Yet the

(123) Fonteyne above n 110 219. But see Brownlie above n 113 145-6.

(124) Margo above n 117 306.

(125) Ermascora above n 94 378; Fonteyne above n 110 200.

prohibition on intervention is limited to matters which are essentially within the domestic jurisdiction of any state. Because it is generally accepted that a state's domestic jurisdiction concerns '... its jurisdiction in situations in which it is not bound by international obligations'(126), a state which does not fulfil its international obligations may not claim that its failure to do so is a domestic matter. Therefore, on the argument that a state is obliged to respect human rights (or, at least not to regress in their promotion), it is incorrect for a state which does not respect human rights to assert that the protection of human rights is a domestic matter. In other words, the protection of human rights no longer rests '... ab initio within the sphere of essentially domestic jurisdiction'(127) and the principle of non-intervention contained in Article 2(7) is inapplicable.(128) The conduct of UN organs confirm this assertion as far as the promotion of self-determination and the protection against 'gross or consistent' violation of human rights are concerned.(129) Moreover, if the deprivation of human rights constitutes a threat to the peace, the action of the state which violates these rights becomes internationalized and is no longer a matter falling within the domestic jurisdiction of the state.(130)

Because South Africa's policy of apartheid forcibly denies the right of self-determination to the Republic's black population and violates

(126) Wright 'The Goa incident' (1962) 56 AJIL 620. Also see O'Connell International Law 336-7.

(127) Ermascora above n 94 425-6.

(128) Fonteyne above n 110 201.

(129) Ermascora above n 94 435-6. See generally: Jones The United Nations and the Domestic Jurisdiction of States

(130) Reisman & McDougal above n 73 172.

human rights in a gross and persistent manner, it is not a matter essentially within the domestic situation of South Africa. In addition, the Security Council's authoritative determination that apartheid is a threat to the peace confirms that the principle of non-intervention contained in Article 2(7) is not applicable to the apartheid policies of South Africa. The action of UN organs in respect of South Africa supports this contention.(131) Despite South Africa's objections, the international community is justified in not considering the South African government's treatment of its nationals as the Republic's concern alone.(132)

State practice also supports the retention of the traditional right of humanitarian intervention. There have been at least two significant instances undertaken by non-UN forces to protect human rights. The first was the combined United States and Belgian operation in the Congo in 1964 to protect hostages (including non-nationals of the intervening states) held by rebel forces. Although some states condemned this action, the basis of the criticism was not directed against humanitarian intervention nor the fact that the operation was conducted by non-UN forces, but was based on factual controversies.(133) The 1971 Indian intervention in East Pakistan to protect Pakistani inhabitants against brutal repression by the Pakistani army is also cited in support of the contention that the use of force by individual states to protect human rights is legitimate.(134)

(131) See Heunis above n 6 189-450.

(132) See generally: Carey Race, Peace, Law and Southern Africa.

(133) Fonteyne above n 110 218-9.

(134) Greig above n 56 881-2.

Some writers rely on the dictates of policy to reinforce or even found arguments to support this right of intervention. Thus Jenks contends:

'The world community cannot tolerate acts of savagery on the ground that its civilized members have renounced the threat or use of force in their international relations.'(135)

This need to admit exceptions to the Charter provisions is also stressed by Lillich:

'Surely to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress black-letter at the expense of far more fundamental values.'(136)

For O'Brien, justice is the more fundamental value when he states that it is

'... conceivable that there may be circumstances where nonintervention may mean failure to uphold justice Surely it cannot be the case that no matter how repugnant to law and morality,..., there is no warrant for foreign intervention on behalf of the victims of inhuman, perhaps genocidal treatment'.(137)

Hence, even if the right of humanitarian intervention is disallowed by the UN Charter, it may be argued that an exception to Article 2(4) should be admitted. Reisman and McDougal explain the legal basis for treating armed intervention to protect human rights as a special case:

'Humanitarian intervention is an extraordinary remedy, an exception to the postulates of State sovereignty and territorial inviolability that are fundamental to the traditional theory if not the actual practice of international law. The validity of humanitarian intervention is not based upon the nation-state-oriented theories of international law; these theories are little more than two centuries old. It is based upon an antinomic but equally vigorous principle, deriving from a long tradition of natural law and secular values; the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral

(135) Jenks The Common Law of Mankind 30.

(136) Quoted in Margo above n 117 323.

(137) O'Brien above n 119 169.

imperatives, and ultimately, the confirmation of the sanctity of human life, without reference to place or transient circumstance.'(138)

Many writers recognize the need to admit exceptions to positive law in circumstances where rule by this law leads to flagrant injustice.(139) In such circumstances it cannot be 'morally' demanded of the subject that the law be obeyed; if compliance is demanded, the law may be disregarded and, therefore, discredited.(140) Hence it is in the interests of 'positivism' that exceptions (often based on natural law) be recognized. Moreover, the difficulties of formally altering or adding to positive international law strengthen the contention that exceptions be admitted to the provisions of the UN Charter.(141) Yet writers are agreed that an exception to Article 2(4) of the UN Charter must '... be so conditioned by the special circumstances that it will not always justify the use of force'.(142) One such circumstance exists where the situation is intolerable. Silving suggests:

'One guarantee that the "intolerable" will always remain "exceptional" is afforded by the test of general consensus as regards the wider "moral claim".'(143)

(138) Above n 73 168.

(139) Silving 'In re Eichmann : a dilemma of of law and morality' (1961) 55 AJIL 309; Wanek in Livingston (ed) International Terrorism in the Contemporary World 7-8.

(140) Ibid 325.

(141) Morgenstern 'Legality in international organizations' (1976-7) 48 BYIL 255.

(142) Falk 'International law and the United States role in the Vietnam war' (1965-6) 75 Yale Law Journal 1157.

(143) Silving above n 139 346.

There is a growing tendency among certain states and writers to endorse the armed struggle by the ANC (and the states assisting them) as an exception to the provisions of the UN Charter.(144) The special circumstance presented by the continued existence of apartheid is the fact that it represents institutionalized racism which the international community as a whole considers intolerable. Heunis rejects these arguments in respect of South Africa on the basis that if they were accepted they would make '... a mockery of the Charter and the safeguards contemplated by it'.(145) However, he clearly fails to appreciate both the special circumstances presented by apartheid and the fact that most states consider it a mockery of international law that force cannot be used to remove the reprehensible system of apartheid.

Writers who oppose the existence of a right to use force to protect human rights point to the potential for abuse.(146) There is no doubt that traditional humanitarian interventions often served as pretexts for self-interested gain.(147) However, should a right be denied merely because it can be abused? Grotius said in reply to the objection that the right of humanitarian intervention could be abused:

'We know it is done, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends, but a right does not cease to exist in case it is to some extent abused by evil men'(148)

(144) Falk A Study of Future Worlds 71.

(145) Heunis above n 6 379. Also see Erasmus 'The rejection of credentials : a proper exercise of General Assembly powers of suspension by stealth?' (1981) 7 SAYIL 53.

(146) Brownlie above n 113 146; Farer in Lillich above n 73 156, Hingorani Modern International Law 290.

(147) Above n 72.

(148) Quoted in Dugard above n 3 183.

Moreover, those writers who do support the retention of the right of humanitarian intervention in contemporary international law attach certain safeguards to reduce the potential for abuse. Moore's formulation of the conditions that must be met before action purporting to be an exercise of the right of humanitarian intervention may be considered legal are as follows:

- '(1) An immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life;
- (2) A proportional use of force which does not threaten greater destruction of values than the human rights at stake;
- (3) A minimal effect of authority structures;
- (4) A prompt disengagement, consistent with the purpose of the action; and
- (5) Immediate full reporting to the Security Council and appropriate regional organisations.'(149)

The International Commission of Jurists laid down similar requirements at the Fifty-fifth Conference of the International Law Association in 1952.(150) These requirements are closely related to those of the criteria for action in self-defence.

If international law does recognize the right of individual states to take forcible measures to protect human rights, the use of force by the neighbouring states to protect the people of South Africa against apartheid will be lawful because it meets the requirements set out above for the lawful exercise of this right. It should be noted that even amongst writers who oppose a general right of humanitarian intervention,

(149) Quoted in Grieg above n 56 881. See Nanda's criteria listed in Reisman & McDougal above n 73 187.

(150) See Hingorani above n 146 290 note 14.

there is a tendency to recognize the right in exceptional circumstances. By limiting the right to action directed towards protecting the human rights threatened by colonialism and apartheid, such writers assuage the fears of the potential for abuse that a general right would reserve.(151)

No state (other than South Africa) doubts that apartheid constitutes an immediate, extensive and continual threat to fundamental human rights. The South African government's system of apartheid involves a policy whereby the majority of people in South Africa (identified on the basis of their colour)

'... experience intense deprivation with respect to most societal values - power, wealth, welfare, rectitude, respect and enlightenment - or in layman's language, where they are starved and beaten, forced to work for grossly unequal wages, largely denied access to educational and skill-forming opportunities open to other groups, and deprived of the opportunity to form and maintain stable family units...'.(152)

The force employed by the neighbouring states assisting the ANC does not threaten greater destruction of values than the human rights at stake. Indeed the loss of life occasioned by ANC acts of violence(153) is far less than the enormous loss of life and dignity occasioned by apartheid. Farer suggests that

'... where, as in South Africa ..., the oppressed group forms the overwhelming majority of the population and the mass of the remainder supports and contributes to the human rights deprivations, it is reasonable to assume that the criterion of proportionality can be readily satisfied, since there are, in fact, few innocent bystanders, and the condition of the victims is already near the nadir of life'.(154)

(151) Brownlie above n 113 147; Farer above n 144 157. See generally Moskowitz International Concern with Human Rights 62-3.

(152) Farer above n 146 157.

(153) See below p 131.

(154) Farer above n 146 157.

The limited use of force by the neighbouring states has a minimal effect on the authority structures of South Africa. Even in maximum force was used and this drastically altered the authority structures, it would still fall within the parameters of justified humanitarian intervention because for the action to be effective (ie to remove apartheid), the entire form and substance of the South African government's authority may have to be displaced.(155) This would also require a longer engagement of coercion.

As the neighbouring states do not employ their own troops but only permit the use of their territories by ANC guerillas, Moore's fourth criterion (that the troops must withdraw as soon as possible) is irrelevant. The requirement that the intervening state inform the Security Council and the appropriate regional organization also has no relevance here because the neighbouring states deny assisting the ANC in the manner alleged by South Africa.

An additional requirement mentioned by the International Commission of Jurists is that no other means must be available. South Africa's neighbours have campaigned vigorously in the UN and in discussions with the South African government for the abolition of apartheid.(156) Although the campaigns have resulted in South Africa's isolation, they have not been successful in encouraging the South African government to abolish apartheid. The western states refuse to co-operate in imposing full economic sanctions or taking military action against the Republic; the UN Security Council, therefore, is unable to take effective measures to

(155) Ibid 153

(156) See generally Barber South Africa's Foreign Policy 1945-70 159.

protect the majority of South Africans from apartheid. This has left the neighbouring states no alternative but to assist the ANC.

From the above analysis, it is suggested that if the neighbouring states do allow the ANC to use their territories for infiltrating the Republic, their conduct is not contrary to international law.

CHAPTER 5

THE LEGALITY OF SOUTH AFRICA'S CROSS-BORDER RAIDS

All the cross-border raids by South African armed forces prima facie constitute a violation of Article 2(4) of the UN Charter, notwithstanding the controversy surrounding the scope of this article.(1)

Even on the more restrictive interpretation of Article 2(4) by the so-called realist school (whereby force is only prohibited if it is used '... against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'), South Africa's use of force falls within this prohibition. Some writers contend that it is unclear whether the prohibition on the use of force against the territorial integrity forbids only force designed to deprive the other state of territory or, in addition, outlaws force that merely violates territorial borders (however temporarily).(2) However, the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations(3) interpreted Article 2(4) to mean the prohibition on the forcible violation of international boundaries.(4) In the light of this authoritative interpretation, the fact that the raids (usually of short duration) do not deprive the neighbouring states of

(1) See above p 87-8.

(2) Goodrich and Hambro Charter of the United Nations 105; Henkin How Nations Behave 140.

(3) GA Res 2625 (XXV) of 24 October 1970.

(4) Also see art 3(a) of the General Assembly Resolution on the Definition of Aggression: GA Res 3314 (XXIX) of 14 December 1974; Higgins The Development of International Law Through the Political Organs of the United Nations 186-7. See, however, above p 88 for a possible exception.

their territory, is irrelevant; the raids violate boundaries and therefore South Africa's use of force is against the territorial integrity of its neighbours. Moreover, the raids violate the political independence of the neighbouring states. The political independence of a state is violated '... if a state is coerced through the threat or use of force by a more powerful state into taking action which it would not otherwise take.(5) Because South Africa's use of force is designed to bring pressure to bear on the neighbouring states to prevent the ANC from using their territories to infiltrate the Republic, South Africa prima facie violates Article 2(4).

South Africa has argued that its use of force is directed not against the neighbouring states, themselves, but only against the ANC in the neighbouring states.(6) Even if this is the aim, the results of the cross-border raids demonstrate that the action is not restricted to the

(5) Goodrich & Hambro above n 2 105. See also Higgins above n 4 183; McDougal & Feliciano 'Legal regulation of resort to international coercion: aggression and self-defense in policy perspective' (1959) 68 Yale Law Journal 1101.

(6) A spokesman for the SADF stated that:

'Attacks on ANC hideouts in neighbouring states are deeds of aggression against terrorist organisations and are not aimed at the neighbouring states involved.'

(Weekend Argus 21 6 86)

alleged ANC targets.(7) Yet, if it was possible for South Africa to limit its action against the ANC, it none the less forcibly violates the territorial boundaries and (to the extent that it brings pressure to bear on the states to deny transit facilities to the ANC) the political independence of the neighbouring states.

There are no legal grounds to justify South Africa's prima facie violation of Article 2(4). The reasons for this submission are apparent

(7) Carpenter, when discussing raid no. 2, shows that it is implausible to suggest that the cross-border raids only involve attacks on the ANC. She says:

'... it would appear to be somewhat far-fetched to construe the South African attack as an attack against individuals. For one thing, the ANC bases were situated here and there in Maseru itself, and not in some self-contained area like a military headquarters. From a purely practical point of view, therefore, the action simply could not have been restricted to the individuals who were the targets of the raid. It was inevitable that the civilian population would be affected and consequently the South African action must be seen as having been taken against the state of Lesotho after all.'

(The South African raid on terrorist bases in Lesotho bases in Lesotho (1982) 8 SAYIL 160). The same practical realities are present in the other neighbouring states; the results of the other cross-border raids in which civilians were either killed or injured, therefore, justify the conclusion that South Africa's action was not restricted to ANC members. South African officials explained the civilian deaths as unavoidable and the Minister of Defence, General Malan, blamed the deaths of civilians in raid no. 2 on the ANC because the organization had, in his opinion, '... deliberately located [its] headquarters in civilian houses throughout the residential suburbs of Maseru.' (London Times 10 12 82). None the less, the fact remains that the cross-border raids seriously threaten the safety of the neighbouring states' civilians. South African is fully aware of the threat: the pamphlets dropped during the triple raid warned people in Zimbabwe and Botswana that for their 'own safety' they should not '... allow the ANC to occupy houses and offices in [their] territory'. (Weekly Mail 23 5 86-29 5 86). Also see above p 3 n 10. Moreover, the raids often necessitated clashes with the neighbouring states' security forces and, on two occasions, South Africa attacked military installations in the neighbouring states; the cross-border raids, therefore do affect the governments of South Africa's neighbours.

when South Africa's conduct is analyzed in terms of the possible legal justifications that exist for the use of force.

South Africa contends that its cross-border raids are justified as acts of self-defence.⁽⁸⁾ As discussed in Chapter 2, if South Africa wishes to avail itself of the right of self-defence to justify its cross-border raids, it will have to show the following: (i) that the neighbouring states commit an international delinquency (in the form of an armed attack or, on a broader interpretation of Article 51, an actual or imminent violation of its essential rights); (ii) that its use of force is reasonably necessary; and (iii) that it exercises the right of self-defence in good faith.

Is South Africa the victim of an armed attack by the neighbouring states? The answer depends upon what action constitutes an armed attack for the purposes of Article 51.

There is no authoritative interpretation of the phrase 'armed attack' and the records of the San Francisco Conference do not contain any definition. Yet most writers agree that an armed attack is synonymous with armed aggression (thus excluding economic and ideological forms of aggression from its ambit)⁽⁹⁾: the phrase 'aggression armée' in the French text supports this view.

⁽⁸⁾ Cf the statements of the South African government after the particular raids quoted in Chapter 1.

⁽⁹⁾ Brownlie International Law and the use of force by States 373; Rifaat International Aggression 125; Wright 'United States intervention in Lebanon' (1959) 53 AJIL 124.

Permission by a state for armed bands to use its territory for launching an armed attack against another state constitutes an armed attack unless legally justified.(10) As discussed in Chapter 4, there is ample support in the 1970 Declaration on Friendly Relations that a state's failure to exercise all the means at its disposal to prevent the departure from its territory of guerillas, amounts to an armed aggression in violation of Article 2(4) of the UN Charter. Because the use of armed force in violation of Article 2(4) constitutes armed aggression in terms of Article 1 of the 1974 General Assembly Resolution on the Definition of Aggression(11), it is sufficient (in the absence of a legal justification) to comprise an armed attack.

The fact that a state permits the departure of guerillas from its territory is not sufficient, in itself, to constitute the armed attack; in addition, the armed bands must be launching an armed attack against the state infiltrated(12) and the state must not be legally entitled to permit the use of its territory for this purpose. Therefore, whether the neighbouring states commit an armed attack against South Africa depends upon the nature of the ANC's armed struggle against the Republic and the legality of the assistance which the neighbouring states give to the ANC.

Because it is generally accepted that an armed attack need not be undertaken by the armed forces of a state, the ANC's legal personality is

(10) Kelsen The Law of the United Nations 62-3. Also see Akehurst A Modern Introduction to International Law 244-5; Wright 'The prevention of aggression' (1956) 50 AJIL 527.

(11) GA Res 3314 (XXIX) of 14 December 1974. See Rifaat above n 9 267.

(12) See art 3(a) of GA Res on the Definition of Aggression above n 11; Brownlie above n 9 273; Rifaat above n 9 273; Stone Conflict Through Consensus.

only relevant to the determination of the organization's use of force as an armed attack in so far as its armed struggle may be legally justified.

Fawcett outlines the factors that are relevant:

'[W]hat activities of armed bands constitute an "armed attack" will depend upon difficult questions of fact: for example, armed bands, self-organized and irregularly equipped, may constitute no threat at all to a powerful state but their operations may well amount to an "armed attack" upon a militarily weak or politically unstable state.'(13)

In other words, the inquiry involves an assessment of the amount of force used relative to the seriousness of the situation.(14)

An important guide to establishing the seriousness of an act of violence by guerillas will be the frequency of such operations. Feinstein says:

'... an isolated act of terrorism which emanates from one state's territory and is carried out against another State must be considered in a different light than a terrorist act constituting a link in a long chain of similar attacks.... [W]hile each individual terrorist act may not in itself "qualify as an armed attack" explained by Yehuda Z Blum "the totality of such acts does reveal such a pattern". According to this "Nadelstichtactic" ("tactics of the needleprick") or "accumulation of events" theory, although each needleprick alone probably would not be considered intolerable or serious to the target State, the total effect of these "pricks" may result in dangerous consequences and unbearable provocation.'(15)

The history of similar violence will be relevant not only to support the contention that a particular act of violence, albeit a limited use of force, is very serious and, thus, an armed attack, but also to assess the reasonableness of a state's assertion that it is a victim of a continuous

(13) 'Intervention in International Law' 1961 103 RdC 363.

(14) Skubizewski in Sørensen (ed) Manual of Public International Law 777. See generally McDougal & Feliciano above n 5 1097-1120.

(15) "The legality of the use of armed force by Israel in Lebanon - June 1982" (1985) 20 ILR 385-6. Also see Bowett 'Reprisals involving recourse to armed force' (1972) 66 AJIL 3-6.

armed attack. There is no reason why persistent sorties by guerillas (or states, for that matter) should not constitute an enduring armed attack(16), particularly when the guerillas have declared an intention to commit and continue to carry out acts of violence.

It is suggested that if the ANC does not constitute a 'state', or as a 'state' is unable to justify its use of force against the Republic as an act of self-defence, South Africa is a victim of a continuous armed attack by the ANC.

The declared intention of the ANC to carry out (and intensify) its acts of violence against South Africa(17), together with the fact that since 1980, the ANC has been responsible for over 400 bomb attacks on South African targets(18) indicate a persistent onslaught by the ANC against the Republic. Given the ANC's popular base and the nature of urban guerilla strategy it has, despite its military weakness in conventional terms, been able to sustain a well co-ordinated strategy of

(16) Dugard 'The Organization of African Unity and Colonialism : an enquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism' (1967) 16 ICLQ 189.

(17) See above p 47-8.

(18) Morris & Combrinck calculate that in the five years between July 1981 and June 1986, 434 acts of violence (one every 4.33 days on average) involving explosive devices (including limpet-mines, grenades, landmines, mortars, rock projectiles and a variety of improvised items) have taken place in South Africa: SA Bomb Summary 39-42. Although some of the violent acts were carried out by the PAC and certain right-wing groups, the ANC was responsible for the majority of the attacks.

violent attacks on targets in South Africa.(19) And, despite South Africa's superior military capacity, the government has been unable to contain the increasing number of attacks launched by the ANC. The political instability in South Africa renders the attacks particularly serious for the government. Yet, the fact that the ANC operations have caused the deaths of over 200 people(20) and damage estimated at several millions of Rands(21) would justify any state considering the attacks as very serious.

However, as argued in Chapter 3, the ANC's armed struggle is justified as an act of self-defence; it, therefore, cannot constitute an armed attack for the purposes of Article 51 of the UN Charter. On this argument there is no international delinquency for which the neighbouring states can be responsible(22) and South Africa may not act in self-defence against what is a legal use of force.

None the less, I shall consider the position where the ANC either does not comprise a 'state' for the purposes of its armed struggle or as a 'state' for this purpose, is unable to justify its use of force as an act of self-defence. In these instances, the ANC are sustaining an armed

(19) Although many of the attacks have been sporadic, the fact that many have taken place on politically significant dates (cf the Warmbaths incident which occurred on Kruger day and one day before the South African Prime Minister was to open the Transvaal Municipal Association in Warmbaths; and those attacks which coincided with labour disputes and rent strikes in South Africa) suggests a well co-ordinated strategy by the ANC.

(20) Morris and Combrinck above n 18 42.

(21) Cape Times 23 5 83.

(22) Any prima facie violation of art 2(4) by the neighbouring states would be justified as an act of collective self-defence.

attack against South Africa; the neighbouring states, therefore, are also committing a continuous armed attack against the Republic provided it can be shown that these states, without legal justification, fail to exercise all the means at their disposal to prevent the ANC from using their territories to infiltrate South Africa. Yet, as discussed in Chapter 3, the question whether the neighbouring states permit the ANC to use their territories for infiltrating the Republic cannot be answered authoritatively. Moreover, even if they do assist the ANC in this manner, there are good arguments (outlined in Chapter 3) to support the contention that South Africa's neighbours are legally entitled to provide the ANC with transit facilities.(23)

The inquiry proceeds on the doubtful assumption that the neighbouring states are launching an armed attack against South Africa.

For reasons given above, the armed attack is a continuous one. This is a key factor for analyzing South Africa's cross-border raids as acts of self-defence. Because the Republic is the target of a continuous armed attack by its neighbours, it may use force (provided South Africa can prove the requisite necessity and good faith) in self-defence against the neighbouring states not only when a particular act of violence is being perpetrated but at any time. Therefore, the fact that all the raids took place after (in some cases, months after(24)) the ANC had committed acts

(23) Excluding the argument that their assistance is justified as an act of collective self-defence.

(24) Cf raid nos. 1 and 2.

of violence in South Africa does not prejudice South Africa's right to justify its conduct as an act of self-defence.(25)

However, if the armed attack is not continuous and the conduct of the neighbouring states only comprises an armed attack when the ANC perpetrate a particular act of violence, South Africa's cross-border raids are not legitimate in terms of the strict interpretation of Article 51 because they take place after the armed attack occurred.

Even if the frequency of ANC armed activities is not sufficient to constitute a continuous armed attack, it may be relevant in the assessment of South Africa's contention that its raids are designed to pre-empt acts of violence by the ANC.

There is no authoritative basis to deny South Africa the right of anticipatory self-defence. The legality of pre-emptive strikes depends upon the reasonableness of a state's expectation that an armed attack is immediately pending.(26) A declared intention by the ANC to attack targets in South Africa and the frequency of previous armed activity by the organization indicates that its guerillas are always about to infiltrate the Republic and commit acts of violence there. Thus, it may be reasonable for South Africa to expect that an armed attack from its

(25) As the suggestion that the armed attack is continuous is based on the history of the ANC's frequent violent activity, its application is, perhaps, limited to later raids: the initial raids in 1981 and 1982 were preceded by infrequent violent activity by the ANC and, therefore may not have justified South Africa's contention that it was the victim of an on-going armed attack when it launched the first raids in Mozambique and Lesotho.

(26) Shapiro 'The Six Day War and the right of self-defence' (1971) ILR 75; Schwarzenberger The Fundamental Principles of International Law 333.

neighbours is persistently imminent. Provided the anticipated conduct constitutes an international delinquency and there is the requisite necessity to use force and good faith, South Africa may justify its raids into the neighbouring states as acts of anticipatory self-defence.

Yet, if the contention that South Africa is always the target of an imminent armed attack is not accepted, the Republic must show (to justify its cross-border raids on the wide interpretation of Article 51) that an armed attack was immediately pending when it launched the particular cross-border raid. The potential for abusing the entitlement to pre-empt armed attacks is obvious; it is difficult to disprove a state's contention that its intelligence sources had identified an armed attack that was immediately pending. Statements of South African officials to justify some of the raids included claims that the government was in possession of irrefutable evidence which proved that the ANC was about to launch an armed attack.(27) The fact that these raids took place quite a while before the attack they were allegedly designed to anticipate (in one case four weeks before(28)) may suggest that South Africa's appreciation of the attack as imminent is unreasonable. Evidence of bad faith may also negate South Africa's contention that an armed attack is imminent. It was argued above that the cross-border raids are an important feature of South Africa's policy of destabilization against the neighbouring states; it is, therefore, possible that the Republic by suggesting that an armed attack is imminent, is creating pretexts for destabilizing its neighbours.

(27) See raid nos. 2,4,5,6 and 7.

(28) Cf raid no. 6.

Even if it is argued that South Africa's use of force is against an actual or imminent armed attack, the cross-border raids will only be justified if South Africa can show that the use of force is reasonably necessary to avert the danger. To fulfill this requirement the Republic's use of force must not only be the last resort but the magnitude and intensity of the force employed must also not be in excess of what is reasonably necessary to prevent the peril.(29)

Is South Africa's use of force against the neighbouring states the only alternative? In other words, can South Africa remove the danger of ANC violence by means other than forcibly violating the territorial integrity or political independence of its neighbours?

Let us examine the possible alternatives. One option available to South Africa is to avail itself of diplomatic channels to persuade the neighbouring states against allowing the ANC to use their territories for infiltrating the Republic. South Africa has exhausted this alternative through its attempts to encourage its neighbours to enter into security arrangements regarding the activities of the ANC. However, because the neighbouring states refute South Africa's allegations that they provide the ANC with transit facilities, discussions on these matters of security often prove fruitless. It was only after South Africa had exercised its military power against Mozambique (on three separate occasions) that the two states signed the Nkomati Accord.

South Africa has also issued frequent warnings to the authorities of the neighbouring states to desist from their activities in respect of the

(29) See above p 36-40.

ANC. To what extent these warnings have been adequate is arguable: a year elapsed between warning Lesotho and launching Raid number 1, and in the triple raid of 1986, South Africa's warning had been issued at the United Nations and not to the states directly. Yet it is difficult to pronounce on the adequacy of these warnings when the danger of delay cannot be authoritatively determined in each case. None the less, the fact that the neighbouring states insist that their assistance to the ANC is limited to moral and diplomatic support, renders the warnings ineffective and, therefore, not a viable alternative. In addition, it is difficult to conceive of the notion of warnings as a peaceful alternative because they normally involve a threat of force which is prohibited in terms of Article 2(4) of the UN Charter.

Another alternative for South Africa may be to take economic measures against its neighbours. However, except for Lesotho (because it is completely surrounded by South Africa) economic measures have not, by themselves, proved effective. Furthermore, South Africa has argued that because states in southern Africa are so dependent on the Republic economically, military strikes are less damaging than economic sanctions against these states.⁽³⁰⁾ This may support the contention that economic sanctions are not a viable alternative.

If the infiltration is a precursor to the acts of violence, would it be reasonable to expect South Africa to take measures in its own territory to prevent ANC guerillas entering the Republic? Bowett comments that:

'This is not a question to which lawyers can give persuasive answers. However, there would be advantage in a strategic study

(30) A government spokesman on South African television on 20 5 86. Also see Carpenter above n 7 161.

of the effectiveness against guerilla activities emanating from abroad of measures of self-defence confined to the target state's own territory. Possibly, variations in circumstances (terrain, size of respective forces, length of frontier, etc) are such as to permit no generalizations.'(31)

The length of South Africa's border with the rest of southern Africa may be too long to insist that South Africa seal off the frontiers with a defensive barrier. Moreover, it is arguable whether South Africa has sufficient resources to undertake such a task.

The only viable and peaceful alternative to remove the danger of ANC violence is for South Africa to address the reasons for the violence. The ANC conducts an armed struggle because South Africa forcibly denies the majority of its people the freedom to exercise their right of self-determination. Pretoria refuses to provide peaceful forums for its black population to challenge the government's policy of apartheid; resort to arms by the ANC is the organization's only alternative.(32) If the South African government abolished apartheid, the violence by the ANC would cease. The fact that South Africa is under a legal obligation to grant self-determination to its black population reinforces the necessity of adopting this peaceful alternative; the demands by the ANC (and the majority of South African people) that apartheid be abolished (as a precondition for the cessation of its armed struggle) are, therefore, reasonable. It is not as if the South African government is being held 'hostage' to unreasonable demands which a state may not be expected to meet (even if by acceding to the demands, the violence would cease) - South Africa is legally obliged to meet these demands.(33) Because South

(31) Bowett above n 15 21 note 80.

(32) See above p 75.

(33) See above p 62.

Africa refuses to grant self-determination to its black population, its use of force against the neighbouring states is not the last resort. As such the force is unnecessary and cannot be justified as an act of self-defence.

Because a viable and peaceful alternative is available to South Africa, any degree of force is unnecessary to protect it from ANC violence. Therefore, an inquiry into the degree of force (often described as the 'proportionality' requirement) is irrelevant to an assessment of the legality of the raids in terms of self-defence.

Even if, for the sake of argument, no viable and peaceful alternatives are available, it is unlikely that South Africa may justify its use of force as an act of self-defence. Although the degree of force may not be excessive, its ineffectiveness in preventing the danger, weakens the argument that the raids are necessary to protect South Africa from the armed activities of the ANC.

The many disputed allegations in respect of the weapons used, the number of civilians that died, the nature of the targets hit, etc. make it difficult to present an adequate assessment of whether South Africa's use of force was excessive. Yet, a few general observations are important.

In the light of South Africa's vast military capabilities, the use of small SADF task forces and the fact that the raids were of very short duration suggest that the Republic acted with restraint. However, if the allegations that South Africa (on two occasions) dropped fragmentation or

so-called 'cluster' bombs(34) are correct it is unlikely that the degree of force used was confined to removing the alleged ANC presence in the neighbouring states. Although many civilians died and extensive damage was caused, South Africa may argue that these consequences were unavoidable because of the locality of alleged ANC bases (in residential and commercial centres) in the neighbouring states.(35) On the other hand if the claims by the neighbouring states that the targets hit were not, as suggested by South Africa, the planning and control headquarters of the ANC but were in fact residences of South African refugees (who were not ANC guerillas) or refugee camps(36), are correct, it will weaken the argument that the civilian casualties were unavoidable. To what extent the attack on the jam factory in the third raid could have been averted is also arguable - in reply to a question why this factory had been hit, the South African Ambassador in London, Mr Steyn retorted: 'Why can't a jam factory be used as a terrorist base?'(37) But for the timing of the raids (all raids, except the third and the Zambian raid took place in the early hours of morning) many more civilians might have died. The possibility that the security of the raiders might have dictated the reasons for this timing as opposed to a concern to avoid civilian casualties is irrelevant - the fact is that the force was not as excessive as it might have been had civilians been in the streets. Although South African forces were involved in clashes with the security forces of the neighbouring

(34) Cf raid no.3 and 6. A cluster-bomb is an anti-personnel device which on exploding disperses many small bombs. In general, they are designed to hit large troop concentrations and are, therefore, unsuitable to hit ANC guerillas in the neighbouring states.

(35) See above n 7. Also see Feinstein's argument in respect of the Israeli raids into Lebanon: above n 15 394-5.

(36) Cf raid no. 6.

(37) Cape Times 25 5 83.

states(38), these involved minimum combat and may be considered necessary to safeguard the raiders. For the same reasons, South Africa could justify its attacks on the military installations of the neighbouring states.(39)

Accepting that the raids are not excessive, are they effective in removing the danger faced by the Republic? As discussed in Chapter 2, it is difficult to conceive of force being necessary when it is ineffective in removing or reducing the peril particularly where it can be shown that the action was responsible for increasing the danger. The requirement that alternatives to the use of force must prove to be ineffective before forcible measures are taken (as the only alternative) suggests that, unless the resort to force, itself, is effective it cannot be an alternative and therefore, is unnecessary.

The danger facing the Republic is ANC violence. To the extent that the neighbouring states allow the ANC to commit acts of violence against the Republic, the attacks on the neighbouring states have been effective in reducing the willingness of these states to grant or continue to provide transit facilities to the ANC.(40) However, there has been no

(38) Except for raid no. 4 and the raids on Zimbabwe and Zambia.

(39) Raid nos. 3 and 6. See the argument of Knisbacher to justify Israel's destruction of Uganda's aircraft in the Entebbe raid: 'The Entebbe operation : a legal analysis of Israel's rescue action' (1977) 12 Journal of International law and economics.

(40) Swaziland (1982), Mozambique (1984) and Lesotho (1986) have entered into non-aggression pacts with South Africa whereby these states undertake to prevent the use of their territories for ANC activity against South Africa. These states have expelled a large number of ANC members and have taken security measures to ensure compliance with their undertakings. Although Botswana refuses to enter into a similar non-aggression pact, it has expelled many South Africa refugees. After the 1986 raid on Zimbabwe, however, Mugabe pledged more support for the ANC: see raid no. 6.

decline in ANC activity against the Republic. On the contrary, statistics indicate that the momentum of ANC violence has increased dramatically. The Institute of Strategic Studies of the University of Pretoria has found an 800% increase in revolutionary violence in South Africa since the Republic and Mozambique signed the Nkomati Accord.(41) The choice of targets would also appear to have shifted: Morris and Combrinck have shown that in 1981, the ANC choice of targets was some 88% hard targets and 12% 'soft' whereas in 1986 the figures were 19.3% and 80.7% respectively.(42)

Although it is difficult to assess the efficacy of the action taken, there are sound bases for the contention that South Africa's cross-border raids are largely responsible for these developments in the ANC's armed struggle.(43)

Because the ANC has been denied bases in the neighbouring states, ANC strategists have altered the nature of the organization's armed struggle; the organization has abandoned its conventional 'hit and run' guerilla warfare from nearby bases in the neighbouring states in favour of a 'Peoples War'.(44) These new insurrectionary tactics have achieved a measure of success(45) and the increase in acts of violence have

(41) Quoted in Botha 'Anticipatory self-defence and reprisals re-examined. South African attacks on ANC bases in neighbouring states : the "Guns of Gaborone" or "rAIDS disease"' (1985-6) 11 SAYIL 139.

(42) Above n 18 6.

(43) See Lodge 'The ANC after Nkomati' 1985 South African Institute of Race Relations Topical Opinion 7

(44) Lodge 'The African National Congress : Kabwe and after' (1986) 10 International Affairs Bulletin 7.

(45) See above p 47.

demonstrated that the ANC is capable of maintaining an armed presence inside South Africa without the assistance of the neighbouring states.(46) As the new tactics are designed to make South Africa ungovernable in whatever manner possible, they pose a more severe danger to South Africans than the former strategy of selective targeting.

In addition, because it is more difficult for ANC guerillas to infiltrate the Republic, the ANC has to rely on training its cadres inside South Africa.(47) Yet the training is not as extensive as it is in the base camps outside South Africa. This may explain the higher incidence in attacks on 'soft'-targets which are less difficult to attack than well-guarded hard targets. Moreover, with the lines of communication between ANC guerillas inside South Africa and the organization's headquarters outside the Republic less secure than they were when the neighbouring states were prepared to co-operate with the ANC, the organization is less able to control the activities of its guerillas inside South Africa.(48) Accordingly, there is a lack of discipline which may explain how attacks on 'soft' targets increase despite the ANC's pledge not to strike at such targets.(49)

(46) Lodge above n 43 1.

(47) Ibid 6; New African June 1984.

(48) Ibid 6.

(49) See above p 47. Some attacks on 'soft'-targets may also be explained as retaliation for South Africa's cross-border raids. After South Africa's raid on Lesotho in 1981, the ANC issued a warning that its military wing might be forced by 'this cold-blooded massacre' to retaliate by doing 'the same in South Africa against white civilians' (London Times 10 12 82). Six months later the ANC claimed responsibility for the Pretoria car-bomb explosion that killed 17 people.

Therefore, it is suggested that the cross-border raids have contributed to a situation in which ill-trained and undisciplined guerillas are operating against 'soft' targets in South Africa and attempting to make the country ungovernable. In other words, the contention is that South Africa's action has not only been ineffective in protecting South Africans but has also (by being partly responsible for the intensification of ANC activity) prejudiced the security of the Republic's citizens.

Another possible basis for rejecting South Africa's contentions that its cross-border raids are justified as acts of self-defence, is to argue that its use of force is not exercised in good faith.⁽⁵⁰⁾ As shown in Chapter 1, there are sound arguments that the raids form an integral part of Pretoria's policy of destabilization against its neighbours; because destabilization is designed to retain white minority rule in South Africa (and because the cross-border raids fail to prevent ANC violence), it is suggested that the raids defend only apartheid, not the citizens of South Africa. The alleged presence of the ANC may merely serve as a pretext for destabilizing the region. Moreover, the important domestic political purposes performed by the raids is further evidence of a bad motive.

It was stated above that if the armed attack by the neighbouring states is not continuous but occurs only on each occasion when the ANC commits an act of violence, South Africa's use of force cannot be justified as an act of self-defence because it occurs after the armed attack has occurred. In such a situation, the cross-border raids assume the character of illegal reprisals.

(50) See Chapter 2.

Akehurst defines reprisals as:

'[A]cts which would normally be illegal but which are rendered legal by a prior illegal act committed by the other state.'⁽⁵¹⁾

However, reprisals involving recourse to armed force are illegal in terms of paragraphs 3 and 4 of Article 2 of the UN Charter.⁽⁵²⁾ Moreover, the General Assembly has authoritatively interpreted Article 2(4) as prohibiting forcible reprisals.⁽⁵³⁾ Without the authorization of the UN Security Council⁽⁵⁴⁾, states are no longer permitted to use force to remedy international wrongs.⁽⁵⁵⁾

Yet there are writers who argue that forcible reprisals should be legitimate because an unqualified prohibition on reprisals involving the use of force is unrealistic in the decentralized legal system that governs the international community. They contend that in the absence of a centralized and effective mechanism of enforcement, it is not practical to expect an injured state to abstain from using force (when peaceful means of redress are ineffective or impossible) to obtain redress from the wrongdoer.⁽⁵⁶⁾

(51) Above n 10 6.

(52) Brownlie above n 9 223; Greig International Law 887; Schwarzenberger A Manual of International Law 185-6. Also see arts 25, 51 and the Purposes of the United Nations which demand the peaceful settlement of disputes.

(53) Paragraph 6 of the first principle in the General Assembly Declaration on Friendly Relations: above n 3.

(54) Under Chapter 7 of the UN Charter.

(55) Higgins above n 4 217. Also see Brierly The Law of Nations 401-2.

(56) Bowett above n 15 2; See generally Botha above n 41 150-5; Falk 'The Beirut raid and international law of retaliation' (1969) AJIL 430; Kalshoven Belligerent Reprisals 10.

However, the argument fails to appreciate the reason for the prohibition of armed reprisals - recourse to forcible self-help is contrary to international law because it is an instrument available only to the powerful(57) and thus abhorrent to a legal system based on the sovereign equality of states. The International Court of Justice has rejected arguments that forcible intervention is justified as an act of self-help because:

'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.'(58)

To the extent that punitive measures have a deterrent effect, armed reprisals may constitute acts of self-defence.(59) South Africa could, therefore, argue that although the raids are punitive (because they take place after the particular armed attacks) they have a deterrent value. Yet, the argument is irrelevant in South Africa's circumstances because the Republic is unable to justify its cross-border raids as instances of self-defence.

Other legal grounds which have been raised to justify the use of force include the rights of necessity and hot pursuit.

(57) Merrills Anatomy of International Law 35; Singh Nuclear Weapons and International Law 5.

(58) The Corfu Channel Case (1949) ICJ Reports 5. See Colbert Retaliation in International Law 100.

(59) Bowett above n 15 3; Latham-Brown Public International Law 46; Wohl 'Responses to terrorism: self-defence or reprisal?' (1973) 12 International Problems 30-1.

The traditional right of necessity which permitted a state to injure the rights of an innocent state to protect its own rights(60), is, under the UN Charter, no longer available to justify the use of force.(61) An act of necessity is not permissible in terms of Article 51 of the UN Charter because, unlike acts of self-defence, necessity does not require an international delinquency on the part of the target state.

Thus, in the unlikely situation where the ANC launches armed attacks after infiltrating the Republic from the neighbouring states but these states do not commit an international delinquency against South Africa (because they either do not permit the departure of ANC guerillas from their territories or are legally permitted to provide the ANC with transit facilities(62)), South Africa cannot justify its forcible violation of the neighbouring states' rights as an act of necessity.

Yet, even if the traditional right of necessity was still available to justify the use of force, South Africa could not meet the requirements for this right (laid down by Webster in The Caroline Case(63) and, except for the requirement that the target state be guilty of an international delinquency, identical to those for the customary right of self-defence)

(60) Bowett Self-Defence in International Law 10; Higgins above n 4 218.

(61) de Arechaga in Sørensen above n 14 542-4; Hull & Novogrod Law and Vietnam 114; Latham-Brown above 59 43; The Corfu Channel Case above n 58.

(62) Provided the legal justification is not collective self-defence; if it is collective self-defence, the ANC is acting in self-defence and, therefore, the organization is not launching an armed attack against South Africa.

(63) See above p 37.

because, as shown above, the Republic's use of force is not the last resort.(64)

South Africa has also described its raids as 'legitimate hot pursuit strikes'.(65) However, although a right of hot pursuit does exist in international law, the Republic cannot rely on this right to justify its cross-border raids.

In terms of the right of hot pursuit, a state is permitted to continue the pursuit of wrongdoers from its own territory onto or above the high seas or into a no-mans land.(66) Yet, the right ceases the moment the state enters another state's territory unless the latter has explicitly agreed to the entry.(67)

Because recourse to hot pursuit is permitted only under special agreement between the states concerned, states cannot invoke the right of hot pursuit to justify unauthorized incursions into other states in pursuit of wrongdoers.(68) None the less attempts have been made to justify the unauthorized pursuit of armed bands into the territory of

(64) Above p 137-8.

(65) General Viljoen, the Chief of the SADF, in his opening address at a conference organized by the University of Pretoria's Institute for Strategic Studies in 1985: quoted in Hough (ed) Revolutionary Warfare and Counter-Insurgency 5.

(66) See generally Poulantzas The Right of Hot Pursuit in International Law.

(67) Ibid 2.

(68) Ibid 35. Also see O'Connell International Law for students 722; Pace 'Word die spontane agtervolgings leerstuk misbruik' (1976) 39 THRHR 66-71.

another state as cases of legitimate hot pursuit.(69) Clearly these attempts are based on a misunderstanding of the legal right of hot pursuit. Although the United States has invoked the right of hot pursuit to justify its frequent incursions into Mexico between 1856 and 1919 in pursuit of armed bands, it based this right on the right of self-defence(70) and official justifications for these raids show that the officials were of the opinion that in the absence of an express agreement, no right of hot pursuit existed in international law.(71) If the conditions for the lawful exercise of self-defence are present, the crossing of the frontier is an act of self-defence and there is no need to invoke a right of hot pursuit in such circumstances. Moreover, the rights of self-defence and hot pursuit are not synonymous: the former is preventative while the latter is punitive(72) (and occurs after the wrongful act has taken place); and the right to cross frontiers in self-defence is not, as with hot pursuit, dependent upon the existence of a special agreement to that effect.(73)

Despite the untenable proposition that the right of hot pursuit is a corollary of the exercise of the right of self-defence, it is clear that the United States did not recognize a right of hot pursuit in the absence

(69) Both Israel and France have used the terminology of hot pursuit to justify their unauthorized entry into Jordan and Tunisia to pursue Palestinian and Algerian guerillas respectively: Poulantzas above n 66 26; Kühn 'Terrorism and the right of self-defence' (1980) 6 SAYIL 49.

(70) Garcia-Mora International Responsibility for Hostile Acts of Private Persons against States 121; Bowett above n 60 38.

(71) Poulantzas above n 66 14 note 21.

(72) Bowett above n 60 40; Garcia-Mora above n 70 122-3.

(73) See generally Poulantzas above n 66 16.

of an agreement to justify the use of force in circumstances where no right of self-defence was available. Therefore, these incursions are not evidence of state practice that the right of hot pursuit permits a state to enter the territory of another without the latter's authorization where such conduct cannot be justified as an act of self-defence. Indeed, writers agree that a right of hot pursuit in such circumstances has not developed into a right in customary international law.⁽⁷⁴⁾ The fact that a right of hot pursuit on the high seas exists in customary international law cannot support a contention that states are, therefore, also permitted to pursue armed bands into another's territory where no agreement to this effect exists. The basis for permitting pursuit on the high seas is that the action does not violate the rights of any other state (for this reason, the right ceases the moment the vessel being pursued enters the territorial waters of another's state); it is, therefore, untenable to suggest that a right of hot pursuit on land should be admitted to justify the unauthorized violation of another's territory on the same basis that the right of hot pursuit on the high seas is admitted.⁽⁷⁵⁾

Because there is no agreement between South Africa and its neighbours permitting the former to continue the pursuit of ANC guerillas into the territories of the neighbouring states, the Republic may not justify its cross-border raids as 'legitimate hot pursuit strikes'.

(74) Bowett above n 60 38-41; Brownlie above n 9 372; Poulantzas above n 66 15; Waldock 'The regulation of the use of force by individual states in international law' (1952) 81 RdC 455 ff.

(75) Bowett above n 60 40; Garcia-Mora above n 70 123; Hershey 'Incursions into Mexico and the doctrine of hot pursuit' (1919) 13 AJIL 568-9; O'Connell above n 68 723.

There are no other legal grounds to justify South Africa's use of force.

The legal opinion that South Africa is not permitted to launch cross-border raids against the ANC in neighbouring states, does not mean that South Africa is legally powerless to prevent the ANC from committing acts of violence. On the contrary, it is mainly because the Republic has the power to remove the danger without using force, that resort to armed force is legally denied to it; not only has South Africa the power to remove apartheid, but it is legally obliged to grant self-determination to its Black population.

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